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

[2026] SGHC 128

Originating Application No 1153 of 2025

Between

(1) DSV
(2) DSW

… *Claimant(s)*

And

DSU

… *Respondent(s)*

GROUNDS OF DECISION

[Arbitration — Award — Recourse against award — Setting aside — Breach of natural justice]
[Arbitration — Arbitral procedure — Whether arbitral procedure was in accordance with the parties' agreement]
[Arbitration — Award — Recourse against award — Setting aside — Grounds raised in the supporting affidavit but not advanced in submission]

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v
DSU

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Vinodh Coomaraswamy J:

Introduction

1 The claimants apply to set aside a partial final award ("the Award") dated 14 July 2025 issued in an arbitration seated in Singapore ("the Arbitration").[1] In order to maintain the confidentiality associated with the Arbitration, the parties have consented to an order for the names of the parties and their associated entities to be anonymised pursuant to s 23(4) of the International Arbitration Act 1994 (2020 Rev Ed) ("the Act") and O 48 r 2(1) of the Rules of Court 2021 ("the Rules").[2] I shall therefore refer to the first claimant as "DSV", to the second claimant as "DSW", to both of them collectively as "the claimants" and to the respondent as "DSU". In order further

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1 1 JBOD 92–170.

2 HC/ORC 7581/2025 dated 2 December 2025 (filed 18 December 2025).

to maintain confidentiality, I shall refer to the country in which the underlying events occurred as Ruritania. As the precise sums in dispute are immaterial, I shall convert all sums of money in issue into Singapore dollars and round them off for convenience.

2 The claimants advance three grounds for setting aside the Award. The first ground is that the Tribunal breached the rules of natural justice, within the meaning of s 24(*b*) of the Act, read with Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), in its treatment of an issue that I shall call the Stay Issue.[3] The second ground is that the Tribunal departed from the procedure that the parties had agreed, within the meaning of Art 34(2)(*a*)(iv) of the Model Law.[4] The third ground is that the Tribunal exceeded its powers in reserving its jurisdiction over DSU's application for certain post-Award freezing relief.[5]

3 In their written submissions the claimants also relied on Art 34(2)(*a*)(iii) of the Model Law.[6] But they withdrew any reliance on it in the course of oral submissions.[7] A further set of complaints is directed at the way the Tribunal construed the parties' contract. Those complaints appear only in the affidavit filed in support of the application. They were not pursued in submissions. I deal with them, and with a related matter arising from that affidavit, at the end of these grounds.

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3 Claimants' Written Submissions dated 16 February 2026 ("CWS") at paras 11; Transcript, 23 February 2026, at p 26 lines 5–16.

4 CWS at paras 11.2–11.3 and 20.2.

5 CWS at para 11.4.

6 CWS at paras 20.2, 24 and 89.

7 Transcript, 23 February 2026, at p 25 line 1 to p 26 line 16.

4 The central question in this application is a narrow one. It is not whether the Tribunal was right, on which I should not and do not express any view. The central question is whether, in the way the Tribunal handled the issues before it, the Tribunal denied the claimants a fair hearing or departed from the parties' agreed procedure.

5 In my judgment the Tribunal did neither. The Tribunal confined the hearing that led to the Award to the issues that the parties had pleaded. It did so after giving both sides a fair hearing on what precisely those issues were. That was a decision that the Tribunal was entitled to make. In making it, the Tribunal was not unfair to the claimants and did not depart from any agreed procedure. I have therefore dismissed the application. I have also found that the application was, in substance, nothing but an appeal on the merits of the Award dressed up, very poorly, as an application to set aside the Award. I have therefore ordered the claimants to pay the respondent's costs on the indemnity basis.

6 The claimants have appealed against the whole of my decision. I now give my reasons.

Background

7 In 2022, DSU and DSV entered into a high-value transaction. The transaction was documented under the 2002 Master Agreement published by the International Swaps and Derivatives Association, Inc ("the Master

Agreement") supplemented by a schedule and a confirmation letter.[8] I refer to the contract in all its parts as "the Confirmation".[9]

8 The Confirmation is governed by English law.[10] Although the Confirmation is, in form, an option, it was in economic substance a loan. The substance of the Confirmation involved DSU lending DSV about $192m to part-finance DSV's acquisition of shares in a Ruritanian business. DSW executed a personal guarantee of DSV's obligations to DSU.[11] Under the terms of the Confirmation, DSU was entitled to terminate the transaction and to recover a contractually defined sum from DSV upon the occurrence of an event of default. I shall refer to this sum as "the Early Termination Amount".

9 One type of event of default under para 1(e) of the Confirmation is what I shall call "a Bankruptcy Event of Default".[12] In summary, a Bankruptcy Event of Default was deemed to arise where insolvency proceedings were instituted against DSV or against an associated entity defined in the Confirmation by name as a "Specified Entity". But, under para 1(e) of the Confirmation, the occurrence of a Bankruptcy Event of Default was subject to a proviso ("the Proviso"). Under the Proviso, the insolvency proceeding must not be "dismissed, discharged, stayed or restrained" within 30 days of its institution.[13]

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8 1 JBOD 18, 1st Affidavit of Scott Cramer Senecal dated 13 November 2025 ("SCS Affidavit"), at para 8; see also 1 JBOD 172; 1 JBOD 218.

