IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA(I) 6

Court of Appeal / Civil Appeal from the Singapore International Commercial Court No 11 of 2023

Between

CZT

… *Appellant*

And

CZU

… *Respondent*

In the matter of Singapore International Commercial Court / Originating Summons No 1 of 2023

Between

CZT

… *Applicant*

And

CZU

… *Respondent*

JUDGMENT

[Arbitration — Award — Setting aside]

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CZT
v
CZU

[2024] SGCA(I) 6

Court of Appeal — Civil Appeal from the Singapore International Commercial Court No 11 of 2023
Sundaresh Menon CJ, Steven Chong JCA and James Allsop IJ
2 July 2024

13 September 2024 Judgment reserved.

James Allsop IJ (delivering the judgment of the Court):

Introduction

1 This is an appeal from orders made by the Singapore International Commercial Court (the "SICC") constituted by three judges, dismissing an application by the Appellant to set aside an arbitral award made in a dispute between the Appellant (as Respondent in the arbitration) and the Respondent to the appeal (as Claimant in the arbitration), on the ground, relevantly for the appeal, that the Appellant was denied natural justice in the making of the award.

2 For the reasons that follow, we dismiss the appeal.

3 The underlying dispute between the parties arose out of a contract underpinning the construction of a certain type of defence equipment (the "Equipment"). We will refer to the Respondent to the appeal, the Claimant in

the arbitration, as the "State Party". The Appellant, the Respondent in the arbitration, was, at all material times, a defence equipment fabricator which designed, manufactured and sold equipment of the type which was the subject of the relevant contracts. We will refer to the Appellant as the "Foreign Constructor".

4 The arbitration concerned asserted liability for a defect in the Equipment. By a majority of the three-person arbitral panel (the "Majority"), the tribunal (the "Tribunal") found the Foreign Constructor liable to the State Party under the relevant code of the State (the "Code") for damages for the delivery of defective material packages from which the Equipment was constructed.

5 Central to the Appellant/Foreign Constructor's claims that it was denied natural justice was how the members of the Majority reached their conclusion that the Respondent/State Party was owed a relevant *contractual* obligation by the Foreign Constructor that could found a liability in damages under the Code. That central question required the Tribunal to construe and interpret a number of related contractual documents. The asserted failure to afford the Foreign Constructor natural justice arose, it was submitted, from how the members of the Majority dealt with the material before them, including the contractual documents and the parties' submissions. On the appeal, it was asserted that the Majority (a) failed "to properly consider" critical arguments made by the Foreign Constructor; and (b) arrived at conclusions based on facts and matters that were not pleaded or argued by the parties and beyond what was reasonably to be anticipated by them.

6 Before discussing the approach of the Majority, the relevant complaints of the Foreign Constructor, and the reasoning of the SICC, it is necessary to set out some factual background.

Factual background

7 The particular Equipment which was the subject of the dispute was the first piece of equipment in the second phase of the State Party's defence equipment enhancement programme. This second phase was to involve the construction of several pieces of defence equipment by a constructor of the State concerned (the "Domestic Constructor"). In the first phase of the enhancement programme, a foreign constructor had built the first piece of equipment and delivered it. Thereafter the later pieces of equipment in the first phase were built by a domestic constructor from material packages delivered by the foreign constructor, with technical and advisory assistance of that foreign constructor. The second phase was to adopt this latter model of domestic construction by assembly of material packages delivered by a foreign constructor, with technical and advisory assistance being provided by it.

8 The contractual arrangements for the Equipment in question involved four contracts. The first was a contract referred to in next, and related, contracts as the "Provisional Contract" (although not so specifically entitled in its own terms) between the Foreign Constructor and the State Party which was entered into before the State Party had chosen the Foreign Constructor as the supplier at a time when there was another possible foreign constructor in contention, and before the State Party had chosen the Domestic Constructor from at least two possible domestic constructors.

9 The second contract was entitled "Agreement for Transfer of the Provisional Contract to the [Domestic Constructor]" (to which we will refer as the "Transfer Agreement") between the State Party, the Foreign Constructor (now confirmed as the seller of the material packages and provider of the associated services) and the Domestic Constructor (now confirmed as the domestic constructor), for the transfer of the State Party's rights arising from the Provisional Contract to the Domestic Constructor and the clarification of what rights and obligations remained with the State Party from the Provisional Contract.

10 The third contract was the "Supply Contract", between the Foreign Constructor and the Domestic Constructor, to which the State Party was a signatory as witness, for the delivery of the material packages of necessary components for the construction of the Equipment.

11 The fourth contract was a domestic contract (the "Domestic Contract") between the State Party and the Domestic Constructor for the construction and delivery of the Equipment.

12 Of these four contracts, the Domestic Contract had no relevant importance to the task of construction of the Provisional Contract and the Transfer Agreement undertaken by the Majority, and did not feature in the arguments before the SICC, nor on appeal.

13 Central to the debate between the parties was the proper construction and interpretation of the Provisional Contract and the Transfer Agreement, and the ascertainment as to whether, after the Transfer Agreement was entered into, the State Party was owed any contractual obligation by the Foreign Constructor

breach of which could found a liability in damages under the Code should the material packages be defective (as they were).

The nature of the task performed by the Tribunal about which complaint is made

14 The feature of the task performed by the Majority about which complaint is now made was how they approached and executed their analysis in reaching their views as to the proper construction of the provisions of the Provisional Contract.

15 The appreciation of the nature of the task before the Tribunal is not unimportant. The Tribunal's mandate was to reach a view about the applicable meaning of relevant commercial documents, considering, amongst other relevant matters, how the structure and language of the documents illuminated the meaning to be ascribed to the relevant provisions.

16 Meaning of words and contractual provisions can strike different people differently. It is rarely, if ever, a process solely of strictly logical thought. Linguistic context and nuance often play a part, even if not expressed. Reasonable minds may differ about weight to be given to different considerations and about the content of meaning to be taken from words in their context. Often these kinds of considerations are difficult to place into express reasoning. Any experienced commercial lawyer familiar with the task of construction of documents would be aware of such matters.

17 In the resolution of a dispute about meaning of this kind heard before a court or an arbitral tribunal with lawyers representing all parties (as was and is the case here), the parties should have (as they were given here) a full opportunity (subject to the rules of evidence and the relevant principles of

construction and interpretation) to place before the court or tribunal all the arguments that they considered relevant to the advancement of their favoured construction. The task of the court or tribunal is to reach its view *as to meaning*. That may well not be reaching a view based on accepting in whole, or in sufficient part, one side's submissions. The court or tribunal has the task or mandate to ascribe meaning, and, assisted by the submissions of the parties, is obliged to fulfil that task or mandate by reference to the contractual documents, any admissible evidence and in accordance with applicable legal principles governing the task. It is to be noted that no complaint was made on appeal or before the SICC about the correctness of the Majority's application of the relevant State's law to the interpretive task before them.

