

REDACTED & AMENDED VERSION

HCCT 96/2021
[2022] HKCFI 2267

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 96 OF 2021**

IN THE MATTER OF SECTION 81 OF
THE ARBITRATION ORDINANCE
(CAP 609)

and

IN THE MATTER OF AN ARBITRAL
AWARD DATED 21 OCTOBER 2021
BY MR ROBERT TANG GBM, SBS,
QC, SC, JP, DR THOMAS SO, JP AND
MS WINNIE TAM, SBS, SC JP

BETWEEN

LY

Plaintiff (Respondent
in the Arbitration)

and

HW

Defendant (Claimant
in the Arbitration)

Before: Hon Mimmie Chan J in Chambers

Date of Hearing: 28 June 2022

Date of Decision: 26 July 2022

DECISION

Background

1. In these proceedings, the Plaintiff (“LY”) applied to set aside a final arbitral award on merits and quantum dated 21 October 2021 (“Award”) made by a tribunal of 3 arbitrators (“Tribunal”) in an arbitration which had been commenced by the Defendant (“HW”) in Hong Kong against LY (“Arbitration”). The grounds relied upon for the setting aside are that the arbitral procedure was not in accordance with the parties’ agreement, in that the Tribunal failed to deal with all the key issues which had been put before it, and/or the Tribunal had failed to provide sufficient reasons for its decisions on the key issues; and that the Award is in conflict with the public policy of Hong Kong.

2. HW opposed the application, firstly on the ground that a failure to deal with key issues cannot give rise to an order setting aside the Award under section 81 of the Arbitration Ordinance (“Ordinance”). Reliance was placed on the decision in *Brunswick Bowling & Biliards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD, where the Court pointed out that a tribunal’s failure to consider an issue is a matter which goes to the substantive decision rather than a failure to follow the arbitral procedure agreed by the parties. It is at most an error of law which cannot be a basis for the Court to set aside the award.

3. On behalf of HW, Mr Manzoni SC also referred to the *travaux préparatoires* to Article 34 of the Model Law (“Article 34”), which suggested that the drafters had considered the possibility of adding a

separate ground of *infra petita* for setting aside, but it was not eventually adopted. However, as Mr Yu SC pointed out on behalf of LY, the Working Group was then considering the possibility of adding *infra petita* as a specific ground for setting aside, and the eventual decision of the Working Group was to limit the scope of Article 34 to the grounds specified in the New York Convention, to ensure a high degree of consistency with the Convention. The drafters of Article 34 considered that a claim or complaint of *infra petita* would in any event fall within the ground of public policy already included in Article 34. The authorities show that once *infra petita* is made out, it would be a valid ground of challenge, as an arbitral procedure which is in contravention of principles of natural justice and basic standards of fairness would *not* be a procedure to which parties to an arbitration agreement would have agreed. The authorities referred to by Counsel include *Joseph, Jurisdiction and Arbitration Agreements And Their Enforcement* (3rd ed), para 16.42- 16.43; *Binder, International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (2019), p 448; *Born, International Commercial Arbitration* (3rd ed) pp 3899-3900; and *Waincymer, Procedure and Evidence in International Arbitration* (2012) para 16.19.1. Counsel also referred to this Court's earlier decisions in *Z v R* unreported, HCCT 11/2021, 9 August 2021 and *N v C* unreported, HCCT 3/2019, 16 September 2019.

4. *N v C* was a case decided on the ground of serious irregularity, under section 4 of Schedule 2 of the Ordinance, which expressly includes as a ground for challenging an arbitral award a failure by the tribunal to deal with all the issues that were put to it, which has caused substantial injustice to the applicant.

5. As for the judgment in *Brunswick*, I would agree that it is generally correct to say that a tribunal's failure to *consider* an issue would normally be a matter which goes to the substantive decision, which may amount only to an error of law, which is *not* a ground for challenging the award. It remains to be seen whether the tribunal has failed to actually decide or deal with an issue, what the issue is, and in the context of the present dispute, whether the tribunal failed to give reasons for its decision on an issue claimed to be essential to the determination of the dispute submitted to the tribunal, and whether such failure can constitute a failure to follow the parties' agreed arbitral procedure, to become a ground under section 81 of the Ordinance for setting aside.

6. In *A v B* [2015] 3 HKLRD 586, for example, the tribunal's failure to deal with the important defence, of the claim being time-barred, was considered to be not just an error of law made, but a denial of due process causing substantial injustice and unfairness to the parties, as the parties were entitled to expect the limitation defence, which would have defeated any and all claims raised, to be addressed and to be seen from the award to have been considered by the tribunal. It was most evidently a key and critical issue, which was not considered or dealt with by the tribunal at all.

7. In the present case, however, the arguments made by Counsel on this preliminary point on Article 34(2)(a)(iii) make no difference of significance, since LY has applied under both Article 34 (2) (a) (iii) and Article 34 (2) (b) (ii) to set aside the Award. Even if the Tribunal's alleged failure to deal with a key issue does *not* come within the ground of non-compliance with the agreed arbitral procedure under Article 34 (2) (a) (iii),

LY is still entitled to claim that such failure is against the public policy of Hong Kong as a matter undermining due process, and being contrary to basic notions of justice and fairness, to invoke the Court's discretion to set aside the Award as a result. That was the approach adopted by this Court for the setting aside in *A v B* [2015] 3 HKLRD 586.

8. On the general question of whether or not a ground has been established to seek setting aside as the exclusive recourse against an award under Article 34, given effect by section 81 of the Ordinance, the authorities are clear. In *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1, the Court referred to the commentary of Professor van den Berg in "*The New York Convention of 1958: An Overview*", that "the grounds for refusal of enforcement are to be construed narrowly", which means that "their existence is accepted in serious cases only", and that "the courts appear to accept a violation of due process in serious cases only, thereby applying the general rule of interpretation of article V of the New York Convention that the grounds for refusal of enforcement are to be construed narrowly". At paragraph 94 of the judgment of Tang VP (as His Lordship then was), it was observed:

"I am inclined to the view that the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process."

9. A similarly narrow approach has been adopted by the courts to the construction of the "public policy" ground for setting aside. In *Qinhuangdao Tongda Enterprise Development Co v Million Basic Co Ltd* [1993] 1 HKLR 173, 178, the Court emphasized that the "public policy" ground must not be seen as a catch-all provision to be used wherever convenient. It is limited in scope and is to be sparingly applied. "Contrary

to public policy” has been held by the Court of Final Appeal to mean “contrary to the fundamental conceptions of morality and justice” of the forum (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 139F). If the public policy ground is to be raised, “there must be something more, that is, a substantial injustice arising out of an award which is so shocking to the court’s conscience as to render enforcement repugnant” (*A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389).

