IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(I) 10

Originating Application No 3 of 2022

Between

CYW

… *Applicant*

And

CYX

… *Respondent*

JUDGMENT

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

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CYW
v
CYX

[2023] SGHC(I) 10

Singapore International Commercial Court — Originating Application No 3 of 2022
Thomas Bathurst IJ
15 March 2023

31 May 2023 Judgment reserved.

Introduction

1 By HC/OA 491/2022 ("OA 491") filed on 26 August 2022, the applicant, CYW, sought, among other things, an order that the Final Award dated 16 May 2022, Award No 67 of 2022 (the "Award") made in an arbitration between CYW and the respondent, CYX, be set aside. The arbitration proceedings were seated in Singapore, administered by the Singapore International Arbitration Centre (the "SIAC"), and conducted in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016) (the "SIAC Rules"). I will refer generally to the arbitration proceedings between the parties as the "Arbitration".

2 OA 491 was initially filed in the General Division of the High Court of the Republic of Singapore. It was subsequently transferred to the Singapore International Commercial Court as SIC/OA 3/2022 ("OA 3").

3 In support of its application, CYW relies on s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") and Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration as enacted under the First Schedule to the IAA (the "Model Law").

Facts

The parties

4 CYW is a company incorporated in Indonesia, and a state-owned entity of the Government of Indonesia which at the relevant time effectively held 89.6% of its shares. At the time of the entry into the agreement that forms the subject of the dispute, Mr C and Mr D were directors of CYW.

5 CYX is the Singapore branch office of Company C, a cooperative situated in the Netherlands offering international banking and financial services.

The dispute forming the subject of the Arbitration

6 The dispute that formed the subject of the Arbitration between the parties arose out of certain commercial arrangements entered into between: (a) CYW; (b) CYW's associated company, Company A; and (c) CYX, relating to the purchase of cattle in the state of Queensland in Australia for subsequent slaughter and importation into Indonesia as beef products (the "Beef Programme"). The company designated to supply the cattle was an Australia-incorporated company, Company B.

7 The background to the transaction giving rise to the dispute is conveniently set out in paras 9–30 of the affidavit of Mr A, the legal manager

of CYW, that was filed on behalf of CYW. The relevant background may be summarised as follows.

8 In November 2017, Mr C, purportedly on behalf of CYW, signed a Sales and Management Service Agreement (the "Sales Management Agreement") with Company B which provided for terms upon which cattle was to be bought in Australia by Company B, fattened at farms in Queensland, then slaughtered and processed into beef products for subsequent export to Indonesia. The Sales Management Agreement also contemplated a bill exchange facility between Company B and CYX to enable the purchase orders made by CYW under the Sales Management Agreement to be funded.

9 The arrangement under the Sales Management Agreement contemplated the following steps:

(a) CYW would first issue monthly purchase orders setting out the cattle requirements and the delivery date of the corresponding beef products.

(b) Second, Company B was to purchase the requested number of cattle from third parties and sell them to CYW. At the same time, Company B would raise a bill of exchange for the purchase and sale of the cattle. The bill of exchange would be drawn by Company B with CYW as drawee and CYX as payee.

(c) Company B would then arrange for the slaughter of the cattle and the delivery of the beef products to CYW. At that time, a second bill of exchange would be drawn by Company B with CYW / Company A as drawee and CYX as payee in respect of Company B's services of

fattening and slaughtering the cattle and providing logistical arrangements for the delivery of the beef products to Indonesia.

(d) Finally, CYW was required to pay the total amounts set out in each bill of exchange on or before the maturity date in accordance with the facility agreement between Company B and CYX.

10 On 15 November 2017, Company B entered into a bill purchase facility with CYX pursuant to which CYX was obliged to purchase the bills drawn by Company B under the Sales Management Agreement. The maturity date for the bills was to be no later than 330 days from the purchase date. Company B was also obliged to apply the proceeds obtained from the sale of the bills in fulfilment of its obligations under its agreement with CYW.

11 In addition, Mr C purported to execute on behalf of CYW a security deed dated 16 November 2017 (the "Security Deed") to secure any moneys due from CYW to CYX. Under the Security Deed, as security for all moneys payable to CYX, CYW granted CYX a fixed charge over all livestock purchased by CYW from Company B and any products or proceeds derived from their sale.

12 From January to August 2018, Company B issued 21 invoices and bills of exchange for an aggregate amount of USD16,661,227.61. Fourteen of the bills were accepted by Mr C purportedly on behalf of CYW for amounts totalling USD13,355,381.29.

13 Following the removal of Mr C and Mr D from their position as directors of CYW by way of a shareholders' resolution dated 28 June 2018, CYW refused to accept the remaining bills. On 31 October 2018, CYX, in the exercise of its

powers under the Security Deed, appointed receivers and managers of the livestock and its proceeds. The receivers thereafter seized and sold the livestock subject to the Sale Management Agreement. The amount apparently realised by the receivers totalled USD5,105,679.

14 In the Arbitration, CYW denied that it was liable to pay the accepted bills. CYW claimed that the Security Deed was invalid because CYW lacked the capacity to enter into the Security Deed or to accept the accepted bills. It also claimed that Mr C had no authority to enter into the Security Deed on CYW's behalf. It sought declarations that the Security Deed and the related contracts were void and invalid, as well as consequential damages arising from CYX's alleged failure to practice prudential banking or conduct due diligence as required by Indonesian law.

15 CYX, by counterclaim, sought to enforce the Security Deed and counterclaimed for the amount unpaid on the accepted bills, on the basis that CYW had capacity, and Mr C was authorised, to enter into the Security Deed and accept the bills. Alternatively, it claimed for damages flowing from misrepresentations of Mr C's authority. CYX also resisted CYW's claim on the basis that CYX was not subject to Indonesian banking laws and had conducted sufficient due diligence.

16 Two other matters should be noted. First, clause 18.1 of the Security Deed stated that the document was governed by the laws of Queensland. Second, in addition to the Arbitration, the subject of the present proceedings, on 19 December 2018, Company B issued a notice of arbitration against CYW and Company A, seeking damages for alleged breaches of the Sales Management

Agreement. A dispute as to the jurisdiction of the arbitrator to determine these proceedings remains unresolved.

The procedural course of the Arbitration

17 CYW's complaints in the present application are based primarily on the two orders made by the Tribunal on 3 July 2021 in its Procedural Order No 2 ("PO No 2"). The first of these orders was that CYW was to submit its "witness statements and expert report by 7 July 2021" and any witness statement or expert report not filed by that date would not be admitted into the Arbitration. The second order was that CYW was to submit English language translations of all exhibits and legal authorities upon which it relied by 7 July 2021. The order provided that any later translated or untranslated exhibits and legal authorities would be excluded from the Arbitration.

18 In considering whether the effect of these orders was to deny CYW of natural justice, it is necessary to consider the procedural course of the Arbitration in some detail.

19 The Arbitration was commenced by a notice of arbitration filed by CYW as claimant with the SIAC on 3 February 2020 (the "Notice of Arbitration"). The response to the Notice of Arbitration was filed by CYX on 14 February 2020. Following constitution of the arbitral tribunal (the "Tribunal"), a preliminary meeting was convened by the Tribunal on 2 July 2020.

20 On 6 July 2020, the Tribunal issued Procedural Order No 1 ("PO No 1"). The procedural directions given at that time relevantly provided for CYW to submit its Statement of Claim ("SOC") together with all supporting documents including factual exhibits, written witness statements and legal authorities

within ten weeks from the date of PO No 1, namely, 14 September 2020. On 20 July 2020, the Tribunal issued a procedural timetable setting out the dates by which various documents were to be submitted (which was agreed to by the parties on 28 July 2020) (the "Procedural Timetable"). Two days later, on 22 July 2020, the Tribunal set down the hearing on the merits for five days commencing on 6 September 2021.

