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

[2021] SGHC 287

Originating Summons No 511 of 2021

Between

CNQ

… *Applicant*

And

CNR

… *Respondent*

JUDGMENT

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

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v
CNR

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General Division of the High Court — Originating Summons No 511 of 2021
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12, 16 November 2021

28 December 2021 Judgment reserved.

Andre Maniam J:

Introduction

1 The applicant Buyer was found liable in an arbitration for non-acceptance of goods under a sale and purchase contract (the "Agreement"). It seeks to set aside the damages awarded, but does not challenge its liability for breach of contract.

2 The Buyer complains that the tribunal had awarded damages based on s 50(3) of the Sale of Goods Act (Cap 383, 1999 Rev Ed) ("SOGA") although the respondent Seller's position in the arbitration had been that s 50(3) did not apply, and it had claimed under s 50(2) instead. I shall refer to this as the "SOGA Issue".

3 The setting-aside application was filed on the grounds that:

(a) the Buyer was unable to present its case, under Art 34(2)(*a*)(ii) of the Model Law read with s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"); and

(b) there was a breach of the rules of natural justice in connection with the making of the award by which the Buyer's rights have been prejudiced, under s 24(*b*) of the IAA.

4 The Buyer thereafter also submitted that the tribunal had exceeded its jurisdiction, another ground for setting-aside: Art 34(2)(*a*)(iii) of the Model Law. This ground was, however, not mentioned in the originating summons, affidavits, or written submissions – it was first raised in oral submissions at the hearing of the application. Indeed, the SOGA Issue itself was first raised in those oral submissions, and it then dominated the hearing of this application, with the Buyer's other reasons for setting-aside receding into the background.

5 I find that the none of the grounds for setting-aside is established, and that the Buyer has not suffered prejudice from the matters complained of. I thus dismiss the setting-aside application.

6 I deal first with the SOGA Issue, and then with the Buyer's other reasons for setting-aside (essentially that the tribunal had failed to consider the Buyer's contentions).

The SOGA Issue

The goods

7 The goods in question are optical fiber preforms: rods made of synthetic quartz doped with germanium; preforms are used to produce optical fiber, which would then be bundled to form optical fiber cables for sale to end users.[1]

8 The tribunal referred to the preforms which the Buyer had agreed to buy, and the Seller to sell, as "Preforms" (with an uppercase "P"), as distinct from "preforms" (with a lowercase "p") being "a class of goods that is used to produce optical fiber and fiber cables".[2] I use these terms in the same way.

9 The distinction matters because – as the Seller contended and the tribunal found – once preforms were manufactured *for the Buyer* (becoming the Preforms under the Agreement), they were customised for the Buyer's requirements: they were specifically designed by the Seller for the Buyer and could no longer be considered generic, once manufactured.[3]

The Buyer's breach

10 The tribunal found the Buyer to be in breach of contract, in its non-acceptance of shipments of Preforms in the period from February to December 2019.[4]

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1 Award exhibited at Agreed Bundle of Documents ("ABOD"), 999 ("Award"), paras 122 and 236.

2 Award, paras 74 and 230.

3 Award, para 231.

4 Award, para 177.

The Seller's claims

11 Part VI of the SOGA deals with actions for breach of contract. In that Part, ss 49 and 50 address the seller's remedies: an action for the price of the goods under s 49, and an action for damages for the buyer's non-acceptance of the goods under s 50.

12 In the present case, the primary relief sought by the Seller was the price of the goods, under s 49 of the SOGA. The tribunal found against the Seller on this.

13 The Seller, however, succeeded in its alternative claim for damages under s 50 of the SOGA, which provides as follows:

> **Damages for non-acceptance**
>
> **50.**—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
>
> (3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.

14 The Seller had claimed damages under s 50 of the SOGA based on the measure of damages under s 50(2), *ie*, "the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract".[5] The Seller specifically considered s 50(3) of the SOGA, and asserted that it *did not apply*: s 50(3) applied "[w]here there is an available market for the goods",

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5 Statement of claim (ABOD 128) at paras 78–87 (ABOD 159–161).

and there was *no available market for the Preforms* as they were "specially designed and produced to meet [the Buyer's] specifications".[6] Thus, the Seller contended that "there are no ready buyers available to purchase the shipments of [the Preforms] which [the Buyer] has refused to accept in breach of contract. Accordingly, section 50(2) shall apply to [the Seller's] claim for damages."

The Buyer's defence

15 The Buyer denied being in breach of contract. It said that there was an "astronomical" drop in prices of optical fiber towards the end of 2018, and that because of that, the price of preforms reduced astronomically.[7] It contended that this had frustrated the Agreement.[8]

16 The Buyer also disputed the Seller's assertion that there was no available market for the Preforms. The Buyer asserted that the Preforms were generic,[9] so there was an available market for the Preforms,[10] and s 50(3) of the SOGA would apply.[11] The Buyer further contended that damages claimed by the Seller would be kept at a minimum as it had not acted reasonably to mitigate its losses; and if it had chosen not to sell any preforms at all in the relevant period, it would not have suffered any loss.[12]

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6 Statement of claim, paras 84–87 (ABOD 161).

7 Defence (ABOD 166), paras 68–73 (ABOD 189–191).

8 Defence, para 177 (ABOD 222).

9 Defence, paras 9, 46 (ABOD 171, 184).

10 Defence, paras 48–50 (ABOD 184).

11 Defence, paras 108–111 (ABOD 203–204).

12 Defence, para 111 (ABOD 204).

The Seller's reply

17 In its reply to the Buyer's defence, the Seller elaborated on why the Preforms were not generic,[13] and reiterated its claim for damages pursuant to the measure of damages under s 50(2), not s 50(3), of the SOGA.[14]

The Seller's use of s 50(3) of the SOGA

18 Although the Seller's pleaded case was that s 50(3) of the SOGA did not apply as there was no available market for the Preforms, the Seller sought to claim damages under s 50(2) using a measure of damages similar to that under s 50(3).

19 Specifically, the Seller contended that it should be awarded damages on the basis of the contract price for the Preforms, less a "Hypothetical Market Price" derived using the market price of optical fiber as a comparable product. The tribunal awarded damages against the Buyer on this basis.

20 Although the Seller took reference from s 50(3) of the SOGA in formulating the measure of damages claimed, its pleaded position was that s 50(3) did not apply as there was no available market for the Preforms.

The Seller's witness statements

21 In the first witness statement of the Seller's witness Mr [X],[15] he stated at para 62 that the Preforms supplied to the Buyer under the Agreement are tailor-made, and it was difficult to sell them to any other company without re-

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13 Reply (ABOD 233) paras 104–112 (ABOD 276–279).

14 Reply, paras 95–97 (ABOD 273–274).

15 ABOD 346.

processing, and therefore "in the strict sense of the term, there is no 'market price' of such products to speak of."[16]

22 In para 69 of that witness statement, Mr [X] then referred to s 50(3) of the SOGA, saying he had been advised that if there is an available market for a product, the difference between the market price and the contract price was considered to be the *prima facie* amount of damages. He said that the Seller thus regarded the difference between (a) the "market" price of preforms (calculated by adjusting the contract price of the Preforms by the rate of decrease in the price of optical fiber) – the "Hypothetical Market Price"; and (b) the contract price of the Preforms, to be "an indicator of damages incurred" by the Seller.