The dispute in the Arbitration

10. LY is a company incorporated in Hong Kong, and HW is a company incorporated on the Mainland. Both are in the business of pharmaceutical distribution on the Mainland.

11. HW entered into a Distribution Agreement dated 29 January 2015 (“**Agreement**”), under which HW was appointed the exclusive distributor of S products (“**Products**”) of [REDACTED] (“**AZ**”), a company also engaged in the business of manufacturing and distributing pharmaceutical products. AZ is an affiliated company of [REDACTED], whereas HW is a member of the group of companies forming part of [REDACTED], a publicly listed company in Hong Kong.

12. Under the Agreement, HW was to purchase the Products in its own name from AZ, and sell them in its own name within the Mainland, subject to and in accordance with the terms set out in the Agreement.

13. By a notice dated 27 June 2018 (“**Notice**”), AZ assigned to LY all its rights and obligations under the Agreement, with effect from 28 June 2018 (“**Assignment**”). The validity of the Assignment is not disputed in the Arbitration. By virtue of the Assignment, LY stepped into the shoes of AZ, and HW became LY’s exclusive distributor of the Products on the Mainland. Further, it is not disputed that Schedule 1 of the Notice referred to a letter dated 1 August 2016 (“**2016 Letter**”), from HW’s parent company and accepted by AZ’s parent company, as a supplemental agreement between HW and AZ, and that both HW and AZ agreed to be bound by the 2016 Letter. The contents of the 2016 Letter will be dealt with below.

14. On 17 May 2019, LY issued a notice of termination of the Agreement, on the ground that HW had failed to achieve the annual growth rate target agreed, in that the annual sales value (“**ASV**”) for 2018 was merely RMB 353.31 million, which is lower than RMB 354 million as the ASV required under the 2016 Letter. The purported termination was disputed by HW, and on 29 July 2019, HW filed a notice of arbitration in accordance with the dispute resolution mechanism prescribed under the Agreement.

15. In the Arbitration, HW sought (1) a declaration that LY was in breach of the Agreement, and that its purported termination is invalid; (2) an order that LY’s invalid termination had been accepted by HW; and (3) damages for breach, with interest and costs. HW put forward various contentions in relation to the calculation of the ASV figure, and one of such contentions was that HW had met the ASV target for 2018, as the 2017 “rollover” sales volumes should have been included in the calculation

of the 2018 ASV figure, in accordance with a Rollover Arrangement agreed, by virtue of which the sales value representing inventory volume in excess of certain inventory days should be deducted from the current year's figures (i.e. 2017) and included in the next year's figures (i.e. for 2018) ("**Rollover Arrangement**").

16. On its part, LY put forward and relied on its calculation of the ASV for 2018 being RMB 353.31 million.

17. Hence, the parties were in dispute over how the ASV should be calculated under the Agreement, and whether the ASV target of RMB 354 million for 2018 had been met. If LY's calculation of the ASV for 2018 was not accepted by the Tribunal, the purported termination of the Agreement in May 2019 would have been wrongful, LY would have been in breach of the Agreement, and liable for the damages sought by HW.

18. The above is reflected in the pleadings served in the Arbitration, by the parties' submissions, and correctly pointed out by the Tribunal, at paragraphs 64 and 73 of the Award:

"64. The parties are agreed that the sales in 2017 exceeded RMB 290m. The parties disagree over whether the target of RMB 354m for 2018 was met.

...

73. At the heart of this arbitration is the parties' disagreement over the correct calculation of the annual sales value. (HW)'s case is that the target for 2018 was met in one or more ways explained below." (Emphases added)

The issues not dealt with

19. According to LY, the Tribunal failed in its Award to deal with 3 issues which had been expressly drawn to the attention of the Tribunal, which issues were integral to the resolution of the parties' dispute concerning the Rollover Arrangement relied upon by HW for its calculation of the ASV under the Agreement. The Rollover Arrangement had been put forward by HW as an arrangement which had been made and agreed between HW and AZ, whereby sales value representing inventory volume in excess of certain inventory days should be deducted from the figure of a particular year, and included in the next year.

20. LY claims that in the Arbitration, the parties had disputed whether the alleged Rollover Arrangement existed, and if it existed, whether it would be consistent with the Agreement, in light of the definition of ASV in section 10.2 of the Agreement, and the need for any amendment to the Agreement to be signed and in writing in accordance with section 38.1. This was referred to as the "sections 10.2 and 38.1 Issue".

21. The second disputed issue which had been put to the Tribunal, on LY's case, was whether the Joint Review Committee established under section 13.1 of the Agreement ("**JRC**") had power to make a determination on the ASV for future years, and whether the determination by the JRC recorded in the minutes of a meeting of the JRC held on 18 January 2016 ("**2016 Minutes**"), to determine the inventory days at the end of 2015, and that the portion exceeding 55 days would not be included in the calculation of rebate for 2015 and would be included in the 2016 sales value for the calculation of rebate ("**JRC Agreement**"), had

effect on the parties' rights and obligations under the Agreement, and whether the JRC Agreement amounted to a valid amendment of the Agreement by virtue of section 38.1. This was referred to as the "sections 13.3 and 38.1 Issue".

22. Finally, LY claims that the third issue in dispute was whether the Rollover Arrangement would be binding on LY as an assignee under Article 82 of the PRC Contract Law, given LY's state of knowledge (or lack of knowledge) of the practice between HW and AZ. This was referred to as the "Assignment Issue".

23. It was emphasized on behalf of LY that if any of these 3 issues had been found in favour of LY in the Arbitration, the sales value in 2017 could not have been carried over and taken into account for the calculation of the ASV for 2018, such that HW would have been in breach of agreement for the 2018 target, and LY would have been entitled to terminate the Agreement.

24. It was accordingly claimed that as evident from the Award, the Tribunal had failed to deal with key issues put before it, and that the reasons provided by the Tribunal in the Award were insufficient to enable the parties to understand the legal basis on which the Tribunal had found against LY on the Rollover Arrangement issue, which amounted to a departure from the parties' agreed arbitral procedure, was a denial of due process, and hence in conflict with the public policy of Hong Kong, and should be set aside.

The applicable legal principles

25. Section 67 of the Ordinance applies Article 31 of the Model Law. Article 31 (2) provides that an award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given.

26. As already pointed out in the preceding paragraphs of this Decision, the grounds for setting aside and refusal of enforcement of an award are to be construed narrowly, and it has to be shown by the applicant that the error complained of is egregious to warrant the setting aside of the award.

