IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 183

Originating Summons No 1117 of 2019

Between

CGS

… *Applicant*

And

CGT

… *Respondent*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]
[Arbitration] — [Singapore International Arbitration Centre] — [Rules 2016]

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v
CGT

[2020] SGHC 183

High Court — Originating Summons No 1117 of 2019
Andre Maniam JC
19 June 2020

14 September 2020 Judgment reserved.

Andre Maniam JC:

Introduction

1 How absolute are a party's rights to decide who will represent it in arbitration, and how it will conduct its case? If a party feels that its rights have been infringed, can it keep silent and complain only if the award goes against it?

2 In this case, the applicant (the "Claimant" in the arbitration) claimed that it was not allowed to have its general manager act as co-counsel alongside its external legal counsel; it did not complain about this at the time, but applied to set aside the award (the "Award") made by the arbitral tribunal (the "Tribunal") thereafter.

3 The Claimant's grounds for setting aside the Award were:

(a) the arbitral procedure was not in accordance with the agreement of the parties (Art 34(2)(*a*)(iv) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") read with s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA"));

(b) the Claimant was unable to present its case (Art 34(2)(*a*)(ii) of the Model Law read with s 3 of the IAA); and

(c) a breach of the rules of natural justice occurred in connection with the making of the Award by which the rights of the Claimant have been prejudiced (s 24(*b*) of the IAA).

Background

The arbitration

4 The arbitration was subject to the Singapore International Arbitration Centre ("SIAC") Rules (6th ed, 2016) (the "SIAC Rules"). Pursuant to the parties' agreement, the SIAC had directed that the arbitration be conducted according to the Expedited Procedure in the SIAC Rules, and the arbitration was so conducted.

5 When the Claimant commenced arbitration on 14 June 2018, it was represented by legal counsel, who submitted the notice of arbitration on the Claimant's behalf.

6 The Claimant ceased to be legally represented on 9 August 2018. According to the Claimant, this was because it wanted to proceed with the

arbitration in a cost-effective and efficient manner. Its general manager ("R") served as one of its party representatives.

7 On 18 October 2018, a case management conference was held over the telephone. The next day, the Tribunal circulated a draft procedural order,[1] paragraph 6 of which provided that "[w]here a Party is represented by Counsel, communications with the Tribunal shall be with Counsel instead of the Party's representatives." The Claimant did not raise any issues with that paragraph (although it did comment on other aspects of the draft), and on 30 October 2018, Procedural Order Number 1 ("PO 1") was issued with paragraph 6 in terms of the draft.[2]

8 On 28 January 2019, the Claimant engaged legal counsel ("T") for the upcoming hearing from 11 to 13 February 2019.

9 Paragraph 72 of PO 1 provides that "[a]ny Party has leave to apply to the Tribunal on three days' notice for a variation of this Procedural Order No. 1, giving particulars of the variation sought and the reason for it". The Claimant, however, never applied to vary paragraph 6 of PO 1. Instead, it waited until *after* the Award had been issued, and then complained that paragraph 6 of PO 1 had infringed its right to decide how it would be represented in the arbitration.

The Claimant's complaints

10 The Claimant complained of the following:

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1 Bundle of Documents, vol 3 ("3BOD"), pp 2051–2063.

2 R's affidavit dated 4 September 2019, pp 347–359.

(a) that because of paragraph 6 of PO 1, R was omitted from certain e-mail communications in the days leading up to the hearing up until shortly after the hearing. These e-mail communications were sent to T instead;

(b) that R was not allowed to act as co-counsel alongside T at the hearing: the Claimant wished to be represented by an R+T team, but that was thwarted – R conducted part of the Claimant's oral opening, but did not question witnesses or make oral submissions; and

(c) that the Tribunal failed to deal with one of the Claimant's claims *as pleaded*, namely, the Claimant's "FRP Claim".

11 I evaluate these complaints in the following sections:

(a) the nature of a party's right to representation in arbitration;

(b) correspondence about communications with the Tribunal, and about R's role at the hearing;

(c) R's role at the hearing and thereafter; and

(d) whether there are grounds to set aside the Award, in whole or in part.

The nature of a party's right to representation in arbitration

12 A party has a common law right to choose his representation in arbitration, although this right can be limited by statute. Thus, for example, "[parties'] common law right to retain whomsoever (from the category of unauthorised persons) they desire or prefer for their legal services in arbitration

proceedings in Singapore has … been taken away by the [Legal Profession Act (Cap 161, 1985 Rev Ed) (the "LPA")]": *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd and another* [1988] 1 SLR(R) 281 ("*Turner*") at [34].

13 Since *Turner*, the LPA has been amended and there is now no legislative impediment to parties in arbitrations in Singapore being represented by whomsoever they choose. This freedom of choice is reinforced in SIAC arbitrations by rule 23.1 of the SIAC Rules, which states: "Any party may be represented by legal practitioners or any other authorised representatives."

14 The respondent however argued that rule 23.1 requires parties to choose between two alternatives: *either* to be represented by legal practitioners, *or* to be represented by other authorised party representatives. It argued that the rule did not give parties the ***right*** to a team comprising legal counsel *and* other authorised party representatives (although the Tribunal would have the *discretion* to allow this).

15 I did not agree with the respondent on this. In my view, rule 23.1 does allow parties to choose to be represented by *both* legal counsel *and* non-legally-qualified party representatives.

16 Rule 23.1 uses the term "legal practitioners". That would not include legally-trained persons in the employ of a party, such as in-house counsel, who would instead be "other authorised representatives" within rule 23.1. If (as the respondent contended) rule 23.1 required a party to choose between "legal practitioners" and "other authorised representatives" (but did not allow a party to choose both), an in-house team could still be assembled comprising legally-qualified and non-legally-qualified party representatives. The SIAC Rules thus

do not force a choice between legally-qualified and non-legally-qualified party representatives. If the legally-qualified party representative happens to be a "legal practitioner", it makes no sense to then exclude all other party representatives. The inclusion of rule 23.1 in the SIAC Rules was meant to promote free choice in this regard, not to restrict it.

17 The Claimant cited two commentaries by Gary B Born ("Born") for the proposition that a party's right to representation in international arbitral proceedings, by lawyers or others, is of fundamental importance: Gary B Born, "Legal Representatives and Professional Responsibility in International Arbitration" in *International Arbitration: Law and Practice* (Kluwer Law International, 2nd Ed, 2015) ("Born, IA") ch 14.01 at p 267 and Gary B Born, "Legal Representation and Professional Conduct in International Arbitration" in *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) ("Born, ICA") ch 21.01 at p 2833.

18 Born goes on to say that "[m]ost institutional rules recognize the parties' rights of representation in the arbitral proceedings, either expressly or impliedly providing that a party is entitled to be represented by persons of its own choice".[3] As examples, Born specifically includes, *inter alia*, the UNCITRAL Rules and the London Court of International Arbitration Rules 2014 (the "LCIA Rules").[4]

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3 Born, ICA, ch 21.01, p 2836.

4 Born, IA, ch 14.01, p 268 and footnote 845; Born, ICA, ch 21.01, p 2836 and footnote 24.

19 According to Born, "[s]ome institutional rules either expressly or impliedly provide for the possibility of representation by non-lawyers *as well as* lawyers" [emphasis added].[5] He cites the LCIA Rules as an "explicit" example of this.[6] Rule 18.1 of the LCIA Rules states that "[a]ny party may be represented by legal practitioners or any other representatives". That phrase "legal practitioners or any other representatives" is identical to that found in rule 23.1 of the SIAC Rules.

20 As such, rule 23.1 of the SIAC Rules would certainly be interpreted the same way by Born, who is also the President of the SIAC Court of Arbitration. The same interpretation is adopted in Choong, Mangan and Lingard, *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2nd Ed, 2018) at paragraph 9.90: "The SIAC Rules, consistent with their hallmarks of party autonomy and procedural flexibility, provide that a party is free to choose its representatives, which can *include* persons not qualified as lawyers" [emphasis added].