9 1 JBOD 118–124; Award at [24]–[25].

10 1 JBOD 124; 1 JBOD 173, para 1(e) of the Confirmation.

11 1 JBOD 485, Deed of Personal Guarantee dated 7 September 2022, cl 2.1 (cl 2.1 at 1 JBOD 490).

12 See 1 JBOD 173.

13 1 JBOD 124, para 1(e) of the Confirmation.

10 The Specified Entity owed about $1.5bn to a consortium of lenders ("the Creditors") under a term loan unconnected with DSU or the Confirmation. On 22 January 2024 the Creditors applied to the insolvency tribunal in Ruritania ("the Insolvency Tribunal") to commence an insolvency process against the Specified Entity ("the Creditors' Application"). The Creditors' Application was made under Ruritania's insolvency code ("the Code").[14] On 21 February 2024, 30 days had elapsed from the filing of the Creditors' Application. DSU took the position that the Proviso had not been satisfied and that a Bankruptcy Event of Default had occurred. On 27 February 2024, DSU exercised its right to terminate the transaction. It demanded the Early Termination Amount from DSV. The next day, DSU demanded the same sum from DSW under his personal guarantee.[15] Both of those demands went unsatisfied.

11 On 7 March 2024, DSU commenced the Arbitration against both claimants seeking to recover the Early Termination Amount.[16] DSU also obtained a worldwide freezing order against the claimants from an emergency arbitrator on 28 March 2024 ("the Freezing Order").[17] In opposing the Freezing Order, the claimants filed submissions ("the EA Submissions"). They contended there that DSU had no *prima facie* case in the Arbitration. In support of this contention, they raised two issues. I shall call the first issue "the Institution Issue". The claimants' contention on this issue was that the mere

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14 1 JBOD 131, Award at [40]; 2 JBOD 145–147, Claimant's Statement of Claim dated 30 August 2024 at para 25.

15 Statement of Claim at para 15; 1 JBOD 163, Award at [99]–[101]; 1 JBOD 22–23, Affidavit of SCS at para 15.

16 1 JBOD 159–160, Award at [91]; 1 JBOD 23–24, SCS at para 17.

17 1 JBOD 622, Interim Award of the Emergency Arbitrator dated 28 March 2024 at para 97.

filing of the Creditors' Application, before it had been reviewed and admitted by the Insolvency Tribunal, did not amount to the institution of insolvency proceedings within the meaning of para 1(e) of the Confirmation. I shall call the second issue "the Stay Issue". The claimants' contention on this issue was that the Creditors' Application had, in any event, become subject to what they said was "effectively a stay" within 30 days of institution, and therefore the Proviso was satisfied.[18]

12 The Tribunal was constituted in mid-2024.

13 At the claimants' request, the Tribunal directed the parties to proceed on pleadings.[19] The Tribunal did so over DSU's express preference for memorials instead of pleadings. The claimants pressed for pleadings precisely so that the issues, and the consequent evidential stages, would be defined and confined by the pleadings.

14 DSU thereafter served a statement of claim. In due course, the claimants served a statement of defence and counterclaim ("the Defence"). DSU then served its reply and its defence to the claimants' counterclaim.

15 In November 2024, DSU applied for the early determination of its claim.[20] It contended that its claim, read with the statement of defence, raised no disputed issues of fact, and instead raised only the Institution Issue which was a question of construction. The claimants informed the Tribunal expressly that

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18 Claimants' Response to the Application for Emergency Arbitration (Revised) dated 20 March 2024 at para 127; 2 JBOD 51.

19 2 JBOD 122.

20 Early Determination Application dated 22 November 2024 at paras 1(i) and 11; 2 JBOD 271–272.

they did not oppose early determination. They asked only for an opportunity to adduce evidence of Ruritanian insolvency law.[21]

16 The Tribunal ordered early determination on the basis put forward by DSU; a basis that was expressly not opposed by the claimants. The Tribunal also accepted the claimants' request and gave each side liberty to adduce evidence of Ruritanian insolvency law on the institution of proceedings under the Code and on the time generally taken for such a proceeding to be set aside. It fixed a hearing for 10 and 11 March 2025 ("the Hearing").[22]

17 On the first day of the Hearing the Tribunal heard argument on the scope of the Hearing. On the second day it ruled that the claimants had not pleaded the Stay Issue and had made a clear decision not to pursue it in the substantive Arbitration.[23] It then heard and determined the claim, and issued the Award.