23 In Mr [X]'s second witness statement,[17] he maintained that there was no available market for the Preforms under the Agreement. At paras 21–27,[18] he said that the Preforms manufactured for the Buyer cannot be considered to be generic products. At para 25 he said, "the preforms [the Seller] supplies to [the Buyer] are different from the preforms [the Seller] supplies to other optical fiber manufacturers. Accordingly, the preforms [the Seller] manufactures for [the Buyer] cannot simply be sold to other customers as they are without any re-processing". At para 27 he then said, "[the Buyer's witness] further states that there is an available market for preforms. Insofar as [the Buyer's witness] is suggesting that the preforms which [the Buyer] has refused to accept could be sold to other optical fiber manufacturers, I disagree."

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16 ABOD 372.

17 ABOD 423.

18 ABOD 431–434.

The lists of issues

24 In the Seller's list of issues,[19] it did not cite s 50(3) of the SOGA. Instead, it referred to s 50(2) in its framing of Issue 1(e)(ii):[20]

> (e) whether, as an alternative to the price of the shipments … [the Seller] is entitled to damages under section 50(1) of the SOGA arising from [the Buyer's] breach of the Agreement. In particular:
>
> …
>
> (ii) whether [the Seller] has suffered any loss directly and naturally resulting from [the Buyer's] wrongful non-acceptance *under section 50(2) of the SOGA* …
>
> [emphasis added]

25 On this point, the formulation in the Buyer's list of issues was similar – Issue 1(e)(ii) was:

> (e) whether, as an alternative to the price of the shipments … [the Seller] is entitled to damages under section 50 of the SOGA arising from [the Buyer's] breach of the Agreement. In particular:
>
> …
>
> (ii) Whether [the Seller] has suffered any loss directly and naturally resulting from [the Buyer's] wrongful non-acceptance …

26 Although the Buyer did not expressly cite s 50(2) of the SOGA, it formulated the above issue using the phrase "loss directly and naturally resulting", which is the measure of damages under s 50(2).

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19 ABOD 440.

20 ABOD 442.

The oral opening and closing submissions of the Seller's counsel

27 In the oral opening of the Seller's counsel, he stated that there was no available market for preforms, even generally.[21] He then said that "if there is a market", there was s 50(3) of the SOGA; but even under s 50(2) of the SOGA, a "*similar kind of quantification approach*" [emphasis added] was not excluded.[22]

28 In the Seller's counsel's oral closing, he maintained that the Seller "claim[ed] for damages *under section 50(2) of the SOGA*, which allows a wide range of methods of calculation." [emphasis added] He went on to say:[23]

> We recognise an inherent difficulty in ascertaining the appropriate measure of damages in this case because *there is no available market for preforms*. Even though the raw material for the preform is generic, there has been no sales opportunity at the relevant time for the client, which means that there has been *no available market in reality*.
>
> …
>
> [The Seller] came up with the hypothetical market price approach, *getting a hint from section 50(3) of SOGA*. This approach is reasonable because there is a strong correlation between the preform price and the fiber price …
>
> We submit that since section 50(2) and 50(3) of SOGA are not mutually exclusive, *the similar approach as set out in section 50(3) can be taken, even under 50(2)*, if no other preferable calculation method is readily available.
>
> [emphasis added]

29 As at the end of the merits hearing, the Seller's position was thus:

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21 ABOD 547 line 10 to 548 line 13.

22 ABOD 549 line 25 to 549 line 7.

23 ABOD 742 line 3 to 743 line 13.

(a) there was no available market for the Preforms under the Agreement;

(b) there was no available market for preforms, even generally;

(c) on its terms, s 50(3) of the SOGA did not apply: it would apply if there was an available market for the goods in question, but there was no such available market;

(d) the Seller claimed damages under s 50(2) of the SOGA; and

(e) although the Seller claimed under s 50(2) of the SOGA, and there was no available market for the Preforms (or preforms generally), with a hint from s 50(3) it had used an approach similar to that under s 50(3) – that being the contract price less the Hypothetical Market Price.

The Seller's written closing submissions

30 In the Seller's written closing submissions,[24] however, it submitted at paras 176–177:

> 176. [The Seller's] position is that *there is an "available market" for preforms* as a class of goods that is used to produce optical fiber and fiber cables, such that *section 50(3) of the SOGA applies* in determining [the Seller's] measure of damages.
>
> 177. [The Seller] has applied the measure of loss under section 50(3) of the SOGA as comprising the price of preforms under the Agreement less the hypothetical market price of preforms ("**Hypothetical Market Price approach**") …
>
> [emphasis in original in bold; emphasis added in italics]

31 The Seller's para 176 submission that there *was an available market* for preforms generally, contradicted its counsel's earlier oral submission (in his oral

[24] ABOD 883.

opening and oral closing) that there *was no available market* for preforms, even generally (as noted in the preceding section).

32 Moreover, taking at face value the Seller's submission that "section 50(3) of the SOGA applies", that was not the position it had pleaded and maintained till that point, which was: s 50(3) did not apply; but it could, in claiming under s 50(2), use an approach similar to that under s 50(3).

33 The Seller nevertheless continued to assert that the Preforms under the contract were not generic.[25] This position, which the Seller maintained throughout the arbitration, would mean that there was no available market for the Preforms under the Agreement (and consequently no market price for those Preforms) and so s 50(3) of the SOGA would not apply. Consistent with this, the Seller's para 176 submission referred to an available market for "preforms as a class of goods", rather than to an available market for the Preforms under the Agreement.

34 The Seller concluded that part of its written submissions as follows: "In conclusion, the only two components that are relevant for determining [the Seller's] claim for damages are (a) the contract price of preforms under the Agreement and (b) the *hypothetical market price* of such preforms."[26] [emphasis added]

35 Given the Seller's position that there was no available market for the Preforms under the Agreement, it used the Hypothetical Market Price – a *hypothetical price*, from a *hypothetical market*. That is *not* the measure of damages under s 50(3) of the SOGA, which requires "an available market for

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25 ABOD 934, para 184; see also ABOD 943, para 211(a).

26 ABOD 935, para 187.

the goods in question", *ie*, the Preforms under the Agreement, and compares the "contract price and the *market or current price* of the goods" [emphasis added].

36 It thus appears that the Seller was still maintaining its claim under s 50(2) of the SOGA using an approach similar to that under s 50(3), rather than making some claim directly under s 50(3) whilst taking the inconsistent position that there was no available market for the goods in question, *ie*, the Preforms under the Agreement. I shall return to this when I review the award, for the tribunal essentially accepted the Seller's contentions in awarding damages (see [47]–[68] below).

The Buyer's written closing submissions

37 In the Buyer's written closing submissions[27] (which were put in concurrently with the Seller's written closing submissions),[28] the Buyer submitted at para 212:[29]

> In the present dispute [the Seller] has sought the relief of price of monthly shipments of 3000kg. of [Preforms] from February to December 2019 under Section 49(2) of USD [XYZ] and in the alternative, damages under Section 50(3) of SOGA of USD [ABC] based on the computation of loss of profit on the basis of a hypothetical market price of preform ([Preform]).

38 The Buyer described the Seller's claim based on the Hypothetical Market Price as being for "damages under Section 50(3) of SOGA", and responded to that.

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27 ABOD 818.

28 ABOD 883.

29 ABOD 869.

39 Why was the Buyer referring to the Seller's claim in those terms, when the Seller's position hitherto had been that it was claiming under s 50(2) of the SOGA, but using an approach similar to that under s 50(3)? The Buyer had yet to see the Seller's para 176 submission that "section 50(3) of the SOGA applies", yet it characterised the Seller's damages claim as being for "damages under Section 50(3) of SOGA". Furthermore, the Buyer did not say that such a claim was not open to the Seller on its pleaded case.

40 Perhaps the Buyer was simply referring to the Seller's claim under s 50(2) of the SOGA using an approach similar to that under s 50(3), as a claim for "damages under Section 50(3) of the SOGA". If so, might the Seller have done likewise, in saying "section 50(3) of the SOGA applies" in its para 176 submission?