21 On 9 September 2020, CYW sought an extension of time of two weeks up to 28 September 2020 to file its SOC and supporting documents. That extension was granted, and CYW submitted its SOC dated 14 September 2020 on 28 September 2020.

22 As the Tribunal pointed out in its Award at para 27, paras 89 and 90 of PO No 1 stipulated that any exhibit or legal authority, which was not in English, had to be translated within five days of the documents being submitted. Nearly two weeks after submitting the SOC, CYW sought an extension of time until 23 October 2020 to provide English language translations of the exhibits and legal authorities in its SOC, stating that an extension was required due to the volume of the documents. The Tribunal noted that the extension was granted but ultimately, the translations were not provided by 23 October 2020. The Tribunal further stated that no explanation for the failure was offered.

23 CYX filed its Defence and Counterclaim ("Defence") on 16 November 2020.

24 Requests for document production were made by each of the parties on 7 December 2020. On 28 December 2020, CYW requested an extension of time

to respond to CYX's request. The Tribunal granted the request and extended the deadline to 6 January 2021.

25 On 15 February 2021, the Tribunal issued its orders on the parties' contested document production requests. On the date production was due, 22 March 2021, CYW sought a two-week extension of time to provide the documents which it had been ordered to produce. The Tribunal recorded in its Award at para 32 that counsel for CYW had explained that it needed the extension to comply with the said orders as they were "presently taking [their] client's instructions thereon".

26 The Tribunal recorded that although PO No 1 required any extension to be sought at least three days before the expiry of the deadline, it granted the extension. However, the documents ordered to be produced were not provided by CYW by the extended deadline. The Tribunal further recorded that CYW did not explain this failure.

27 On 15 April 2021, CYX advised the Tribunal that it had still not received the requisite documents that CYW was ordered to produce. The Tribunal recorded in its Award (at para 35) that it sought CYW's comment and CYW's counsel responded: "we have difficulties obtaining our client's instructions at present and will endeavour to provide a detailed response […] as soon as we are able." The Tribunal granted CYW until 23 April 2021 to produce the documents but expressed concern at the delay in production.

28 On 15 April 2021, CYX also reminded CYW that the translations of the documents submitted with the SOC remained outstanding. The Tribunal recorded in its Award (at para 29) that CYW stated some days later that they

would require two more weeks to furnish the required English translations of the documents.

29 The Tribunal recorded in its Award (at para 30) that "[n]otwithstanding the shifting explanation as to why the translations could not be provided, the Tribunal granted [CYW] a further extension until 11 May 2021 (some 7.5 months *after* it had filed its Statement of Claim) to provide the English-language translations of the Bahasa Indonesia documents" [emphasis in original]. The Tribunal noted that despite granting CYW more time than it had requested, the translations were still not provided, and no explanation was proffered.

30 The Tribunal recorded in its Award (at paras 37–40) that at the same time, though unbeknownst to the Tribunal, CYW was pursuing civil proceedings in Indonesia relating to the Security Deed. It noted that in June 2020, CYW brought an action in the District Court of Sukoharjo against Company B, Company A, Mr D and another company seeking among other things a determination that the Beef Programme contravened CYW's core business purpose and that the Sales Management Agreement was unlawful. The Tribunal recorded that on 22 December 2020, the District Court held that the Beef Programme contravened CYW's core business purposes and declared the Sales Management Agreement unlawful and void. The Tribunal further noted that it only became aware of these proceedings on 1 July 2021 when CYX provided a translated copy of the judgment of the District Court. It noted that the same firm represented CYW in both the proceedings in the District Court of Sukoharjo and in the Arbitration.

31 The Tribunal dealt with the circumstances surrounding the filing of CYW's Reply and Defence to Counterclaim ("RDCC") at paragraphs 41–47 of

the Award. As Mr A acknowledged in his affidavit, pursuant to item 9 of the Procedural Timetable, CYW's expert reports were required to be filed with the RDCC, and CYX's expert reports were required to be filed with the Rejoinder and Reply to Defence to Counterclaim ("Rejoinder") by 14 June 2021.

32 The procedural timetable required CYW to file its RDCC by 3 May 2021. On 21 April 2021, CYW applied to the Tribunal for a two-week extension of time to do so. As the Tribunal recorded, the reason proffered by CYW for seeking the extension was that CYW's counsel was "experiencing difficulties in obtaining instructions […] and will not be able to meet the due date of the [RDCC], which include the preparation of voluminous submissions, exhibits and bundles" [emphasis in original omitted]. The Tribunal, without objection, granted an extension of time to file the RDCC to 17 May 2021 and ordered that the Rejoinder be filed by 28 June 2021. In its e-mail of 22 April 2021 granting the extension, the Tribunal indicated it would soon provide a revised procedural timetable.

33 CYW did not file the RDCC by the extended deadline. The Tribunal recorded at para 43 of its Award that CYW did not seek a further extension or explain why "the submission" was not provided.

34 On 19 May 2021, the Tribunal wrote to the parties concerning the failure of CYW to file the RDCC by the due date of 17 May 2021. It noted that CYW had not sought a further extension of time but in its discretion under rr 19 and 27 of the SIAC Rules, it directed CYW to file its RDCC by 21 May 2021. The e-mail granting the extension stated that the parties were directed to adhere to the procedural timetable and lodge all submissions and take other required

actions on the specified dates so the hearing can proceed as scheduled beginning on 6 September 2021.

35 The Tribunal recorded that as CYW did not file the RDCC by the extended deadline of 21 May 2021 and on 25 May 2021, the Tribunal e-mailed the parties noting that it now proposed to proceed with the Arbitration. It stated that, having regard to the failure of CYW to file its RDCC, a Rejoinder would not be necessary. On the same day, counsel for CYW responded by e-mail making the following comments:

> We have difficulties obtaining instructions from our client as our client is a state-owned enterprise of the Government of Indonesia and would have to obtain approval from its stakeholders, including obtaining ministerial clearance before taking any action in these arbitration proceedings.
>
> As such, we seek this Tribunal's indulgence in granting one week for us to seek substantive instructions from our client in relation to the present proceedings.

That may seem to be surprising having regard to the fact that it was CYW that instituted the arbitration.

36 On 27 May 2021, the Tribunal granted a further extension to CYW to file its RDCC. The extension was granted until 18 June 2021. The e-mail emphasised that the hearing would proceed as scheduled from 6 September 2021 and that the Tribunal considered it fundamentally important to retain the dates for the hearing because of the very considerable difficulties in finding new dates. The Tribunal also stated in the e-mail that the parties should note that the Tribunal had extended time for CYW to provide a RDCC beyond the time sought by CYW and that it had done this in order to "give [CYW] a <u>final</u> and very adequate opportunity to provide its submission" [emphasis in original]. It

noted that CYW would be replying to CYX's Defence which CYW had had since 16 November 2020.

37 The Tribunal recorded in its Award at para 49 that CYW did not contact the Tribunal between 27 May 2021 and 17 June 2021.

38 CYW failed to file its RDCC by 18 June 2021. That evening, counsel for CYW wrote to the Tribunal seeking a further 14-day extension of time for its filing. The reason for the delay was attributed to the worsening Covid-19 ("Covid") pandemic in Indonesia, with the e-mail stating that CYW required "more time to seek [the] Minister's approval and clearance for the instructions as he [was] currently occupied with the COVID crisis". The application for the extension was opposed by CYX in an e-mail dated 21 June 2021. Although CYX accepted that there was an increase in the number of positive Covid cases in Indonesia and that there were some restrictions on working from the office, CYX commented that it was not true that the Indonesian government had imposed a national lockdown.