27. As already emphasized in the decision of *Z v R* and the cases referred to therein:

“18. The legal principles do not appear to be in real dispute. In determining whether the ground of the tribunal’s failure to deal with all issues is established, there has to be an ‘issue’ which has been put to the tribunal, and it has to be shown that the tribunal failed to deal with the issue and that such failure has caused substantial injustice. Counsel for the Plaintiff relies on *Petrochemical Industries Co v Dow Chemical* [2012] EWHC 2739 (Comm). The Plaintiff accepts that the tribunal does not have to set out each step by which it reaches its conclusion, and a tribunal’s decision on an issue without giving reasons does not constitute failure to deal with it. Counsel relies on the fact that it must be made apparent from the award that the tribunal has addressed the issues which it has to revolve, referring to the observations made by the Court in *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), at para 38, in the context of an application made under section 68 of the Arbitration Act 1996 to set aside an award on the ground of serious irregularity:

‘... there should be some form of communication, normally in the form of a decision, by an arbitral tribunal to the parties from which the latter can ascertain whether or not an essential issue has been dealt with. It is not sufficient for

an arbitral tribunal to deal with crucial issues *in pectore*, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section 68 (2) (d) is to ensure that all those issues the determination of which are crucial to the tribunal's decisions are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined." (Emphasis added)

19. In *N v C* [2019] HKCFI 2292, this Court emphasized that a failure to deal with an issue is not equivalent to failure to deal with an argument or a submission made or advanced at the hearing. The decision in *Weldon Plant Ltd v The Commission for the New Towns* [2000] BLR 496 was referred to, where the English court explained (again in the context of section 68 (2) (d) of the Arbitration Act):

'It is concerned with a failure, that is to say where the arbitral tribunal has not dealt at all with the case of a party so that a substantial injustice has resulted, eg where a claim has been overlooked, or where the decision cannot be justified as a particular key issue has not been decided which is crucial to the result.' (Emphases added)

20. As the Plaintiff also accepts, the fact that the arbitrator had not given adequate reasons for his award, or sufficiently clarified that an issue fell away because of the findings which had been made, is not tantamount to the arbitrator having failed to deal with an issue. In *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) (cited in paragraph 35 of *N v C*), the point was made clear:

'If the tribunal has dealt with the issue in any way, Section 68 (2) (d) is inapplicable and that is the end of the inquiry (*Primera* at paragraph 40-1); it does not matter for the purposes of Section 68 (2) (d) that the tribunal has dealt with it well, badly or indifferently.

...

A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue (*Fidelity Management v Myriad International* [2005] 2 Lloyd's Rep 508, paragraph 10, *World Trade Corporation*, paragraph 19). A failure by a tribunal to set out each step by which to reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that

was put to it (*Hussman v Al Ameen* [2000] 2 Lloyd's Rep 83).

...

A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decision on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise (*Petrochemical Industries* at paragraph 27). If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues (*Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), paragraph 30).' (Emphasis added)

21. Needless to say, as it is trite, the issue before this Court is not whether the tribunal came to the right conclusion. Whether the tribunal is right on its findings of facts and law, whether its decision is supported by evidence, whether the tribunal gave sufficient reasons for the findings, and the quality of the reasoning, are not matters for consideration. As the Hong Kong Court repeatedly emphasized, an application made under section 81 of the Arbitration Ordinance is not an appeal on the merits or on law. The court is not concerned with the substantive correctness of an award, but only with the structural integrity of the arbitral process and it is only when there is a serious or egregious denial of due process that the court can interfere (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq)* (*No 1*) [2012] 4 HKLRD 1)."

28. It is also clear from the authorities, that in considering the important question of whether a tribunal has dealt with an issue, the approach is to read the award in a "reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it" (*Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at p14F *per* Bingham J). It has to be borne in mind that the parties to the arbitration to whom the award was issued were aware of and understood how the issues had been presented to and argued before

the tribunal. Reading the award may involve taking account of the parties' submissions, but the submissions made by the parties cannot dictate how the tribunal structures the disposal of the dispute referred to it. Although awards often respond to the parties' submissions, they should not be read in a vacuum, and the question is whether, properly understood, the award has dealt with an issue which is key to the tribunal's decision on the dispute referred to it in the arbitration. The tribunal is only required, under Article 31(2), to state the reasons upon which the award is based.

29. In the case of *Petrochemical Industries Company (KSC) v The Dow Chemical Company* [2012] EW HC 2739 (Comm), the Court highlighted the distinction between "issues" and "arguments" advanced or "points" made by the parties:

"A distinction is drawn in the authorities between, on the one hand 'issues' and, on the other hand, what are variously referred to as (for example) 'arguments' advanced or 'points' made by parties to an arbitration or 'lines of reasoning' or 'steps' in an argument (see, for example, *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83, 97 and *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The 'Pamphilos')* [2002] 2 Lloyd's Rep 681, 686). These authorities demonstrate a consistent concern to maintain the 'high threshold' that has been said to be required for establishing a serious irregularity (see *Lesotho Highlands Development Authority v Impregilo SpA and ors* [2005] UKHL 34 paragraph 28 and the other judicial observations collected by Tomlinson J in *AAB AG v Hochtief Airport GMBH and anor* [2006] EWHC 388 paragraph 63). The concern has sometimes been emphasised by references to 'essential' issues or 'key' issues or 'crucial' issues (see respectively, for example, *Ascot Commodities NV v Olam International Ltd* [2002] 2 Lloyd's Rep 277, 284; *Weldon Plant v Commission for New Towns* [2001] 1 All ER 264, 279; and *Buyuk Camlica Shipping Trading and Industry Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm.)), but the adjectives are not, I think, intended to import a definitional gloss upon the statute but simply allude to the requirement that the serious irregularity result in substantial injustice: *Fidelity Management SA v Myriad International Holdings BV* [2005]

EWHC 1193 at paragraph 10. They do not, to my mind, go further in providing a useful test for applying section 68(2)(d).

I do not attempt the impossible task of defining what is an ‘issue’, but I reject three suggested yardsticks: First, in the Fidelity Management case (at paragraph 9) it was suggested that the answer to whether something is an issue ‘should normally be obvious’ if it is considered whether what has not been dealt with by a tribunal is ‘capable of being formulated as an essential issue of the nature of what should be included in an agreed list of issues being prepared for the purpose of a case management conference’. I do not find this helpful: what is appropriate for a case management list of issues varies enormously depending on the nature of the case, but there is no standard or recognised criterion for their formulation.

Secondly, it was suggested by Mr Smouha that the lists of issues submitted by the parties cast light, or at least that submitted by PIC casts light, upon what questions in the arbitration are ‘issues’ for the purpose of sub-section 68(2)(d). He cited observations by HHJ Humphrey Lloyd QC in the Weldon Plant case at paragraph 34, by Morison J in the Fidelity Management case at paras 13 and 18 and by Colman J in *World Trade Corp v C Czarnikow Sugar Ltd*, [2005] 1 Lloyd’s Rep 422 at paragraph 16. The Tribunal ordered that the parties exchange ‘proposed lists of definitive issues in the arbitration’ and they did so. ... I can understand that a list of issues of this kind might assist to determine whether an issue was ‘put to’, and I come to that later: as I read them, this is what was meant in the authorities cited by Mr Smouha and referred to above. I do not accept that it helps to decide whether a question is an ‘issue’ within the meaning sub-section 68(2)(d). Otherwise parties would be able to modify the application of the mandatory provisions of section 68 by their formulation of issues in the course of a reference and I cannot accept that they can.”