41 In any event, it is clear that the Buyer had the opportunity to respond to a claim for "damages under Section 50(3) of SOGA", as the Buyer put it in its written closing submissions.

The Buyer's rebuttal submissions

42 There was also a round of written reply/rebuttal submissions.

43 In the Buyer's rebuttal,[30] it did not say that paras 176–177 of the Seller's written submissions articulated a claim that was not open to the Seller on its pleaded case.

44 Instead, the Buyer responded to paras 161–187 of the Seller's written closing submissions (which included paras 176–177) by saying, "[the Buyer]

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30 ABOD 947.

has already explained numerous flaws relating to irrelevant market, imperfect correlation, etc. in the computation of damages provided by [the Seller] in the closing submissions."[31] At para 86 of the Buyer's rebuttal,[32] the Buyer specifically addressed the Seller's para 176 submission by reiterating that there was an available market for Preforms under the Agreement, and submitting that the Buyer's reliance on legal authorities in cases where there was no available market, was inapplicable and misplaced. Evidently the Buyer did not understand the Seller's para 176 submission to mean that the Seller was claiming under s 50(3) of the SOGA (which requires an available market for the Preforms) – the Buyer knew the Seller maintained that there was no available market for those Preforms.

The tribunal's findings

45 The tribunal found the Buyer to be in breach of contract, for non-acceptance of the Preforms under the Agreement for the period from February to December 2019.

46 The tribunal awarded the Seller damages based on the Seller's proposed measure: contract price of the Preforms, less the Hypothetical Market Price.

The tribunal's references to s 50(3) of the SOGA

47 At para 137 of the award, the tribunal set out a list of issues, including "[w]hether [the Seller] has suffered any loss directly and naturally resulting from [the Buyer's] wrongful non-acceptance [under s 50(2) of the SOGA]".[33]

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31 ABOD 967, para 84.

32 ABOD 968.

33 Award, para 137(e)(v) (ABOD 1033).

The tribunal addressed this issue at paras 222–258 of the award.[34] In doing so, however, the tribunal cited s 50(3) of the SOGA at paras 230–231, 234, 254–257, and 258(d) of the award. I set out paras 230–234, 252–258 of the award below:

> 230. *I accept that* ***the measure of loss under Section 50(3) of the SOGA*** *is the Price of Preforms under the Agreement less the market price of preforms, what [the Seller] describes as the Hypothetical Market Price.* [The Seller's] position is that there is an available market for preforms as a class of goods that is used to produce optical fiber and fiber cables, but even if there is no available market, [the Seller] is free to compute what it considers to be the value of those goods to it, including by reference to comparable products. [The Buyer] also submits that there is a market for preforms, but does not agree with either [the Seller's] Hypothetical Market Price or that [the Seller] put forward its own evidence of market price. I accept both Parties' common position that there is an available market for preforms. I do not find it helpful to go by [the Seller's] alternative argument that [the Seller] is free to compute what it considers to be the value of those goods to it, given the lack of information and evidence on what this might be. The case cited by [the Seller], *Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd*, is a case where the High Court found that there was a market for the goods in question, and used the market price of a comparable product as evidence. I shall return to this case below.
>
> 231. Some adjustments have to be made. First, the contract Price for Preforms under the Agreement is the price for preforms manufactured according to the specifications in the Agreement. I accept [the Seller's] evidence that, once the preforms are manufactured for [the Buyer], they are customised for [the Seller's] requirements. They were specially designed by [the Seller] for [the Buyer] and can no longer be considered generic, once they are manufactured. However, where they have not been manufactured for [the Buyer], the raw materials can be made into preforms to meet any customer's requirements. In that sense, [the Seller] says, there is a market for preforms generally. I quote [the Seller's] explanation in the Claimant's Closing Submissions:
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> > 176. [The Seller's] position is that there is an "available market" for preforms as a class of goods that is used to produce optical fiber and fiber cables, such that ***section***

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[34] Award, paras 222–258 (ABOD 1057–1071).

> ***50(3) of the SOGA applies*** *in determining [the Seller's] measure of damages.*
>
> …
>
> 183. [The Seller's] position stated at paragraph 176 above (i.e. that there is an "available market"), however, does not mean that the preforms of the type and specifications that [the Seller] supplies to [the Buyer] are "generic". This is because while the raw materials used to produce preforms are "generic" (i.e. silicon dioxide and germanium dioxide), as explained in Mr. [X]'s evidence, [the Seller] produces preforms specifically customised to suit each customer's drawing apparatus and conditions, and requirements in terms of optical characteristics. Consequently, any adjustment to a single feature such as length, outer diameter or Mode Field Diameter would mean that a particular preform can be used by one customer but not another.

232. Secondly, there is no data about market preform prices. Mr [X] testified that there is no "market price" for the Preforms to be supplied to [the Buyer] because these are tailor-made. [The Seller] submits that the Tribunal should take the spot market price for spot optical fiber because contracts for preforms are negotiated on a case-by-case basis and kept confidential:

> 186. [The Seller's] Hypothetical Market Price approach is entirely consistent with the factual circumstances relevant to the preform and optical fiber market. Preforms are products that only a small number of companies worldwide are able to produce, and which can only be used for the purpose of producing optical fiber and fiber cable. Therefore, [the Seller's] Hypothetical Market Price approach is the reasonable method for computing damages arising from [the Buyer's] breach of contract. In addition, contracts for preform supply and purchase are negotiated on a case-by-case basis and kept strictly confidential, including prices of preform under long-term, short-term or spot basis contracts. For this reason, even in the [business analysis] reports, there are no data about the preform prices while the spot fiber prices are reported.

233. [The Seller] submits that optical fiber is the most appropriate comparable product to preform given that optical fiber is, in fact, the final product melted down and drawn from preform. The market price of optical fiber is the closest and most direct evidence of the price of preform sold on a spot basis in any given time.

234. I accept that it is in principle permissible to look at the market price of comparable products where there is no market price for the specific goods in question. As cited by [the Seller], the Singapore High Court in *Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd* relied on evidence of the market price of 3800 NAR coal "as the closest and most direct evidence of the market price of 3400 NAR coal" *in awarding damages for non-acceptance of a shipment of 3400 NAR coal* ***under Section 50(3) of the SOGA*** *because there was no available market for 3400 NAR coal.* In that case, both experts were agreed that coal with a calorific value of 3400 NAR was treated as the commercial equivalent of coal with a calorific value of 3800 GAR.

…

252. By PO No. 4, [the Seller] had been ordered to produce any communications between [the Seller] and its customers and prospective customers in relation to the [Preforms] which had not been accepted by [the Buyer], if any such communications exist.

253. [The Seller] did not produce any such communications. Mr [X] testified that for the period from February to December 2019, [the Seller's] customers could only purchase what they were already bound by contract to purchase. They were unable to purchase any more preforms and [The Seller] was unable to sell any additional volume for this period of time. The market situation was such that [the Seller's] customers could not purchase any additional volume. Mr [X] further testified that the supply that [the Seller] made to its customer in [Country A] was based on a long-term agreement. [the Seller] was unable to acquire any new customers during this period of time. [The Buyer] submits that Mr [X]'s statement that [the Seller] was unable to convince its customers to buy additional volume is unsubstantiated and [the Seller] took no possible measures to mitigate and reduce the quantum of damages.