18 In the Award the Tribunal held that the filing of the Creditors' Application amounted to the institution of a proceeding within the meaning of para 1(e) of the Confirmation. It held that a Bankruptcy Event of Default had therefore occurred. It ordered the claimants to pay the Early Termination Amount, about $300m, with interest. It recorded that its orders were "dispositive of the entirety of [DSU]'s substantive claim … apart from costs".[24]

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21 2 JBOD at p 277–278.

22 Award at [61]; Tribunal directions dated 2 January 2025 and 20 January 2025; 2 JBOD at pp 287–288.

23 Award at [61]; 1 JBOD at p 143–145.

24 Award at [114] and *dispositif* paras 1–4; 1 JBOD at p 168.

19 At the Hearing, DSU had also sought the continuation of the Freezing Order and the Tribunal's reservation of its jurisdiction over enforcement. The Tribunal reserved its jurisdiction in respect of that relief, in terms I set out at [50] below.[25]

The issues

20 The claimants pursue only three grounds for setting aside the Award. I take them in turn. The first ground is the allegation that the Tribunal breached natural justice in its treatment of the Stay Issue at the Hearing and in the Award. The second ground is the allegation that the Tribunal departed from the agreed arbitral procedure at the Hearing and in arriving at its decision in the Award. The third ground is the allegation that the Tribunal exceeded its power by agreeing to reserve its jurisdiction to grant post-Award freezing relief. A discrete short issue arises within the first two grounds. This discrete issue is the determination of the quantum of the Early Termination Amount ("the ETA Issue"). I shall deal with this discrete issue separately. I deal last with certain grounds for setting aside raised only in the supporting affidavit, and with the conduct of the application.

Ground 1: breach of natural justice and the Stay Issue

21 The first ground fails. The Tribunal did not deny the claimants a fair hearing. It found, after hearing both sides, that the claimants had failed to plead the Stay Issue and had thereby abandoned it. The correctness of the Tribunal's finding that the Stay Issue was unpleaded is not, on the grounds advanced in this application, open to review. Confining the Hearing to the issues that the

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25 Award at [115]–[116] and *dispositif* para 5; 1 JBOD at p 175–176.

Tribunal found the claimants had pleaded was not a breach of the fair hearing rule.

22 The claimants' case is that the Tribunal wrongly treated the Stay Issue as not in issue. They say that the Tribunal thereby shut out the factual evidence and the expert evidence of Ruritanian insolvency law by which they would have shown that the Creditors' Application was "effectively stayed" within 30 days. That, they say, denied them a fair opportunity to present their case.[26] The complaint engages the fair hearing rule under s 24(*b*) of the Act and Art 34(2)(*a*)(ii) of the Model Law. The claimants accept that the two provisions stand or fall together and raise no separate principles.[27]

23 An applicant under s 24(*b*) of the Act must show which rule of natural justice was breached, how it was breached, how the breach was connected to the making of the award, and what prejudice it caused: *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 ("*China Machine*") at [86]. Throughout, the court intervenes only to the minimum extent possible: *COT v COU* [2023] SGCA 31 at [26].

24 The fair hearing rule guarantees each party a reasonable opportunity to present its case and to meet its opponent's case. That opportunity is a full one, but it is not an unlimited one. It is bounded by reasonableness and fairness, and what it requires is assessed in context. The question is whether what the Tribunal did fell within the range of what a reasonable and fair-minded tribunal might have done in the circumstances: *China Machine* at [104]. Two related

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26 CWS at paras 24–42; Transcript, 23 February 2026, at pp 29–52.

27 Transcript, 23 February 2026, at p 25 line 29 to p 26 line 16.

principles are engaged here. First, it is not a breach of natural justice for a tribunal to decline to hear a case that a party wishes it had run in the arbitration rather than the case it actually did run: *DKT v DKU* at [8(a)]. Equally, it is not a breach of natural justice for a party to fail to take an opportunity open to it: *CJA v CIZ* [2022] 2 SLR 557 ("*CJA v CIZ*") at [75]. The second principle is that, for a purely legal issue, a fair opportunity to make submissions is all that fairness requires: *CJA v CIZ* at [76].

25 I must also bear in mind the proper scope of my review. The claimants have withdrawn reliance on Art 34(2)(*a*)(iii). They accept that their complaint, at its highest, is that the Tribunal failed to exercise a jurisdiction that it had. That is a complaint of *infra petita*, not a complaint of an excess of jurisdiction: *DEM v DEL* [2025] 1 SLR 29 at [53]–[59]. The significance of the withdrawn reliance on Art 34(2)(a)(iii) is this. There is no scope for me to review *de novo* the Tribunal's finding that the claimants had failed to plead the Stay Issue. I could do that only if it went to jurisdiction. The claimants now accept that it does not. The only question for me is therefore not whether the finding was right. It is whether the process by which the Tribunal reached and acted on that finding was fair.

26 The claimants' best authority is *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [46].[28] In that case, a tribunal overlooked a pleaded contention in the mistaken belief that it had been abandoned. The tribunal was held to have breached natural justice.

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[28] CWS at paras 53–58; Transcript, 23 February 2026, at p 143 line 18 to p 146 line 6.