21 Giving rule 23.1 of the SIAC Rules the restrictive interpretation for which the respondent contends would also go against the policy of promoting Singapore as an arbitration centre. In explaining the amendment to the LPA prompted by the *Turner* ([12] *supra*) case, the Minister of Law referred to the importance of giving effect to the parties' freedom of representation to Singapore's position as an international arbitral centre: Born, IA, ch 14.01 at p 269; see also *Singapore Parliamentary Debates, Official Report* (15 June 2004) vol 78 at cols 96–97 (Prof S Jayakumar, Minister for Law). A restrictive

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5 Born, ICA, ch 21.02, p 2847.

6 Born, ICA, ch 21.02, p 2847 and footnote 81.

interpretation to rule 23.1 would instead go against the promotion of SIAC arbitration.

22 The right to representation is, however, not an absolute one. As Born notes:[7]

> Questions would arise as to the limits of a party's entitlement to legal counsel of its choice if its preferred counsel were supposedly unable to attend a hearing, or to complete written submissions, in accordance with the parties' or tribunal's procedural timetable. Although tribunals often exhibit a degree of flexibility in such circumstances, there are cases where arbitrators will order a hearing to proceed, or a submission to be filed, even if a party's counsel claims to be unavailable.
>
> These sorts of orders do not, absent extraordinary circumstances, deny a party its right to select counsel of its choice. As one authority reasoned:
>
> > "if a party's first choice is not available, his second choice will still be 'a lawyer or other person chosen by him'. The right to be represented exists but must not be abused."
>
> Nonetheless, if a party is arbitrarily subject to procedural requirements that effectively deny it the counsel of its preference, or that exclude counsel on the basis of discrimination with regard to nationality, religion, or place of qualification, the guarantee of freedom to select legal representation is implicated. Moreover, if an order is made late in the arbitral proceedings, scheduling a hearing (or other significant event in the arbitration) at a time when counsel that is familiar with the case cannot appear, a party's right to be heard and freedom of legal representation is also implicated.

23 Born also observes that "[a]s a practical matter, the parties' right to select representatives of their own choosing is of fundamental significance: the quality, loyalty and vigor of a party's representatives can have substantial consequences for the party's opportunity to present its case, for the outcome of

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7 Born, ICA, ch 21.01, p 2846.

the arbitral process and for the parties' perceptions regarding the fairness and legitimacy of the process".[8] That being said, a party's right to present its case is not an absolute one.

24 Natural justice requires that parties be given a "fair", "reasonable" opportunity to be heard (on what "fairness" entails, see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43] and *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*CMNC*") at [1]; as for the meaning of "reasonable", see *Soh Beng Tee* at [55], *ADG and another v ADI and another matter* [2014] 3 SLR 481 ("*ADG*") at [112] and *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi*") at [124]).

25 In *ADG*, the court stated at [112]: "… the right to be heard too is not unqualified: it is subject to the standard of reasonableness. By the parties' agreement, therefore, the Tribunal is entitled to make procedural decisions which give each party a *reasonable* right to present its case, after weighing the competing considerations. This includes the need to ensure the fair expeditious, economical and final determination of the dispute …" [emphasis in original] (see also *CMNC* at [97] and [104(b)]).

26 The phrase "fair[,] expeditious, economical and final" as used in *ADG* comes from rule 19.1 of the SIAC Rules, which states as follows: "The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final

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[8] Born, ICA, ch 21.01, p 2833.

resolution of the dispute." There is also a similar expression in rule 41.2 of the SIAC Rules, which deals with residual powers.

27 In *ADG* at [103], the court held that the right to be heard "… is not an unqualified right to present any and all submissions and evidence at any time of a party's choosing no matter what the consequences". Thus, in the example cited in Born, ICA at [22] above, should a tribunal proceed with a hearing in the absence of a party's first choice of counsel, the right to representation will not necessarily be infringed, nor will there necessarily be a breach of natural justice.

28 Where a party complains that his right to choose his representation has been infringed, it is relevant to ask whether he was thereby deprived of a fair or reasonable opportunity to present his case, or, in the language of Art 34(2)(*a*)(ii) of the Model Law, whether he was "unable to present his case".

29 Rule 23.1 of the SIAC Rules cannot be read in isolation from the rest of the SIAC Rules, or from what the arbitral process entails. The Claimant argued that if it could not proceed with its intended co-counsel arrangement, that *per se* would mean "the arbitral procedure was not in accordance with the agreement of the parties" within Art 34(2)(*a*)(iv) of the Model Law, thereby justifying the Award being set aside – *even if* it had been given a fair and reasonable opportunity to present its case, it was not unable to present its case, and it did not suffer any prejudice. This would however elevate the right to party representation *above* the right to be heard (the latter being an aspect of natural justice), which did not seem right. I will return to this when I discuss the facts.

30 The complaint about party representation was said to involve a breach of agreed procedure, and not just the denial of the right to a fair hearing. But the

complaint was still about the Tribunal's conduct of the proceedings. As such, the principles set out by the Court of Appeal in *CMNC* ([24] *supra*) at [98]–[105] (in the context of the right to a fair hearing) remain relevant. I highlight in particular [104(c)] and [104(d)]:

> (c) What constitutes a 'full opportunity' is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.
>
> (d) In undertaking this exercise, the court must put itself in the shoes of the tribunal. This means that: (i) the tribunal's decisions can only be assessed by reference to what was known to the tribunal at the time, and it follows from this that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in matters of procedure and will not intervene simply because it might have done things differently.

31 Like the present case, *CMNC* ([24] *supra*) was one where the parties had agreed to an expedited arbitration. The court observed (at [143]) that this was a relevant consideration in determining what natural justice demands:

> … it is trite that what natural justice demands turns in part on the parties' particular agreement to arbitrate … Of course, parties do not relinquish their due process rights simply by dint of agreeing to an expedited arbitration. That said, the fact that parties agreed to an expedited arbitration will inevitably have a bearing on the expectations that parties may reasonably and fairly have as to the extent of the procedural accommodation that may be afforded to them. …

32 Where (as in this case) the complaint is about a tribunal's case management powers, one must bear in mind that parties who "choose to arbitrate in Singapore or under the SIAC Rules therefore and thereby agree to

give the Tribunal a wide and flexible discretion to determine its own procedures and processes and to receive and evaluate competing evidence and arguments in order to arrive at its determination": *ADG* ([24] *supra*) at [111], citing *Soh Beng Tee* ([24] *supra*) at [60]. The court's supervisory role over a tribunal's exercise of case management powers will be "exercised with a light hand": *Anwar Siraj and another v Ting Kang Chung and another* [2003] 2 SLR(R) 287 at [42].

33 With those principles in mind, I turn to examine the facts of the case.

Correspondence about communications with the Tribunal, and about R's role at the hearing

Protocol for communications with the Tribunal

34 The Claimant complained that its party representative R was omitted from certain e-mails after the Claimant engaged legal counsel T for the hearing.

35 On this, paragraph 6 of PO 1 stated: "Where a Party is represented by Counsel, communications with the Tribunal shall be with Counsel instead of the Party's representatives." The Claimant did not take issue with paragraph 6 when PO 1 was circulated in draft, and never applied to vary that paragraph (which the Claimant could have done pursuant to paragraph 72 of PO 1). Nor did the Claimant complain, at the time when PO 1 was issued or when R was omitted from some e-mails, that its rights had been infringed. It first complained about this only *after* the Award had been issued.

36 It is quite understandable that a tribunal may not wish to have multiple lines of communication with a single party: multiple representatives may send mixed signals to the tribunal, placing the tribunal in the difficult situation of

having to assess what *the party* wished to say. Having the arbitration expedited (as in this case) heightens the need for clear lines of communication.

37 The Claimant's complaint about paragraph 6 of PO 1 is ironic, for its own notice of arbitration (submitted by its then legal counsel ("H")) stated this at paragraph 2.3: "The Claimant is represented in this arbitration by [H], to whom all communications for the purposes of this arbitration should be made."[9]

38 The notice of arbitration did not at the material time stipulate that apart from H, communications also had to be sent to R or other representatives of the Claimant. Paragraph 6 of PO 1 was therefore in line with the communications protocol that had been put forward in the notice of arbitration by the Claimant's then counsel, H.