254. [The Seller's] failure to produce communications in which it tried to find buyers for preforms during the relevant period means that it cannot prove the efforts that it took to find buyers. *This does not mean that its* ***claim under Section 50(3) of the SOGA*** *fails or has to be reduced. I accept [the Seller's] submission that the principle of mitigation is already assumed within the measure of loss in Section 50(3) of the SOGA.*

255. Benjamin's Sale of Goods (10th Edition) says as follows:

> ***The normal rule stated in s.50(3)*** *incorporates the common law established before the Act*, viz. when the buyer fails both to pay the price and to accept the goods, the seller's damages are calculated by deducting from

> the contract price the market price at the time and place fixed by the contract for acceptance. The rationale of the statutory provisions is to provide a straightforward and readily applicable measure of damages which will enable the innocent party to be put into the same financial position as it would have been in had the contract been performed and which does not depend upon the action actually taken by the innocent party …
>
> *The doctrine of mitigation is one of the bases of this principle* ***[i.e. section 50(3)]****:* it is assumed that with this additional amount of money [i.e. damages] the seller could, by selling in the market at the current price, put himself into the same financial position he would have been in had the contract been performed according to its terms.

256. At footnote 531, Benjamin cited the following authorities:

> *But* ***if s.50(3) of the 1979 Act applies****, the claimant need not satisfy the requirements of reasonable mitigation: Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No. 2)* [1990] 3 All E.R. 723 at 726. In *Air Sutdios (Lyndhurst) Ltd v Lombard North Central Plc* [2012} EWHC 3162 (QB); [2013] 1 Lloyd's Rep. 63 at [93] it was said that the rationale of the statutory provisions is to provide a straightforward and readily applicable measure of damages which will enable the innocent party to be put into the same financial position as it would have been in had the contract been performed and which does not depend upon the action actually taken by the innocent party.

257. These authorities make sense. The starting point for [the Seller's] loss is that it has not been paid the contract price. One starts with that whole contract price. But if [the Seller] does what is reasonable, it will try to find alternative buyers for the preforms. That is the mitigation aspect. *Whether or not it in fact finds alternative buyers,* ***Section 50(3) of the SOGA*** *assumes that it would have done so and procured alternative buyers at the market price during the relevant period.* Therefore, instead of being able to claim the entire contract price, [the Seller] can only claim the difference between the contract price and the market price, whether or not it has actually managed to sell the preform at the market price. *Based on authorities and logic, there has already been an assumption of mitigation built into* ***the measure of loss in Section 50(3) of the SOGA*** *and it is inappropriate to make any further deductions from [the Seller's] computation of loss under that section.*

258. In conclusion, with regard to damages, I find that:

> a) [The Seller] has suffered loss directly and naturally resulting from [the Buyer's] wrongful non-acceptance of the shipments;
>
> b) The Preforms sold by [the Seller] to [the Buyer] are not generic, but the raw materials for their manufacture are generic and the preforms can be manufactured to any customer's specifications;
>
> c) There is an available market for preform, as submitted by both Parties;
>
> *d) [The Seller's] damages should not be reduced by reason of any failure to mitigate, as* ***this is not required under Section 50(3) of the SOGA***;
>
> e) Although [the Seller] was not ready with the February 2019 shipment of Preforms, it does not preclude [the Seller] from claiming damages for the difference between the contract price and the market price; and
>
> *f) [The Seller] is entitled to damages under Section 50 of the SOGA for USD [ABC] for the period from February to December 2019.*
>
> [emphasis added]

48 Do those references to s 50(3) of the SOGA show that the tribunal purported to award damages under s 50(3) when the Seller's pleaded position in its statement of claim was that s 50(3) did not apply?

49 In answering that question, the award should be read supportively, in a manner which is likely to uphold it rather than to destroy it: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [59]. It is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process (*Soh Beng Tee* at [65(f)]); the court should not nit-pick at the award (*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [45]).

50 Asking whether the tribunal awarded damages under s 50(3) of the SOGA begs the question: did the tribunal find s 50(3) to apply? In turn, one must ask: did the tribunal find that the Preforms under the Agreement were

generic, such that there was an available market for them? Section 50(3) of the SOGA would only apply if there were an available market for the Preforms under the Agreement.

51 The issues framed by the tribunal at para 137 of the award included the following sub-issues, under Issue (e):

> (i) Whether Preforms sold by [the Seller] to [the Buyer] are generic products or were specially designed by [the Seller] for [the Buyer];
>
> (ii) Whether there has been an available market accessible to [the Seller] to sell such Preform at the relevant time or whether there is an available market for preform …

52 The tribunal's findings on these issues were summarised at paras 258(b) and (c) of the award:

> b) The Preforms sold by [the Seller] to [the Buyer] are not generic, but the raw materials for their manufacture are generic and the preforms can be manufactured to any customer's specifications;
>
> c) There is an available market for preform, as submitted by both Parties …

53 The tribunal (at paras 231 and 258(b) of the award)[35] agreed with the Seller that the Preforms under the Agreement were customised for the Buyer's requirements; they were specially designed by the Seller for the Buyer and could no longer be considered generic, once they were manufactured. Furthermore, at para 232 of the award, the tribunal accepted the Seller's evidence that there was no "market price" for the Preforms under the Agreement because they were tailor-made.[36]

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35 Award (ABOD 1060 and 1071).

36 Award, para 232 (ABOD 1060).

54 These were the points the Seller had raised in its pleadings and evidence, to contend that there was no available market for the Preforms under the Agreement, and so s 50(3) of the SOGA did not apply, for there was no "available market for the goods in question".

55 The tribunal's findings are thus to the effect that there was no available market for the Preforms under the Agreement, but that there was an available market for "preforms as a class of goods". It should follow from that, that the tribunal accepted the Seller's pleaded position that s 50(3) of the SOGA did not apply, and rejected the Buyer's pleaded position that it applied.

56 The Buyer however points to para 254 of the award, where the tribunal referred to the Seller's "*claim under Section 50(3) of the SOGA"*; and to para 231 of the award which quotes para 176 of the Seller's written closing submissions: "section 50(3) of the SOGA applies in determining [the Seller's] measure of damages".

57 Nevertheless, the *first* reference to s 50(3) of the SOGA in the relevant section of the award, is in para 130 where the tribunal referred to "the *measure of loss* under s 50(3) of the SOGA" [emphasis added], which the tribunal accepted was the price of Preforms under the Agreement less the Hypothetical Market Price.

58 The Seller had put forward that measure of damages pursuant to s 50(2) of the SOGA, not s 50(3), all the while maintaining that s 50(3) did not apply as there was no available market for the Preforms. Indeed, the very contention that there was no available market for the Preforms led to the Seller coming up with the Hypothetical Market Price using the price of a comparable product – optical fiber.

59 The *second* reference to s 50(3) of the SOGA, in para 231 of the award, is in similar vein. There, the tribunal quoted para 176 of the Seller's written closing submissions in conjunction with para 183 of the same submissions (which explains the reference in para 176 to there being "an 'available market' for preforms as a class of goods"). Paragraph 183 of those submissions stated that the Seller maintained that the Preforms under the Agreement were not generic, although the raw materials used to produce them were generic. There was an "available market" for preforms as a class of goods, but no "available market" for the Preforms under the Agreement. Thus explained, the Seller's para 176 submission was not a contention that s 50(3) applies in the sense of there being an available market for the Preforms under the Agreement – it was a contention that the Seller could use a measure of damages like that under s 50(3), but substituting the Hypothetical Market Price for the market price of the Preforms (for there was neither a market, nor a market price for the Preforms).

60 The *third* reference to s 50(3) of the SOGA was in para 234 of the award, where the tribunal cited *Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd* [2019] SGHC 287 ("*Avra Commodities*") as a case in which damages were awarded "under Section 50(3) of the SOGA". Indeed, damages were awarded under s 50(3) in *Avra Commodities*, for the court found at para 128 of the judgment there *was* an available market for the goods in question (3400 NAR coal), stating: "In my view, there was an available market for the three cargoes at the relevant time." In that case, although there was an *available market* for 3400 NAR coal, there were no transactions for that grade of coal from which directly to derive its *market price* – thus the court derived that from the price of a comparable product (3800 GAR coal).