39 On 21 June 2021, the Tribunal e-mailed the parties granting an extension of time for delivery of the RDCC by 14 days. However, the Tribunal expressed its concerns with CYW's repeated failure to adhere to timetables set down in the Arbitration. The e-mail contained the following remarks:

> The Tribunal is most concerned with the Claimant's [*ie*, CYW] repeated failure to adhere to timetables set down in this arbitration. The Claimant itself agreed to the Procedural Timetable but has frequently failed to comply with it. This has been exacerbated by the Claimant seeking extensions of time at a very late stage or not at all.
>
> Such failure is no better demonstrated than with respect to the present application concerning the R&DCC. The R&DCC is in response to the Respondent's [*ie*, CYX] Statement of Defence &

> Counterclaim which was filed on 16 November 2020. The Tribunal finds it remarkable that over a period of some seven months the Claimant has failed to obtain the instructions it has sought. The Claimant could not have been unaware of the Tribunal's recent concern about the Claimant's failures to comply with the timetable. The Tribunal reminds the Claimant that it confirmed on 27 May 2021, when it last extended the due date for the R&DCC, that if the submission was not filed by the extended date of 18 June 2021, the arbitration would proceed on the basis that the Claimant would not be filing its pleading.
>
> Notwithstanding this, and the Respondent's understandable opposition to any further extension of time, the Tribunal now extends time for the filing of the R&DCC--one last time--by one week until Friday, 25 June 2021.

40 The RDCC was filed on 25 June 2021. CYW did not file witness statements or expert reports along with the RDCC. The reason for this was set out in a letter from CYW's counsel to the Tribunal dated 25 June 2021. It stated as follows:

> 3. Unfortunately, our client is unable to submit its witness statements and expert reports as we have only received instructions recently due to the need to obtain approval from the Indonesian Ministry. Moreover, it has now come to our knowledge that two of our client's witnesses, [Ms I] (i.e. the Claimant's factual witness) and [Prof F] (i.e. the Claimant's Indonesian law expert witness) have recently been diagnosed with covid-19. Our client is therefore constrained in preparing its witness statements and expert reports and shall endeavour to submit the same as soon as practicable.
>
> 4 **Furthermore, our client requests that the present proceedings be suspended pending criminal investigations against employees of the Respondent** [*ie*, CYX]**, including one of the factual witnesses of the Respondent, in relation to its involvement in the … cattle business and the transactions thereunder**. In particular, we have been instructed that several individuals have been summoned by the Indonesian National Police Headquarters, including […] the Senior Relationship Manager of the Respondent, and […] the former Director of the Indonesian branch office of the Respondent. The Indonesian National Police Headquarters have sent a letter to the Respondent in relation to the summons via the Indonesian Ministry of Law and Human Rights and the

> Singapore Attorney-General's Chambers; however, we understand that the Respondent has yet to reply to the summons to date.
>
> 5 Our clients submit that the criminal investigations and the results thereof are highly relevant to the issues in dispute in the present proceedings and that this Tribunal ought to stay the proceedings until the conclusion of the said criminal investigations. In this regard, the validity of the BOEs [*ie*, the bills of exchange] (which the Respondent relies on in its counterclaim) would turn on whether it has been implicated in an unlawful purpose.
>
> [emphasis in original]

41 In its Award, the Tribunal pointed out at para 53 that PO No 1 stipulated that witness statements and expert reports were to be submitted "*with* the Reply" and that CYW had not sought an extension of time to file them [emphasis in original].

42 CYX opposed CYW's request for a suspension of the Arbitration contained in counsel for CYW's letter of 25 June 2021. In those circumstances, the Tribunal wrote to CYW on 2 July 2021 directing it to provide the letter from the Indonesian National Police Headquarters (the "Indonesian Police Letter") to the Tribunal. In response, counsel for CYW stated that CYW did not have a copy of the Indonesian Police Letter and was not privy to the specific details of its content. The e-mail claimed that the Indonesian Police had confirmed that the Indonesian Police Letter was sent. In support of that contention, CYW enclosed a shipment notice from the Ministry of Law and Human Rights in Indonesia to the Attorney-General's Chambers in Singapore. The shipment notice does not refer to any material being delivered to CYX. It should be noted that in an affidavit filed by Mr B on behalf of CYX, he denied that CYX had ever received any such letter from the Indonesian Police.

43 On 3 July 2021, the Tribunal rendered its decision on the suspension application in PO No 2. The Tribunal denied the suspension application and directed CYW to submit its witness statements, expert reports and English translations of all Bahasa Indonesian exhibits and legal authorities relied upon by 7 July 2021. As I have stated earlier (at [17]), the order provided that unless witness statements and expert reports and translations were filed by that time, they would not be admitted and would be excluded from the arbitration.

44 At para 11 of PO No 2, the Tribunal noted that CYW asserted that it had not been able to obtain instructions and that its witnesses had contracted Covid. The Tribunal noted that the significance of those factors, if established, was greatly reduced by the fact that CYW had had nearly eight months to obtain the necessary witness statements and expert reports. The Tribunal also pointed out that CYW had repeatedly failed to comply with timetables in the Arbitration and had routinely sought extensions of time at very late stages or not at all. As far as the English language translations of the documents submitted with the SOC on 28 September 2020 were concerned, the Tribunal noted at paras 14–17 of PO No 2 that on 7 October 2020, CYW had sought and received an extension until 23 October 2020 to submit the translations. The Tribunal noted that the translations were necessary to enable CYX to file its Rejoinder.

45 On 5 July 2021, counsel for CYW wrote to the Tribunal objecting to the limited time granted to provide witness statements, expert reports, and translations. The letter contained the following comments:

> 2. The Procedural Order leaves our client with an extremely short timeline of only 3 business days in which to obtain our client's instructions and to procure its witness statements, expert reports, and English-language translations of all exhibits and legal authorities, failing which our client shall be subject to the draconian measure of having its material

evidence, documents, and authorities excluded and shut out from the arbitration.

3. Our client hereby lodges its objections to the terms of the Procedural Order, and in particular, the Unless Order, which our client submits are patently unreasonable.

4. Firstly, and as was informed to this Tribunal earlier, our expert witness on Indonesian law, one [Prof F] is *infected with covid-19*. We have reached out to [Prof F] earlier today and understand that he remains unwell and will and will [*sic*] not be able to prepare this expert report within the time stipulated by this Tribunal. With all due respect, our client takes the view that it is not reasonable for this Tribunal to expect [Prof F] to work through a debilitating and potentially life-threatening illness such as *covid-19* in order to comply with its timelines. Our client strongly urges this Tribunal to provide an extension of time until after [Prof F] has fully recovered and is in a position to draft his expert report.

5. Secondly, the timeline of only 3 business days is insufficient time for our client to comply with the directions in the Procedural Order No. 2 and the Unless Orders. As this Tribunal is aware, our client is a state-owned entity of the Government of Indonesia and is accountable to the Indonesian Minister for any action that it takes in the present arbitration proceedings. It is not within our client's ability to obtain its instructions and react to this Tribunal's directions within the restrictive timeline imposed on it.