30. In Hong Kong, the arbitration judge pointed out in *R v F* [2012] 5 HKLRD 278 that when reading an arbitral award and the reasons therein given by the tribunal, account should be taken of the nature of the arbitral process itself:

“An arbitral award must be read and understood in its proper context, in particular against the context as to how the relevant issues have been argued before the arbitration tribunal. This is particularly so as arbitration is a private and confidential dispute

resolution process based on party autonomy. An award made thereunder is intended to be read by the parties (who would be familiar with the background and how the issues have been argued) and, unlike a judgment of the court, not to be made public.

Further, it has often been said that a judgment of a court is not intended and should not be read as if it were a transcript of the proceedings before it. This must also apply with equal (if not greater) force in relation to arbitral awards. Of course, the reasoning process expressed in an award must be one that the readers of the award (who are mostly if not always the parties themselves only) can understand how and why the conclusion is reached on a particular issue. However, the way the reasons expected to be given in an arbitral award for a particular issue should be proportional to the complexities of how that issue is contended (or not contended) before the arbitral tribunal. Depending on how the issues are contended, the reasons do not necessarily need to be elaborate or lengthy, provided they could be understood in its proper context. It must be borne in mind that an arbitration award is the result of a private consensual process, which is intended and expected to be cost effective, and shorn of complexities and technicalities.”

31. It suffices therefore that the tribunal should clearly state its determination on the essential questions in dispute, and explain the reasons it came to the decision on the dispute. The reasons do not have to be elaborate or lengthy, as the award must be read against the context as to how issues had been argued before the tribunal, and an award is the result of a private consensual process. It is particularly important for the Court to bear in mind the object and principles of the Ordinance: which are to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense; that parties to a dispute should be free to agree on how their dispute should be resolved; and that the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance; all in accordance with and to reflect the policy of minimal judicial intervention into the arbitral process. The policy of minimal curial intervention is generally recognized in jurisdictions which are parties to the

New York Convention. The Singapore Court referred to that policy as being characterized by the desire to “support, and not to displace, the arbitral process” (*Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR (R) 732 at [29]).

32. I find the judgment of Vinodh Coomaraswamy J in *ASG v ASH* [2016] SGHC 130, cited by Mr Manzoni for HW, particularly helpful in the summary of various principles as stated by the Singapore Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, on the subject of the policy of minimal curial intervention:

“I summarise briefly the principles stated in *Soh Beng Tee* that are relevant to the present case:

- (a) Parties to arbitration have, in general, a right to be heard on every issue that may be relevant to the resolution of a dispute.
- (b) A successful party should not be deprived of the fruits of arbitration by technical challenges or an attempt to reargue the merits of the dispute disguised as a setting-aside application.
- (c) Minimal curial intervention is underpinned by two considerations: first, the need to recognise the autonomy of the arbitral process by encouraging finality; and second, that parties who opt for arbitration acknowledge and accept the attendant risk of having only a very limited right of recourse to the courts.
- (d) It is not the function of the court to comb an award to assign blame or to find fault in the process. Rather, the court should read an award generously so as to remedy only meaningful breaches of the rules of natural justice which actually cause prejudice.”

33. *ASG* concerned an application to set aside an arbitral award on the ground that there was a breach of the rules of natural justice, in that the

arbitrator had failed to consider or attempt to understand the plaintiff's evidence and submissions on a central aspect of its case, or that the plaintiff was unable to present its case on that aspect. In considering the claim that the tribunal had failed to deal with an issue, the Court in *ASG* pointed out that the courts generally take a generous approach towards reading the arbitral award, and referred to the observations of Akenhead J in the English case of *Atkins Limited v The Secretary of State for Transport* [2013] EWHC 139:

"I consider that it is very important that, where the Court is asked to conduct an exercise to determine whether or not in reality and substance an arbitrator has failed to deal with all the issues put to it [sic] within the meaning of Section 68 (2) (d) [of the English Arbitration Act dealing with setting aside], the Court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written. This is particularly so when the arbitrator in question is not only eminent and highly respected in his field but also has immense legal experience in the relevant field of law concerned. In a clear and obvious case, of course the Court will find that the ground exists and can move on to consider whether or not the circumstances merit interfering with the award." (Emphasis added)

34. The learned judge in *ASG* went on to examine other cases, and to explain the approach adopted by the courts when dealing with the question of whether an arbitrator has dealt with the issues. At paragraphs 57 to 61 of the judgment, the judge observed:

"57 Chan Seng Onn J also cited the decision of Bingham J (as Lord Bingham then was) in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 ('*Zermalt*') at [14]:

As a matter of general approach, the courts strive to uphold arbitration awards. *They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually*

the case, that there will be no substantial fault that can be found with it.

[emphasis added]

58 The observations in *Atkins and Zermalt* were approved by the Court of Appeal in *BLC* at [86] and *AKN* at [59]. In *AKN*, the Court of Appeal explained (at [38]) that the parties do not have a right to a ‘correct’ decision from an arbitrator. They have only a right to a decision which is within the ambit of their consent to have their dispute arbitrated and which follows a fair process. This means that ‘poor reasoning on the part of an arbitral tribunal is not a ground to set aside an arbitral award; even a misunderstanding of the arguments put forward by a party is not such a ground’ (at [59]). Thus, following the policy of minimal curial intervention, the courts will not interfere in the merits of an award in order to rescue parties who have made forensic choices that they might come to regret, or to offer them a second chance to canvass the merits of their respective cases (at [37]).

59 In *TMM*, Chan J identified and discussed an arbitrator’s duty to deal with the arguments presented (at [72] – [77]) and the duty to attempt to understand the parties’ submissions (at [88] - [91]). First, in relation to a tribunal’s duty to deal with the arguments presented:

- (a) A tribunal does not have a duty to deal with every issue that each party raises. The tribunal is required only to deal with the essential issues.
- (b) Tribunals must be given fair latitude to select which issues are essential. A court should not be too ready to intervene in this regard.
- (c) In deciding the essential issues, the tribunal need not deal with every argument which the parties have canvassed under each essential issue.
- (d) As long as a decision on one argument suffices to resolve an essential issue, the tribunal need not go on to consider all other arguments canvassed under that issue and which have become of academic interest only. As Judith Prakash J stated in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [60], ‘[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made’.
- (e) An issue need not be resolved expressly in an award; it may be resolved implicitly. Resolving an issue does

not have to entail navigating all the arguments and all the evidence. If the outcome of certain issues flows from the conclusion of a specific logically anterior issue, the tribunal may dispense with delving into the merits of the arguments and evidence for the former.