39 There was nothing untoward about paragraph 6 of PO 1. If communicating *solely* with counsel were regarded as a departure from the agreed procedure for the arbitration, the Claimant had departed from that first by what its own counsel H had said in the notice of arbitration. In any case, there was no agreed communications protocol in the first place. Moreover, PO 1 was the *Tribunal's* procedural order following a case management conference. It was not the *parties'* "agreed procedure" for the purposes of a setting-aside application under Art 34(2)(*a*)(iv) of the Model Law (as held in *Triulzi* ([24] *supra*) at [84]–[85] and [88], which I respectfully agree with).

40 Nor did paragraph 6 of PO 1 infringe the parties' right to representation, as set out in rule 23.1 of the SIAC Rules. The Claimant could be *represented* by

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9 R's affidavit dated 4 September 2019, p 217.

whomsoever it pleased, but the Tribunal could reasonably direct that there only be just ***one*** line of *communication* between each party and the Tribunal. As stipulated in paragraph 6 of PO 1, such communication would be through counsel, if a party were represented by counsel.

41 Finally, paragraph 6 of PO 1 did not cause any breach of natural justice. The Claimant was not denied a fair or reasonable opportunity to be heard or prevented from presenting its case.

Correspondence after the Claimant appointed T for the hearing

42 On the facts, the complaint about R being left out of certain e-mails was at best a storm in a teacup. This was clear from my review of the e-mails in question.

43 The "storm" started brewing when T was appointed as the Claimant's counsel on 28 January 2019. That same day, he wrote to the Tribunal and the respondent's counsel, stating: "We will appear together with [R] at Wednesday's CMC [*ie*, on 30 January 2019]. The undersigned shall also appear as counsel at the forthcoming hearing." T signed off as "Counsel for the Claimant".[10] While T mentioned that he would appear together with R for the CMC (*ie*, Case Management Conference), he did not say the same about the forthcoming hearing. T only mentioned that *he* would appear as counsel at the forthcoming hearing, and nothing was said about the Claimant wanting R to be co-counsel at the hearing. In the same e-mail, T asked that all correspondence and notices be addressed to him, but that those still be copied to the Claimant's

10 R's affidavit dated 4 September 2019, p 1118.

two party representatives named in PO 1 (one of whom was R). The impression conveyed by that e-mail is that T had come on board as counsel and would appear together with R for the CMC, but for the "forthcoming hearing" (*ie*, at the 11–13 February 2019 hearing), T would be counsel.

44 On 29 January 2019, the Tribunal replied to T's e-mail of 28 January 2019, with the Claimant's party representatives copied in. The Tribunal referred to T as "the Claimant's Counsel", which is how T had introduced himself.

45 In its reply, the Tribunal further stated that:[11]

> With respect to communications, the Tribunal would highlight that paragraph 6 of Procedural Order No. 1 dated 30 October 2018 (a copy of which is attached for ease of reference) provides that where a Party is represented by Counsel, "*communications with the Tribunal shall be with Counsel instead of the Party's representatives*". As you will note, this is the present arrangement in place for communications to and from the Respondent, who is also represented by Counsel. The tribunal therefore ***requests*** that the Claimant similarly follow this arrangement going forward.
>
> [emphasis in original in italics; emphasis added in bold italics]

46 The Tribunal's 29 January 2019 e-mail was not a ruling by the Tribunal: paragraph 6 of PO 1 was already in place, and the Tribunal simply *requested* that it be followed. T replied on the same day, merely saying, among other things, "[t]he Claimant takes note of your directions and your comments in respect to paragraph 6 of Procedural Order No. 1."[12] That was also the last time T signed off as "Counsel for the Claimant". R was then omitted from some e-mails with the Tribunal.

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11 R's affidavit dated 4 September 2019, p 1117.

12 R's affidavit dated 4 September 2019, p 1115.

47 R was also omitted from certain e-mails on 29 and 30 January 2019 from the respondent's counsel to T. T did not copy R in his replies to those e-mails. Paragraph 6 of PO 1 did not apply to these communications as they were between counsel and not with the Tribunal. The Tribunal cannot be faulted at all for counsel writing to each other without copying in the Claimant's party representatives. It does not appear that the Tribunal even knew about these communications in the course of the arbitration.

48 As for the e-mails with the Tribunal which R had not been copied on, if the Claimant considered that its rights were being infringed, it ought to have said so; it could also have applied to vary paragraph 6 of PO 1. But it did nothing of the sort. Instead, the response from T (on 29 January 2019) to the Tribunal's request to follow paragraph 6 of PO 1 merely stated that "[t]he Claimant takes note of [the Tribunal's] directions and [the Tribunal's] comments". This was essentially an acknowledgement of the Tribunal's request, amounting to nothing more than "noted".

49 The Court of Appeal in *CMNC* ([24] *supra*) stated at [101]–[102]:

> 101 … the contours of what constitutes fair and proper procedure cannot be found in any one rulebook, but will be shaped by the grunts of assent and the cries of protestation from the parties during the course of the proceedings. The fairness of that procedure can only be judged against what the parties themselves may be taken as having agreed to and expected, *by what they contemporaneously communicated to the tribunal*.
>
> 102 … in the context of a challenge directed at the exercise of a tribunal's procedural discretion, there can be no non-compliance to speak of if the complaining party had not informed the tribunal of what, in its view, such compliance required.
>
> [emphasis in original]

50 "Noted" is not a cry of protestation. There was thus no reason for the Tribunal to think that paragraph 6 of PO 1 was objectionable.

51 The Claimant submitted that the Tribunal and the respondent had disregarded R's role, and her intended "co-counsel" arrangement with T. But the Claimant had not communicated these concerns to the Tribunal at the time.

52 There was no mention of any "co-counsel" arrangement until T's subsequent e-mail on 1 February 2019:[13]

> …
>
> Further to my email below, we would like to raise a point in regard to the Claimant's representatives. This is to advise that [R] remains in her role, just as prior to the appointment of this Firm. We have simply been asked to assist her in her continuing representation of the Claimant. This Firm's appointment is in accordance with Article 23.2 of the SIAC Rules whereby [T's firm] is added to the representation of [the Claimant].
>
> In respect to communication, *notwithstanding paragraph 6 of Procedural Order No. 1*, we ask for the ***indulgence*** *of the Tribunal and opposing counsel* and ***request*** that [R] continue to be copied on exchanges, as she continues to act as counsel, in addition to the undersigned. This is important given that we are joining these proceedings at a late stage, as well as given the difficulties of our being in a different time zone.
>
> …
>
> [emphasis added in italics and bold italics]

53 The words "indulgence" and "request" in T's e-mail are telling. Just as the court noted in *ADG* ([24] *supra*) at [69], there was no objection to the procedure which the Tribunal had adopted (in this case, paragraph 6 of PO 1); it was not alleged that any of the Claimant's procedural rights had been

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13 R's affidavit dated 4 September 2019, p 1160.

infringed; and the use of the word "indulgence" indicated an acknowledgment by the Claimant that it was "in the realm of procedural indulgences rather than procedural rights". The word "request" reinforces this.

54 The respondent's counsel responded on 3 February 2019 to say that it did not object to R being included on communications with the Tribunal going forward, but if that were acceptable to the Tribunal, the respondent would want to add its client representatives to the e-mail distribution.[14]

55 The respondent also took issue with R "act[ing] as counsel" in the arbitration, for she was not "counsel" or a "legal practitioner" under rule 23.1 of the SIAC Rules – she was a principal of the Claimant. R had played a role in the underlying events directly in issue in the arbitration, but she had not submitted a witness statement. As such, the respondent expressed its concern that R might seek to put forward evidence in the form of arguments.

56 The next day, on 4 February 2019, R wrote directly to the Tribunal to say:[15]

> …
>
> With reference to the matter above, [the Claimant] would like to clarify the appointment of [T] of [T's firm].
>
> As stated in Rule 23.2 of the SIAC Rules, [T] has been added as a representative to this arbitration.
>
> 23.2 After the constitution of the Tribunal, any change or addition by a party to its representatives shall be promptly communicated in writing to the parties, the Tribunal and the Registrar.