18 The importance of these general comments about the nature of the mandate or task performed by the Majority will become clearer in dealing with the Appellant/Foreign Constructor's arguments that the "rules" of natural justice were infringed by the Majority: *ie*, that they were treated *unfairly*.

19 At this point, it is sufficient to say that it is not necessarily unfair (fairness being the essence of natural justice) for a court or a tribunal to come to its view about the meaning of a provision in a contract by drawing upon parts of the contract or relevant surrounding circumstances that may have been left unaddressed by the parties in what they chose to put to the court or tribunal to persuade the court or tribunal towards their asserted preferred meaning. The possibility of such inheres in the nature of the task or mandate to come to a view about *meaning*. Whether the parties have been treated unfairly will be evaluated by reference to all the circumstances and the principles attending the obligation to afford natural justice or as it is sometimes called, procedural fairness.

The SICC judgment

The background facts

20 At [2]–[10] of its judgment in *CZT v CZU* [2023] SGHC(I) 22 (the "SICC Judgment") the SICC set out the background facts. In addition to those to which we have referred, it concisely set out at [3]–[10] the provisions of the Provisional Contract and the Transfer Agreement which identified the issue of construction and other relevant matters (footnotes omitted):

> 3 Article 1.1 of the Provisional Contract set out the "main obligations" of the plaintiff [Foreign Constructor] and the defendant [State Party], which included the following:
>
> (a) The plaintiff [Foreign Constructor] agreed to "deliver to the [Domestic Constructor] … the [Material Packages], out of which the [Domestic Constructor] shall, under a separate contract with the [defendant/State Party], construct … and deliver to the [defendant/State Party] [certain products]".
>
> (b) The plaintiff [Foreign Constructor] agreed to "render training to the [defendant's/State Party's] personnel …".
>
> (c) The "[defendant (State Party)/Domestic Constructor]" agreed to "provide the [plaintiff/Foreign Constructor] with all necessary declarations regarding the final destination of the … Material Packages, …".
>
> 4 Subsequently, the defendant [State Party] appointed the [Domestic Constructor]. The plaintiff [Foreign Constructor], the defendant [State Party] and the [Domestic Constructor] then entered into an agreement for the transfer of the defendant's [State Party's] rights and obligations under the Provisional Contract to the [Domestic Constructor] (the "Transfer Agreement").
>
> 5 Article 1 of the Transfer Agreement provided that all rights and obligations of the defendant [State Party] in the Provisional Contract were unconditionally and irrevocably transferred to the [Domestic Constructor] except those "identified" in an attachment to the agreement (the "Attachment"). Article 2 of the Transfer Agreement provided that the defendant [State Party] was "completely released from all the contractual obligations and waive[d] all contractual rights

stipulated in the Provisional Contract except for those as identified in the Attachment".

6 The Attachment set out a table containing two columns. The left-hand column was titled "Article" and the right-hand column was titled "Comments". The table included the following references to and comments on Art 1.1 of the Provisional Contract:

Article	**Comments**
1.1	[The plaintiff/Foreign Constructor] shall render training to the [defendant/State Party] as per Annex …
1.1	The [defendant/State Party] shall provide [the plaintiff/Foreign Constructor] with all necessary declarations regarding the final destination of the … Material Packages, …

As stated in [3] above, Art 1.1 provided that the *plaintiff* [Foreign Constructor] was to render training to the [defendant's/State Party's] personnel and the [defendant (State Party)]/[Domestic Constructor] was to provide the *plaintiff* [Foreign Constructor] with the necessary declarations regarding the final destination.

7 Article 6 of the Transfer Agreement provided that the Transfer Agreement and the Attachment were incorporated and made part of the Provisional Contract.

8 Two other contracts were entered into:

(a) The plaintiff [Foreign Constructor] entered into a contract with the [Domestic Constructor] for the supply of the Material Packages to the [Domestic Constructor] (the "Supply Contract").

(b) The defendant [State Party] entered into a contract with the [Domestic Constructor] for the [Domestic Constructor] to construct certain products for the defendant [State Party] (the "Domestic Contract").

9 The defendant [State Party] alleged that it subsequently discovered that certain components of the Material Packages were defective. The defendant [State Party] filed an action in the defendant's [State Party's] home jurisdiction ("Country D") against the [Domestic Constructor] and the plaintiff [Foreign Constructor] (the "Litigation"). The court found the [Domestic Constructor] liable for 30% of the damages suffered by the defendant [State Party]. The claim against the plaintiff [Foreign Constructor] was dismissed due to lack of jurisdiction because of an arbitration agreement in the Provisional Contract.

> 10 The arbitration agreement in the Provisional Contract provided for disputes to be settled by arbitration in Singapore by three arbitrators "in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce".

The central issue

21 It is helpful to set out somewhat more of Art 1.1 than appears at [6] of the SICC Judgment to illuminate its full scope:

> **1.1 Descriptions of the Main Obligations**
>
> In consideration of the mutual covenants herein contained, the SELLER [Foreign Constructor] agrees, subject to the details of this Contract including the ANNEXes attached hereto which constitute an integral part hereof, to perform the following:
>
> - deliver to the [Domestic Constructor] three (3) sets of material, machinery and equipment (hereinafter called the "Material Packages"), out of which the [Domestic Constructor] shall, under a separate contract with the [State Party], construct, equip, test and deliver to the [State Party] three [pieces of equipment] … according to the Technical Specification at ANNEX 1 at its [premises] in the [State],
> - render services for the Material Package management,
> - deliver the Construction Documents and models as per ANNEX 3,
> - deliver the integrated logistic support as per ANNEX 2,
> - deliver the surplus margin as specified in ANNEX 14, item 3,
> - render training to the [State Party's] personnel as per ANNEX 6,
> - set up of Overhaul Maintenance Specifications as per ANNEX 5,
> - deliver other materials and render other services stipulated in the Contract, and
> - provide and perform all those obligations, guarantees and warranties, including such being technical, contractual and management related as stipulated in the ARTICLEs and the ANNEXes of this Contract
>
> and the [State Party]/[Domestic Constructor] agrees, subject to the details of this Contract including the ANNEXes attached hereto, to perform the following:

> - provide the SELLER [Foreign Constructor] with all necessary declarations regarding the final destination of the three (3) Material Packages, and the [equipment] constructed therewith,
> - accept the delivery of the Material Packages,
> - accept the delivery of services for the Material Package management, the Construction Documents, models, integrated logistic support, the surplus margin, training, Overhaul Maintenance Specifications and other material and services stipulated in this Contract, all as specified above,
> - perform all such other obligations as stipulated in the Contract, and
> - effect the payments to the SELLER [Foreign Constructor].