60 As for the tribunal's duty to attempt to understand the parties' submissions:

- (a) A tribunal must demonstrably have at least attempted to comprehend the parties' arguments on the essential issues.
- (b) The inability to ascertain the explanation for a tribunal's decision is only one of the factors which may establish that the tribunal did not in fact properly attempt to consider or comprehend the parties' arguments.
- (c) The central inquiry is whether the award shows that the tribunal applied its mind to the critical issues and arguments.
- (d) An assessment of whether the tribunal attempted to understand the parties' submissions is effectively an investigation into the tribunal's mind. The tribunal may, after applying its mind to an issue, come to a decision which may be characterised as inexplicable because it has failed to comprehend the submissions or has comprehended them erroneously. That is not a breach of the rules of natural justice."

35. At paragraph 61 of the judgment in *ASG*, the learned judge referred to the decision of the Singapore Court of Appeal in *AKN and another v ALC and others* [2015] 3 SLR 488, where the Court explained that an inference will not be made that a tribunal has failed to consider an important issue, unless such inference is "clear and virtually inescapable". The explanation of the relevance of the principles is useful, in the context of LY's reliance on public policy as the ground to set aside the Award in this case. The Court of Appeal's observations in *AKN* are set out at paragraph 46 of its judgment:

“46 To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem* (see also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (*‘Soh Beng Tee’*) at [43], citing *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 386). *Front Row* is useful in so far as it demonstrates what must be shown to make out a breach of natural justice on the basis that the arbitrator failed to consider an important pleaded issue. It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party’s case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party’s case), then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should **not** be drawn.

47 *Front Row* was recently considered in *AQU v QV* [2015] SGHC 26 (*‘AQU’*), where the High Court judge distilled the very principles which we have just enunciated above (see *AQU* at [30]-[35]). The judge in *AQU* also considered the High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 (*‘TMM’*), and reiterated the proposition that no party to an arbitration had a right to expect the arbitral tribunal to accept its arguments, regardless of how strong and credible it perceived those arguments to be (see *AQU* at [35]), citing *TMM* at [94]). This principle is important because it points to an important distinction between, on the one hand, an arbitral tribunal’s decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and, on the other hand, the arbitral tribunal’s failure to even consider that argument. Only the latter amounts to a breach of natural justice; the former is an error of law, not a breach of natural justice. [emphasis added]

36. The above principles are all useful and applicable to the consideration of the question in these proceedings, as to whether the Tribunal had failed to consider an issue which arose in the Arbitration, what such issue was, and whether the failure to consider such issue and to give reasons for its determination of the issue would constitute a departure from the parties' agreed procedure for arbitration, and/or constitute a breach of natural justice, such that the Award is in conflict with public policy and should be set aside.

The decision in the Award

37. Paragraphs 19 to 22 above set out the issues claimed by LY to have been put to the Tribunal, and which are said were not dealt with by the Tribunal in the Award.

38. To decide on the relevance of the issues, whether they had been dealt with, and if not, the consequence of such failure, it is necessary to consider what was the determination made in the Award, and how the Tribunal come to its decision.

39. The Tribunal first set out in the Award the relevant provisions of the Agreement, including the definitions of ASV, WASP, and CAGR in the Agreement. The Tribunal pointed out at paragraph 57 of the Award that the meaning of ASV is important "because the parties' dispute is concerned principally with whether the requisite ASV for 2018 was satisfied". The Tribunal noted that ASV is defined in clause 10.2 of the Agreement as "the Sales Volume of the Products throughout the Territory during a Calendar Year multiplied by the WASP of the Products for the Year".

40. The definition of WASP was then set out, as being the “weighted average sales price” of a specification of a Product, as was the definition of CAGR in section 1.15 of the Agreement, being the “compound annual growth rate” calculated in accordance with the formula set out in section 10.3 of the Agreement. The minimum CAGR which HW has to meet under the Agreement, in relation to its ASV every year, is a requirement under section 10.1 of the Agreement, and this was recited at paragraph 60 of the Award:

“The Distributor shall procure that the annual turnover of the Product (ASV) will have a (CAGR) of 15% each Calendar Year commencing from the Effective Date (‘Minimum CAGR’) based on the gross sales of the Product generated by (AZ) in 2014 Calendar Year (excluding VAT) which is RMB 201 million subject to adjustment per 2014 annual audit (‘2014 Sales Value’). In any given Calendar Year, the CAGR of the preceding Calendar Years shall not be lower than the Minimum CAGR.”

41. Under section 27.2.7 of the Agreement, if the failure to reach the minimum CAGR was due to reasons solely attributable to HW, AZ as the contracting party shall have the right to terminate the Agreement. The Tribunal pointed out that the minimum CAGR was not fulfilled for 2015, and referred to the 2016 Letter, which provided that AZ would not terminate the Agreement at the end of 2016, if HW should fulfill certain operational targets, including that:

- (1) HW should invest best commercial efforts, in close cooperation with AC, to perform its duties under the Agreement; and
- (2) “HW shall use its best commercial efforts to reach the original 15% CAGR in 2017 (307m RMB ex-AZ sales). If HW fails to reach this target but the sales is greater than 290m RMB, HW will be given one calendar year to remedy the situation and

reach 15% CAGR by end of 2018, which means AZ shall have the right to terminate the agreement if 2018 ex-AZ sales are lower than 354m RMB". (Emphasis added)

42. It is pertinent that according to the Opening Submissions of Counsel for LY served in the Arbitration, and even on LY's case, HW and AZ had agreed to be bound by the 2016 Letter, and further, that the Notice of the Assignment served on HW, with copy to LY, had referred to the 2016 Letter, as the Agreement assigned was described as the Agreement "as supplemented by" the 2016 Letter and by other side letters/supplemental agreements.

43. The Tribunal then referred to the parties' disagreement as to whether the target of RMB 354 million for 2018 ("**Target**") was met. It referred to the calculations relied upon by LY, LY's calculations being the result of lower prices for the Product in the Guangdong province, and HW's dispute thereof. The Tribunal then referred to LY's termination of 17 May 2019.

44. The parties' respective cases were set out under sections F and G of the Award. The Tribunal referred to HW's different bases for arguing that there was no shortfall in the sales and that the Target had been met, such that LY was not entitled to terminate the Agreement. HW's alternative case in the Arbitration was that even if the Target had not been met, the shortfall was less than 0.2% which was significantly trivial and did not entitle LY to terminate. From paragraph 76 to 80 of the Award, the Tribunal summarized the arguments made by HW on liability:

“76. The first basis upon which HW argues that there was no shortfall involves the calculation of the Annual Sales Value (ASV). ASV is arrived at when the sales volume of the Products during a calendar year is multiplied by the WASP of the Products of the same calendar year. See Section 10.2.