27 *Front Row* does not assist the claimants. That case concerns an issue that was in play on the pleadings and was wrongly treated as abandoned. The present case is the opposite. The Tribunal found that the Stay Issue had never been pleaded and was not in play at all. It made that finding after according natural justice to both sides on the scope of the Hearing. A finding that an issue was never pleaded, reached after hearing both sides on precisely that question, is not a denial of a fair hearing. At the very most, even assuming that the Tribunal's finding were wrong, that would amount only to an error. An error of that kind, not going to jurisdiction, is not a ground on which the Award can be set aside.

28 Furthermore, it cannot be said that the Tribunal did anything that fell outside the range of what a reasonable and fair-minded tribunal might have done in the circumstances. The Tribunal's reading of the pleadings was well open to a reasonable and fair-minded tribunal.

29 The Defence pleaded only two issues in response to DSU's plea that a Bankruptcy Event of Default had occurred. First, it pleaded the Institution Issue, *ie*, that the mere filing of the Creditors' Application was not the institution of an insolvency proceeding.[29] Second, it pleaded what I shall call the "Commercial Realities Issue", namely that the words "30 days" in the Proviso could not be read literally because the Insolvency Tribunal was so overburdened that a respondent could not, as a matter of commercial reality, obtain a stay within 30 days.[30] It did not plead the Stay Issue, *ie*, that the Creditors' Application had in fact become subject to the equivalent of a stay within 30 days.

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29 2 JBOD 200, Statement of Defence and Counterclaim at paras 95–97.

30 2 JBOD 196–197, Statement of Defence and Counterclaim at paras 85 and 86, in particular para 86(iv).

30 The Stay Issue and the Commercial Realities Issue are distinct. The Stay Issue assumes that an insolvency proceeding has been instituted and asks what has happened to it and whether that is or amounts to a stay within the meaning of para 1(e) of the Confirmation. The Commercial Realities Issue concerns the construction of the words "30 days" in the Proviso. They turn on different words of the Proviso and call for different evidence.

31 The Tribunal found exactly that. It recorded that, in the pleadings for the merits stage, the claimants "did not pursue any point based on a suggested stay", but "raised a different point, based on the impracticality of complying with the 30-day period".[31]

32 At the Hearing the claimants sought to argue that the Stay Issue from the EA Submissions remained in play in the substantive Arbitration despite being unpleaded in the Defence. The Tribunal heard them and refused to expand the scope of the Arbitration beyond the claimants' pleadings. The President of the Tribunal explained its refusal in these terms:[32]

> … it emphatically does not raise any of the further points which it is now suggested might, or should, be lead and which were originally set out in the emergency arbitration pleadings.
>
> It is impossible to take that presentation of [the claimants'] position as anything other than a clear decision not to pursue any of the other points raised in the emergency arbitration proceedings, and this tribunal cannot contemplate a situation where [the claimants] are allowed to go back on that clear decision on which [DSU has] clearly acted by commencing these proceedings, stating that there is no issue of fact …

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[31] 1 JBOD at p 159–160, Award at [91].

[32] 1 JBOD at p 143–145, Award at [61] (see specifically 1 JBOD 145).

33 The claimants meet this by relying on the lifespan of a pleaded issue. They say that an issue once raised in a party's case remains in play unless it is expressly withdrawn: *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [150], approved in *BTN v BTP* [2022] 4 SLR 683 at [87]; and see *CDM v CDP* [2021] 2 SLR 235 at [18]–[20].[33] That principle is sound. But it governs an issue raised in the pleadings. The anterior question that those cases did not deal with is what counts as a pleading.

34 I make two points about pleadings. First, pleadings have three functions: (a) to tie the pleading party down on the case it intends to advance; (b) to give reasonable notice of that case to the opposing party; and (c) to define and limit the issues that the court has to decide. Second, it goes without saying that pleadings perform these functions in connection with, and only in connection with, the substantive and binding determination of the merits of the parties' dispute.

35 The EA Submissions were not pleadings. They were not directed to the substantive and binding determination of the parties' dispute. They were directed to a different and purely interlocutory determination, namely whether DSU had established a *prima facie* case on its substantive claim so as to support the grant of interim relief. Once that question was decided, the purpose of the EA Submissions was spent. They did not survive and delineate the issues in the substantive Arbitration. Only the pleadings in the substantive Arbitration did that. The claimants had themselves sought a pleading-style reference so that the issues would be fixed by the pleadings. The claimants cannot now complain that the Tribunal went beyond what a reasonable and fair-minded tribunal might

[33] CWS at paras 53–58; Transcript, 23 February 2026, at pp 60–66.

have done simply by holding the claimants to the very outcome that they sought by making that election.