22 At the risk of oversimplification, it can be said that a central question involved in the issue of construction was whether the "comments" section set out in [6] of the SICC Judgment delineated and limited the parts of Art 1.1 that were not unconditionally and irrevocably transferred to the Domestic Constructor and not the subject of any release or waiver for or by the State Party, for the purposes of Arts 1 and 2 of the Transfer Agreement. The Majority found that they did not, and that none of the rights and obligations of the State Party in the whole of Art 1.1 was unconditionally and irrevocably transferred to the Domestic Constructor for the purposes of Art 1 of the Transfer Agreement and none was the subject of any release or waiver for the purposes of Art 2 of the Transfer Agreement.

23 Whilst it is no part of this appeal, as it was no part of the application before the SICC, for the Court to stray into the merits or the correctness of the conclusion of the Majority, certain things should be noted at this point about the Provisional Contract and Art 1.1. First, it was plain and uncontested and a known and incontestable fact that the Provisional Agreement was entered into by the Foreign Constructor and the State Party before the contractual choice of both the foreign and the domestic constructors had been made by the State Party.

That was both obvious and incontestable and explained the name that the parties gave this contract in the Transfer Agreement: the "Provisional Contract".

24 Secondly, Art 1.1 did not have any denominated sub-paragraphs such as (a), (b), *etc*, to identify parts of the Article.

25 Thirdly, the subject matter of the Provisional Contract was of the utmost importance to the State Party. To put the matter rhetorically, the subject of the contract was not the manufacture of furniture for use in public offices of the State, but for the provision of materials to build important equipment for the defence of the nation. This fact was obvious to all parties, and did not require expression.

26 These matters are relevant to note at this point because they help frame the mandate performed by the Majority, the arguments of the Appellant/Foreign Constructor before the Tribunal and the SICC, and what could be reasonably expected by parties represented by counsel before the Tribunal in understanding and anticipating how the Tribunal would approach its task.

The arbitration proceedings

27 At [13]–[17] of the SICC Judgment, the SICC set out the issues and the essential arguments of the parties as follows (footnotes omitted):

> 13 The Provisional Contract was governed by the laws of Country D. Under Art X of the relevant Code (the "Code") in Country D, the defendant [State Party] was entitled to claim damages against the plaintiff [Foreign Constructor] in respect of the defective Material Packages. However, the defendant [State Party] could rely on Art X only if it had the right to delivery of the Material Packages and this right remained with the defendant [State Party] after the Transfer Agreement was executed.

14 The issues in the Arbitration that are relevant to the present proceedings were whether:

(a) the defendant [State Party] had a right to delivery of the Material Packages under Art 1.1 of the Provisional Contract; and

(b) if so, whether the right to delivery under Art 1.1 of the Provisional Contract remained with the defendant [State Party] or whether it was transferred to the [Domestic Constructor] pursuant to the Transfer Agreement.

15 The defendant [State Party] argued in the Arbitration that:

(a) The obligation under Art 1.1 of the Provisional Contract to deliver the Material Packages to the [Domestic Constructor] was an obligation to physically deliver the Material Packages to the [Domestic Constructor] and an obligation to supply the Material Packages free of defects to the defendant [State Party].

(b) As the [Domestic Constructor] was not initially a party to the Provisional Contact, the delivery obligation must have been understood as owed to the defendant [State Party] prior to the execution of the Transfer Agreement.

(c) The rights and obligations "as identified" in the Attachment remained with the defendant [State Party]. This "identification" was done by listing Articles in the left-hand column of the Attachment.

16 On the other hand, the plaintiff [Foreign Constructor] argued that:

(a) It was clear from Art 1.1 of the Provisional Contract that the plaintiff [Foreign Constructor] was to deliver the Material Packages to the [Domestic Constructor]. The defendant [State Party] was not entitled to any right to delivery of the Material Packages. The Provisional Contract did not create any effective rights or obligations until the [Domestic Constructor] was appointed, at which point the plaintiff's [Foreign Constructor's] delivery obligations were owed to the [Domestic Constructor].

(b) In any event, only the obligations listed under the "Comments" column in the table in the Attachment remained with the defendant [State Party]. Thus, the only rights and obligations under Art 1.1 of the

> Provisional Contract that remained with the defendant [State Party] were those relating to training and the certificates of final destination (see [6] above). The intent was to transfer rights and obligations to the [Domestic Constructor].
>
> (c) The defendant's [State Party's] submissions contradicted those that it made in the Litigation, in which the defendant [State Party] had denied that the main rights under the Provisional Contract remained with the defendant [State Party].
>
> 17 No claims were made in the Arbitration with respect to the Domestic Contract. The [Domestic Constructor's] entitlement (if any) under the Supply Contract or any other contract was also not in issue in the Arbitration.

28 At [19]–[20], the SICC concisely explained the Majority's views underpinning its conclusion that the Defendant/State Party had a valid claim against the Plaintiff/Foreign Constructor for breach of contract for the delivery of defective material packages constituting "incomplete performance" under the relevant provision of the Code:

> 19 In brief, the Majority found that:
>
> (a) At the time that the Provisional Contract was entered into, the plaintiff's [Foreign Constructor's] obligations under the Provisional Contract, including delivery of the Material Packages to the [Domestic Constructor], were owed to the defendant [State Party]. The phrase "deliver to the [Domestic Constructor]" in Art 1.1 of the Provisional Contract referred to a physical location of delivery, and must have referred to rights and obligations between the defendant [State Party] and the plaintiff [Foreign Constructor].
>
> (b) Pursuant to the Transfer Agreement, the rights and obligations that remained with the defendant [State Party] were identified in the Attachment by listing the Articles in the left-hand column of the table in the Attachment. The Comments clarified ambiguous aspects of the Articles that were identified. Based on the words of the Transfer Agreement and Attachment, the logical meaning was that the rights and obligations in Art 1.1 of the Provisional Contract, as identified in the left-hand column of the table in the Attachment, remained with the [defendant/State Party].