77. There is no disagreement over the volume of the products sold during 2018. The disagreement between the parties is over the calculation of WASP for the year, in particular, whether the sales at 26 hospitals in Guangdong Province should be taken into account in the calculation of WASP. In its written Opening Submissions, the Claimant submitted at paragraph 7(b) that

‘Section 1.59 provided a single applicable price at any one time and for any one province. Hence, the words used in the provision (which apply “price” in the singular); the other contractual provisions; the purpose of the contract (*inter alia* to use WASP for the products sold across China, without undue complexity of using multiple simultaneous market prices in each province); industry practice (whereby WASP was determined by reference to a single provincial price in 2015); and [REDACTED] and HW’s (the “original parties” practice which apply a single price every year until LY took over the Agreement).’

78. The second basis is that HW claims that the ASV for 2018 would have been satisfied if the 2017 ‘rollover’ volumes had been included. Specifically, it is alleged that LY had failed to take into account the Rollover Arrangement (the ‘Rollover Arrangement’) by which sales value representing inventory volume in excess of certain Inventory Days should be deducted from the current year’s figures and included in the next.

79. Thirdly, the 2018 target would have been met if LY had not refused to accept certain 2018 purchase orders in breach of Section 6.13 of the Agreement.

80. It is not disputed that if HW is right on any of the above, LY’s termination of the Agreement was wrongful. On that basis, HW claims damages for itself and its affiliated party [REDACTED].”

45. At paragraph 86, the Tribunal set out LY’s case on liability, as follows:

“In broad summary, LY’s case on liability is that:

- (a) Under Section 1.59, the 2018 Lower Prices in the province of Guangdong should be taken into account. HW's case that Section 1.59 provides for a '*unified province-wide price*' is plainly untenable.
- (b) There is no contractual basis to support HW's contention that the 2017 Rollover volume should be included in the 2018 ASV.
- (c) Section 6.3 is not applicable because HW itself agreed to withdraw the 2018 Purchase Orders, and in any event, LY was not obliged to confirm the orders due to practical difficulties in handling such orders as they were only placed 3 days before AZ closes its books for the year.
- (d) As far as the argument based on triviality is concerned, Minute 47 is not binding, and in any event, the breach was not 'significantly trivial'.
- (e) As to whether the breach was '*solely attributable*' to HW, LY says that it only applies on the first occasion when HW fails to achieve the Minimum CAGR (i.e., in 2015). Where HW still fails to reach the Minimum CAGR after implementing remedial measures, AZ or LY is entitled to terminate the Distribution Agreement without satisfying any additional requirements.
- (f) Section 13.8 of the Distribution Agreement is not a precondition to exercising the right to terminate the agreement. It is merely a mechanism to resolve the parties' differences as they arise in the course of project management. In any event, it is common ground that a JRC meeting to discuss the differences was held between the parties in March 2019. The HW's complaint that the LY ignored its offer to negotiate is therefore factually incorrect.
- (g) Finally, and insofar as necessary, LY says that, in any event, it was entitled to terminate the Distribution Agreement by reason of the HW's fundamental breaches of the Distribution Agreement."

46. At paragraphs 90 to 92, the Tribunal set out the issues put before it:

"90. There is no dispute that the Tribunal has the requisite jurisdiction to determine this Arbitration. The core issue is whether the 2018 ASV was satisfied.

91. (1) If so, HW's alternative arguments based on the failure to satisfy the 2018 ASV target would be academic although we must consider the merits of LY's other reasons and/or justifications for termination of the Agreement.

(2) If not, we shall have to consider whether the shortfall was '*significantly trivial*' and if so, whether termination should be refused. Furthermore, whether HW's failure to do so was not '*due to reasons solely attributable to (HW)*'.

92. If LY was not entitled to terminate the Distribution Agreement, we shall consider what damages, if any, HW is entitled to recover."

47. The Tribunal's determination on liability is set out at section I of the Award. It referred again to the primary issue, at paragraph 96 of the Award:

"96. The primary issue is whether LY is entitled to terminate the agreement because HW had failed to satisfy the 2018 ASV. If we accept that the 2018 ASV had been satisfied, HW should succeed on its primary case and it would not be necessary for us to consider its alternative case(s). We proceed at once to deal with HW's primary case."

48. The Tribunal then focused on LY's right of termination as stated in the 2016 Letter, which set out the condition on the Target to be achieved, and considered the question of whether the 2018 sales were below the Target of 354 million RMB. It first considered the parties' disagreement on the calculation of WASP, referring to section 1.59 of the Agreement, and the formula of the average sales price of a specification of a Product, the tender price or the actual sales price of the Product in each province, the volume of the Product sold in the corresponding province, and the total volume of Products sold in the territory. The Tribunal considered the arguments made by HW that there should be a single applicable price at any one time and for any one province; LY's arguments

as to how the WASP should be calculated, and what tender price should be used on LY's contentions; the expert evidence on the industry practice of assuming a single tender price per province per specification at any one time for the purposes of calculating WASP; and HW's evidence on its practice with AZ of adopting a single price practice for calculating WASP.

49. The Tribunal stated (at paragraph 107) that its view of the language of section 1.59 of the Agreement supported the contention of LY, that more than one tender price should be used for the calculation of WASP. The Tribunal did not accept that the reduction in the tender price paid by hospitals in the Guangdong province in 2017 was for the purpose of rebate only (paragraph 110). At paragraph 118, the Tribunal concluded that HW had failed to show that the WASP calculation relied upon by LY for its termination was wrong.

50. The Tribunal then considered the question of the "Rollover" at paragraphs 119 to 135 of the Award.

51. The Tribunal pointed out that "ASV is made up of the annual sales volume multiplied by the WASP for the same calendar year". This is clearly a reference to section 10.2 of the Agreement, so it cannot be said that the Tribunal had not considered the contractual definition of ASV, and that this referred to the relevant figures "for the same Calendar Year". The Tribunal further pointed out that "annual sales volume" is not defined in the Agreement, and that the annual target is expressed in terms of "Annual Sales Value and not annual sales volume".

52. The Tribunal then set out the provisions of section 17.2 of the Agreement, in connection with HW's obligation to maintain a reasonable inventory level of the Products. It considered the purpose of the need to maintain a reasonable inventory system, the mischief of overstocking, and how this can be tied to the rationale for calculating rebates under the Agreement. The observations made by the Tribunal in this regard are set out at paragraphs 120 to 122 of the Award:

"120. Section 17.2 deals with Inventory and provides

'The Distributor shall maintain reasonable inventory level of the Product to meet customers' needs of instant delivery the Product inventory of the Distributor will be formulated annually, after consultation with AZ, on the basis of its prediction of the Product sales of the Territory. The Distributor shall have a reasonable inventory system to ensure that the Product is sold according to the principle of first-expire-first-sold.'