6. Thirdly, the Tribunal's decision to make the draconian Unless Orders was made without giving our client the opportunity to be heard. There was neither any application by the Respondent [*ie*, CYX] for the Unless Orders nor any reasonable notice that the Tribunal would make the Unless Orders. Insofar as the Unless Orders were made on the basis of the allegations in the Respondent's letter of 1 July 2021, our client was not provided with a reasonable opportunity to respond, as the Unless Orders were made only 2 days after the said letter. In *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125, the Singapore Court of Appeal held that 3 days' notice (prior to the making of an additional arbitral award) was insufficient for the other party to respond and constituted a breach of natural justice.

7. The above-stated issues with the Unless Orders deprive our client of the full opportunity to present its material evidence, authorities and expert reports to the Tribunal for a fair adjudication of the issues in the arbitration as mandated

> by Articles 18 and 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (as implemented by the Singapore International Arbitration Act (Cap. 143A)).
>
> [emphasis in original]

46 On 7 July 2021, counsel for CYW again wrote to the Tribunal enclosing a witness statement by Mr A and an expert report on Queensland law given by Mr H. It repeated its requests for: (a) the orders for the filing of witness statements, expert reports and translations by 7 July 2021 made in PO No 2 to be set aside; and (b) the Tribunal to direct that the report of its expert, Prof F, is to be filed one week after his full recovery from Covid and that the English language translations are to be submitted two weeks from the date of the letter. The letter contained a certificate of health assessment dated 22 June 2021 stating that Prof F had tested positive for Covid.

47 On 8 July 2021, the Tribunal wrote to the parties rejecting CYW's application to set aside the orders in PO No 2. It stated its reasons for refusing an extension of time for the filing of Prof F's expert report in the following terms:

> The Tribunal is prepared to accept that [Prof F] is presently ill and acknowledges receipt of a medical certificate dated 22 June 2021 now provided by the Claimant [*ie*, CYW]. However, the Tribunal cannot agree to indefinitely postpone receipt of the Expert Report. To do so would prevent the Respondent [*ie*, CYX] from providing its Rejoinder & Defence to Reply to Counterclaim. It would also, in all probability, require the hearing which is to commence in early September 2021 to be adjourned to a later date. The hearing dates were set down on 22 July 2020 and it would be highly problematic to find replacement dates either this year or early next year.
>
> The Claimant has had an unfortunate history of repeatedly seeking extensions and failing to adhere to deadlines. This has occurred not only with respect to expert reports but also with respect to translation of documents, document production and the filing of substantive pleadings. Against this backdrop and taking into account the fact that the Claimant has now had

> almost eight months in which to prepare and plan its [RDCC] (including obtaining the Expert Report), the Tribunal considers it would be most unfair to the Respondent to postpone the hearing. It has advanced substantial counterclaims and strenuously objects to any further delays and extensions of time.
>
> Nor is the Tribunal persuaded that it requires expert evidence on Indonesian law. The agreement between the Parties is governed by the laws of Queensland, Australia. The capacity of the Claimant and its directors' authority may be governed by Indonesian law. The Parties have already made submissions on both Indonesian and Queensland law—without the assistance of experts—and it is now commonplace in international arbitration for a tribunal to decide matters of law without hearing independent experts on a particular system of law. Further, as far as Indonesian law is concerned, Parties have Indonesian co-counsel who can address the Tribunal on any issues of Indonesian law at the hearing.
>
> [emphasis in original]

48 In relation to the translation of documents, the Tribunal explained its reasons for refusing an extension in the following terms:

> Having regard to the substantial period of time that has elapsed since the Bahasa Indonesia documents were filed and taking into account the Claimant's persistent failure to comply with its responsibility, the Tribunal is not minded to grant further time. Additionally, in order for the Respondent [*ie*, CYX] to prepare its Rejoinder, which is due in one month, it will be necessary for it to have all documents in the record in an English-language format. …

49 The Tribunal also made the following general remarks:

> The Tribunal is conscious that the Claimant is an Indonesian company which is partially-owned by the Indonesian government and was prepared to assume that Claimant's counsel would therefore require more time than would ordinarily be needed to obtain instructions. The Tribunal has, therefore, repeatedly made allowances for this fact and granted the Claimant multiple indulgences for compliance with its obligations under the Procedural Timetable.
>
> The Claimant has, however, agreed to arbitration under the SIAC Rules which allow the Tribunal to set a procedural

> timetable. Moreover, like PO No 1, the Procedural Timetable in this arbitration was drafted in consultation with the Parties and was accepted without objection. Indeed, it overwhelmingly reflects the Parties' agreed positions. It is also noted that it was the Claimant who commenced the arbitration and was or should have been well-prepared. The Claimant is therefore obliged to proceed with the arbitration as conducted by the Tribunal in accordance with the SIAC rules. The Claimant cannot constantly request further time endangering the dates set down for the hearing and the Respondent's [*ie*, CYX] legitimate expectations to have its counterclaims determined within a reasonable period.

50 On 28 July 2021, counsel for CYW wrote to the Tribunal asserting that the Tribunal's position was highly prejudicial to its case and patently unreasonable as there had been no agreement between the parties not to call expert witnesses and as the operation of Indonesian law was particularly critical to the Arbitration. The letter asserted that CYW would not be able to adequately present its case without the testimony of an expert witness. It also asserted that another of CYW's witnesses was ill with Covid. The letter stated that in those circumstances CYW was of the view that: (a) the Tribunal's orders excluding material documentary evidence as well as the expert evidence of Prof F; and (b) the Tribunal's failure to take into account the plight of CYW's witnesses, resulted in CYW being severely handicapped in the conduct and presentation of its case. The letter stated that counsel for CYW was instructed that CYW was withdrawing under protest from the Arbitration forthwith.

51 The Tribunal recorded in its Award at para 60 that CYX opposed the withdrawal of CYW's claims, and at para 66 that CYX's position was that it had legitimate interests in obtaining a final award on the claim and that CYW's reasons for withdrawal were not legitimate or substantiated. The Tribunal also noted that CYX had submitted several pictures from Prof F's Instagram account chronicling his workouts between 27 June 2021 and 19 July 2021.

52 The Tribunal noted in its Award at para 67 that in its response, CYW did not deny CYX's legitimate interests or authenticity of the pictures.

53 By a majority, in Procedural Order No 4 dated 16 August 2021, the Tribunal declined to allow CYW to withdraw its claims. The majority's view was that CYX had a legitimate interest in obtaining a final determination of the claims so as to, *inter alia*, reduce the risk of repeated claims being brought and avoid wasted costs.

54 Thereafter, CYW took no further part in the arbitration. However, as the Tribunal pointed out in its Award at para 71, the Tribunal continued to include CYW in correspondence and confirmed that the hearing would commence on 6 September 2021 as scheduled.

55 In its Award, the Tribunal dismissed the whole of CYW's claim. It declared that the Security Deed was a valid agreement between the parties and among other things, ordered CYW to pay damages to CYX in the sum of USD8,249,702 together with simple interest on each outstanding accepted bill at a rate of 6% per annum from the date of each bill's maturity to the date of full payment. CYW was also ordered to pay CYX's legal costs incurred in the Arbitration.

The parties' cases

CYW's case

56 As I mentioned above at [3], CYW relies on s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law in arguing that the Award should be set aside.

57 First, CYW submits that it was not afforded a reasonable opportunity to present its case in respect of expert evidence. In particular, CYW asserts that the Tribunal had acted in a draconian and unreasonable manner in insisting that the witness statements and the expert report of Prof F be submitted by 7 July 2021, failing which they would not be accepted into the record. CYW highlights that Prof F had been diagnosed with Covid at the material time, and that it faced difficulties in gathering documents due to the pandemic. CYW also argues that the Arbitration was not constituted under the Expedited Procedure pursuant to r 5 of the SIAC Rules and that the "aggressive directions" of the Tribunal were not warranted. During the hearing before me on 15 March 2023, counsel for CYW submitted that a fair and reasonable tribunal would not have made the orders that the Tribunal did, which essentially had the effect of compelling Prof F to work through his sickness. CYW argues that at the time it sought a time extension, the hearing was still two months away and Prof F's report could have been produced in time for the hearing.