20 The Majority's reasons for its interpretation of the Transfer Agreement included the following:

> (a) The interpretation was consistent with the wording of Art 1.1 of the Provisional Contract and the Supply Contract. If the rights and obligations of the defendant [State Party] were transferred by virtue of the Transfer Agreement, one would have expected the wording of Art 1.1 to change from Provisional Contract to the Supply Contract. Instead, Art 1.1 of the Supply Contract retained the same wording as Art 1.1 of the Provisional Contract. In other sections of the Supply Contract, the parties quite carefully changed the expression "[the State Party/the Domestic Constructor]" into "[the State Party]" or "[the Domestic Constructor]" when they saw that such a change was needed, *eg*, in Arts 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1.
>
> (b) The plaintiff's [Foreign Constructor's] reading of the Attachment would create inconsistency and render meaningless the parties' express agreement about the defendant's [State Party's] remaining obligations to the plaintiff [Foreign Constructor] under the Provisional Contract. Under Art 1.1 of the Provisional Contract, the [defendant (State Party)]/[Domestic Constructor] had the obligation, among others, to "effect the payments to the [plaintiff/Foreign Constructor]". According to the plaintiff's [Foreign Constructor's] interpretation of the Attachment, by virtue of the Transfer Agreement, the defendant [State Party] would no longer have the obligation to effect payments to the plaintiff [Foreign Constructor]. If this was correct, it would not make much sense for the parties to expressly agree that Art 12 of the Provisional Contract (which stipulates the consequences of termination) shall also apply to the defendant [State Party] "to the extent it refers to remaining rights and obligations" of the defendant [State Party].
>
> (c) For example, Art 12.4.1 of the Provisional Contract provided that the [defendant (State Party)]/[Domestic Constructor] and the plaintiff [Foreign Constructor] "shall both have the right to terminate this Contract …, without prejudice to any other rights or remedies the terminating party may have, if … the other party has become insolvent or entered into liquidation …" If the plaintiff [Foreign Constructor] terminated the Provisional Contract pursuant to Art 12.4.1 upon the insolvency of the [Domestic Constructor], the plaintiff [Foreign Constructor] must be entitled to claim payment

> in respect of Material Packages already delivered or any services already rendered, from the defendant [State Party] as well as the [Domestic Constructor]. According to the plaintiff's [Foreign Constructor's] interpretation, however, the plaintiff [Foreign Constructor] would have no recourse to the defendant [State Party] when it most needed to have such a recourse because of the insolvency of the [Domestic Constructor].

The Foreign Constructor's case below

29 At [26(a)]–[26(b)], the SICC summarised the bases of the case for a denial of natural justice relevantly for the appeal as follows:

> (a) The Majority failed to consider critical arguments made by the plaintiff [Foreign Constructor] in the Arbitration.
>
> (b) The Majority reached conclusions in the Final Award based on facts or matters that were not argued by the parties during the Arbitration and wrongly attributed arguments and positions to the parties that were not supported by the Arbitration record.

30 The SICC took these two bases in turn.

Whether the Majority failed to consider critical arguments

(1) Applicable legal principles

31 The SICC commenced this section of its reasons by setting out at [27]–[35] the applicable legal principles. No issue was taken on the appeal with this expression of principle. For that reason, it is not appropriate to deal with this matter as fully as we might otherwise do so, but it is helpful and relevant for present purposes to emphasise some aspects of what the SICC said and some aspects of the authorities to which reference was made by the SICC.

32 At [27] the SICC correctly stated that an assertion of a denial of natural justice is a serious matter and cases that have succeeded have been limited to

egregious cases where the error is clear: *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [2]. That this is the case only reflects the reality that the essence of a denial of natural justice is that the party has been treated *unfairly* by the tribunal, not that some technical rule of procedure has been breached.

33 At [28] the SICC set out the quadripartite analysis by this Court of an asserted breach of natural justice in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29]:

(a) which rule of natural justice was breached;

(b) how was it breached;

(c) in what way was any breach connected to the making of the award; and

(d) how the breach prejudiced the complaining party's rights.

34 *Soh Beng Tee* is a decision of this Court which has been followed on a number of occasions. The quadripartite analysis should be seen as clarifying, but not exhaustive, of the task. In particular, from the balance of the reasons in *Soh Beng Tee*, the quadripartite analysis should not be seen as limiting the analysis or evaluation of unfairness to the breach of expressed rules (generally drawn from illustrative examples). At [43] of *Soh Beng Tee*, the Court quoted an influential passage from the judgment of Marks J in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396, where his Honour discussed the two principles referred to by the SICC as the two pillars of natural justice: (a) disinterestedness and lack of bias; and (b) the "fair hearing" rule, in respect of both of which Marks J said "[t]ranscending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties".

35 Further, at [44]–[56] the Court in *Soh Beng Tee* engaged in, with respect, a valuable discussion of the dangers of converting the expressions of reasons in particular cases for the findings of unfairness into *a priori* rules untethered to the foundation of the requirement of fairness. Within this discussion, particular regard should be paid to the evaluation of the circumstances that founded the conclusion of unfairness, rather than to the reduction of such circumstances into abstract rules. The discussion at [45]–[48] in the reasons in *Soh Beng Tee* of *Société Franco-Tunisienne D'Armement-Tunis v Government of Ceylon* [1959] 1 WLR 787 and *The "Vimeira"* [1984] 2 Lloyd's Rep 66 and why the circumstances in each case disclosed real unfairness is valuable. The Court in *Soh Beng Tee* at [48] cautioned against the literal application of the words of judges in these cases in a process of transformation into rules, saying "[t]hese *dicta* must … be read measuredly in the context of [the] case …".

36 Likewise, at [49]–[50] the Court in *Soh Beng Tee* warned against expansive application of words in the judgment in *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730 that were used to explain why *in that case* it was unfair to decide a matter not argued by the parties.

37 At [51]–[56], the Court in *Soh Beng Tee* looked at cases where there had been some departure by the court or tribunal from how the parties had constructed the case, but which gave rise to no unfairness and no denial of natural justice. One example was in *Burne v Young* [1991] NZHC 1501 with the rejection of a witness on grounds not put to the witness. The reasons of Neazor J in that case included the following passage that was cited by the Court in *Soh Beng Tee* (which is, of course, to be read in full context):

> … It is for counsel to lay out and develop the case, and for the Judge or arbitrator to decide as best he may on the materials the parties have given him.

38 At [52], the Court in *Soh Beng Tee* cited the similar expression of the matter by Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369 that:

> … the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. …

39 At [55], the Court in *Soh Beng Tee* set out at length passages from the valuable judgment of the New Zealand High Court in *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 at 463. Particular reference should be made to paragraphs (f), (g), (h) and (i) of those reasons.

40 The SICC, after setting out the quadripartite approach referred to above, at [29] of its reasons, correctly dealt with prejudice by reference to *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54] that the issue is whether as a result of the breach of natural justice the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations; the test is whether the material could reasonably have made a difference to the arbitrator rather than whether it could necessarily have done so.