121. Obviously, the distributor must keep adequate inventory to meet customers' needs. There are good reasons for limits to be placed on inventory. Mr W said and we agree that without inventory control, *'HW would be able to achieve the annual sales target by overstocking. This runs contrary to the pivotal purpose of the Agreement'*. Both Mr W and Mr X are clear that one purpose of inventory control is to prevent achieving annual sales target by overstocking. Indeed, Mr W said *'... the increase in sales figure as a result of overstocking is artificial.'*

122. Nor is artificially meeting the sales target the only mischief. Overstocking may also affect the amount of rebate payable. Section 11.5.1 provides for a rebate of 27% before the Based Sales Value is achieved and under 11.5.2, 55% after the Base Value has been achieved."

53. The analysis made by the Tribunal led to its remark at paragraph 123 of the Award, which LY has highlighted in its criticisms of the Award:

"Thus, it is not surprising that the minutes of the Joint Review Committee held on 18 January 2016 recorded that 'To determine the inventory days at the end of 2015 in accordance with the final

data of AZ Finance Department, the portion exceeding 55 days will not be included in the calculation of rebate for 2015 and will be included in the 2016 sales value for the calculation of rebate.”

Counsel for LY pointed out that the Tribunal did not, at paragraph 123 (or elsewhere in the Award) make any finding as to the binding effect of the 2016 Minutes, whether the JRC had the power to decide on the calculation of ASV generally for purposes other than the rebate for the year 2015, and how the JRC Agreement recorded in the 2016 Minutes can be binding without an amendment in writing of the Agreement which is signed by the parties, on HW and AZ as parties to the Agreement, and on LY as an assignee.

54. At paragraphs 124 to 128 of the Award, the Tribunal set out the witnesses’ evidence on the practice of the Rollover Arrangement. The Tribunal referred to LY’s evidence, that it was not aware of any practice to roll over annual sales value, that the inventory exceeding the agreed limit had been deducted from the calculation of rebate only, and LY’s evidence that HW had not itself agreed to any commitment on inventory days.

55. Paragraphs 130 to 135 of the Award are, in my view, important in the summary of the Tribunal’s findings and determination on the Rollover Arrangement, and these are set out below:

“130. LY does not dispute that in 2017 for the calculation of rebate in 2017, which as we have said depended on the ASV for 2017, the excess inventory amounting to RMB 1,174,079.00 had been deducted. LY accepts that the rebate attributable to the deducted ASV should be paid in 2018. LY accepts that that, should the deducted ASV be included in the 2018 ASV, the Claimant would have met the target of RMB 354m.

131. Dr William Wong submits that the Agreement contains no rollover inventory arrangement. He is right. The Agreement

contains no explicit provision. This may explain why in 2016 the JRC dealt specifically with inventory control. Dr Wong is confronted by the undeniable fact that inventory in excess of 40 days were excluded from the calculation of rebate for 2017. As we have said above, rebate depends on the ASV, just as the annual target depends on ASV. There is not an ASV for rebate under Section 11.4 and a different ASV for the purpose of Section 10.1 and 10.2.

132. We believe the substance of Mr. W's evidence supports our view that excess inventory in a year would not be allowed to be counted as part of the sales value in the calculation of sales targets for the same year. Otherwise, ASV targets could be met by excessive inventory.

133. Moreover, we believe, common sense and logic support this view. Under the principle of '*first-expired-first-sold*', the excess inventory of the previous year would have been sold in the following year, for which sales rebate should be paid. There is no reason not to count them towards the ASV in the following year. So, despite Dr Wong's submissions, we take the view that the excess inventory in 2017 should be included in the ASV for 2018.

134. Dr Wong also relied on the fact that reliance on the roll-over inventory appears to be an afterthought. Mr C disagreed. But we do not believe it matters. The proper treatment of the 2017 excess inventory has long been part of the Claimant's case. It is also a question of fact whether the 2018 ASV was satisfied.

135. It follows that in our view, because of the rollover, HW was able to satisfy the ASV for the year 2018 and LY was not entitled to terminate the Agreement on 17 May 2019 or at all. HW no longer pursues its claim for specific performance of the Agreement, it follows that LY is liable to HW for loss or damage, which shall be dealt with under Quantum below. For the sake of completeness, we will also deal with the third basis upon which HW puts its case."

The alleged failure to deal with issues or to give reasons

56. It is correct, as Counsel for LY have pointed out, that there is no express finding made by the Tribunal in the Award that the Rollover Arrangement was consistent with the Agreement in light of the definition of ASV (as being calculated during a Calendar Year) under section 10.2,

and the requirement for signed and written amendment of the Agreement under section 13.3. Nor is there any express finding that the JRC had power under section 13.3 of the Agreement to make a determination on the calculation of ASV for future years, and whether the JRC Agreement (contained in and evidenced by the 2016 Minutes) had effect on the rights and obligations of the parties without an amendment in writing of the Agreement under section 38.1.

57. It is also correct that the Tribunal did not make any express finding in the Award on whether the Rollover Arrangement was binding on LY as an assignee under Article 82 of the PRC Contract Law, when LY claimed to have no knowledge of the practice of the Rollover Arrangement.

58. As the Courts have emphasized in the authorities referred to, an award should be read in a reasonable and commercial way, without a meticulous legal eye endeavoring to pick holes, inconsistencies and faults, but generously, and only to remedy serious breaches of rules of natural justice which cause injustice. With such an approach, it is clear from the Award that the Tribunal found that HW's calculation of ASV for 2018 was correct, that the inventory in excess of 40 days had been excluded in the calculation of ASV in 2017 as a result of the Rollover Arrangement, and that on the Tribunal's construction of the Agreement, the same ASV should be used in ascertaining whether the Target had been achieved for 2018. The Tribunal's analysis of the relevant provisions of section 10.2 and section 1.59 of the Agreement was set out in the Award. The Tribunal's construction of section 17.2 and of the purpose of the maintenance of a reasonable inventory system, explained the Tribunal's conclusion on the meaning of "ASV" under the Agreement, and how

it should be calculated, for both purposes of rebate and annual target. It is obvious from paragraph 131 of the Award that the Tribunal was clearly aware of and had taken into consideration the argument made for LY, that there was no contractual basis for the Rollover Arrangement, as it was not spelt out in the Agreement. However, the Tribunal stated, at paragraphs 131 to 133 of the Award, the matters which it regarded as critical to its finding on the calculation of ASV, and why it accepted HW's arguments that its calculation was correct, and that the calculations relied upon by LY to terminate the Agreement were wrong.