58 Moreover, CYW submits that the breach of natural justice caused by the Tribunal's orders in relation to CYW's expert evidence affected the final award, as the "wilful exclusion of crucial evidence from on [*sic*] expert witness which would have provided the Tribunal with a counter opinion from those of CYX's expert witness may have resulted in a different outcome". CYW points out that even in the absence of expert witness evidence on CYW's part, a member of the Tribunal had come to a different view in relation to the issue of whether Mr C had actual and/or implied authority to enter into the Security Deed. On this basis, CYW argues that the Award was affected as the Tribunal was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to its deliberations. CYW further submits that the breach of natural justice had caused it to suffer prejudice; it argues that if the Tribunal

had afforded it an extension of time for Prof F to recover from Covid and to produce the Expert Report, it may have come to a different conclusion in relation to whether Mr C had actual or implied authority to enter into the Security Deed.

59 Second, CYW submits that the Tribunal's decision in PO No 2 not to grant an extension of time of two weeks from 7 July 2021 to provide the translations of the exhibits referred to in its SOC deprived it of a reasonable opportunity to be heard in respect of those exhibits. In particular, CYW highlights the Indonesian Supreme Court case of *Nine AM Ltd v PT Bangun Karya Pratama Lestari* 1572 H/Pdt/2015 ("*Nine AM*") which was one of the mentioned exhibits. According to CYW, *Nine AM* stood for the proposition that a cross-border agreement that is not translated into Bahasa Indonesia would not be valid under Indonesian law pursuant to Law No 24 of 2009 regarding the State Flag, Language, Emblem and the National Anthem of Indonesia (the "Language Law"). On this view, CYW claims that *Nine AM* would have assisted the Tribunal in its assessment of whether the Security Deed was invalid by reason of non-compliance with the Language Law, and that there was a real chance of *Nine AM* making a difference to the Tribunal's decision had it taken guidance from the case.

60 Counsel for CYW also submitted in the hearing on 15 March 2023 that CYW could not be faulted for withdrawing from the Arbitration as they were "shut out" from relying on crucial documents including the case of *Nine AM* and Prof F's report, and that was not the kind of arbitration they had signed up for.

CYX's case

61 In relation to the Tribunal's decision in PO No 2 not to grant an extension of time for CYW to produce translations of the exhibits in CYW's SOC (including the case of *Nine AM*), CYX argues that there was no breach of natural justice as it would not be unreasonable for a tribunal to hold parties to timelines previously set. CYX highlights that: (a) these translations were originally due to be submitted on 21 September 2020 (*ie*, within five business days after the SOC was due); (b) CYW had had around two months since the start of the Arbitration to prepare the translations of the exhibits; and (c) the Tribunal had granted to CYW three further extensions in time, amounting to a total of 276 days, to produce the translations of the exhibits. Further, the Tribunal had set out its reasons for rejecting CYW's request for a further time extension. Among other things, the Tribunal explained that: (a) nearly ten months had passed since the original deadline; (b) CYW had persistently failed to comply with timelines; and (c) CYW's constant requests for time-extensions would endanger the dates set down for the hearing. Moreover, CYX contends that the justifications given by CYW for seeking a further time extension (namely, the difficulties in preparing the documents caused by the pandemic) were not articulated to the Tribunal from the outset, and were unreasonable and inconsistent.

62 As for the Tribunal's refusal to grant a time extension for Prof F to produce his expert report, the Tribunal had explained that, among other things: (a) CYW had over seven months to provide the report; (b) while the Tribunal was prepared to accept that Prof F was ill, it could not agree to indefinitely postpone receipt of his expert report; and (c) it was not necessary to have expert evidence on Indonesian law since the agreement between the parties was

governed by Queensland law and the parties, in any event, could make submissions on Indonesian law through Indonesian co-counsel. In the circumstances, CYX contends that the Tribunal's decision was aimed at striking a balance between the competing interests of the parties, and therefore fell within the bounds of what a reasonable and fair-minded tribunal would have done in those circumstances.

63 Finally, CYX submits that the alleged breaches of natural justice did not prejudice CYW, as even if CYW had submitted English translations of its exhibits and Prof F's Report, it would not have altered the final outcome of the Arbitration. While CYW asserts that the case of *Nine AM* would have had a significant impact on whether the Security Deed is invalid for non-compliance with the Language Law, it is clear that the Tribunal had thoroughly considered the Language Law issue and the *Nine AM* case during the evidentiary hearing and in its deliberations when writing the Award.

64 With regard to Prof F's expert report, CYX argues that it is CYW which deprived itself of an opportunity to present evidence on Indonesian law by withdrawing from the Arbitration. Moreover, CYW chose not to attend the hearing despite having been given details to access and address the Tribunal and the hearing. Furthermore, as CYX failed to produce a draft of Prof F's report, there is no basis for the court to consider how the final outcome of the Arbitration would have been altered had the report been submitted.

65 CYX further argues that Prof F's expert report would not have made a difference to the Tribunal's determination of the following issues: (a) whether CYW had capacity to enter into the Security Deed; (b) whether Mr C had actual and/or implied authority to enter into the Security Deed; and (c) whether the

Security Deed was invalid due to non-compliance with the Language Law. CYX highlights that the Tribunal eventually decided that under Queensland law, Mr C had ostensible authority to enter into the Security Deed – a conclusion which did not turn on Indonesian law. Accordingly, CYW has not suffered any prejudice, and cannot make out the grounds for setting aside the Award under s 24(*b*) of the IAA and/or Art 34(2)(*a*)(ii) of the Model Law.

Issues to be determined

66 In a list of issues filed in connection with a Case Management Conference held on 29 November 2022, the parties agreed that the following issues arise for determination in the present proceedings:

(a) Whether a breach of natural justice as alleged by CYW had taken place due to the Tribunal's conduct of the arbitral proceedings, in particular, whether there was/were:

(i) denial of reasonable and fair opportunity for CYW to be heard and/or to present its case;

(ii) infringement of CYW's right to adduce expert evidence; and/or

(iii) procedural irregularities such as exclusion of documents filed with CYW's SOC.

(b) Whether there exists a causal nexus between the alleged breaches of natural justice and the Award, and relatedly, whether consideration of CYW's expert evidence (on Indonesian law) would have affected the Tribunal's conclusion in the Award.

(c) Whether the alleged breach of natural justice had caused CYW to suffer real or actual prejudice.

67 Having considered the parties' written and oral submissions, the issues arising for my determination may be categorised as follows:

(a) The first issue is whether there was a breach of natural justice by reason of CYW not having been given a fair opportunity to present its case.

(b) The second issue is whether, assuming that there was a breach of natural justice, CYW had suffered prejudice as the Tribunal was denied the benefit of arguments that had a real as opposed to a fanciful chance of making a difference to its decision.

The relevant principles

68 I begin by setting out the relevant principles for the setting aside of an arbitral award on the basis of a breach of the rules of natural justice under the IAA and the Model Law. Section 24 of the IAA is in the following terms:

> Despite Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> (*a*) the making of the award was induced or affected by fraud or corruption; or
>
> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

69 Article 34 of the Model Law, so far as relevant, provides as follows:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> > (*a*) the party making the application furnishes proof that:
> >
> > …
> >
> > > (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; …

70 It is unnecessary in the present case to explore the difference in operation and effect of s 24 of the IAA and Article 34 of the Model Law.