41 At [31]–[32] of its reasons, the SICC recognised that a failure by an arbitrator to address an issue can (that is may) constitute a "breach of the fair hearing rule", that is, it may amount to unfairness (citing *CKH v CKG and another matter* [2022] 2 SLR 1 and stating at [32]):

> 32 In *CKH*, the Court of Appeal also emphasised the following (at [14]):
>
> > (a) There is an important distinction between making a decision on an issue (which may be right or

> wrong) and failing to consider an issue at all; it is only the latter which may lead to court intervention.
>
> (b) There must be shown to be a causal nexus between the breach and the award.
>
> (c) The breach must have prejudiced the aggrieved party's rights.

42 At [33] of its reasons, the SICC dealt with "chain of reasoning", stating, by reference to *BZW and another v BZV* [2022] 1 SLR 1080 at [60]:

> 33 … To comply with the fair hearing rule, the tribunal's chain of reasoning must be: (a) one which the parties had reasonable notice that the tribunal could adopt; and (b) one which has a sufficient nexus to the parties' arguments. A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if: (i) it arose from the parties' pleadings; (ii) it arose by reasonable implication from their pleadings; (iii) it is unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (iv) it flows reasonably from the arguments actually advanced by either party or is related to those arguments. See *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZW*") at [60(b)].

43 At [34]–[35] of its reasons, the SICC expressed the matter clearly in summary form, as follows:

> 34 The overriding burden is on the applicant to show that a reasonable litigant in his shoes could not have foreseen the possibility of the reasoning of the type revealed in the award. The arbitrator is not expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him. See *Soh Beng Tee* at [65(d)–(e)].
>
> 35 An arbitral tribunal has to ensure that the essential issues are dealt with; it need not deal with each point made by a party and in determining the essential issue, the tribunal should not have to deal with every argument canvassed under each of the essential issues: *TMM Division* at [73]; *CYE v CYF* [2023] SGHC 275 at [101] …

(2) The SICC's rejection of the Foreign Constructor's arguments

44 The SICC at [36]–[55] then set out and rejected the Plaintiff/Foreign Constructor's arguments that the Majority had failed to consider critical arguments, being the three arguments set out at [36] of the SICC Judgment as follows:

> (a) that Art 2.2.1 of the Provisional Contract and the Supply Contract provided specifically for a payment obligation of the [Domestic Constructor]; not the defendant [State Party];
>
> (b) that the Provisional Contract did not create any effective rights or obligations until the [Domestic Constructor] was appointed, at which point the plaintiff's [Foreign Constructor's] delivery obligations were owed to the [Domestic Constructor]; the plaintiff's [Foreign Constructor's] obligation under the Provisional Contract was to deliver the Material Packages to the [Domestic Constructor]; and
>
> (c) that during the Litigation, the defendant [State Party] took the position that the main rights under the Provisional Contract were transferred to the [Domestic Constructor].

45 We will only deal with the first two of these arguments at (a) and (b) since the third argument was not pressed on appeal.

(A) THAT ART 2.2.1 IN THE PROVISIONAL CONTRACT AND SUPPLY CONTRACT SPECIFICALLY DEALT WITH PAYMENT BY THE DOMESTIC CONSTRUCTOR

46 The SICC identified at [39] of its reasons how Art 2.2.1 appeared in the Foreign Constructor's case that it was always clear that the intention from the beginning was to transfer rights and obligations to the Domestic Constructor and the core obligations of the Foreign Constructor were to be owed to the Domestic Constructor.

47 The SICC noted at [41] of its reasons that Art 2.2.1 was referred to by the Majority in setting out the Foreign Constructor's arguments as to transfer of rights. The SICC concluded at [42] that the essential issue of what rights and

obligations remained with the Defendant/State Party under Art 1.1 of the Provisional Contract was dealt with by the Tribunal. The SICC said that the Majority did not have to deal with every point made in the argument, thus it did not have to expressly address Art 2.2.1 in the Foreign Constructor's argument.

48 The SICC also concluded at [43] and [44] of its reasons that there was no causal nexus between the asserted breach and the award and no prejudice. The SICC concluded at [44] that the argument regarding Art 2.2.1 could not reasonably have made any difference to the Majority's interpretation of the Transfer Agreement.

49 The SICC also, at [45] of its reasons, rejected an argument in the application before it that the Majority ignored Art 2.2.1 in the Foreign Constructor's argument that there was no obligation to deliver to the State Party under the Provisional Contract (this is the argument to which we will next come). That was not how the Foreign Constructor used Art 2.2.1 before the Tribunal according to the SICC.

50 In any event, the SICC concluded at [46] that the Majority did consider Art 2.2.1 in connection with this latter argument.

(B) THAT THE PROVISIONAL CONTRACT DID NOT CREATE ANY EFFECTIVE RIGHTS OR OBLIGATIONS UNTIL THE DOMESTIC CONSTRUCTOR WAS APPOINTED (THE SO CALLED "ACTUALISATION ARGUMENT")

51 This argument was founded on the terms of para 376 of the award set out at [47] of the SICC's reasons as follows:

> 376 At the time of entry into the Provisional Contract …, the parties to the contract were the [State Party] and the [Foreign Constructor]. It is *uncontentious* that, at that point in time, the obligations owed by the [Foreign Constructor] under the Provisional Contract, including delivery of the Material

> Packages to the [Domestic Constructor], were owed to the [State Party]. It is reasonable to conclude that the phrase "deliver to the [Domestic Constructor]" refers to a physical agreed location of delivery. It could not have referred to a legal right since the [(ultimately appointed) Domestic Constructor] was not an original party to the Provisional Contract. Even if it was intended that [the Domestic Constructor] would join the contract later, at that point in time, it could not have been bound to any legal rights under the Provisional Contract. Therefore, in that context, references to [the Domestic Constructor] were descriptive only, not legal rights, and must have referred to rights and obligations between the [State Party] and [the Foreign Constructor]. Had the Parties intended to give legal rights and obligations to the [Domestic Constructor] at the time of entry into the Provisional Contract, they could have entered into a tripartite contract from the beginning. [emphasis added]

52 The complaint was that the use of the word "uncontentious" demonstrated that the Majority had ignored the Plaintiff/Foreign Constructor's argument that the Provisional Contract had no legal force as between the Foreign Constructor and the Defendant/State Party.

53 At [50] of its reasons, the SICC rejected the argument that "uncontentious" meant "undisputed"; rather it meant "not likely to cause disagreement":

> … All that the Majority did in para 376 of the Final Award was to express its view that at the time the Provisional Contract was entered into, the [Foreign Constructor's] obligations under the Provisional Contract were owed to the [State Party], and that this view should not give rise to argument. The Majority was not saying that this view was undisputed.