36 It is true that the President observed during the Hearing that the EA Submissions were part of the arbitration.[34] But this observation does not assist the claimants. In making this observation, the President did not say that the EA Submissions were pleadings in the substantive Arbitration. And there is no warrant for reading his observation in that way. In context, he meant no more than that the EA Submissions were on the record in the Arbitration and could be put to forensic use at the Hearing. For example, a variance between the EA Submissions and the claimants' pleaded case in the substantive Arbitration could be the basis for a submission that the pleaded case was an afterthought or a recent invention. But only the pleadings in the substantive Arbitration are the pleadings in the substantive Arbitration. The question for the Tribunal in the substantive Arbitration was whether DSU had established a Bankruptcy Event of Default on the parties' pleaded cases in the substantive Arbitration. An issue that a party raises at a different stage of an arbitration for a different purpose in order to meet a different legal test does not survive like a zombie to define its case in the substantive arbitration merely by remaining on the record.

37 The claimants say, finally, that the Tribunal should have let them amend their Defence to plead the Stay Issue and to adduce evidence on it. But they never applied to amend their Defence. They knew, by the time DSU filed its skeletal submissions before the Hearing, that DSU was treating the Institution

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[34] Award at [61], 1 JBOD at 143–145; 3 JBOD at p 454, Transcript of the arbitration hearing, 10 March 2025, at p 50 lines 17–23.

Issue as undisputed.[35] They had ample time before the Hearing to apply to amend the Defence. They did not. A party cannot found a complaint of natural justice on an opportunity that was open to it and that it did not take: *CJA v CIZ* at [75]. Nor does a tribunal breach natural justice by declining to volunteer to a party the case it chose not to run: *DKT v DKU* [2025] 1 SLR 806 ("*DKT v DKU*") at [8(*a*)].

38 The claimants have in any event shown no prejudice. A breach of natural justice will not lead to an award being set aside unless it could reasonably have made a difference to the outcome. The claimants say that, if they had been allowed to adduce factual evidence and expert evidence of Ruritanian insolvency law, they would have shown that the Creditors' Application was effectively stayed within 30 days. But they have not put that evidence before me.[36] Without it I cannot assess whether it could have made any difference. Its absence is fatal to this limb: *CGS v CGT* [2021] 3 SLR 672 at [91]. The first ground fails.

Ground 2: departure from the agreed arbitral procedure

39 The second ground fails, for reasons that follow from the first. Its factual foundation is the same as that of the first ground. It is whether the Stay Issue was within the scope of what the parties had pleaded and accepted should be the subject of the early determination application. I have held that the Tribunal did not breach natural justice. For the same reasons, the Tribunal also did not depart

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35 3 JBOD 314, Claimants' Skeletal Submissions dated 28 February 2025 at para 27; Transcript, 23 February 2026, at p 114 lines to p 115 line 15.

36 CWS at paras 67–72; Transcript, 23 February 2026, at p 150 line 10 to p 151 line 15, p 154 line 19 to p 154 line 19.

from the agreed arbitral procedure. I address here only what is distinct to the claimants' challenge under Art 34(2)(*a*)(iv).

40 A party relying on Art 34(2)(*a*)(iv) must establish four things. It must show that the parties agreed on a particular arbitral procedure. It must show that the Tribunal failed to adhere to that procedure. It must show that the failure could reasonably have produced a different result. And it must show that it is not precluded by a failure to object to the alleged departure: *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2018] 4 SLR 271 at [63], drawing on *AMZ v AXX* [2016] 1 SLR 549 at [102].

41 The first element is the agreed procedure. The claimants' challenge under Art 34(2)(*a*)(iv) fails on this element alone. The procedure the parties agreed was a pleading-style reference in which the issues, and the evidence, were defined by the pleadings. The claimants themselves sought this procedure for this very reason. The Tribunal did not depart from it. It applied it. It confined the Hearing to the issues defined by the pleadings.

42 The claimants' true complaint is not that the Tribunal departed from the parties' agreed procedure. It is that the Tribunal applied that procedure to exclude an issue that the claimants wished to run but had failed to plead. Fixing the scope of a hearing in that way is a case-management decision within the Tribunal's province. The court accords that decision a margin of deference and does not intervene merely because it might have proceeded differently: *China Machine* at [98] and [104(d)]. Article 34(2)(*a*)(iv) is not engaged by a case-management choice of that kind.

43 The remaining elements add nothing. On causation, the claimants have not shown that adherence to any different procedure could reasonably have produced a different result, for the reasons given on prejudice at [38] above. The claimants are in any event precluded. They sought and obtained the pleading-style reference. They took the express position that they did not oppose early determination on the basis proposed by DSU. That led to the benefit of an early and confined hearing. Having done so, they cannot now allege that the procedure they agreed to was not followed. That is an ordinary application of approbation and reprobation: *BWG v BWF* [2020] 1 SLR 1296 at [102] and [118]. The second ground fails.

The ETA Issue

44 The complaint about the ETA Issue discloses neither unfairness nor a departure from the agreed procedure. The complaint is that the Tribunal determined the quantum of the Early Termination Amount at the Hearing rather than at a later stage.