71 In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*"), Sundaresh Menon CJ delivering the judgment of the court noted at [4] that many of the cases presented as due process violations typically concern the management of the particular arbitration which almost inevitably are matters that fall within the discretion of the tribunal. The present case is a good example of such a case. As Menon CJ pointed out, when such decisions are subsequently challenged in court, it is essential that the court steers a course which holds two competing interests in balance: first, the need to robustly uphold what may properly be regarded as the parties' due process rights; and second, the importance of preserving the proper limits of the tribunal's discretion in dealing with the procedural details of the case it must decide. He pointed out at [97] that the parties' right to be heard is implicitly limited by considerations of reasonableness and fairness and pointed out at [98] that in deciding whether a party has been denied the right to a fair hearing, the proper approach a court should take is to ask itself whether what the tribunal did (or decided not to do) falls within the range of what a reasonable

and fair-minded tribunal might have done. After emphasising at [102] that any alleged unfairness on which the complaining party seeks to found its claim of breach of natural justice must have been brought to the attention of the tribunal, Menon CJ went on to make the following remarks at [103]–[104]:

> [103] Second, the court should accord a margin of deference to the tribunal in its exercise of procedural discretion. Deference is accorded in recognition of the fact that (a) the tribunal possesses a wide discretion to determine the arbitral procedure, and (b) that discretion is exercised within a highly specific and fact-intensive contextual milieu, the finer points of which the court may not be privy to. It has therefore been said that the court ought not to micromanage the tribunal's procedural decision-making, and will instead give 'substantial deference' to procedural decisions of the tribunal (*On Call Internet Services Ltd v Telus Communications Co* [2013] BCAA 366 at [18]). This means that the court will not intervene simply because it might have done things differently ([*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*")] at [58], citing *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 at [67]). Overall, the threshold for intervention is a relatively high one: there must be a real basis for alleging that the tribunal has conducted the arbitral process 'either irrationally or capriciously' (*Soh Beng Tee* at [65(d)]), or where the tribunal's conduct of the proceedings is 'so far removed from what could *reasonably* be expected of the arbitral process that it must be rectified' ([*ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm)] ([97(c)] *supra*) at [38]).
>
> [104] The foregoing discussion of the applicable principles may be summarised as follows:
>
> > (a) The parties' right to be heard in arbitral proceedings finds expression in Art 18 of the Model Law, which provides that each party shall have a 'full opportunity' of presenting its case. An award obtained in proceedings conducted in breach of Art 18 is susceptible to annulment under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA.
> >
> > (b) The Art 18 right to a 'full opportunity' of presenting one's case is not an unlimited one. It is impliedly limited by considerations of reasonableness and fairness.

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

72 More recently, Sir Henry Bernard Eder IJ in *CPU and others v CPX* [2022] 4 SLR 314 conveniently summarised the principles applicable to an application under s 24(*b*) of the IAA in the following terms at [53]:

> The first thread concerns the applicants' submission that the Award should be set aside pursuant to the power in s 24(*b*) of the Act, which provides that the court may set aside an award if 'a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced'. As submitted by the respondent:
>
> > (a) In order to succeed in setting aside an arbitral award on the basis that the rules of natural justice have been breached, the applicant must establish: (i) which rule of natural justice has been breached; (ii) how the rule has been breached; (iii) in what way the breach was connected to the making of the award; and (iv) how the breach prejudiced its rights: [*Soh Beng Tee*] at [29].
> >
> > (b) The threshold for finding a breach of natural justice is a high one, and it is only in exceptional cases that a court will find that threshold crossed: [*China Machine*] at [87] and *Soh Beng Tee* at [54]. There must be a real basis for alleging that the tribunal has conducted the arbitral process 'either irrationally or

capriciously', or the tribunal's conduct of the proceedings must be 'so far removed from what could reasonably be expected of the arbitral process that it must be rectified': *China Machine* at [103].

(c) The overarching enquiry is whether 'what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done': *China Machine* at [98]. As submitted by the respondent, this inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances. The corollary to that is twofold: (i) the tribunal's conduct and decisions will only be assessed by reference to what was known to the tribunal at the material time, and hence the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in its exercise of procedural discretion and will not intervene simply because it might have done things differently (*China Machine* at [104(d)]).

(d) Since an assertion that a tribunal has acted in breach of natural justice is very serious, it is clear that if a party (*China Machine* at [168] and [170]):

> … intends to contend that there has been a fatal failure in the process of the arbitration, then there *must* be fair intimation to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding. [emphasis in original]

(e) Even if there has been a breach of natural justice, a causal nexus must be established between the breach and the award made: *Soh Beng Tee* at [73].

(f) The applicant must show that the breach of natural justice denied the tribunal the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to its deliberations. The issue is whether the material *could reasonably* have made a difference to the arbitrator, rather than whether it *would necessarily* have made a difference. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the

> arbitrator: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54]; *Soh Beng Tee* at [86].

[emphasis in original]

73 In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, V K Rajah JA delivering the judgment of the court stated at [37] that in order to set aside an arbitral award under s 24(*b*) of the IAA, the court must be satisfied, first, that the arbitral tribunal breached a rule of natural justice. Second, the court must then be satisfied that the breach caused actual or real prejudice to the party challenging the award. In other words, the breach must have altered the final outcome of the proceedings in some meaningful way. The latter requirement was explained by Menon JA (as he then was) in delivering the judgment of the Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") as follows at [54]:

> The proliferation of labels may not ultimately be helpful. Nevertheless, it is important to bear in mind that it is never in the interest of the court, much less its role, to assume the function of the arbitral tribunal. To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, 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. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be

> said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator (cf *Soh Beng Tee* at [86]).

74 It follows that in accordance with the principles laid down in the above cases, for CYW to succeed in its application, it must establish, first, that there was a breach of natural justice and, second, as explained in *L W Infrastructure* at [54], that the Tribunal was denied the benefit of arguments that had a real as opposed to a fanciful chance of making a difference to their decision.

Issue 1: Whether there was a breach of natural justice as CYW was not given a fair opportunity to present its case

75 Although primary attention was paid to the effect of the orders made on 3 July 2021 described by counsel for CYW as "Unless Orders" (see [17] above), CYW also complained in its written submissions of the statement made by the Tribunal on 22 April 2021 that no further extension will be given to file the RDCC beyond 17 May 2021. CYW submitted that thereafter, it hurriedly engaged an expert to expedite the matter. Although there was no evidence of when the expert was engaged, it may at least seem to be surprising that an expert was not engaged earlier having regard to the fact the RDCC was initially due on 3 May 2021 (see [32] above).

76 It does not seem to me that the approach taken by the Tribunal at that time was unreasonable. In any event, the Tribunal granted a further extension up to 18 June 2021 (see [36] above). What seems to me more significant was that the Tribunal was making it clear that the hearing dates were firm and that it was not prepared to have CYW proceed on the basis that the timetable fixed by the Tribunal was fluid. Further, it could hardly be said the Tribunal was unreasonable in granting a three-week extension of time for CYW to file its

RDCC on 27 May 2021 when CYW's counsel only sought a one-week indulgence to obtain its client's instructions on 25 May 2021 (see [35] above). It should be noted that the reason provided for the request of a one-week extension of time was that CYW was a State-owned entity and therefore would have to obtain approval from its stakeholders, including ministerial clearance, before taking any action in the Arbitration.

77 It was in that context that the request for a further 14-day extension of time was made by CYW on 18 June 2021. That request made no mention of any difficulty in filing an expert report or witness statements due to their expert and witness being diagnosed with Covid (see [38] above). This difficulty was first raised on 25 June 2021. I have set out the relevant portion of CYW's letter at [40] above. It should be noted that no timeframe was proffered for the provision of the expert report and witness statements, but only that they would be supplied as soon as practicable.