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14 R's affidavit dated 4 September 2019, pp 1163–1164.

15 R's affidavit dated 4 September 2019, pp 1167–1168.

> [T] does not replace the undersigned whom should be able to continue to communicate with the Tribunal. *However, for purposes of the Hearing, Claimant has requested [T] to lead in these communications.*
>
> Claimant's understanding of international arbitration in Singapore is firstly that a party can be represented by any one person, or by several people. Second, there is no requirement that representation in arbitration must be solely by lawyers. A party can be represented in proceedings by anybody that it so chooses.
>
> The Claimant intends that the undersigned shall participate *during the Claimant's Opening Statement at the Hearing*. The Claimant would be grateful if the Tribunal would confirm that this shall not be an issue, despite the Respondent's objections. It's unfortunate that the Respondent should seek to prevent the ongoing role of the undersigned, where the Rules and practice in Singapore does not support their attempts to exclude a representative at a late stage of the proceedings.
>
> In regard to [the respondent's counsel's] request that his client's representatives be directly copied on emails and other communications, Claimant has no objection.
>
> …
>
> [emphasis added]

57 In relation to paragraph 6 of PO 1, R said that she "should be able to continue to communicate with the Tribunal", but it was not suggested that the Claimant's rights would be infringed if paragraph 6 of PO 1 were to be followed.

58 I should also point out that paragraph 6 of PO 1 was intended to avoid *precisely* the situation that the Tribunal was now faced with, *ie*, two lines of communication from the Claimant on the same matters – T's e-mail of 1 February 2019, and R's letter of 4 February 2019 – which would require examination so as to divine what the Claimant's position was.

59 In any event, R stated that "for purposes of the Hearing, Claimant has requested [T] to lead in these communications [with the Tribunal]"; and "[t]he

Claimant intends that [R] shall participate during the Claimant's Opening Statement at the Hearing". R then asked whether the Tribunal would confirm that that would not be an issue.

60 This description of R's role was put forward by *the Claimant* – indeed, by R herself. Significantly, the Claimant did not define a more extensive speaking role for R at the hearing, beyond her participation "during the Claimant's Opening Statement". Seen in this light, the present complaint that R was not allowed to function fully as "co-counsel" alongside T rings hollow. That is not what R asked for in her letter of 4 February 2019 *before* the Tribunal made any ruling as to what she was permitted to do.

61 On 5 February 2019, counsel for the respondent replied to say that the respondent did not object to R "participat[ing] during the claimant's opening statement at the hearing" provided certain conditions were complied with.[16]

62 On 7 February 2019, the Tribunal responded to these exchanges of 1, 3, 4 and 5 February 2019, as follows:[17]

> …
>
> The Tribunal has considered the Claimant's request and the Respondent's objections. The Tribunal notes that the Claimant has appointed [T] as counsel for the purposes of the Hearing and understands that [T] will lead the communications with the Tribunal at the Hearing, which commences in a few days. In the circumstances, the Tribunal does not see any reason to depart from the terms of paragraph 6 of PO No. 1.
>
> The Tribunal therefore expects that the Claimant's counsel will manage the communications with Claimant's party

16 R's affidavit dated 4 September 2019, pp 1170–1171.

17 R's affidavit dated 4 September 2019, pp 1503–1504.

> representatives accordingly, notwithstanding time differences – just as the Respondent's counsel has done for the last few months.
>
> The Tribunal's understanding is that [R] will attend the Hearing as the Claimant's representative and [T] as the Claimant's counsel will address the Tribunal on all matters pertaining to the Hearing. In light of the Respondent's email of 5 February 2019 below, the Claimant is invited to clarify the role that [R] will have at the Hearing and in particular, if [R] is looking to address the Tribunal and if so, to what extent and in respect of which issue. The Claimant should revert with its clarification by Friday, 8 February 2019 at 5.30pm (Singapore time).
>
> …
>
> [emphasis in original omitted]

63 T replied to the Tribunal on 8 February 2019. He did not copy R in his reply, and rightly so, given what the Tribunal had said about paragraph 6 of PO 1. In his reply, T did not say that the Claimant's rights had been infringed. Indeed, he said nothing about communications with the Tribunal. He merely provided the clarification sought by the Tribunal about R's intended role at the hearing, as follows:[18]

> …
>
> We refer to your email below in respect to the role of [R] at the hearing. You have asked us to clarify that role and to address if [R] is looking to address the Tribunal and if so, to what extent and in respect of which issue.
>
> The Claimant desires the assistance of [R] to address the Tribunal *solely* during its Opening Statement. This is frankly on account of the fact that the undersigned has only had very limited time to come up to speed with the case, and that there are aspects of the claim that [R] as sole party representative to date, and de facto counsel, knows a lot better than I, notably the navigation of the exhibits relating to damages. The Claimant assures the Tribunal that it does not seek to introduce evidence through the back door.

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18 R's affidavit dated 4 September 2019, pp 1502–1503.

> [R] fully understands and appreciates that she is not a fact witness. Her role will simply relate to navigating certain exhibits. Her statements will only relate to what is on record, and under no circumstances her personal factual knowledge.
>
> …
>
> [emphasis added]

64 T also agreed to the conditions suggested by the respondent's counsel in its 5 February 2019 e-mail.

65 The Claimant contended that its "only option" had been for T to say that R would be addressing the Tribunal ***solely*** *during the Claimant's opening statement*, given that the Tribunal's indicated "understanding" seemed far more drastic, *ie*, that R would have no involvement at all.[19] There is no merit in this. R had already stated in her letter of 4 February 2019 that "[t]he Claimant intends that [R] shall participate *during the Claimant's Opening Statement at the Hearing*" [emphasis added]. Moreover, the Tribunal never expressed any "understanding" that R would have no involvement at all; to the contrary, the Tribunal invited the Claimant "to clarify the role that [R] will have at the Hearing and in particular, if [R] is looking to address the Tribunal and if so, to what extent and in respect of which issue". If the Claimant (and R in particular) had wanted R to play a more expansive "co-counsel" role, beyond what R herself had expressed in her letter of 4 February 2019, this was the time to say so. Instead, T continued in the same vein as R's letter of 4 February 2019, expressing that R would participate during the Claimant's opening statement at the hearing, and *solely* in that aspect.

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19 R's affidavit dated 4 September 2019, para 54.

66 On 8 February 2019, the Tribunal thanked T for the clarification, and stated that the Tribunal would accede to the Claimant's request to have [R] address the Tribunal in part during the opening of the Claimant's case. In so doing, the Tribunal was simply acceding to the role which the Claimant itself had said it wanted R to play. Although T's e-mail of 1 February 2019 had conveyed that R "continues to act as counsel, in addition to [T]", that was then qualified in the subsequent communications from T and from R herself. By the time of the Tribunal's e-mail of 8 February 2019, all the Claimant was asking for was that R address the Tribunal during the Claimant's opening statement. The respondent agreed to this, as did the Tribunal.

67 The Court of Appeal's observations in *CMNC* ([24] *supra*) at [165] are directly on point:

> … the inevitable consequence of this final submission that [CMNC's counsel] made to us … is that … the prospects of a fair arbitration had been irretrievably lost as a result of the Tribunal's mismanagement of its procedure (***or alternatively, and at the very least, that the scheduled evidentiary hearings could not proceed***). In his words, he said the arbitration process had become "dysfunctional". Yet, in *none* of these communications did CMNC make *that point*. On the contrary, CMNC had, by its continued engagement as a party in the arbitration, consistently expressed its intention to forge ahead with the main evidentiary hearing and to see the arbitration through to its conclusion at the scheduled time right up to the end of June 2015, even as matters came to a head …
>
> [emphasis in original in italics and bold italics]

68 At [170] of *CMNC* ([24] *supra*), the Court of Appeal went on to say:

> In our judgment, there is a principle to be drawn from this and it is this: if a party intends to contend that there has been a fatal failure in the process of the arbitration, then there *must* be fair intimation to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding. This would ordinarily require that the complaining party, at the very least, seek to suspend the

> proceedings until the breach has been satisfactorily remedied (if indeed the breach is capable of remedy) so that the tribunal and the non-complaining party has the opportunity to consider the position. This must be so because if indeed there has been such a fatal failure against a party, then it cannot simply "reserve" its position until after the award and if the result turns out to be palatable to it, not pursue the point, or if it were otherwise to then take the point … If a party chooses to carry on in such circumstances, it does so at its own peril. The courts must not allow parties to hedge against an adverse result in the arbitration in this way.
>
> [emphasis in original]

69 In the present case, the Claimant argued that it did the best it could in the circumstances: it was close to the hearing by the time the Claimant appointed T as counsel, and the only prudent way forward was to abide by the constraints.

