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Claim No. CA 006/2025

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BEFORE: H.E. CHIEF JUSTICE WAYNE MARTIN, H.E. JUSTICE SIR PETER GROSS, AND H.E. JUSTICE PATRICK KEANE

BETWEEN

OHEO BANK

Appellant/Claimant

and

PARKER

Respondent/Defendant

Hearing : **5 March 2026**

Counsel : Yash Bheeroo (lead counsel) and Ravi Jackson (junior counsel) instructed by Simmons & Simmons Middle East LLP for the Appellant

Stephen Doherty instructed by Morgan, Lewis & Bockius LLP for the Respondent

Judgment : **24 April 2026**

JUDGMENT OF THE COURT OF APPEAL

UPON the Arbitration Claim filed on 21 February 2025 seeking to set aside parts of a Partial Final Award dated 1 November 2024 issued by DIAC (the "Arbitration Claim")

AND UPON the Order with Reasons of H.E. Justice Shamlan Al Sawalehi dated 18 July 2025 dismissing the Arbitration Claim with costs (the "Judgment")

AND UPON the Order with Reasons of H.E. Justice Shamlan Al Sawalehi dated 11 August 2025 disposing of costs (the "August Order")

AND UPON the Order with Reasons of H.E. Justice Shamlan Al Sawalehi dated 11 September 2025 dismissing the Claimant's application for permission to appeal the Judgment with costs (the "September Order")

AND UPON the Order with Reasons of H.E. Justice Shamlan Al Sawalehi dated 16 October 2025 disposing of costs (the "October Order")

AND UPON the Appellant's renewed Appeal Notice dated 26 September 2025 seeking permission to appeal the Judgment (the "Renewed Application")

AND UPON the Order with Reasons of H.E. Chief Justice Wayne Martin dated 17 November 2025 granting the Appellant's Renewed Application

AND UPON hearing counsel for the Appellant and counsel for the Respondent at the Appeal Hearing on 5 March 2026 before H.E. Chief Justice Wayne Martin, H.E. Justice Sir Peter Gross and H.E. Justice Patrick Keane (the "Appeal Hearing")

IT IS HEREBY ORDERED THAT:

1. For the reasons given in the Schedule of Reasons:

   (a) The Bank's Appeal on Ground I is dismissed.

   (b) The Bank's Appeal on Gound II is allowed;

   (c) Paragraphs [298], [302] - [308], [332] - [333], [335] and [352] of the Award are set aside.

   (d) The Bank's Appeal on Ground III is allowed.

2. The Judgment is set aside.

Costs

3. The costs order in the Judgment is set aside and in lieu it is ordered that Parker pay the Bank its costs of the proceedings before the Court of First Instance.

4. Parker shall pay the Bank its costs of the Appeal before this Court.

5. The costs order in the August Order is set aside.

6. The costs order in the September Order is set aside.

7. The costs order in the October Order is set aside.

8. The parties shall attempt to agree all questions relating to costs within 28 days of the date of this Judgment, failing which the Registrar is to give directions for the resolution of all such questions, including the orders to be made replacing the August, September and October Orders.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 24 April 2026
At: 3pm

SCHEDULE OF REASONS

INTRODUCTION

1. It is a tribute to the resilience of the Registry of the DIFC Courts, the individuals working there and the sophistication of technology, that, amid hostilities in the region, this Appeal proceeded online, as scheduled, without delay or disruption.

2. The Appeal raises for the first time at an appellate level in the DIFC Courts a consideration of the principles underlying Arts. 41(2)(a)(ii) and (iii) of DIFC Law No. 1 of 2008 (the "Arbitration Law").

3. Arts. 41(2)(a)(ii) and (iii) of the Arbitration Law provide as follows:

> "(1) Recourse to a Court against an arbitral award made in the Seat of the DIFC may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) Such application may only be made to the DIFC Court. An arbitral award may be set aside by the DIFC Court only if:
>
> (a) the party making the application furnishes proof that:
>
> ...
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to Arbitration, or contains decisions on matters beyond the scope of the submission to Arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to Arbitration may be set aside; ..."

4. It has been said, in the context of international arbitration, that the role of the Curial Court is a light touch statutory supervisory regime entailing "*Maximum support. Minimum interference.*".[1] The enforcement of arbitration awards depends, however, on the exercise of state power and states are reluctant to lend their support in rare cases where basic standards of procedural fairness have not been met. The over-arching question for this Appeal is whether it meets the high threshold justifying Court intervention.