78 It was in those circumstances, over the objection of CYX, that the Tribunal made PO No 2 granting a further extension of time until 7 July 2021 (see [43] above). This was a date around two months after the RDCC was originally due on 3 May 2021.

79 I have set out the reasons the Tribunal gave for making the order at [47]–[49] above. The Tribunal had taken into account the difficulty CYW faced in obtaining instructions and the fact that its witnesses had contracted Covid. However, it pointed out that CYW had had nearly eight months to obtain the witness statements and expert reports and had consistently failed to comply with timetables.

80 At the hearing before me on 15 March 2023, counsel for CYW placed particular reliance on what was said in its letter of 5 July 2021 to the Tribunal objecting to PO No 2 (see [45] above). He submitted, referring to that letter, that it was unreasonable for Prof F to have to work through a debilitating and potentially life-threatening illness such as Covid to comply with the timetable. However, the difficulty is that although there was a medical certificate of 22 June 2021 stating that Prof F had tested positive for Covid, there was no evidence of his state of health as at 5 July 2021 or any indication of when he could provide a report. That that was so was made clear in the letter from counsel for CYW of 7 July 2021, when an order was sought that Prof F was to furnish his report one week after a full recovery from Covid. Such a direction would leave the Tribunal and CYX in a state of complete uncertainty as to when the report would be filed and whether in fact the hearing could take place on the allocated days. Further, there was no suggestion as to when the other witness statements would be filed. Counsel for CYW very fairly conceded he did not know how long it was going to take to get the relevant instructions from the relevant minister of Indonesia to whom CYW answers. However, he submitted, having regard to the Covid pandemic, that it was a very uncertain time.

81 In that context, counsel for CYW referred to the e-mail written on behalf of CYW to the Tribunal on 18 June 2021 which stated that because of Covid, it had been a trying and difficult time for the people of Indonesia and all government agencies were directing their efforts and energies towards controlling the infection. He submitted that this was the first time he had alerted the Tribunal that the parties "were not operating in normal times". However, even at that point, an extension to file and serve the RDCC was only sought for 14 days (see [38] above).

82 Counsel for CYW referred to the fact that in *L W Infrastructure*, the Court of Appeal held that the Tribunal's giving of three days' notice prior to making an additional award constituted a breach of natural justice as there was insufficient time for the other parties to respond (see *L W Infrastructure* at [75]–[76]). To the extent that CYW's complaint was in relation to the Tribunal's failure to give advance notice of the orders in PO No 2 to the parties, the Tribunal had considered CYW's response contained in its counsel's letters of 5 and 7 July 2021 and resolved not to vary the orders. Therefore, unlike the plaintiff in *L W Infrastructure*, it could not be said that CYW was not afforded an opportunity to be heard in relation to the Tribunal's orders in PO No 2. Further, to the extent that that case was relied upon to demonstrate that the order itself was unreasonable, as was pointed out in *China Machine* at [103], the question of whether such an order was appropriate must be considered in the highly specific and fact-sensitive matrix in which the present Arbitration took place, which I address below.

83 Counsel for CYW criticised the Tribunal for requiring Prof F's report to be submitted by 7 July 2021 notwithstanding that the Tribunal was prepared to accept that Prof F was ill. Counsel for CYW also criticised the Tribunal's statement that expert evidence probably was not required on Indonesian law, pointing out that it was agreed in the Arbitration that each party would present expert evidence on matters of foreign law.

84 In my opinion, it was open to the Tribunal to make the orders which it made in PO No 2 for the following reasons.

(a) First, the orders were made in circumstances where there had been consistent non-compliance with the Tribunal's directions.

(b) Second, in the context where expert reports and witness statements were to be filed at the same time as the RDCC, the Tribunal prior to the date of PO No 2 had granted an extension up to 17 May 2021 for the submission of the expert reports, witness statements and the RDCC (see [32] above). Subsequently, in default of compliance with that extension, the Tribunal unilaterally extended the time for filing up to 21 May 2021 (see [34] above). It was only after CYW failed to file the RDCC by 21 May 2021, and the Tribunal indicated on 25 May 2021 that it would proceed with the Arbitration, that CYW sought a further extension of one week (see [35] above). In fact, the Tribunal extended the time until 18 June 2021 stating that was the final opportunity to provide the material (see [36] above). On 21 June 2021, a further 14-day extension was given, the Tribunal once again expressing its concern with the delay (see [39] above). On 25 June 2021, CYW stated in its letter that it would provide the witness statement and expert report as soon as possible (see [40] above). It seems to me that that chronology indicates that the Tribunal gave CYW a more than reasonable opportunity to file the material.

(c) Third, CYW had some eight months to provide the expert report and witness statements as CYX's Defence was served on 16 November 2020 (see [23] above).

(d) Fourth, despite requesting relatively short extensions during May and June 2021, CYW by 25 June 2021 was unable to provide any timeframe by which the outstanding material would be supplied.

(e) Fifth, the conduct of CYW, if it were allowed to continue, would lead to the adjournment of the hearing and consequent difficulty in obtaining an early alternative date.

(f) Sixth, and importantly, CYX had a legitimate interest in the prompt determination of the Arbitration, particularly having regard to its very substantial counterclaim.

85 In all these circumstances, notwithstanding the difficulty CYW may have had in complying with the directions of the Tribunal, the approach of the Tribunal was one which was open to be taken by a reasonable and fair-minded tribunal. There was in these circumstances no denial of natural justice. CYW was given a reasonable opportunity to present its case, notwithstanding the difficulties it may have faced as a result of the Covid pandemic and the difficulty in obtaining instructions from the Indonesian Government.

86 If the only basis for the Tribunal's order in relation to Prof F's Report was that it was unnecessary as questions of Indonesian law could be dealt with by argument rather than evidence, there may have been some force in CYW's contention. Although the Tribunal, with respect, was correct in stating that it was common in international arbitration for such questions to be dealt with by submissions from counsel without receiving expert evidence (see [47] above; see also Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 7th Ed, 2023) at paras 6.151–6.152), the parties to the present proceedings contemplated that questions of foreign law would be dealt with by expert witnesses. However, leaving this matter aside, the fact remains there was no denial of natural justice in relation to the orders made in PO No 2 so far as they related to expert reports and witness statements.

87 The same applies to the Tribunal's order that the English translations of the documents filed with CYW's SOC were to be filed by 7 July 2021. Further, it is difficult to see that the Covid pandemic could have hindered such translations. CYX was entitled to have the translations within a reasonable time to enable it to file its Rejoinder and it must be remembered that the documents to be translated were those filed with the SOC which was filed on 28 September 2020. In those circumstances, a reasonable and fair-minded tribunal was entitled to make the order that the Tribunal made in PO No 2 relating to the translation of documents.

88 For these reasons, there was no breach of natural justice by reason of the time limits imposed for the delivery of witness statements, expert reports including Prof F's report, and English translation of the documents including *Nine AM*.

Issue 2: Whether CYW had suffered prejudice as the Tribunal was denied the benefit of arguments that had a real as opposed to a fanciful chance of making a difference to the decision

89 Although it is strictly unnecessary to decide the question of whether CYW had suffered prejudice in light of my conclusion above that there was no breach of natural justice, it is appropriate that I do so in the event that my conclusion on the first issue is found to be incorrect.