70 That, however, goes against the principle stated in *CMNC* ([24] *supra*) which is cited above at [68]: if the Claimant considered that there had been a fatal failure in the process of the arbitration that had caused it prejudice, it *had to* ***complain***. It *could not* simply press on with the hearing; there was no "prudent way forward". Moreover, the Claimant itself had, in its correspondence with the Tribunal, defined the role that R would play at the hearing. The Tribunal had simply agreed to what the Claimant wanted in that regard.

71 I now return to the controversy about communications with the Tribunal. Between the Tribunal's e-mail of 7 February 2019 (in which it decided that paragraph 6 of PO 1 should be followed) and the hearing that commenced on 11 February 2019, there is only one e-mail in the entire train of e-mail correspondence that R was not copied on (that of 7 February 2019 wherein the

Tribunal made no order on the Claimant's request for documents, which was filed out of time).[20]

72 R complained that her being left out of e-mails prejudiced the Claimant, because it *caused* the Claimant's third document request to be rejected for being out of time. Conspicuously, this was not mentioned in the Claimant's submissions. It is clear why this was the case: there was no merit in this complaint.

73 At paragraph 43 of R's first affidavit, she sought to attribute the delay in the Claimant's submission of the third Redfern schedule to her exclusion from e-mail correspondence.[21] However, the submission of this document was due on 28 January 2019, the same day that T was appointed counsel and on which T first wrote to the Tribunal.

74 On Thursday, 24 January 2019 at 7.12pm (Singapore time), the Claimant sent the respondent its third document request;[22] per PO 1, the respondent had four business days to respond and did so within that time on Tuesday, 29 January 2019 at 12.19am (Singapore time).[23] By then, the Claimant was already past the 28 January 2019 deadline to submit the third Redfern schedule to the Tribunal, but that was a consequence of *the Claimant being late* in making its third document request in the first place. T wrote to the Tribunal to submit the third Redfern schedule on 29 January 2019 at 10.21pm (Singapore time),

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20 R's affidavit dated 4 September 2019, pp 1107–1108.

21 R's affidavit dated 4 September 2019, para 43.

22 3BOD2090–2094.

23 3BOD2096.

acknowledging that it was "one day late".[24] The late submission of the third Redfern schedule had nothing to do with R being omitted from e-mails. Indeed, R was not omitted from any e-mails until 29 January 2019, by which time it was already past the deadline for the submission of the third Redfern schedule. In the event, the Tribunal considered the third Redfern schedule to have been filed "out of time, with no good reasons proffered for the delay",[25] and made no order on the Claimant's third document request.

75 Indeed, paragraph 43 of R's first affidavit is internally inconsistent as to the cause of the delay in submitting the third Redfern schedule to the Tribunal. On the one hand, R claimed that her exclusion from e-mails "informed the delay to [the Claimant's] submission of the third Redfern schedule" and that "delays were caused … in respect of the filing of the Redfern schedule … because of [her] sporadically being dropped out of email distribution lists".[26] Shortly after that statement, however, R contradicted herself when she said that "[the Claimant] only received the completed (third) Redfern schedule from [the respondent] on the morning of 29 January 2019, and therefore was simply unable to have filed the completed (third) Redfern schedule any earlier".[27]

76 For the above reasons, R's omission from e-mails had nothing whatsoever to do with the late submission of the third Redfern schedule, and it does the Claimant and R no credit to have linked the two.

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24 R's affidavit dated 4 September 2019, p 1120.

25 3BOD2126–2127.

26 R's affidavit dated 4 September 2019, para 43.

27 R's affidavit dated 4 September 2019, para 43(c).

77 I also find R's complaint that she was "often only able to receive and process information about 24–48 hours late"[28] due to time differences to be an exaggeration. T was prompt in forwarding to R the e-mails that he had received from the Tribunal and which she was not copied on. Moreover, from the time T was appointed on 28 January 2019, he was only in a different time zone from R for a few days: they met in person when they both flew to Singapore around 6 February 2019, in advance of the 11–13 February 2019 hearing.

78 While T continued to represent the Claimant for a while after the hearing, paragraph 6 of PO 1 continued to be observed. Thus, the Tribunal's e-mail of 15 February 2019 (with certain follow-up items) was sent to T but not to R.[29] This is not said to have caused the Claimant any prejudice, and indeed, it would not have. T replied on 18 February 2019,[30] and the Claimant was also allowed a further response (despite the respondent's objections). R submitted that further response on 23 February 2019[31] as T had ceased to represent the Claimant on 21 February 2019.[32] R also provided a final submission on behalf of the Claimant on 11 March 2019.[33]

R's role at the hearing and thereafter

79 Besides the broader allegation that the Claimant was not allowed to proceed with its intended "co-counsel" arrangement (which in view of the above

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28 R's affidavit dated 4 September 2019, para 70(b).

29 3BOD2173–2174.

30 3BOD2172.

31 3BOD2213.

32 3BOD2202.

33 3BOD2274–2276.

is without merit), the Claimant raised two specific complaints about the Tribunal's handling of the hearing, which I shall deal with below:

(a) that the Tribunal had interrupted R when she was addressing the Tribunal during the Claimant's opening statement; and

(b) that the Tribunal had declined to allow R to raise a question to one of the Claimant's witnesses.

There was no breach of agreed procedure or breach of natural justice when the Tribunal "interrupted" R during the Claimant's opening statement

80 As part of the Claimant's opening statement, R made a presentation to the Tribunal about the Claimant's Final Request for Payment ("FRP") and Exhibit C72 (which I will say more about later). From the transcript, it appears that she had *finished* making her presentation:[34]

> [R]: Okay. *So that is my presentation*, but I will just now skip in to answer your questions. Now these figures that we gave originally in 2012, 294 was the whole year's expenses because the project was dedicated to working for [the respondent and its parent company] and these were calculated on time and man-days as well.
>
> [emphasis added]

81 It was then that the Tribunal said:[35]

> ARBITRATOR: I don't need you to take me through the table any more. I think your PowerPoint slide made it quite clear as to what your claim now is, something in

34 R's affidavit dated 4 September 2019, p 1203.

35 R's affidavit dated 4 September 2019, p 1203.

> the region of $1.8 million plus. I think where I would need help is to identify what are your demobilisation costs and expenses.

82 This exchange appeared to be entirely innocuous. The Tribunal merely indicated what it understood from the presentation, and the areas which it wished R to address further.

83 The Claimant, however, sought to cast this exchange in a more sinister light. In R's first affidavit, this exchange was said to be an "intervention" which resulted in the Claimant not being able to present its "claims … in a manner consistent with its previous pleadings".[36] As a result, R was purportedly denied the opportunity to explain Exhibit C72 further, and the Claimant was "not allowed to present its case as it intended".[37]

84 In my view, it would be a sad day if such a complaint sufficed to set aside an arbitral award. Tribunals would be reduced to passive observers, until the time came for them to render their decision. That is not how arbitration works. As I noted above, the right to be heard is not unqualified. What the parties have is the right to a "fair" or "reasonable" opportunity to be heard. In determining whether this right has been infringed, the question the court should ask is whether what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done: *CMNC* ([24] *supra*) at [104(c)].

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36 R's affidavit dated 4 September 2019, para 70(d).

37 R's affidavit dated 4 September 2019, para 75(c).

85 The question is thus not whether *the Claimant* had its way. It is whether *the Tribunal's* conduct was objectionable. I find that a reasonable and fair-minded tribunal in those circumstances might have done what the Tribunal did, which was simply to provide feedback on the Claimant's presentation.