54 The SICC noted at [51] of its reasons that the Majority was aware of the argument (*ie*, the so-called "Actualisation Argument") as it had referred to it in dealing with the arguments of the parties and in stating that the State Party rejected this argument. Thus, it could not be said that the Majority were saying the point was undisputed; rather they were rejecting the contrary argument.

Whether the Majority based its conclusions on extraneous matters

(1) Applicable legal principles

55 The legal principles referred to earlier in their discussion by the SICC were supplemented by a discussion of Art 34(2)(*a*)(iii) of the Model Law and *CFJ and another v CFL and another and other matters* [2023] 3 SLR 1 and the cognate question of excess of jurisdiction. These matters were not relevant to the arguments on appeal.

(2) The SICC's rejection of the Foreign Constructor's arguments

56 At [62(a)]–[62(j)] of its reasons the SICC concisely set out the elements of the Majority's reasoning.

57 At [63(a)]–[63(e)] of its reasons the SICC set out the Foreign Constructor's complaints as to aspects of the reasoning of the Majority.

58 The first complaint was that the Majority used the terms of a number of provisions of the Supply Contract where the phrase "State Party/Domestic Constructor" or "State Party" or "Domestic Constructor" were used in concluding that "the parties carefully changed the first expression "State Party/Domestic Constructor" present in the Provisional Contract into "State Party" or "Domestic Constructor" when they saw such change was needed. This aspect of their chain of reasoning was not, it was said, put to the parties and so without hearing argument, thereby denying the Foreign Constructor natural justice.

59 The SICC rejected this argument at [68]–[71] of its reasons, concluding that the chain of reasoning was capable of reasonable anticipation; indeed, the SICC noted that the Foreign Constructor itself at the arbitration had argued that

some changes between the Provisional Contract and the Supply Contract provided an indication of relevant contractual intention. Also, the SICC noted that exchanges at the hearing involving the arbitrators made it clear that the task of the Tribunal involved comparing the Provisional Contract and the Supply Contract.

60 The second complaint of the Plaintiff/Foreign Constructor concerned the so-called "Dual Contractual Entitlement Finding" that the Defendant/State Party was removed from Art 12.3.1 of the Supply Contract concerning termination. It is to be recalled that the State Party was not a party to the Supply Contract, only a witnessing signatory. The Majority concluded that this did not indicate that an obligation of delivery was not owed to the State Party, nor that it did not have a right of termination under the Provisional Contract. Rather, the Domestic Constructor had the right to delivery and to termination under the Supply Contract and the State Party had the right to defect-free delivery and to termination under the Provisional Contract.

61 The Foreign Constructor complained that the Dual Contractual Entitlement Finding was neither pleaded nor argued.

62 The SICC rejected the argument at [74] of its reasons. The State Party had in fact argued in the arbitration that "the delivery obligation under Art 1.1 of the Provisional Contract was an obligation to physically deliver the Material Packages to the [Domestic Constructor] and an obligation to supply the Material Packages free of defects to the [State Party]". Thus, the parties had reasonable notice that this was a finding that the Tribunal could make.

63 The SICC also considered that there was a lack of causal nexus between the Dual Contractual Entitlement Finding and the conclusion as to the delivery obligation owed to the State Party.

64 The third complaint concerned the use made by the Majority of Art 12.4.1 giving the parties (relevantly for the argument, the Foreign Constructor) the right to terminate on the insolvency of another party. The Majority in its reasoning said that if the Appellant/Foreign Constructor terminated the Supply Contract and the Provisional Contract for the insolvency of the Domestic Constructor, it would have no right of recourse for payment from the Respondent/State Party, unless it owed a concomitant obligation to the State Party concerning delivery. This supported the conclusion of the Majority that the delivery obligation remained owed to the State Party after the Transfer Agreement. In its division and categorising of the reasoning of the Majority, the Foreign Constructor labelled this the "Insolvency Finding" which was said to be one part of the Majority's so-called "Payment Finding" (the other part being the next complaint below). The Foreign Constructor complained that the State Party having a payment obligation that survived the Transfer Agreement was not pleaded or argued.

65 The SICC at [82] of its reasons accepted that the Insolvency Argument was not pleaded or argued. The SICC was not, however, persuaded that there was any prejudice, saying:

> … The Insolvency Argument was one of several reasons given by the Majority in support of its interpretation of the Transfer Agreement. It is abundantly clear to us that even if the plaintiff [Foreign Constructor] had been invited to respond to, and was successful in rebutting, the Insolvency Argument, that would not have made a difference to the Majority's interpretation of the Transfer Agreement.

66 The fourth complaint (though not pressed on appeal) concerned Art 22.8 in the Provisional Contract and the Supply Contract. It is unnecessary to deal with this. Other complaints were made that were also not pressed on appeal and may be left to one side.

The appeal

67 The Appellant/Foreign Constructor complains of error on the part of the SICC in its failure to accept some, though not all, of its arguments put below.

The Foreign Constructor's arguments

68 To a degree, the Foreign Constructor undertook on appeal a re-ordering, and re-emphasis, of arguments put below. Most importantly, the so-called "Actualisation Argument" founded on the terms of, and especially the word "uncontentious" used in para 376 of the Majority's award (see generally [51]–[54] above) was placed at the forefront of the argument on appeal. It was described on appeal in the Appellant's Case at para 14 as "[the] starting point [and] platform upon which the Majority premised [the] Award …". It was submitted that this misconception which led to a central argument being ignored infected the whole of the subsequent reasoning leading to the threshold finding that the Foreign Constructor owed the Respondent/State Party a delivery obligation after the Transfer Agreement.

69 In addition to the asserted error of the SICC in failing to recognise the correctness of the Actualisation Argument, the Foreign Constructor asserted error in the SICC in failing to accept its arguments as to:

(a) the unpleaded and unargued reliance upon Arts 3.3.2, 3.3.3, 3.3.4, 22.8.1 and 12.3.1 of the Supply Contract: see [58]–[59] above;

(b) the so-called "Dual Contractual Entitlement Finding" see [60]–[63] above; and

(c) the so-called "Insolvency Finding": see [64]–[65] above.

70 The crux of the Foreign Constructor's argument was that the Majority completely overlooked its case and submissions in paras 32 and 33 of the Statement of Defence, in para 116 of the Statement of Rejoinder, in oral opening, in oral address and in the post-hearing brief, to the effect that the Provisional Contract was provisional only *and so* gave rise to no legal relations between the Foreign Constructor and the State Party and that the only delivery obligation that was ever intended to arise arose from the execution of the Transfer Agreement and was owed to the Domestic Constructor.