61 The tribunal did say in para 234 of the award that *Avra Commodities* was a case where there was "no available market"; however, earlier at para 230

of the award the tribunal said that in *Avra Commodities* "the High Court had found that *there was a market* for the goods in question" [emphasis added] (as indeed the court had). I resolve this inconsistency by regarding the reference in para 234 to "no available market" as an aberration; possibly the tribunal meant "no available market price" and simply omitted the word "price".

62 It is only the *fourth* reference to s 50(3) of the SOGA, in para 254 of the award, that mentions the Seller's "claim under Section 50(3) of the SOGA". Given the preceding references, though, I regard that as merely short form for the measure of damages put forward by the Seller, *ie*, contract price less Hypothetical Market Price. The tribunal was not saying that s 50(3) of the SOGA applies (for which there needed to be an available market for the good in question) – he had agreed with the Seller that there was no available market for those goods, namely the Preforms under the Agreement.

63 The *fifth to seventh* references to s 50(3) of the SOGA are in paras 255–256 of the award, where the tribunal referred to *Benjamin's Sale of Goods* (Michael Bridge gen ed) (Sweet & Maxwell, 10th Ed, 2017) ("*Benjamin's Sale of Goods*") for its commentary on mitigation in the context of the *measure of damages* under s 50(3).

64 In similar vein are the *eighth and ninth* references to s 50(3) of the SOGA – in para 257 of the award, where the tribunal reasoned that an assumption of mitigation is built into "the *measure of loss* in Section 50(3) of the SOGA".

65 The *tenth and final* reference to s 50(3) of the SOGA is in para 258(d) of the award, where the tribunal stated, "[the Seller's] damages should not be reduced by reason of any failure to mitigate, as this is not required under Section

50(3) of the SOGA". That follows on from the discussion in paras 255–257: the tribunal was referring to the *measure of damages* it was awarding in the present case, namely contract price less Hypothetical Market Price, which it reasoned (with reference to *Benjamin's Sale of Goods*) had an assumption of mitigation built into it, as did the measure of damages under s 50(3).

Did the tribunal award damages under s 50(3) of the SOGA, or under s 50(2)?

66 There are indeed infelicitous references to s 50(3) of the SOGA in the award: "the measure of loss under Section 50(3) of the SOGA" in para 230; "no available market" (in relation to *Avra Commodities*) in para 234; and "claim under Section 50(3) of the SOGA" in para 254. On the whole, however, it is clear that the tribunal accepted the Seller's proposed measure of loss (contract price less Hypothetical Market Price) while also accepting the Seller's contention that there was no available market for the goods in question (the Preforms under the Agreement), and so s 50(3) did not apply.

67 This is not a case where the tribunal found s 50(3) of the SOGA applicable and so awarded damages under it. On the contrary, the tribunal found s 50(3) inapplicable. The tribunal then used an analogous measure: contract price less Hypothetical Market Price (not contract price less current or market price, as stipulated in s 50(3)). That the tribunal awarded damages under s 50(2) is reinforced by para 258 (a) of the award: "[The Seller] has suffered loss directly and naturally resulting from [the Buyer's] wrongful non-acceptance of the shipments". That is the general measure of damages under s 50(2).

68 The Seller had contended that those damages could be reckoned by way of the difference between contract price and Hypothetical Market Price, and the tribunal accepted that. That specific measure of damages was fully canvassed between the parties, as was the related issue of whether the goods under the

contract were generic or there was an available market for them. Based on my reading of the award in the context of the pleadings, evidence and submissions, there was no breach of natural justice, or excess of jurisdiction. I nevertheless analyse these grounds more fully below.

Is setting-aside warranted?

Inability to present one's case, and breach of natural justice

69 The Buyer contends that it was unable to present its case, and there was a breach of the rules of natural justice in connection with the making of the award, in that the tribunal awarded damages under s 50(3) of the SOGA when the Seller had not advanced such a claim (at least not prior to its written closing submissions where it asserted at para 176 that "section 50(3) of the SOGA applies").

70 However, the Buyer had a full, fair, and reasonable opportunity of presenting its case in relation to the Seller's proposed *measure of damages*, *ie*, the difference between the contract price of the Preforms, and the Hypothetical Market Price. In particular, the Buyer submitted a reply witness statement of its expert Mr [Y] who criticised the Seller's damages claim.[37] The Buyer also addressed the Seller's proposed measure of damages in its written opening statement,[38] its counsel's oral opening,[39] its cross-examination of the Seller's witness Mr [X],[40] and its written closing submissions.[41]

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37 ABOD 392.

38 ABOD 456.

39 ABOD 573–581.

40 ABOD 614–620 and 624–636.

41 ABOD 860 (para 172) and 860–864 (paras 173–187).

71 The Seller had not relied directly on s 50(3) of the SOGA, it had instead relied on s 50(2) of the SOGA whilst nevertheless using an approach similar to that under s 50(3) – that being the contract price less the Hypothetical Market Price.

72 This was pointed out in the Seller's written submissions for the present application – it submitted at paras 75–78, particularly at paras 75 and 76 that:

> 75. [The Seller] did not rely directly on section 50(3) above for the Claim for Damages. This is because, amongst other things, [the Seller's] case was that there is no available market price for the [Preforms] under the Agreement, given that the [Preforms] were customised for [the Buyer's] use and could not be generally resold.
>
> 76. Instead, [the Buyer] relied on s 50(2) above …

73 At the hearing before me, however, the Seller's counsel sought to retract paras 75–78 of those written submissions. He submitted that those paragraphs were not accurate, and that the Seller *had* relied directly on s 50(3) of the SOGA *from the time of Mr [X]'s first witness statement*. He further submitted that if the Seller had maintained that its claim was only under s 50(2) of the SOGA, and the tribunal then awarded damages under s 50(3), that would be a problem – but he argued that things had changed with Mr [X]'s first witness statement, and so there was no issue with the award.[42]

74 I did not however think paras 75–78 were inaccurate; on the contrary, they accurately described what had happened: the Seller had not relied directly on s 50(3) of the SOGA, instead it relied on s 50(2) but used an approach similar to that under s 50(3).

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42 12 November 2021 Notes of Evidence.

75 In seeking to retract those submissions, the Seller implicitly acknowledged that the tribunal ***had*** *strayed* from the pleadings, awarding the Seller damages under s 50(3) of the SOGA when that was not the Seller's pleaded case. Counsel argued that this was alright, for the Seller had allegedly departed from its pleaded case from as early as Mr [X]'s first witness statement. The contention was that the Seller had, since then, claimed directly under s 50(3), and so an award under s 50(3) was unobjectionable.

76 As noted above at [21]–[22], Mr [X]'s first witness statement did not go so far as to assert a claim under s 50(3) of the SOGA. On the contrary, Mr [X] continued to maintain that the Preforms under the Agreement were tailor-made, difficult to sell to any other party, and so there was no "market price" of the Preforms to speak of. His reference to s 50(3) of the SOGA was only to explain why the Seller considered the difference between the hypothetical "market" price and the contract price to be "an indicator of damages incurred".

77 Mr [X]'s witness statements were followed by the oral opening and closing submissions of the Seller's counsel, where counsel explained that the Seller was not making a claim under s 50(3) of the SOGA (which it had pleaded did not apply); rather, it was claiming under s 50(2) of the SOGA but using an approach similar to that under s 50(3).