90 In its written submissions, CYW referred to a number of issues in relation to which the Tribunal, in its Award, made reference to the evidence of CYX's expert, Dr G, with regard to Indonesian law. CYW submits that had Prof F been permitted to give evidence, the Tribunal may have come to a different conclusion as to whether there was actual or implied authority for Mr C to enter

into the Security Deed. It is also contended that the case of *Nine AM* may have been of assistance to the Tribunal as to whether the Security Deed was invalid for non-compliance with the Language Law. CYW also states that the evidence of Prof F may have informed the Tribunal on the issue of whether CYW had capacity to enter into the Security Deed; but apart from noting that the Tribunal relied on Dr G's evidence in relation to that issue, CYW made no further submissions on it.

91 In dealing with the issue of Mr C's authority, CYW refers to Dr G's evidence that Mr C could create security without informing the board of CYW of it and without minutes of any meeting authorising the creation of the security. It was submitted that was exactly where the evidence of Prof F would have made a difference.

92 CYW also relies upon the fact that one of the arbitrators, Dr E, dissented on whether Mr C had actual authority or the first limb of ostensible authority to bind CYW to the Security Deed. Dr E reached that conclusion based on his construction of Article 98(3) and Article 102 of the Company Law (Law No 40 of 2007) (Indonesia) (the "Indonesian Company Law"). It is unnecessary to set out his reasoning which is contained at [9]–[28] of his dissenting opinion in which he concludes that only the board of directors was entitled to make any decision to enter into a security deed charging less than 50% of the company's net assets. CYW argues that in this respect, the evidence of Prof F could have made a difference to the outcome of the Award.

93 Although with great respect there is force in Dr E's construction of the two Articles of the Indonesian Company Law in question, what is critical is that Dr E agreed with the majority that as a matter of Queensland law, CYW had

represented to CYX that Mr C had authority to enter into the Security Deed, which representation was relied upon by CYX as a consequence of which CYW was bound by the Security Deed. In its Award, the Tribunal unanimously concluded (at paras 178–182) that Mr C had ostensible authority to enter into the transaction or that CYW was estopped from denying he had authority to do so. In Dr E's dissenting opinion, he observed at para 2:

> [T]he minority has no disagreement with the [majority of the Tribunal] on the majority of the paragraphs of the Award pertaining to the final conclusion that the Respondent [*ie*, CYX] has proved its case … that the *Respondent* had represented that [Mr C] had Ostensible Authority to enter into the Security Deed on the Claimants [*sic*] [*ie*, CYW] behalf … [emphasis added]

It is evident that the phrase "the Respondent had represented" in the extract reproduced above was in fact intended to refer to CYW, and not CYX.

94 In this context, CYW's contention that Prof F's evidence would have had a real chance of making a difference to the Tribunal's decision raises two difficulties. The first is that there is no evidence of what Prof F was likely to say in his report on the question of Mr C's actual or implied authority. Absent such evidence, it cannot be said that CYW has demonstrated that the Tribunal was denied the benefit of arguments on this issue which had a real chance of making a difference to the decision of the Tribunal.

95 Even if it could be assumed that Prof F would give an opinion consistent with the conclusion reached by Dr E on the question of actual and implied authority, that could not affect the basis on which the Tribunal unanimously reached their conclusion on ostensible authority and estoppel which the Tribunal concluded were matters governed by Queensland law. There is nothing to suggest that Prof F had the expertise to give evidence on this question, much

less that he would have given evidence contrary to the conclusion which was reached.

96 That leaves the Language Law. The Tribunal noted in its Award at para 219 that it was an agreed fact that the Security Deed had not been translated into Bahasa Indonesia. It noted CYW's submission that that failure caused the Security Deed to be in breach of Article 31(1) of the Language Law which was an unlawful act that resulted in the contract being invalid under Indonesian law. The Tribunal also noted that CYW relied upon the decision of the Indonesian Supreme Court in *Nine AM* which held invalid a loan agreement governed by Indonesian law that was not translated into Bahasa Indonesia.

97 The Tribunal unanimously rejected this argument. Their conclusions were as follows:

> 221 In the Tribunal's judgment, the Language Law has no bearing on the validity of the Security Deed. The contract is government by Queensland law *not* Indonesian law. [Mr H], the Claimant's expert on Australian law, was asked "[w]hether the Language Law in Article 1320 of the Indonesian Civil Code appl[ed] [*sic*] to the issue of the Validity of the Security Deed, as the Security Deed is governed by Queensland law". In his expert opinion, he did not say that the Language Law applied. This is not surprising. It is a basic principle that the law chosen by the parties in their contract governs the formation and substantive validity of that contract.
>
> 222 The Tribunal need go no further to determine this issue. However, even under Indonesian law the Language Law would not affect the validity of the Security Deed. This is because the Language Law required a presidential regulation to come into effect. The relevant presidential regulation was not promulgated until September 2019, nearly two years after the Security Deed was executed. The Tribunal accepts the evidence of [Dr G] and the statement of Indonesian Minister for Law and Human Rights that the Language Law does not have retrospective operation. Neither, according to [Dr G], is it mandatory in operation. Thus, a failure to comply with the Language Law does not have any consequences.

98 Submitting that the evidence of Prof F would have a real and not fanciful chance of making a difference to the decision, CYW placed reliance on an interchange between Dr E and Dr G which took place during the course of the Arbitration. Dr G was asked by Dr E about an Indonesian legal opinion obtained by CYX in 2017 which Dr E suggested to Dr G indicated that the Security Deed had to be executed in the Indonesian language in order to comply with the requirements of the Language Law. Dr G said he did not agree as "the object of the Security Deed was located in another country", and the law applicable to the Security Deed was the law of the place where the object was located.

99 Dr E also referred Dr G to a reference in the opinion to a West Jakarta District Court decision which found that an Indonesian law-governed loan agreement was null and void on the basis that it violated the Language Law, which decision was subsequently upheld by the Jakarta High Court. Dr G accepted that one needed to follow what Indonesian statutes say but said that the question was what the legal consequence of not doing so was. Dr G ultimately said he agreed with the opinion that for certainty, the Security Deed should be translated into Bahasa Indonesian and (it would appear) the translation should be signed by the parties.

100 It should be noted that Dr E did not question Dr G on his opinion that the Language Law required a presidential regulation to come into effect and that the resolution was not promulgated until nearly two years after the Security Deed was executed. He also did not question Dr G on his opinion that the Language Law did not have retrospective operation.

101 Once again there are two insuperable difficulties to CYW's submissions on this issue. First, there is nothing to suggest that Prof F would have given an

opinion contrary to that of Dr G or that the matters referred to in para 222 of the Award were incorrect. Second, there is nothing to suggest that Prof F would have given evidence that the Language Law extended to an agreement governed by Queensland law. In these circumstances, it cannot be said that it has been established that Prof F's evidence on this issue would have had a real chance of making a difference to the decision of the Tribunal.

Conclusion

102 In these circumstances, CYW's claim fails. I therefore dismiss the application.

103 CYW is to pay CYX its costs of the application.

104 In the event that the parties are unable to agree on the quantum of costs payable within 14 days of the date of this order, I direct the parties are to make submissions on the appropriate quantum within a further 21 days, with such submissions including summaries of the costs which each party has incurred to

date. Parties are at liberty to apply for a variation of the directions in this paragraph concerning costs.

Thomas Bathurst
International Judge

Suhaimi bin Lazim, Mohamed Hashim H Sirajudeen (Mirandah Law LLP) and Abdul Rohim bin Sarip (A. Rohim Noor Lila LLP) for the applicant;
Herman Jeremiah, Aw Sze Min, Lee Qiu Li and Tan Yi Xi Joie (Dentons Rodyk & Davidson LLP) for the respondent.