45 The ETA Issue was within the scope of the Hearing. The Hearing was directed to DSU's claim to the Early Termination Amount. It was intended to dispose entirely of that claim, one way or the other. A determination that disposes entirely of a claim to a sum of money encompasses not only liability but also, if liability is established, the quantum of that sum.[37]

46 The single matter the claimants put in issue on quantum was the date from which the Early Termination Amount should run. That is itself a question

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[37] Award at [114]; 2 JBOD 269, Early Determination Application dated 22 November 2024 at para 11.

of construction, turning on which of a number of potential bankruptcy events of default is the operative one. Determining this matter lay within the very determination the Tribunal had been asked to make. It raised no question of fact requiring further evidence.

47 The claimants had a fair opportunity on the ETA Issue on any view. Their own counsel accepted at the Hearing that the calculation was "largely just a question of applying the contract".[38] For a legal question of that kind, a sufficient opportunity to make submissions is all that fairness requires: *CJA v CIZ* at [76]. The Tribunal permitted submissions on the ETA Issue at the Hearing. The parties exchanged further submissions on it afterwards. The claimants have identified nothing they were prevented from putting forward that could reasonably have made a difference. The complaint fails.

Ground 3: the reservation of jurisdiction over the freezing relief

48 The third ground fails. The Tribunal exercised no jurisdiction in the passage complained of, and so cannot have exceeded any. Nor did it act unfairly or contrary to the agreed procedure.

49 As originally framed, the ground rested on *functus officio*. The claimants said that, having declared that it had disposed of DSU's substantive claim, the Tribunal could not reserve jurisdiction over the continued freezing relief: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [84]. That way of putting the ground was abandoned at the hearing before me.

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[38] 3 JBOD at p 460, Transcript of the arbitration hearing, 10 March 2025, at p 73 lines 1–3.

Counsel for the claimants withdrew the *functus* point.[39] It is common ground that the Tribunal was not and is not *functus officio*. The Award is a partial award. Costs and the reserved relief remain outstanding. The Tribunal may make further awards. The authorities on *functus officio* therefore fall away.

50 What remains is the contention that, in [116] of the Award and para 5 of the *dispositif*, the Tribunal exercised, or purported to exercise, a jurisdiction it lacked. It did no such thing. The Tribunal did not grant continued freezing relief. It did not order the continuation of the Freezing Order. It declined to determine the relief claimed and deferred it to a further hearing at which the parties could be heard. That is a case-management deferral, not the exercise of any jurisdiction. Paragraph 116 reads, so far as material:[40]

> The Tribunal is concerned about the jurisdictional basis for the relief claimed … However, to preserve the position, and to enable the Parties to consider and make submissions on these issues, the Tribunal will reserve its jurisdiction in respect of these reliefs, and issue necessary directions separately. In the meantime, this arbitration continues, and the Interim Award of the Emergency Arbitrator dated 28 March 2024 remains in full force and effect, subject to any further order by the Tribunal.

51 The closing words of this paragraph are not, on any conceivable view, an order. They state the legal effect of the emergency arbitrator's award of the freezing order. That freezing order continued of its own force pending the conclusion of the Arbitration, whether or not the Tribunal said so. The Tribunal's observation to that effect altered nothing. Claimants' counsel, in the end, all but accepted this point.[41] A reservation of jurisdiction, coupled with a

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39 Transcript, 23 February 2026, at p 90 lines 1–8.

40 Award at [116]; 1 JBOD at p 168–169.

41 Transcript, 23 February 2026, at p 91 line 10 to p 93 line 29.

direction that the parties make submissions on relief that has been sought, is the very opposite of a denial of a fair hearing. It is equally the very opposite of a departure from any agreed procedure. The third ground fails.

The grounds raised only in the affidavit, and the conduct of the application

The grounds raised only in the affidavit

52 A further set of complaints, and a matter of evidence, remain. They are linked by a single proposition about what an affidavit is and does. An affidavit's only office is to place admissible evidence before the court. The admissibility of that evidence turns on the common law of evidence and therefore turns primarily on the deponent's ability to give direct evidence on the issues within the meaning of s 62(1) of the Evidence Act 1893 (2020 Rev Ed) ("the Evidence Act"). From that proposition follow both my disposal of the complaints that the claimants included only in their supporting affidavit and my unhappiness about the state of the claimants' evidence on this application.

53 The claimants' supporting affidavit advanced a series of complaints about the Tribunal's construction of the Confirmation. The complaints were that the Tribunal rewrote the parties' contract, that it mistook the scheme of the Code, that it misapplied the canons of construction, that it failed to consider the claimants' evidence of Ruritanian insolvency law and that it reached an incoherent result.[42] None of these complaints was advanced in the claimants' written submissions. None of these complaints was pursued in oral submissions. Pressed on whether the incoherence complaint was maintained, counsel said

[42] Affidavit of at paras 110–134.

simply "Today, no", and made no oral submissions in support of any of them.[43] I deal with these complaints on three independent bases.