78 Notwithstanding the wording in the Seller's written closing submissions saying that s 50(3) of the SOGA "applies" (see para 176 of those submissions), the Seller had explained at para 183 that it maintained that there was no available market for the goods in question, *ie*, the Preforms under the Agreement – and accordingly s 50(3) did not apply.

79 In his oral submissions, the Seller's counsel contended that it was entitled to advance, and the tribunal to award, a claim under s 50(3) of the SOGA, relying on the Court of Appeal's decision in *CDM and another v CDP* [2021] 2 SLR 235 ("*CDM v CDP*"), where the court stated at [1] that the notice of arbitration and the statement of claim do not exhaustively define the jurisdiction of the tribunal. The court then stated at [18]: "The question of what matters were within the scope of the parties' submission to arbitration was answerable by reference to five sources: the parties' pleadings, [agreed list of issues], opening statements, evidence adduced, and closing submissions at the Arbitration."

80 However, the Court of Appeal then explained in *CAJ and another v CAI and another appeal* [2021] SGCA 102 ("*CAJ v CAI*") at [50] that:

> … it would be plainly be wrong to construe our decision to mean that so long as the point was covered in the closing submissions, that would be sufficient for it to come within the scope of the submission to arbitration *even if it was not pleaded*. This court's remark in *CDM* was made in the context of closing submissions which were filed to address issues that were *already pleaded*. In other words, the five sources referred to at [18] of *CDM* are not *discrete or independent* sources. It would not suffice for the purposes of determining the tribunal's jurisdiction that the issue in question had been raised in *any one* of the five sources. Instead, the overriding consideration is to determine whether the relevant issues had been properly pleaded before the tribunal.
>
> [emphasis in original]

81 *CDM v CDP* thus does not give parties licence to introduce new claims only at the stage of closing submissions.

82 At the inception of this arbitration, however, the Seller's damages claim was described in more general terms. Both the June 2019 request for

arbitration[43] and the September 2019 terms of reference,[44] simply stated that the Seller was seeking damages from the Buyer's breach of the Agreement in an amount to be quantified.[45] Thus, a claim under s 50 of the SOGA was within the scope of the submission to arbitration. The Buyer might then claim more specifically under s 50(3), or more generally under s 50(2) – either way, the claim would remain within the scope of the submission to arbitration. This may be contrasted with a claim falling outside the limits of the terms of reference: see the discussion in *CAJ v CAI* at [32]–[41].

83 There is a closer analogy with *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [70] and [74], which the Court of Appeal discussed in *CAJ v CAI* at [46]–[47]. In *AKN v ALC*, the Court of Appeal found that a generic claim for damages was broad enough to encompass a claim that might be characterised as one for a loss of chance. As the court in *CAJ v CAI* explained (at [47]):

> … [in *AKN v ALC*] *damages had already been pleaded; the loss of a chance analysis was merely a measure of the pleaded claim for damages*. As such, the loss of a chance analysis fell within the scope of the submission to arbitration and the tribunal's decision on it had not been made in excess of jurisdiction. The hypothetical we raised thereafter was simply to illustrate the point that, since the loss of a chance analysis fell within the scope of the submission to arbitration, the objections raised by the appellants went towards the question of breach of natural justice rather than excess of jurisdiction.
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> [emphasis added]

84 From the start of the present arbitration the Seller had asserted a *claim for damages* for the Seller's non-acceptance of the goods. Since Mr [X]'s first

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43 ABOD 68.

44 ABOD 110.

45 ABOD 79, paras 36(b), 37(c); ABOD 118, para 39(c).

witness statement, the Seller had put forward the specific *measure of damages* which the tribunal eventually accepted, namely, contract price less Hypothetical Market Price. That measure of damages was within the scope of the submission to arbitration (and in that regard there is no excess of jurisdiction), and the Buyer had a full, fair, and reasonable opportunity to be heard on it (and so there is no breach of natural justice).

85 I find that the Seller had not departed from its pleaded claim, and that the tribunal had not awarded damages on an unpleaded claim. That position was correctly set out in the Seller's written submissions for this application (which the Seller then sought to disavow). That was one of the ironies of this case.

86 Another irony is that the Buyer complained that the tribunal found that s 50(3) of the SOGA applied, which is what the Buyer itself had argued. The ultimate outcome, though, was not what the Buyer had contended for, namely, that the Seller's damages should be minimal, or nothing at all; instead, the tribunal awarded substantial damages based on the difference between the contract price, and the Hypothetical Market Price. The fact that the Buyer had invoked s 50(3) in its defence does not make it right for the Seller to belatedly claim under that sub-section, when the Seller had specifically asserted that s 50(3) did not apply. I find, however, that the Seller did not belatedly advance a s 50(3) claim; it had consistently claimed under s 50(2), not s 50(3).

87 If, however, the Seller's written closing submissions should be interpreted as advancing a claim under s 50(3) of the SOGA, and the award should be interpreted as granting that claim, there would still be no breach of natural justice: whether or not s 50(3) applied was at all material times an issue before the tribunal, which the parties addressed. Moreover, the specific measure of damages put forward by the Seller: contract price less Hypothetical Market

Price was set out in Mr [X]'s first written statement, and was fully canvassed by the parties thereafter.

88 It is also instructive to consider how the parties reacted contemporaneously. In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*CNMC*"), the Court of Appeal stated that in evaluating the tribunal's conduct of the proceedings, a court should ask itself if the tribunal's conduct falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done (at [98]). On a related note, the alleged unfairness upon which the complaining party seeks to found its claim of breach of natural justice must have been brought to the attention of the tribunal (at [102] and [104(d)]).

89 In its oral submissions in this application, the Buyer raised the SOGA Issue and criticised the Seller's para 176 submission as an unpleaded claim; the Buyer argued that that submission was quoted by the tribunal at para 231 of the award, leading to an award allegedly on the said unpleaded claim.

90 Contemporaneously, however, the Buyer never said this about the Seller's para 176 submission: the Buyer's rebuttal submissions simply replied substantively to that and other parts of those submissions. If the language of the Seller's para 176 submission was loose in saying s 50(3) "applies", so too was para 212 of the Buyer's written closing submissions in saying that the Seller had sought "damages under Section 50(3) of SOGA".

91 This can be contrasted with how the aggrieved party behaved in *CAJ v CAI*: there the respondent had objected to the appellant's raising of the "EOT Defence" (which was unpleaded and raised for the first time in its written closing submissions): see [9] and [64]–[68]. That objection was taken in the

respondent's written closing submissions, in response to the appellant's written closing submissions. The equivalent in the present case would be, the Buyer objecting in its rebuttal submissions to a "s 50(3) claim" being put forward – but there was no such objection.

92 Furthermore, the SOGA Issue was not even raised in the Buyers' present originating summons, affidavits, or written submissions – it was first raised in oral submissions at the hearing (more than five months after the setting-aside application was filed). This suggests that when the Buyer received the award, it did not feel aggrieved about the tribunal's various references to s 50(3) in the Award; only at some later point did those coalesce into the SOGA Issue.

Prejudice

93 In any event, to justify setting-aside under s 24(*b*) of the IAA the rights of the Buyer must have been prejudiced by the breach of natural justice. There is no such prejudice here. Had the tribunal proceeded under s 50(2) of the SOGA as the Seller had earlier advocated, given the findings in the award the tribunal would still have arrived at the same measure of damages: contract price less Hypothetical Market Price. It is difficult to imagine what further submissions the Buyer could have made in response to a s 50(3) claim for the same measure of damages, that it had not already made to the tribunal. Any such further submissions could not reasonably have made a difference to the outcome: see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54].