59. On such a reading and understanding of the Award and the findings made by the Tribunal on the construction of the relevant provisions of the Agreement which relate to the calculation of ASV, it is quite obvious that the Tribunal did not consider it necessary to deal at length or with further details on the effect of the 2016 Minutes, or the determination of the JRC. As the authorities show, the Award has to be read in the context of the submissions and arguments made to the Tribunal. It is indisputable that LY had throughout relied on the 2016 Letter, to claim that the condition and Target, specified at paragraph (ii) of the Letter, had not been complied with by HW. That was the condition considered by the Tribunal (set out in paragraph 97 of the Award), when it embarked on the analysis of the meaning of WASP and ASV under the Agreement. LY had not challenged the binding effect of the 2016 Letter, which was included in the Notice of the Assignment, as supplemental to the Agreement. If it was not effective and binding on LY, it could not have invoked the right of termination thereunder. As such, it is difficult to see how the issues of the JRC's power under section 13.3, and the lack of any amendment of the Agreement in writing as required under section 38.1,

can be said to be key issues which are crucial to the Tribunal's finding on the meaning of ASV, and whether the Target and condition set out in the 2016 Letter had been met so as to entitle LY to terminate the Agreement.

60. On the authorities, the Tribunal is not bound to structure its decision and its reasons in accordance with the issues put to and argued before the Tribunal or the submissions made by the parties. The list of issues relied upon by LY (on the Assignment Issue) was only a list agreed by the experts on PRC law. I do not agree that the issues on sections 13.3, 38.1 and on the Assignment are key to the Tribunal's decision on the construction and meaning of ASV, and whether the condition and the Target specified in the 2016 Letter had been complied with or achieved. On the facts of this case, they are all arguments raised to support LY's essential claim, at the heart of the dispute in the Arbitration, that it was entitled to terminate the Agreement on the ground that the agreed Target (which was stated in the 2016 Letter) had not been achieved by HW on LY's calculation of the ASV.

61. Particularly on the Assignment Issue, and whether LY as an assignee should be bound by the Rollover Arrangement alleged, it is sufficiently clear from paragraph 125 of the Award that the Tribunal had taken into consideration that LY was aware and had knowledge of the fact that AZ had, with HW's agreement, deducted inventory exceeding 40 days from HW's rebates for 2017. It was the Tribunal's conclusion that deduction for the purpose of calculating rebate must carry with it a deduction for the calculation of ASV for the Target.

62. As pointed out above, the Opening Submissions of Counsel (at paragraph 22) accept that the 2016 Letter was referred to in the Notice of the Assignment, as supplemental to the Agreement between HW and AZ which was assigned to LY. Coupled with the evidence of LY's knowledge of the practice of deducting excess inventory in 2017, the Tribunal obviously must have considered that the Assignment Issue and the PRC expert evidence thereon with regard to knowledge, was not key or material to the Tribunal's decision on the calculation of the ASV, and the binding effect of the Rollover Arrangement and the 2016 Letter.

63. Even if it was an issue, the Tribunal had pointed out (at paragraph 128 of the Award) that HW's denial of its being bound by the commitment on inventory days could not alter the fact that, as HW's witness accepted, there was a Rollover Arrangement as a result of which excess inventory had not been counted towards the ASV in 2017.

64. In deciding whether the Tribunal had adequately dealt with an issue, or sufficiently explained its decision, the Court must be circumspect in its consideration of the Award to avoid any attempt to review the correctness of the Award, in law or on facts. Even if the Tribunal had not considered and dealt with the Assignment Issue, when it made its findings on the calculations of either the WASP or the ASV, and the practice of AZ before the assignment to LY in 2018, that is at most an error of law, for which there is no redress.

65. Put in another way, the Tribunal's failure to consider or deal with the issues or aspects of the submissions made on behalf of LY in this case is a matter which goes to the substantive decision of the Tribunal,

which may amount to an error of law, but is *not* a ground for challenging the Award.

66. As the Singapore Court of Appeal emphasized, any inference that the arbitrator had failed to consider an important issue, if it is to be drawn at all, must be shown to be clear and virtually inexcusable. If the facts are also consistent with the arbitrator having been mistaken as to the law, or having misunderstood the evidence, or otherwise consistent with the arbitrator choosing not to deal with a point because he thought it unnecessary, even if such view may have been formed on the basis of a misunderstanding of the case, the inference that the arbitrator had not applied his mind to the issue cannot be drawn.

67. Reading the Award in this case, I am not satisfied that this is a case where the Tribunal's failure to deal with the issues complained of by LY was not due to the Tribunal's choice of not dealing with aspects of the submissions made for LY, because the Tribunal considered it was unnecessary to do so by reason of the issues it had dealt with and decided.

68. Parties to an arbitration do not have a right to have all their arguments addressed by the Tribunal. The Court would be extremely slow to interfere with the Tribunal's decision on which issues are essential and necessary to be addressed in the Award. So long as the Tribunal sets out its decision on the dispute and gives sufficient reasons why it came to its particular decision, the parties are bound. No party is entitled to apply to the Court, to repeat its arguments or make further submissions to seek an outcome which enables it to avoid an unfavorable award. Any error in an award made by an arbitrator cannot by itself counterbalance the public

policy bias towards enforcement of arbitration agreements and awards (*A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389). Even if the Tribunal had not dealt with the particular issues complained of by LY in this case, I can find no serious or egregious error which justifies the setting aside of the Award, whether on the ground of arbitral procedure or public policy.

Suspension under Article 34(4)?

69. In the course of the hearing, I had invited submissions on whether the parties would request a suspension of the setting aside proceedings under Article 34 (4), to give the Tribunal an opportunity to resume the arbitral proceedings and to take such action as in its opinion will eliminate the grounds for setting aside. HW did confirm that it would seek such a suspension if the Court should consider setting aside the Award on LY's application.

70. In view of the policy of minimal curial intervention, Article 34 (4) only applies if the grounds for setting aside an award have been made out. A suspension should not be ordered under Article 34 (4) unless the Court finds that there are grounds to set aside the Award, but that instead of making an order to set aside, the opportunity should be given to the tribunal, for it to take such action as it may consider appropriate or necessary in order to eliminate the grounds found by the Court. There is no basis to invoke Article 34 (4) for an award to be clarified, or to be simply improved in any way.

71. Since I have concluded that there are no grounds to set aside the Award in this case, there is no basis and no necessity to invoke Article 34 (4).

Disposition

72. The application to set aside is accordingly dismissed, with costs to be paid by LY on indemnity basis, with Certificate for Counsel.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Benjamin Yu SC, Mr Bernard Man SC and Mr John Leung, instructed
by Anthony Siu & Co, for the plaintiff

Mr Charles Manzoni SC, instructed by Fangda Partners, for the defendant