86 This conclusion is reinforced by what *the Claimant* did (or did not do). If the Claimant considered the Tribunal's intervention to be some breach of its rights, it ought to have objected. R (or T) could have told the Tribunal that R wished to continue addressing the Tribunal on Exhibit C72 (even though she had indicated that she had finished her presentation on Exhibit C72 by saying, "that is my presentation"). T could have revisited this in his oral closing submissions on 13 February 2019. There were further opportunities to do likewise in the written submissions made after the hearing by T on 18 February 2019, and by R on 23 February 2019 and 11 March 2019. None of this was done, and, in my view, this is fatal to the Claimant's complaint.

There was no breach of agreed procedure or breach of natural justice when the Tribunal declined R's request to question a witness

87 The Claimant's other specific complaint about the hearing was that the Tribunal had said "No", when R had asked to question one of the Claimant's witnesses. The transcript of the 11 February 2019 hearing shows what transpired:[38]

> [T]: Sir, I don't think I have any further questions.
>
> [R]: Can I ask a question?
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> ARBITRATOR: No.

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38 R's affidavit dated 4 September 2019, p 1230.

> [T]: Sir, we have no more questions.

88 The transcript shows that R asked whether she could ask a question, *after* T had said he did not think he had any further questions for that witness in examination-in-chief. The Tribunal then declined R's request to question the witness. This was in line with what had been represented, agreed, and decided earlier as to R's speaking role at the hearing, *ie*, solely to address the Tribunal during the Claimant's opening statement. That decision crystallised after the respondent's counsel had expressed concerns about R having a larger role in the hearing, given that she was involved in the events in issue, yet was not a witness (see [55] above).

89 The Tribunal was not obliged to open a discussion on whether R should play a more expansive role, particularly when the hearing was already underway, a witness was on the stand, there were just three days for the hearing, and it was an expedited arbitration. The Tribunal could, and did, simply hold the Claimant to what it had represented regarding R's speaking role at the hearing. The Tribunal's conduct in this regard plainly fell within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.

90 As with the earlier complaint about the Tribunal's intervention, there was also no protest from the Claimant on this point. The Claimant could have asked the Tribunal to reconsider its decision not to allow R to question the witness. Alternatively, R could have instructed T to ask the question that she had wanted to raise; T could have sought time to take instructions from R on that; or R herself could have asked for time to speak with T. None of this happened. Instead, T proceeded to say that the Claimant had no further

questions for the witness. When T said so, the Tribunal was not obliged to prompt him to reconsider asking the question which R had wanted to ask.

91 Notably, that witness did not file any affidavit in these proceedings. It is not possible to know what the witness' answer would have been even if R had asked the question. Even if asked, the question might have led nowhere. It was for the Claimant to show that the Tribunal was denied material that could reasonably have made a difference to the Tribunal's deliberations (see [94] below), and the Claimant failed to show that.

92 My view on this is reinforced by the fact that with some subsequent witnesses, T consulted R before ending his questioning of them. The transcripts show that in one instance, after consulting with R, T sought and obtained leave for further re-examination of the witness (which went beyond the sequence of questioning that had been contemplated). In another instance, T again consulted with R and posed a further question to the witness. In a third instance, R consulted with T who then said he had no further questions. Strikingly, on the occasion complained of, it appears that T and R just did not confer before T said, "Sir, we have no more questions." The question R wanted to ask went unasked, but any blame for that lies squarely on the Claimant itself.

Whether there are grounds to set aside the Award, in whole or in part

Party representation

93 As the foregoing analysis shows, in respect of the above complaints, there was no breach of agreed procedure, and the Tribunal's conduct fell within the range of what a reasonable and fair-minded tribunal in those circumstances

might have done. The Claimant was not deprived of a fair and reasonable opportunity to be heard, and it was certainly not unable to present its case.

94 Moreover, the matters complained of did not result in any prejudice to the Claimant. It is true that where the ground for setting aside an award is a breach of agreed procedure under Art 34(2)(*a*)(iv) of the Model Law, prejudice is not a legal requirement, but it remains a relevant consideration: see *Triulzi* ([24] *supra*) at [64], *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [51] and *AQZ v ARA* [2015] 2 SLR 972 at [136]. Prejudice *is* a legal requirement if breach of natural justice is alleged as the grounds for setting aside an award. Section 24(*b*) of the IAA reads: "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced": see also *Soh Beng Tee* ([24] *supra*) at [29] and *CMNC* ([24] *supra*) at [86]. It was for the Claimant to show that as a result of the alleged breaches, the Tribunal was "denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to [its] deliberations" and that material withheld from the Tribunal as a result "*could reasonably* have made a difference" to the outcome [emphasis in original]: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54], cited in *AMZ v AXX* [2016] 1 SLR 549 at [103]. That was not the case here.

95 It is, in my view, fanciful and entirely speculative for the Claimant to say that if R had participated more extensively as co-counsel, if she had questioned witnesses, and if she had continued explaining Exhibit C72, that could reasonably have made a difference to the outcome. I have already addressed the point about R questioning witnesses above, and I will elaborate on Exhibit C72 below.

96 The Claimant also complained that, in breach of natural justice, the Tribunal had failed to consider the Claimant's FRP claim (the "FRP Claim") *as pleaded*. I now turn to consider that complaint.

The Tribunal did not fail to deal with the Claimant's FRP Claim

97 On 10 August 2012, the Claimant issued to the respondent a FRP invoice (the "FRP Invoice") pursuant to a contract between the parties dated 9 March 2012 (the "Agreement"). In its Statement of Claim ("SOC") in the arbitration,[39] the Claimant referred to the FRP Invoice as the "Final Request for Payment invoice" (at paragraph 72), the "original FRP" (at paragraph 69), or the "Final Request for Payment"/"FRP" (at paragraphs 41, 62(a) and 69).

98 The Claimant also used the term "FRP" more compendiously to encompass various items that the respondent supposedly owed the Claimant "[a]s part of the FRP" (see paragraphs 64, 65 and 68 of the SOC), leading to the table at paragraph 69 of the SOC setting out "the FRP amounts". These FRP amounts totalled US$2,344,794, which was more than "the original FRP at USD 2,317,961" which the Claimant said it could accept (also at paragraph 69 of the SOC). That lesser sum of US$2,317,961 was then claimed (among other things) at paragraph 72 of the SOC in relation to the "Final Request for Payment invoice", where the Claimant requested that the Tribunal "[o]rder the Respondent to pay the FRP, interest on the FRP, and Damages". As the arbitration progressed, the Claimant revised the amounts that it was seeking "as part of the FRP".

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[39] R's affidavit dated 4 September 2019, pp 367–393.

99 At paragraph 72 of the Award,[40] the Tribunal referred to the FRP Invoice in the following terms:

> The Claimant subsequently submitted a final request for payment (the "**FRP**") on 10 August 2012 amounting to USD 2,317,961.00 in respect of the work it had carried out prior to and following the execution of the [Agreement]. The Respondent disputes the FRP and denies that it owes the Claimant such sums as claimed.
>
> [emphasis in original]

100 The Tribunal then set out "The Parties' Claims and Counterclaims" at paragraphs 76–79 of the Award,[41] listing each component of what the Claimant had claimed in the SOC "[a]s part of the FRP" and citing paragraphs 64, 65 and 68 of the SOC (the same paragraphs that I highlighted at [98] above). The Tribunal referred to these as the "Additional Preliminary Work Claim", the "Mobilization Costs Claim" and the "Demobilization Costs Claim". Further, the Tribunal noted that the Claimant had claimed liquidated and unliquidated damages. At paragraph 77 of the Award, the Tribunal cited paragraph 72 of the SOC, stating: "In addition, the Claimant also claimed for interest resulting from non-payment of the FRP; its costs and fees of the Arbitration; and other damages/relief to be determined".

101 The Tribunal set out "The Tribunal's Determination of the Claims and Counterclaims" at paragraphs 99–202 of the Award.[42] He noted that the Claimant's claim for liquidated damages had been summarily dismissed earlier on the respondent's application for early dismissal (see paragraphs 82 and 102

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40 R's affidavit dated 4 September 2019, p 57.