5. The present proceedings arise initially out of an arbitration (the "Arbitration"), with a DIFC seat, conducted pursuant to the Dubai International Arbitration Centre ("DIAC") Rules 2022 (the "Rules"). DIFC law governed the substance of the dispute.

6. By a Partial Final Award, dated 1 November 2024 (the "Award"), the arbitral tribunal, by a majority[2] (the "Majority"), awarded the then Claimant ("Parker") EUR 1 million in respect of one claim (the "Successful Claim") having dismissed all its other claims against the then Respondent (the "Bank"). The Successful Claim was summarised in the Award, at [352], as follows:

> ".the Bank is liable pursuant to Article 94 of the Regulatory Law to compensate the Claimant in the sum of EUR 1 million for breach of its duty under COB Rule 3.2 and GEN Rule 4.2.6 to ensure that its communications with the Claimant were clear, fair and not misleading."

7. The third member of the Tribunal[3] dissented, expressing his views in a Dissenting Opinion, likewise dated 1 November 2024 (the "Dissenting Arbitrator" and "the Dissenting Opinion").

8. By way of an Addendum to the Award, the Majority produced a Response to the Dissenting Opinion (the "Majority Response"). As the Majority Response itself provides (para. 2), it is common ground that:

> "For the avoidance of doubt, the matters set out in this Addendum do not form part of the Tribunal's Final Partial Award, nor do they form

part of Mr Reed's Dissenting Opinion."

9. Subsequently, the Tribunal dealt, unanimously, with costs and interest in its Final Award on Costs and Interest, dated 30 January 2025 (the "Consequentials Award"). As will be seen, the Consequentials Award is revealing and of considerable interest.

10. By an Arbitration Claim, the Bank sought to set aside parts of the Award, in particular[4], paragraphs [298], [302] - [308], [332] - [333], [335] and [352], contending that the Successful Claim comprised an allegation raised for the first time in Parker's Post- Hearing Brief (the "Unpleaded Allegation"); so far as the Award had given effect to the Unpleaded Allegation, it constituted a denial of the Bank's right to be heard and a decision on a matter not submitted to arbitration.

11. By his Order with Reasons, dated 18 July 2025, H.E. Justice Shamlan Al Sawalehi (the "Judge" and the "Judgment") dismissed the Arbitration Claim, with costs.

12. The Bank now appeals to this Court from the Judgment, together with certain consequential costs orders made subsequently by the Judge on 11 August 2025 (the "August Order") 11 September 2025 (the "September Order") and 16 October 2025 (the "October Order"). The Bank does so pursuant to permission granted by H.E. Chief Justice Wayne Martin, in respect of all the Grounds of Appeal advanced, as set out in his Order with Reasons dated 17 November 2025 ("the Chief Justice", the "November Order" and "the Grounds").

13. The Grounds were as follows:

(I) The Judge erred in law in concluding that Art. 41(2)(a)(iii) of the Arbitration Law was not satisfied ("Ground I: Scope of Submission to Arbitration").

(II) The Judge erred in law in concluding that Art. 41(2)(a)(ii) of the Arbitration Law was not satisfied ("Ground II: Reasonable opportunity to present case").

(III) The Judge erred in law and/or was unjust because of a serious procedural irregularity in failing to give adequate reasons for his conclusions that Arts. 41(2)(a)(iii) and 41(2)(a)(ii) were not satisfied ("Ground III: Failing to give adequate reasons").

(IV) The costs orders made by the Judge in the July Order and the August Order were contingent upon the Judge's conclusion that neither Art. 41(2)(a) (iii) nor Art 41(2)(a)(ii) was satisfied; insofar as the Bank succeeds on appeal in challenging those conclusions, the costs orders were also wrong ("Ground IV: Costs").

14. In *form*, Grounds I and II constitute an appeal from the Judgment but, *in substance*, their focus lies on whether the *Award* can successfully be challenged on those Grounds. If yes, the Judgment cannot stand; if no, the Judgment would require further consideration. In form and substance, Ground III concerns the Judgment. Ground IV is ancillary; its resolution depends on the outcome of Grounds I - III.

15. The principal Issues (the "Principal Issues") for us to decide follow the Grounds, save that we will take Ground II before Ground I.