94 The Buyer suggests that it was prejudiced because, having proceeded under s 50(3) of the SOGA, the tribunal found that any failure on the Seller's part in mitigating damage by finding buyers, did not affect the Seller's damages claim. In this regard, the tribunal accepted the Seller's submission that the

principle of mitigation is already assumed within the measure of loss in s 50(3).[46] The tribunal elaborated on this at para 257:

> … One starts with that whole contract price. But if [the Seller] does what is reasonable, it will try to find alternative buyers for the preforms. That is the mitigation aspect. Whether or not it in fact finds alternative buyers, Section 50(3) of the SOGA assumes that it would have done so and procured alternative buyers at the market price during the relevant period. Therefore, instead of being able to claim the entire contract price, [the Seller] can only claim the difference between the contract price and the market price, whether or not it has actually managed to sell the preform at the market price. *Based on authorities and logic, there has already been an assumption of mitigation built into the measure of loss in Section 50(3) of the SOGA and it is inappropriate to make any further deductions from [the Seller's] computation of loss under that section.*
>
> [emphasis added]

95 As the tribunal's views on the relevance of mitigation were based on the measure of loss, it would have made no difference whether the tribunal had arrived at that measure of loss by applying s 50(3) of the SOGA, or by applying s 50(2) but using an approach similar to that under s 50(3). In relation to mitigation, the Buyer has thus not been prejudiced by the tribunal's application of s 50(3).

96 Moreover, in the same written closing submissions in which the Buyer had described the Seller's claim based on the Hypothetical Market Price as being for "damages under Section 50(3) of SOGA" (see [37]–[38] above), the Buyer had also submitted on the Seller's alleged failure to mitigate.[47] As such, the Buyer had the opportunity to address, and did address, mitigation in the context of a claim under s 50(3) (or based on a measure analogous to that under s 50(3)).

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46 Award, paras 254–257, and 258(d).

47 ABOD 965, paras 75–78.

97 While prejudice is not an element of the ground under Art 34(2)(*a*)(ii) of the Model Law, like it is under s 24(*b*) of the IAA, the absence of prejudice remains a relevant consideration when the court decides whether to set aside an award: *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [98]–[100].

98 I find that the Buyer was not unable to present its case, and there was no breach of natural justice in connection with the making of the award. Moreover, there has been no prejudice to the Buyer. Accordingly, I do not set aside the award of damages .

Excess of jurisdiction

99 The SOGA Issue was first raised in the Buyer's oral submissions at the hearing before me, and with it, the contention that excess of jurisdiction is an additional ground for setting-aside.

100 It has recently been held in *BTN and another v BTP and another and other matters* [2021] SGHC 271 ("*BTN v BTP*") at [62] that "the affidavit(s) in support served with the originating summons must reasonably contain all the facts, evidence and grounds relied upon in support of an application under O 69A r 2(1)(*d*) of the [Rules of Court] to set aside an award." This follows from O 69A r 2 of the Rules of Court (2014 Rev Ed), which provides that the affidavit in support must state the grounds in support of the application, set out any evidence relied upon by the plaintiff, and be served with the originating summons.

101 However, the SOGA Issue and the excess of jurisdiction ground were matters of submission based on evidence already before the court. As was the case in *CDM v CDP*, the factual matrix for breach of natural justice (here, in

relation to the SOGA Issue) was identical with that for excess of jurisdiction (see *CDM v CDP* at [16]), *ie*, the breach of natural justice alleged by the Buyer (denial of the right to be heard on a s 50(3) claim) required the Tribunal to have exceeded its jurisdiction in awarding damages under s 50(3) of the SOGA. If the claim were before the tribunal and the Buyer had the opportunity to engage with it, there would be no breach of natural justice.

102 Furthermore, although the distinction between ss 50(2) and 50(3) of the SOGA did not feature prominently prior to the hearing of the application, the Buyer *had* complained about the tribunal failing to consider its contentions in relation to "market price", "available market", and "hypothetical market price", all of which feed into the tribunal's decision on the measure of damages.

103 There was, however, some element of surprise to the Seller, from the introduction of the SOGA Issue and the excess of jurisdiction ground at the hearing before me. Following the hearing, the Seller's solicitors wrote to seek leave to make further arguments in correspondence (which I allowed, also allowing the Buyer's solicitors to reply).

104 In the circumstances, I decided to deal with the SOGA Issue and the excess of jurisdiction ground, on their merits, rather than to exclude them just because they were not mentioned in the originating summons and supporting affidavit. Other cases may well merit stricter treatment in this regard.

105 It follows from my findings in relation to breach of natural justice ([69]–[98] above), that I find that the tribunal had not exceeded its jurisdiction.

106 If, however, the tribunal had made an award on an unpleaded claim (contrary to my reading of the award), the claim for damages for non-acceptance

was nevertheless always within the scope of the submission to arbitration, and the measure of damages awarded (contract price less Hypothetical Market Price) was the same one that had been before the tribunal since Mr [X]'s first witness statement. Moreover, the parties had canvassed whether s 50(3) applies, or only s 50(2) – in particular, whether the goods in question were generic, or there was an available market for them.

107 In the circumstances, any excess of jurisdiction would not have caused the Buyer prejudice: [93]–[98] above.

108 Setting-aside is thus not warranted on this ground either.

Had the tribunal failed to consider the Buyer's contentions?

109 The other reasons put forward by the Buyer to justify setting-aside were:

(a) the tribunal failed to deal with the Buyer's objection in respect of the "market price" aspect of the Seller's damages claim;

(b) the tribunal relatedly failed to consider the Seller's factual evidence and admissions that there was in fact a market for the Preforms under the Agreement; and

(c) the tribunal failed to address the fundamental problems with the hypothetical market price, notably that it dealt with data from [Country B], not [Country A].

110 The common thread is: the Buyer seeks to infer from the award that the tribunal had treated the Buyer's various objections as withdrawn and/or conceded (see para 80 of the Buyer's written submissions). The Buyer tries to draw a parallel between the present case and *Front Row Investment Holdings*

(Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80 ("*Front Row*"), where the tribunal failed to consider a number of the points pleaded, because it thought the respondent had ceased to rely on them.

111 In *Front Row*, there was an explicit indication that the tribunal had failed to consider the points in question: the tribunal said so. That is not so in the present case. The Buyer relies on an inference from the award, and as the Court of Appeal held in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [46], this inference "if it is to be drawn at all, must be shown to be *clear and virtually inescapable*" [emphasis added]: see further *CIX v CIY* [2021] SGHC 53 at [9]–[15].

112 In the present case, I find that it is not a "clear and virtually inescapable" inference from the award that the tribunal had failed to consider the Buyer's contentions. Instead, it appeared that the tribunal had considered those contentions, and rejected them.

The tribunal considered the Buyer's objection to the "market price" aspect of the Seller's damages claim

113 The Buyer argues that the tribunal failed to deal with its fundamental argument that there was in fact a market for the Preforms under the Agreement (as opposed to preforms generally), and correspondingly, in failing to find that the Seller had failed to prove the applicable market price of that market.

114 This is not borne out by the award:

(a) The tribunal considered and rejected the Buyer's contention that the Preforms under the Agreement were generic, finding to the contrary at paras 231 and 258(b).

(b) The tribunal considered and rejected the Buyer's contention that the Seller had failed to prove the applicable market price of the Preforms, accepting Mr [X]'s position that there is no "market price" for the Preforms because those were tailor-made: para 237 of the award.

(c) The tribunal considered and rejected the Buyer's contention that the Seller's damages for claim fails in total and its loss might well be zero because it had failed to prove the facts and the evidence necessary to establish its claim. The tribunal accepted the measure of damages advocated by the Seller, namely, the contract price of the Preforms under the Agreement less the market price of preforms (which the Seller described as the Hypothetical Market Price): para 230 of the award.