41 R's affidavit dated 4 September 2019, pp 58–59.

42 R's affidavit dated 4 September 2019, pp 67–89.

of the Award).[43] He dismissed each of the Claimant's remaining claims, including all that the Claimant had claimed "[a]s part of the FRP" in the SOC. For good measure, the Tribunal further stated at paragraph 211(iv) of the Award that "[a]ll other claims and reliefs sought are hereby dismissed".[44]

102 The Claimant however asserted in this action that "[c]ritically, and/or relatedly, a key component [of the Claimant's] case, the FRP claim, was not dealt with in the Award".[45]

103 The same point was made to the Tribunal *after* the Award was made, when on 27 May 2019 the Claimant sought an additional award in respect of a point allegedly not dealt with in the Award, namely, the FRP Claim.[46] The Tribunal replied on 7 June 2019, saying that "as each of the components of the [FRP Invoice] as pleaded in the Statement of Claim have been dealt with in the Final Award, the Tribunal does not consider [the additional award request] to be justified".[47]

104 The Claimant however said that by its reply, "the Tribunal continue[d] to demonstrate its misunderstanding of the FRP claim".[48]

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43 R's affidavit dated 4 September 2019, pp 60 and 67.

44 R's affidavit dated 4 September 2019, p 93.

45 R's affidavit dated 4 September 2019, para 77.

46 R's affidavit dated 4 September 2019, pp 1485–1489.

47 R's affidavit dated 4 September 2019, p 1499, para 36.

48 R's affidavit dated 4 September 2019, para 73(b).

105 From reading R's first affidavit, I had some difficulty understanding what the complaint was. The Tribunal dealt with each component of the FRP Invoice, and all that had been claimed in the SOC "as part of the FRP". The Tribunal found that the Claimant was not entitled to any of the components of the FRP Invoice, and that it was not entitled to anything claimed "as part of the FRP"; and the Tribunal dismissed all of the Claimant's claims. As such, it was difficult to understand why the Claimant insisted that the FRP Claim had not been dealt with by the Tribunal.

106 The position became clearer from R's second affidavit. There, R asserted that the FRP Invoice had not been disputed after it was issued; it was only disputed in the arbitration, and the respondent did not pay the invoiced amount.[49] R then stated:[50]

> Put simply, this was a case where an invoice was issued from one party to the other, the other party failed to pay yet did not refute or object to the invoice, the invoicing party then commenced arbitration and made a claim for payment of that invoice, and the tribunal failed to deal with that claim (opting instead to scrutinise the underlying bases of the invoice).

107 From the above, it appeared that the Claimant's contention was that it was entitled to be paid on the FRP Invoice because (a) the FRP Invoice had been issued and (b) the respondent had not contemporaneously disputed the FRP Invoice (other than by non-payment). I call this the "Invoice Claim". The Claimant appeared to be saying that even though it was not entitled to be paid for any of the components of the FRP Invoice (as found by the Tribunal), it was

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49 R's affidavit dated 20 December 2019, para 7.

50 R's affidavit dated 20 December 2019, para 8.

nevertheless entitled to be paid the invoiced amount as stated in the FRP Invoice.

108 In the course of oral submissions by the Claimant's counsel, I queried him on whether there was any provision in the Agreement which gave the Claimant the right to be paid the amount stated on the FRP Invoice unless a formal dispute was brought within a certain time, notwithstanding that the Claimant was actually not entitled to the components in the FRP Invoice. The Claimant's counsel candidly admitted that there was no such provision. His case was not that there was any contractual provision giving the FRP Invoice a particular effect apart from the components in the invoice, such as to form a basis for the Claimant's claim for the invoiced amount. Rather, it was that such a claim *had been raised* (whatever its merits) and *had not been dealt with* by the Tribunal, and that this justified the Award being set aside.

109 A review of the Agreement not only confirmed what the Claimant's counsel said as regards the lack of any contractual provision entitling the Claimant to the sum stated on the FRP Invoice without more; it also made it patently clear that the Claimant *was not* entitled to payment just because it had issued an invoice which had not been contemporaneously disputed (other than by non-payment). Article 7.10.1 of the Agreement provides:[51]

> After Final Completion of the Work or earlier termination … the Contractor shall submit a final report and a final request for payment (the "Final Request for Payment"), which shall set forth all amounts due and remaining unpaid to the Contractor. *Upon approval* thereof by the Developer, the Developer shall pay or cause to be paid to the Contractor the amount due under such Final Request for Payment …

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51 R's affidavit dated 4 September 2019, p 141.

[emphasis in original]

110 The stipulation contained in Art 7.10.1 of the Agreement, that the Developer (*ie*, the respondent) would pay the Contractor (*ie*, the Claimant) "upon approval" of the FRP by the Developer, is in a similar vein with Art 7.8.2 of the Agreement, which provides that "[o]n or before the date that is fifteen (15) days after receipt of a Request for Payment, the Developer shall make or cause to be made payment to the Contractor *in the amount approved*" [emphasis added].[52]

111 These contractual provisions flatly contradicted the Claimant's contention that it was entitled to be paid merely because (a) the FRP Invoice had been issued and (b) the respondent had not contemporaneously disputed the FRP Invoice (other than by non-payment). The Claimant did not have a viable Invoice Claim. Its complaint that the Tribunal had failed to deal with a hopeless claim was similarly hopeless. Whether the Invoice Claim had been raised, and whether the Tribunal had failed to deal with it, made no difference whatsoever to the outcome. The Claimant suffered no prejudice from not having a hopeless claim specifically dismissed by the Tribunal.

112 There is, however, an even more basic point: the Claimant had not even raised the Invoice Claim in the arbitration.

113 The Claimant's counsel sought to draw together threads from different parts of the proceedings: a strand here, a wisp there, so as to weave them into a fabric of some substance – the Invoice Claim. However, the more intricate and

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52 R's affidavit dated 4 September 2019, p 140.

arduous his efforts became, the clearer it became that the Invoice Claim had not been put forward in the arbitration. As noted in *Triulzi* ([24] *supra*) at [67], a court should be wary of any attempts by a party to repackage or re-characterise its original case. Similarly, in *BLC and others v BLB and another* [2014] 4 SLR 79, the Court of Appeal observed at [53] that "[t]he 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".

114 The complaint about the Invoice Claim is, like the Emperor's New Clothes, an attempt to create something out of nothing, just by declaring it exists.

115 Nowhere in the notice of arbitration, the respondent's Response, the SOC, the Statement of Defence and Counterclaims, the Statement of Reply, Exhibit C72 and R's presentation on it during the Claimant's opening, remarks by both the Claimant's counsel and the respondent's counsel, and the parties' post-hearing submissions did I see an Invoice Claim being put forward by the Claimant.

116 Indeed, some of these documents were *inconsistent* with an Invoice Claim being asserted. For instance:

(a) The SOC does not put forward an Invoice Claim. Instead, it breaks the FRP/FRP Invoice into its components, and seeks to justify each component (which is precisely what the Claimant said the Tribunal should not have done).[53]

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53 R's affidavit dated 4 September 2019, pp 367–393.

(b) At paragraph 81 of the Statement of Reply, breach of contract and *quantum meruit* were put forward as legal justifications for the FRP/FRP Invoice.[54] Nothing was said about the FRP Invoice having to be paid merely because it had been issued and had not been contemporaneously disputed. Moreover, as the Claimant's counsel conceded, the respondent would not be in breach of contract in not paying the FRP Invoice, because there was nothing in the Agreement requiring the invoice to be paid (indeed, the Agreement was to the opposite effect).

(c) C72 was an exhibit put forward with the Statement of Reply. It purportedly supplied "the analysis and details of the Final Request for Payment",[55] with a table captioned "Final Request For Payment (Details for [the arbitration])" stating a total sum of US$2,526,851.20.[56] That was different from the total of US$2,344,794 stated at paragraph 69 of the SOC, which in turn differed from the amount stated on the FRP Invoice, *ie*, US$2,317,961. There would be no reason for these evolving figures if the Claimant had an Invoice Claim for the sum stipulated on the FRP Invoice.