54 First, the complaints are not before me for decision. The functions of an affidavit are entirely different from the functions of a pleading. Pleadings have three functions: (a) to tie the pleading party down on the case it intends to advance on the substantive and binding determination of the merits of the parties' dispute; (b) to give reasonable notice of that case to the opposing party; and (c) to define and limit the issues that the court has to decide. An affidavit, on the other hand, has only one function: to place evidence before the court. In a setting-aside application, O 48 r 2(4) of the Rules presses the supporting affidavit into serving the first two functions of a pleading. Thus, the Rules require the grounds for setting aside to be stated in the affidavit so as to tie down the applicant on the grounds it relies on for setting aside and to give notice to the opponent of those grounds. But the Rules do not press the affidavit into performing the third function of a pleading. Limiting the legal issues that the court must decide is the work of the applicant's submissions, written or oral. A ground for setting aside that appears only in the supporting affidavit, and that is never advanced in submission, is therefore not an issue that the court has to decide.

55 Second, even if the complaints set out only in the supporting affidavit were before me for decision, the claimants have not even attempted to establish their case on those complaints. The burden of establishing a ground for setting aside lies on the applicant: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [29]; *China Machine* at [86]. The

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[43] Transcript, 23 February 2026, p 27 line 26.

claimants advanced no argument establishing these complaints to be well-founded in law. They pointed to no evidence proving them to be well-founded in fact. The claimants have therefore not merely failed to discharge their burden, they have failed even to attempt to discharge it.

56 Third, the complaints are hopeless even on the merits. I confine myself to the merits of the complaints as grounds for setting aside. The correctness of anything the Tribunal decided is not for me to review.

57 Taken at their highest, the complaints are that the Tribunal decided wrongly questions that were squarely within the scope of what was submitted to it, in particular the construction of the Confirmation. An issue within the scope of the submission does not fall outside it because the tribunal may have decided it wrongly. A mistake of law or fact is not a ground for setting aside: *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [37]; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [33]; *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 at [54]. Moreover, incoherence or irrationality are not a free-standing ground. A failure to consider an issue is inferred only where the inference is clear and virtually inescapable, which is not the case here: *DKT v DKU* at [8(c)]. These complaints are nothing but an entirely impermissible and illegitimate appeal on the merits.

The claimants' evidence on the application

58 The matter of evidence concerns a fundamental irregularity in the supporting affidavit.

59 This application was filed on 14 October 2025. It was supported at the time of filing by an affidavit filed by claimants' solicitor to which was exhibited a draft affidavit of DSW. That is a procedure permitted as an indulgence when, due to circumstances of urgency, a deponent's affidavit cannot be sworn in time to be filed and served together with the application. The indulgence rests on two unspoken premises. First, the party relying on this indulgence will be diligent in ensuring that the deponent's affidavit is sworn and filed as soon as possible. Second, the deponent's affidavit, when filed, will be in terms that are precisely identical to the draft exhibited to the solicitor's affidavit.

60 In this case, both premises were breached. DSW had not affirmed and filed his affidavit even by the time the application came on for hearing. And there was a material and fundamental variance between the draft of DSW's affidavit exhibited to the solicitor's affidavit and the affidavit that was eventually filed on behalf of the claimants to take the place of the solicitor's affidavit.

61 None of this is a mere technicality. A setting aside application is brought by originating application. It is determined on affidavit evidence alone. Although s 2(1) of the Evidence Act provides that that legislation does not apply to affidavits, affidavits are nevertheless subject to the common law of evidence preserved by s 2(2) of the Evidence Act. That must be so, otherwise the outcome of a dispute could turn solely on the originating process used to commence the litigation to resolve it and the differing universe of evidence thereby rendered admissible. Or, even within proceedings commenced by originating claim, the outcome could turn on whether final judgment is entered following an application for summary judgment or an application to strike out of the defence,

both of which are decided on affidavit evidence alone to which the Evidence Act does not apply, or following a trial, to which the Evidence Act does apply.

62 The starting point, therefore, is that an affidavit in support of or in opposition to an originating application must contain only evidence that is admissible under our common law of evidence. That primarily requires evidence that is direct evidence coming from the deponent. That rule is relaxed for interlocutory applications. Order 3, r 5(7) of the Rules, and its predecessor in O 41 r 5 of the Rules of Court 2014, allows the deponent of an affidavit filed in support of or in opposition to an interlocutory application to depose to facts on information or belief so long as the sources and grounds are clearly stated. But that relaxation of the direct evidence rule has no application to an affidavit filed in support of or in opposition to an originating application such as this one.

63 The supporting affidavit is the whole evidential foundation of an originating application. A defect in it is fundamental. An originating application without an affidavit in support is not only irregular, it is entirely without evidential foundation.