(d) The tribunal noted that the Buyer disagreed with the Seller's computation of the market price for preforms (at para 227 of the award), but the tribunal accepted the Seller's computation of damages: paras 249 and 258(f) of the award – in particular, the tribunal accepted that the market price of preforms could be derived by a comparison with the trend of the market price of optical fiber: paras 230–251 of the award. Indeed, the Buyer itself acknowledged that there was a correlation between the price of optical fiber, and the price of preforms: it pleaded that because there was an "astronomical" drop in prices of optical fiber towards the end of 2018, the price of preforms reduced astronomically.[48] It should have come as no surprise to the Buyer that if it were found to be in breach for non-acceptance of the Preforms for the relevant period, it would be ordered to pay substantial damages.

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[48] Defence, paras 68–73 (ABOD 189–191).

The tribunal considered the Seller's factual evidence as to whether there was in fact a market for the goods under the contract

115 The Buyer argues that:

(a) Its submissions and evidence were that there was a market for Preforms under the Agreement.

(b) The Seller's witness had conceded that there was a market for Preforms under the Agreement.

(c) The tribunal noted but failed to act upon the Seller's breach of Procedural Order No 4 (for the production of documents) ("PO 4").

(d) The Seller admitted that it had not manufactured any Preforms in the relevant period, and it is evident that the Seller made no efforts to sell Preforms to other customers, and yet the tribunal awarded damages based on a Hypothetical Market Price of preforms.

(e) The tribunal found that it was the agreed position of the parties that there was an available market for preforms generally, yet proceeded on the basis that there was no available market for the Preforms under the Agreement.

116 Again, it appears from the award that these are all points which the tribunal had considered. Taking the five points above in turn:

(a) The tribunal found that the Preforms under the Agreement were not generic: they were customised, specially designed for the Buyer, tailor-made, and there was no "market price" for them: paras 231, 237, and 258(b).

(b) From Mr [X]'s evidence as reviewed by the tribunal at paras 237 and 253 of the award, Mr [X] had not conceded that there was a market for the Preforms under the Agreement. Instead, Mr [X]'s evidence was, in that period there were no enquiries from other buyers; the Seller's customers could only purchase what they were already bound by contract to purchase, they were unable to purchase any more preforms and the Seller was unable to sell any additional volume; the supply made to the Seller's customer in [Country A] was based on a long-term agreement.

(c) The tribunal dealt with the PO 4 issue at paras 252–257 and 258(d) of the award. The tribunal noted that by PO 4, the Seller had been ordered to produce any communications between the Seller and its customers and prospective customers in relation to the Preforms which had not been accepted by the Buyer, if those communications existed. The tribunal further noted that the Seller did not produce any such communications. The tribunal commented that the Seller's failure to produce communications in which it tried to find buyers for preforms during the relevant period means that it cannot prove the efforts that it took to find buyers, but that does not mean that its claim under s 50(3) of the SOGA failed or had to be reduced, for the principle of mitigation was already assumed within the measure of loss in s 50(3) of the SOGA.

(d) At para 227, the Tribunal noted the Buyer's contention about the Seller not having manufactured Preforms in the relevant period, and not producing evidence that it had offered preforms to its other customers. The Tribunal also noted Mr [X]'s evidence on these aspects: see sub-para (*b*) above. In the event, the Tribunal accepted the measure of damages advocated by the Seller, based on a Hypothetical Market Price.

(e) At para 231, the Tribunal drew a distinction between preforms generally (for which the Tribunal found it common ground that there was an available market), and Preforms under the Agreement, for which the Tribunal did not find an available market.

117 The Buyer also criticises the tribunal for:

(a) failing to consider all the relevant evidence that preform and optical fiber are neither alternatives nor close substitutes, and that optical fiber was not the most appropriate comparable product to preform; and

(b) relying on *Avra Commodities* as the tribunal did.

118 On the former, the award however shows that:

(a) The tribunal noted the Buyer's submission that the optical fiber prices relied on by the Seller are not evidence of the market price of preforms for the relevant period (at para 235).

(b) The tribunal noted Mr [X]'s evidence that a strong correlation exists between the market price of optical fiber and the market price of preform, which applies particularly in spot transactions (at para 238).

(c) The tribunal noted Mr [Y]'s evidence agreeing with Mr [X] that there will be a positive correlation between the preform and optical fiber prices particularly in the long run, but that they were not perfectly correlated (at para 244). In the event, the tribunal accepted the Seller's computation whilst noting that the correlation between optical fiber prices and preform prices is imperfect (but there was generally some correlation between them, as Mr [Y] himself accepted): at para 249. It

was also the Buyer's pleaded position that there was such a correlation: see [15] and [114(d)] above.

119 As for the tribunal's reliance on *Avra Commodities*, the Buyer had in its rebuttal closing submissions[49] at para 92 specifically addressed the Seller's reliance on that case authority. The Buyer was not deprived of a right to be heard on that point, and there was no breach of natural justice; if the tribunal wrongly relied on *Avra Commodities*, that goes to the correctness of the award, it does not justify setting-aside.

The tribunal considered the Buyer's criticisms of the hypothetical market price, in particular that it dealt with data from [Country B], not [Country A]

120 The Buyer complains about the tribunal using figures from [Country B] in determining the hypothetical market price, when the relevant market was [Country A].

121 The Buyer acknowledges that it had made this point in submissions, and in its expert's report (see paras 73–78 of the Buyer's submissions for this application), and the tribunal had indicated that it understood the Buyer's point: "I understand what you are saying about the market. I have heard what you say about how the claimant should not rely on the hypothetical spot market price in [Country B] in order to establish the market for [Country A]. So all that part I understood and I have heard you."[50]

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49 ABOD 947.

50 ABOD 762.

122 The Buyer contends that the award, however, shows that the tribunal had failed to consider its contentions. In this regard, the tribunal stated at para 245 of the Award:

> In addition, it is [the Buyer's] contention that the data used by Mr [X], i.e., prices of optical fiber as provided in the [business analysis] Reports, and which include the [Country B] market, as opposed to using the prices of … Preforms that [the Seller] sold to its other [Country A] customers during the period from February to December 2019, are inappropriate. I am not with [the Buyer] on this point because a reasonable reading of the [business analysis] Reports suggests that [Country A] is covered under the "developing world" region in the [business analysis] Reports. The [business analysis] Reports do not provide for a separate region for "Asia Pacific" which includes [Country A], as Counsel for [the Buyer] contended during the cross-examination of Mr [X].

123 The award and the tribunal's comments in the course of the hearing, do not show that the tribunal had failed to consider the Buyer's contentions. On the contrary, they indicate that the tribunal had considered and rejected the Buyer's contentions, to the extent of considering how the "[business analysis] Reports" should be read.

Is setting-aside warranted?

124 In respect of these other issues, I find that the Buyer was not unable to present its case, nor was there a breach of natural justice. Further, the Buyer has not suffered prejudice from the matters complained of.

125 I understand the Buyer to be alleging excess of jurisdiction only in relation to the SOGA Issue, but for avoidance of doubt, I find that the tribunal did not exceed its jurisdiction on any of the other issues either.

Conclusion

126 The Buyer has not established any of the grounds for setting-aside, and moreover has not suffered prejudice from the matters it complained of. I thus dismiss the setting-aside application.

127 I will hear the parties on costs.

Andre Maniam
Judge of the High Court

Andre Yeap *SC* and Devathas Satianathan
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Tay Yong Seng, Ng Si Ming, Ang Ann Liang and Alyssa P'ng
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