(d) Shortly after the hearing commenced, the Tribunal observed that "it would be good if at some point the line items in the FRP are substantiated by reference to specific evidence".[57] In response, the

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54 R's affidavit dated 4 September 2019, p 515, para 81(i).

55 R's affidavit dated 4 September 2019, p 515, footnote 91.

56 R's affidavit dated 4 September 2019, p 520.

57 R's affidavit dated 4 September 2019, p 1176.

Claimant did not say that it had an Invoice Claim for US$2,317,961 that was not dependent on it substantiating any line item with any evidence. Quite to the contrary, T responded by saying that the Claimant had anticipated the Tribunal's comments and that R would be going through the damages sought with reference to Exhibit C72. R's presentation on Exhibit C72 then delved into the components of the Claimant's FRP Claim.

(e) The figure for the FRP Claim changed again at the hearing: the slide deck used for R's presentation had a figure of US$1,872,978 as the "Claim Amount (From FRP)"[58] and the same document explained the differences in the claimed amounts by stating that the "Original FRP includes Preliminary Work" and that the "FRP Claim now removes work done in the Preliminary Work Letter".[59] T confirmed to the Tribunal that the FRP Claim was now for US$1.872 million, explaining that the Claimant "didn't want to stand up and stick with a number that didn't make sense so [the Claimant had] brought it down".[60] Both T and R expressly confirmed that Exhibit C72 had been amended and superseded by the revised FRP Claim amount.[61] Their confirmations were telling as this was precisely the time for the Claimant to put forward its Invoice Claim, since that was *not* dependent on the merits of any of the components of the FRP Invoice, and it would not be subject to any reduction. The fact that the Claimant presented its FRP Claim for

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58 R's affidavit dated 4 September 2019, p 1443.

59 R's affidavit dated 4 September 2019, p 1439.

60 R's affidavit dated 4 September 2019, p 1200.

61 R's affidavit dated 4 September 2019, p 1200.

US$1.872 million, is fatal to any assertion that it still had an Invoice Claim for the originally invoiced sum of US$2,317,961, which the Tribunal had supposedly failed to deal with in the Award.

(f) In the Claimant's post-hearing submissions, the amount of the FRP Claim changed again: the Table of Damages/Claims submitted on 23 February 2019 contained a figure of US$1,822,738.[62] Again, if the Claimant were still maintaining an "Invoice Claim" for the original US$2,317,961, it had the opportunity to assert that claim and should have done so at this juncture, but it did not.

(g) The Tribunal asked that the Claimant send across the final version of the table setting out its heads of claim, with details of the amount claimed and the legal basis (with reference to specific articles of the Agreement and/or legal doctrine) for each head of claim. But the Invoice Claim is nowhere to be found in the tables submitted on 18 and 23 February 2019,[63] either as a head of claim, or as a legal basis for any claim.

(h) The last straw was the Claimant's Reply Submission of 11 March 2019, where the Claimant stated at paragraph 8 that:[64]

> In response to general comments made in relation to Item 7 and the Damages table, Claimant would like to attest that this table was a revised and fine-tuned version of Exhibit C72, Figure 2, presented for the Final Request for Payment (Final Invoice) claim. Claimant's Claims/Damages remain as follows:

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62 3BOD2222.

63 3BOD2172 and 3BOD2213.

64 3BOD2276.

- Final Request for Payment, presented in Claimant's Damages Table at USD $1,822,738, plus interest.
- Loss of Profit at USD $ 10,000,000 (see paragraph 10 of Claimant's PHQ submission dated 4 March 2019).
- Other Damages at USD$ 2,000,000 (see note below for withholding Equipment)
- Unliquidated Damages for Breach of Contract as determined by the Tribunal.
- Punitive Damages as determined by the Tribunal.

The Invoice Claim for US$2,317,961 is nowhere to be found. If it ever existed (and, for the reasons stated above, I do not think it did), by this juncture it would well and truly have been abandoned.

117 I found it somewhat ironic that although the FRP Invoice was at the heart of the Claimant's complaint, the Claimant did not include the invoice itself as evidence in these proceedings. It was an exhibit in the parties' pleadings for the arbitration (referred to as Exhibit C5 at paragraph 41 of the SOC and as R-28 at paragraph 203 of the Statement of Defence and Counterclaims),[65] but R's first affidavit in these proceedings exhibited only the text of the pleadings, omitting their accompanying exhibits.

118 After reserving my decision, I asked counsel whether those exhibits were in evidence before the court, and I was informed that they were not. Counsel for the Claimant stated that it was prepared to provide copies of those exhibits to assist the court, subject to the court's leave. However, the respondent objected to any attempts by the Claimant to introduce additional evidence at this juncture.

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65 R's affidavit dated 4 September 2019, p 378, para 41; p 471, para 203.

119 The Claimant was invited to write in with reasons by 7 August 2020, if it wished to introduce those documents in these proceedings. The Claimant did not take up that invitation. As such, the Claimant took its stand on the evidence that was before the court. Although I did not have the FRP Invoice before me, I had before me what was said about it – in the arbitration pleadings, transcripts, and submissions; as well as in the affidavits and submissions in this action. Having the FRP Invoice itself in evidence would not have changed my decision that there is no viable Invoice Claim, and that no Invoice Claim was ever put forward in the arbitration.

120 The Claimant relied on *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 (at [46] and [53]), where the arbitrator had mistakenly thought that part of the respondent's case had been abandoned and thus did not deal with that part; see also *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [45]–[46]. That, however, did not happen here.

121 On the first day of the hearing, T informed the Tribunal that the Claimant was "not technically withdrawing any claims at this point". The Tribunal acknowledged this, saying: "I think what – well, you are not withdrawing, I think it would be good a[t] some point for the tribunal to be informed as to what exactly are you pursuing."[66] Having noted that the Claimant was not withdrawing any of its claims, the Tribunal proceeded to deal with each of the Claimant's claims in the Award and dismissed them all.

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66 R's affidavit dated 4 September 2019, p 1176.

122 In *AKN*, the Court of Appeal emphasised at [47] that there is "an important distinction between, on the one hand, an arbitral tribunal's decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and, on the other hand, the arbitral tribunal's failure to even consider that argument. Only the latter amounts to a breach of natural justice; the former is an error of law, not a breach of natural justice."

123 Here, the Claimant had not put forward an Invoice Claim. If it had, the Tribunal had necessarily rejected it: the Tribunal noted that the Claimant had issued a FRP Invoice on 10 August 2012 for US$2,317,961, went on to find that the Claimant was not entitled to each component of the FRP Invoice/FRP, and dismissed all of the Claimant's claims.

124 At best, the Claimant's complaint was that the Tribunal dismissed its claims because the Tribunal failed to comprehend its Invoice Claim and had therefore failed to appreciate its merits. That, however, would be a matter for an appeal. It would not be a basis to set aside the Award. As the court noted in *AKN* ([120] *supra*) at [46], an inference that the arbitrator had acted in breach of natural justice should *not* be drawn if the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case.

125 Here, the Award shows that the Tribunal applied itself (meticulously) to addressing the Claimant's FRP Invoice/FRP claim. The Claimant acknowledged that the Tribunal had examined and rejected each component of the FRP Invoice/FRP, but argued that the Tribunal had failed to consider whether the Claimant was nevertheless entitled to be paid on the FRP Invoice. There is no merit in this. The Claimant was not entitled to be paid for anything

in the FRP Invoice, and so it was not entitled to be paid on the invoice. Again, this is reminiscent of the Emperor's New Clothes. Like the assertion that the clothes exist even though no threads could be seen, the Claimant asserted that the Invoice Claim exists even though there is nothing to its component claims. But there are no threads, and no clothes!

Conclusion

126 For the above reasons, I dismiss the Claimant's setting-aside application. I will hear the parties on costs.

Andre Maniam
Judicial Commissioner

Devathas Satianathan, David Isidore Tan Huang Loong and Avinash Vinayak Pradhan (Rajah & Tann Singapore LLP) for the applicant;
Aaron Lee Teck Chye, Chong Xue Er Cheryl and Chua Xinying (Allen & Gledhill LLP) for the respondent.