16. We turn to the factual history.

FACTUAL HISTORY

17. Parker was a customer of the Bank, with whom it opened an account in 2017 (the "Account"). Parker's ultimate beneficial owners were Mr Stanley ("Mr Stanley") and his parents, who are said to operate a number of companies in the shipping industry. In 2020, Parker's relationship manager at the Bank was Mr Sean ("Mr Sean"); the Assistant Relationship Manager was Mr Khawar ("Mr Khawar").

18. In April 2020, Parker, acting through Mr Stanley, approached the Bank, through Messrs Sean and Khawar, seeking assistance in obtaining finance to complete the purchase of a ship (the "Vessel").

19. Mr Sean allegedly advised Parker that the purchase of the Vessel could be financed through a series of transactions (the "Transactions"), as follows:

(a) First, certain securities and commodities held in the Account would be sold to generate EUR 1.4 million in cash (the "Liquidity Transactions").

(b) Secondly, the EUR 1.4 million generated by the Liquidity Transactions would be transferred from the Account to the account of a third party, a Mr Riley ("Mr Riley"), who owned a company called Afrah ("Afrah") (the "Liquidity Transfer").

(c) Thirdly, in return for the Liquidity Transfer, Afrah would transfer two corporate bonds (the "Bonds") to the Account (the "Bond Transfer"): (i) a bond issued by Deeksha (the "Deeksha Bond"); and (ii) a bond issued by Orlaith (the "Orlaith Bond")[5].

(d) Fourthly, the Bonds would subsequently be used as collateral to obtain a loan from Oritse ("Oritse") to fund the purchase of the Vessel.

20. In the Arbitration, Parker alleged that it acted in reliance on the Bank's/Mr Sean's advice; that the Deeksha Bond was not able to be used to secure finance for the purchase of the Vessel and was worthless, so that Parker suffered loss in the amount of EUR 1 million, which it had paid for the Deeksha Bond.

21. The sum of EUR 1.4 million[6] was paid from the Account to Mr Rileyon 4 June 2020. Prior to the payment, on 28 May 2020, Mr Stanley and his parents executed a written indemnity (the "Indemnity") on behalf of Parker in favour of the Bank. Putting it at its lowest and regardless of the outcome of these proceedings, the circumstances surrounding the Indemnity show the Bank (by virtue of Mr Sean's conduct) in a distinctly unfavourable light.

22. Thus, on 26 May 2020, Mr Khawar was told by the Bank's back office bonds team that the Bank would not be able to sell the Bonds. Mr Sean was copied to this message. On 27 May, Mr Khawar was informed that "*The below bonds are not tradeable and hence we are not able to have it transferred in.*" Mr Khawar passed this information on to Mr Sean. On the same day, Mr Sean responded to the Bank's back office, saying this:

> "The client don't intend to trade on this bond. They are buying these assets to hold till maturity. They could sign up on any indemnity if required."

As Mr Sean was aware, Parker did not intend to hold the Bonds until maturity. He knew that the Bonds were due to be transferred for the purposes of use as collateral in respect of the proposed purchase of the Vessel.

23. On 28 May, the back office responded to Mr Sean as follows:

> "If the below 2 bonds are only for custody only, please get the client to sign the SAP 01 form for on-boarding of such products."

As we understand it, the SAP 01 form was an indemnity form in the Bank's favour, to be signed by the customer. Mr Khawar sent it to Mr Stanley on the same day. Mr Stanley was not told about the Bank's internal communications, or why he was being asked to sign the Indemnity, or that the Indemnity was only required because the Bonds had been identified as untradeable.

24. Instead, still on 28 May, Mr Sean sent Mr Stanley a voice note via WhatsApp stating:

> "I've been trying to reach you. There are a few things I want to explain to you. One, your bond would get settled in your account by tomorrow. For that there are two things that we need to do. Once, Khawar is going to send you a form.[I.e., the Sap-01 form].I just want you to sign and send/scan immediately, don't please sleep on it don't, you know, don't take too much time. That's one thing. Second, as equally important as the first one. I want you to wire this money, 1.4 million, ASAP, you should have done it yesterday. Please send this money because we have to make the payment as soon as the security hits the account. These are top two priority things that you have to do today, nothing else."

25. In this regard, the Tribunal held (at [273]):

> "(1) Mr Sean lied to his colleagues that the Claimant was intending to hold the Bonds until maturity.
>
> (2) Mr Sean failed to pass on to the Claimant the information that the bonds were illiquid.
>
> (3) Mr Sean failed to explain to the Claimant that the Bank required an indemnity because the Bonds were illiquid.
>
> (4) Mr Sean accepted an offer of employment from Mr Riley which put him in an obvious position of conflict of interest, because he was acting for both sides to the transaction, but failed to disclose the conflict to the Claimant."