64 Against that background, four matters trouble me about this application.

65 The first is that claimants' counsel did not follow up with DSW to ensure that his affirmed affidavit was filed by the time this application came on for hearing, let alone as soon as possible after the application was filed. The application was therefore entirely without evidential foundation. I drew this defect to the attention of claimants' counsel well before the application came on for hearing, at a Judge's Case Conference ("JCC") on 26 January 2026. Counsel indicated to me that DSW's affidavit, duly affirmed and in identical terms to the

draft, would be filed by 5 February 2026. It was not filed, whether by 5 February 2026 or when this application came on for hearing. Apart from an assertion from the bar that DSW was having difficulty finding a notary public before whom to affirm his affidavit, claimants' counsel was unable to offer any reason for: (a) failing to file DSW's duly affirmed affidavit as soon as possible after filing this application; (b) failing to file DSW's duly affirmed affidavit before I reminded him of the need to do so at the JCC on 26 January 2026; and (c) failing to file DSW's affidavit by 5 February 2026 or even by the time this application came on for hearing.

66 The second is that counsel appeared to think the hearing could proceed on a solicitor's affidavit alone. It could not. Save in exceptional cases, the solicitor cannot give direct evidence of the facts relevant to a setting aside application, including the facts underlying the parties' transaction and dispute. That ability lies with the client alone. A solicitor's affidavit is inadmissible and cannot supply the factual foundation for an originating application. That is so even if the solicitors' affidavit is taken generously as deposing, on information and belief, the facts set out in a finalised draft of an affidavit to be sworn by the client representative that is exhibited to the solicitors' affidavit.

67 The third matter is distinct. It is a failure of diligence. Although claimants' counsel did file an affidavit on the morning of the hearing of this application, it differed materially from the draft that had been exhibited to the solicitor's affidavit. The difference was in the fundamental issue of the identity of the deponent and therefore in the jurat. The affidavit filed on the morning of the hearing was not affirmed by DSW. It was affirmed by the donee of a power of attorney executed by DSW. It was counsel for DSU who drew this

fundamental difference to my attention.[44] Counsel for the claimants did not. His explanation for not doing so was that he had received the affidavit shortly before he filed it and had not noticed the change.[45] This is not a satisfactory explanation.

68 The fourth matter is that claimants' counsel appeared to think that a power of attorney operated to render a deponent's affidavit admissible. It does not. A power of attorney confers on the attorney authority to act for, and to bind, the principal, including in contract. It does not transfer to the attorney the principal's capacity to give direct evidence on the material issues. The admissibility of evidence in an affidavit supporting an originating application turns on the common law of evidence, not on authority. An attorney cannot give admissible evidence of these matters merely because the principal has authorised the attorney to act as the principal's agent. Authority is not knowledge. A power of attorney cannot, in itself, confer on a deponent the capacity to give admissible evidence of the facts.

69 These four matters, and the disposal of the setting aside grounds raised on affidavit alone, are facets of the one proposition. An affidavit is a vehicle for a deponent's evidence and not for pleading or arguing a party's case. It cannot for that reason define or limit the legal issues that I have to decide. That is why the complaints raised only in the affidavit in support are not before me. Being a vehicle for evidence, and only for evidence, an affidavit in support of an originating application must contain evidence that is admissible coming from the deponent. A solicitor could swear the affidavit in support where the solicitor

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44 Transcript, 23 February 2026, at p 6 lines 22–23.

45 Transcript, 23 February 2026, at p 8 lines 12–14 and lines 25–26.

can give direct evidence of all of the material facts and does so in his own words rather than by simply exhibiting a draft affidavit of another deponent. Apart from that exceptional case, a solicitor's affidavit can operate only as a placeholder. And because the capacity to swear an affidavit turns on admissibility and not on authority, a power of attorney cannot confer capacity to swear an affidavit.

70 Despite these defects, counsel for DSU was prepared to argue the claimants' application on the basis that it was properly supported by admissible evidence before the court in terms of DSW's draft affidavit. I agreed to adopt this course. Given the subject matter of this application, it appeared to me to be consistent with the Ideals in O 3 r 1 of the Rules to deal with it on the merits rather than to dismiss it *in limine* for want of evidence.

Costs

71 On the merits, the application fails on every ground. Taken as a whole it is not a *bona fide* attempt to set aside the Award for any recognised vice. It is, in substance, an attempt to reopen the merits of the Tribunal's decision in the guise of a setting-aside application. It was advanced in significant part on grounds that were never pursued in submissions at all. That, together with the conduct of the application I have described, warrants an order for costs on the indemnity basis.

72 I have therefore ordered the claimants to pay DSU the costs of and incidental to the application on the indemnity basis. I fix those costs in the sum of $65,000 including disbursements.[46]

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[46] Transcript, 23 February 2026, at p 172 lines 3–10.

Conclusion

73 For all these reasons, the claimants' application is dismissed with costs fixed on the indemnity basis at $65,000.

Vinodh Coomaraswamy
Judge of the High Court

Prakaash s/o Paniar Silvam and Yap Wei Xuan Mendel
(Oon & Bazul LLP) for the claimants;
Cavinder Bull, SC, Chan Jin Yi Wesley, Tan Jui Yang Benedict
and Fu Journe Hahn (Drew & Napier LLC) for the respondent.