71 The Foreign Constructor submitted that the SICC was wrong to have construed "uncontentious" in the way it did; in context of the whole of the award it should be taken to mean undisputed and so revealing a failure to attend to this core or foundational argument of the Foreign Constructor.

72 There are a number of reasons why this argument should be rejected. First, the construction or interpretation of the word "uncontentious" by the SICC was open and not shown to be in error.

73 Secondly, a review of the arguments before the Tribunal reveals that the so-called Actualisation Argument, really the argument that the Provisional Contract was provisional, was but one of many arguments put. The essential issue was the meaning and interpretation of the Provisional Contract and the Transfer Agreement and its Attachment, which issue the Majority addressed in detail.

74 Thirdly, reading the whole of the award, it is clear that the Majority recognised that it was not undisputed since the Majority expressly recognised that the State Party rejected the "Actualisation Argument": see para 149 of the award.

75 Fourthly, that the Provisional Contract was provisional (as its recitals stated and as the parties called it from the time of the Transfer Agreement) is not the same thing as saying that it had no legal effect or gave rise to no legal obligations or rights relevant to the question of meaning after the execution of the Transfer Agreement and its incorporation into the Provisional Contract. The parties solemnly executed the Provisional Contract, doing so before, as was no doubt understood, the choice of the Foreign and Domestic Constructors. Certainly, if the Foreign Constructor had not been chosen as the supplier, no full legal relationship would have "actualised", to use the Appellant's nomenclature. Nevertheless, the rights and obligations could be seen as real, if provisional. There was no statement in the Provisional Contract that it was not intended to give rise to legal relations. It was, plainly, provisional. The recitals clearly said as much. It was provisional until the Foreign Constructor was chosen, at which point one element of provisionality would evaporate; and then when the Domestic Constructor was chosen and entered into the Transfer Agreement with the Foreign Constructor and State Party, the Provisional Contract lost any provisional character: becoming "actualised", if one will. None of this means that there was no legal relationship between the Foreign Constructor and the State Party being the only parties to it, which is what the Majority had determined at para 376 of the award: It was provisional but could only exist between the parties to it. We do not say the above as dispositive of some legal argument in this case, since we are not concerned with the merits of the arguments. However, this discussion reveals the clarity and shortness with

which one can deal with an argument that because a written contract is provisional it has no legal effect or content. The Majority was fully cognisant of the argument and knew that it was contested and can be taken to have rejected it, *brevi manu*. That is not a failure to afford natural justice.

76 Fifthly, it is plain that the Majority appreciated that the Provisional Contract was provisional and entered into before the Foreign Constructor and Domestic Constructor were chosen: see para 116 of the award.

77 Sixthly, it is clear that there was engagement during the hearing between the Tribunal members and the parties on this point: see generally the transcript of the arbitral hearing (25 November 2020) at pp 77–83. There it can be seen that the Tribunal members engaged with the provisionality of the Provisional Contract when entered into. At para 376 of the award, the Majority plainly rejected that provisionality was to be equated with a lack of legal content.

78 Seventhly, the failure to deal in detail with one argument in circumstances where the award and the record demonstrates that the Tribunal was alive to and engaged with the argument does not amount here to a denial of natural justice. The Majority heard the argument, engaged with it and rejected it, *brevi manu*. It did so in the context of otherwise dealing in some detail with the essential issue of the construction and interpretation of the contractual documents to ascertain the content of the Foreign Constructor's obligations to the State Party after entry into the Transfer Agreement and other relevant contracts.

79 There was no overlooking or failure to consider the Actualisation Argument. It was rejected.

80 There was no unfairness in the way it was rejected.

81 There was no error in the reasoning of the SICC.

The balance of the complaints

82 With the utmost respect, the balance of the complaints were woven together with unnecessary complexity. Part of the reason for that was an approach which saw the affording of natural justice as the depending solely upon the satisfying of the logical conditions of posited *a priori* rules and the categorisation and sub-categorisation of arguments. Shorn of this complexity, there were three complaints.

The first complaint – provisions referred to in the contractual interpretation exercise

83 The first complaint was that the Tribunal referred to a series of provisions in the Supply Contract as relevant to the ascertainment of the meaning of the Provisional Contract and the Transfer Agreement in circumstances where these provisions were said not to have been pleaded or argued.

84 We reject this argument. First, there has been no error shown in the reasons of the SICC for its rejection of the same argument: see [58]–[59] above. The Appellant/Foreign Constructor itself used aspects of the Supply Contract in its submissions before the Tribunal. The interrelationship of the Provisional Contract, the Transfer Agreement and the Supply Contract and the terms that were amended or not amended in the formulation of the Supply Contract and the significance of that were matters that were plainly open to be considered. The parties had a full opportunity to deal with such aspects of these contractual

documents as they considered appropriate. Both parties did so. The use of the provisions of the Supply Contract by the Majority was within what could be reasonably anticipated in its search for the meaning of relevant provisions of the Provisional Contract and the Transfer Agreement.

85 Both parties undertook a comparative exercise between the Provisional Contract and the Supply Contract. The Tribunal was not limited to agreeing with one or other of these submissions. As observed by this Court in *Soh Beng Tee* at [65(e)]:

> It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him. …

Indeed, as the Respondent/State Party pointed out on appeal, during discussion at the arbitral hearing (see the transcript of the arbitral hearing (25 November 2020) at pp 66–69) in answer to the Tribunal's statements about the process of comparison between the terms of the Provisional Contract and the Supply Contract, counsel for the Foreign Constructor said: "[o]n that question, I think you have to look at both. The transfer agreement makes it clear which rights and obligations are where. So they designate where the rights are".

86 The "both" were the Supply Contract and the Provisional Contract to which the Tribunal had been making reference.

87 Plainly, a reasonable litigant would have foreseen the possibility of the Tribunal examining the Provisional Contract and the Supply Contract for itself

and commenting upon such provisions as it thought to be relevant. The Foreign Constructor could have raised any argument about any provision of these contracts. The Tribunal was not obliged to go back to the parties with a draft of its reasons which included aspects of the very comparison that had been undertaken, but which was wider in scope than the parties had themselves undertaken. That the parties failed to address all the provisions when they had the opportunity to do so does not lead to a responsibility of the Majority to put what it considered to be the relevant aspects of the comparative process of the two contracts to the parties.

The second complaint – the Dual Contractual Entitlement Finding

88 The second complaint was the so-called Dual Contractual Entitlement Finding.

89 There was no error in the SICC's view (see [60]–[63] above) that this was a finding of which the parties had reasonable notice that the Tribunal could make. It could reasonably be seen to flow from the argument that the Appellant/Foreign Constructor had an obligation to make physical delivery to the Domestic Constructor under the Supply Contract and an obligation to the Respondent/State Party of non-defective delivery under the Provisional Contract.

90 Indeed, the very argument was put by the State Party in its Statement of Reply at the arbitration (at para 43): that the Foreign Constructor had an obligation to the State Party to supply the material packages free of defects, and an obligation to the Domestic Constructor physically to deliver the material packages to it.

91 The Foreign Constructor in its Statement of Rejoinder at the arbitration (at para 124) recognised this twofold argument.

92 At the arbitral hearing the Foreign Constructor's counsel criticised what he described as the State Party's "grand theory… that [the Foreign Constructor] somehow ha[d] a double delivery obligation" (see also generally the discussion between the Tribunal and the Foreign Constructor's counsel in the transcript of the arbitral hearing (25 November 2020) at pp 57 and 73–83).

93 Questioning took place at the hearing on the question of the dual obligation: see the transcript of the arbitral hearing (25 November 2020) at pp 73–83.

94 The issue was dealt with expressly by the State Party in its post-hearing brief at para 69 when it stated:

> Respondent [*ie*, the Foreign Constructor] argues that '[its] delivery obligation was towards [the Domestic Constructor] and was always meant to be,' but this only proves that [the Foreign Constructor's] obligations were divided into an obligation to physically deliver the Material Packages to [the Domestic Constructor] and an obligation to supply the Material Packages free of defects to [the State Party] from the beginning and were always meant to be that way. … [emphasis in original omitted]

95 See also generally the State Party's post-hearing brief at paras 79–81.

96 The Foreign Constructor sought to deflect the reality of this engagement with the point at the arbitration by drawing a distinction between what was plainly before the Tribunal, as stated above, and what the Foreign Constructor now said was the true double delivery obligation that was the subject of its complaint. This was said to be that there was an identical obligation under two contracts to (presumably physically) deliver to two parties under two contracts.

97 But the precise form of expression of the duality of the obligation in the argument is not to the point. The arbitration involved the essential issue of construction: After the execution of the Transfer Agreement, did the Foreign Constructor have an obligation to the State Party to deliver non-defective material packages to the Domestic Constructor, which obligation would be breached by physical delivery to the Domestic Constructor of *defective* packages. The State Party argued that it did. The Foreign Constructor argued that it did not. The Tribunal found that it did. That was the duality of entitlement that was found. The Tribunal did not conclude that there was a relevant breach of an obligation owed to the State Party because the material packages were not delivered to it, but to the Domestic Constructor. It concluded that there was a relevant breach of an obligation owed to the State Party because of the physical delivery of *defective* packages to the Domestic Constructor. That was what the State Party had argued. That was the "grand theory" of the State Party that the Foreign Constructor's counsel derided in submissions. That was what the Tribunal found. It was expressly before the Tribunal and both sides engaged with it.

98 There was no unfairness. There was no use of an unaddressed argument of any kind.

The third complaint – the Insolvency Finding

99 The third complaint was the so-called Insolvency Finding, which was related to the overlooking, it was said, of the argument (labelled the "Payment Argument") that Art 2.2.1 of the Provisional Contract and the Supply Contract provided for payment by the Domestic Constructor, not the State Party.

100 We reject this complaint. As the Respondent/State Party submitted on appeal, the Insolvency Finding is simply an outworking of the Tribunal rejecting the commercial position that would arise from the contracts if the Appellant/Foreign Constructor were correct as to it having no obligation to the State Party. It was unconnected with the Payment Argument which was addressed in the award at paras 460–461 where the Majority distinguished between an obligation to pay (remaining with the State Party) and a method of payment by the Domestic Constructor.

101 The so-called Insolvency Finding is the outworking of the central and essential point that was argued: whether any form of obligation concerning delivery was owed to the State Party. If there were none owed, there would not be a payment obligation, leaving the Foreign Constructor commercially vulnerable if the Domestic Constructor became insolvent after it received the material packages.

102 That the Foreign Constructor did not address in argument this evident commercial vulnerability if the Domestic Constructor were to become insolvent (a contingency expressly contemplated by the termination clause in Art 12 of the Provisional Contract and the Supply Contract), that was a matter for it. But it could hardly be said that the vulnerability of the Foreign Constructor to non-payment for material packages already delivered to the Domestic Constructor if the Domestic Constructor were to become insolvent and if it were correct that the State Party had no right of delivery and no obligation of payment, was not able to be foreseen in a chain of reasoning as to why the State Party *did* have an obligation to pay and *did* have an entitlement to see the material packages delivered (to the Domestic Constructor) without defects.

103 There was no unfairness in the so-called Insolvency Finding.

104 The Foreign Constructor says in effect that it did not make submissions because the insolvency of the Domestic Constructor was never put in issue. That, with respect, misses the point. The parties were engaged in an argument about *contractual construction*. They were not engaged in ascertaining whether the Domestic Constructor would, or might, *in fact*, become insolvent. The contractual documents contained a right of termination posited on an hypothesis of insolvency of the Domestic Constructor. The actual possibility of insolvency was not the issue. It was the contractual documents that were being considered and which contained such an insolvency as the basis for termination. The argument involved the hypothesis of the possibility of the Domestic Constructor becoming insolvent in the future and that there was a commercial vulnerability of the Foreign Constructor on the face of the documents. It is the construction of the commercial documents which posited the possible hypothesis of insolvency of the Domestic Constructor that was relevant and evident in argument, not whether or not as a fact anyone thought that the Domestic Constructor would become insolvent.

105 In these circumstances, if the Foreign Constructor chose not to put submissions on the point there was no unfairness in the Tribunal working through the consequences of the construction point and not returning to the parties for further submissions on a subject (the terms of the termination provision) which had already been the subject of argument.

106 None of these three complaints contains any unfairness at all. In those circumstances there was no failure to afford natural justice in respect of them.

107 Further, we see no error in how the SICC dealt with the matter as to causal nexus with the award or prejudice on the hypothesis of some breach of the rules of natural justice. However, we would want to say that the essence of

a failure to afford natural justice is the unfair treatment of the party, of which there was none.

Conclusion

108 There was no unfair treatment of the Appellant/Foreign Constructor. There was no failure to consider any argument of the Foreign Constructor. There was no unfair departure from the pleadings or submissions of the parties. The reasons of the Majority were fairly within the range of considerations that a reasonable litigant represented by skilled lawyers could anticipate was a possible approach in the reasoning of the Majority.

Orders

109 The appeal should be dismissed. There could be no reason why the Appellant should not pay the costs of the Respondent. The Respondent in its submissions sought costs of $180,000. The parties should file within 14 days of

this judgment submissions of no more than two pages as to the costs to be awarded.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

James Allsop
International Judge

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