26. Perhaps unsurprisingly, the Bank did not call either Mr Sean or Mr Khawar to give evidence at the hearing.

THE AWARD: THE CLAIMS WHICH WERE DISMISSED

27. Notwithstanding the Tribunal's searing conclusions as to Mr Sean's (and hence the Bank's) conduct, all Parker's claims - except for the Successful Claim - were unanimously dismissed by the Tribunal. In the paragraphs which follow, we outline this feature of the Award.

28. In broad terms, Parker advanced five heads of claim in its pleadings:

> (1) Deceit;
>
> (2) Misrepresentation;
>
> (3) Breach of the *Quincecare* duty[7];
>
> (4) Breach of regulatory duties; and
>
> (5) Negligence.

29. The Tribunal concluded (Award, at [351]):

> "(1) The Claimant's claim for fraudulent, alternatively negligent misrepresentation is dismissed.
>
> (2) The Claimant's claim for breach of the *Quincecare* duty is dismissed.
>
> (3) The Claimant's claim for negligence pursuant to Articles 17 and 18 of the Law of Obligations is dismissed."

30. The Chief Justice's succinct summary in the November Order (at [28] et seq) explains these conclusions:

> "28. The Tribunal found that Parker had failed to establish that the representations upon which its claims in deceit and misrepresentation were based had in fact been made by the Bank. Accordingly, those claims were dismissed.
>
> 29. The Tribunal also dismissed Parker's claim based upon breach of the *Quincecare* duty, partly in reliance upon the explanation of the limitation upon that duty provided by the Supreme Court in *Philipp v Barclays Bank*, partly because of its findings with respect to the knowledge of relevant employees of the Bank and partly because of its conclusion, after considering the expert evidence adduced by the

parties, that the circumstances of the case did not fall within any possible exception to the Bank's duty to execute a valid payment instruction from its customer."

31. As for the deceit and misrepresentation claims, the Tribunal said this (at [177]):

"In summary, the Tribunal concludes that the Claimant has failed to prove that any of the representations alleged by it were made to it and that its claim [in] deceit falls at the first hurdle."

(See too, [178]). Questions of vicarious liability did not arise because of the Tribunal's conclusion that the representations relied upon by Parker had not been made.

32. So far as concerned Mr Sean's wrongdoing (see above, Award at [273]), the Tribunal had already observed (at [231]):

"His dishonesty was not relevant dishonesty. There is no evidence to suggest that Mr Sean knew or was reckless to the fact that the Claimant would be unable to use the Bonds for their intended purpose of obtaining a loan from Oritse because they were illiquid."

Moreover, at [275], the Tribunal said this:

"The Tribunal would expect the Claimant to have pleaded these instances of wrongdoing by Mr Sean as breaches of duty for which the Bank was primarily or vicariously liable. However, the Claimant has chosen to found its case on the *Quincecare* duty (which is a duty of care and skill), and to limit its case on vicarious liability to alleged misrepresentations which the Tribunal has found were not in fact made. The Claimant has also not advanced any case that the Bank failed to exercise appropriate supervision or control over Mr Sean as its Relationship Manager."

33. The Tribunal therefore concluded (at [278]) that the claim for breach of the Quincecare duty must fail:

".The evidence does not establish that Mr Sean knew (or was reckless) that a fraud was being practised on the Claimant. It is not enough that Mr Sean knew that the Bonds were illiquid, or even that he deliberately failed to draw this to the Claimant's attention. Therefore the normal rule as explained in *Philipp* applies: since the Bank had no reason to doubt the validity of the Claimant's payment instruction, it was under a duty to execute it and not under any duty to inquire whether the Claimant wished to proceed with the transaction."

34. For completeness (though not requiring further comment) Parker's claim in negligence was likewise dismissed (at [341]).

35. Overall, even at a cursory glance, the Award reveals the difficulties the Tribunal encountered in grappling with Parker's pleaded case - and, unfortunately for Parker, Mr Sean's dishonesty (as the Tribunal observed) was not relevant dishonesty.

36. What remained was a breach of the Regulatory law, and it was in that context, that the Majority found the Successful Claim made out.

THE AWARD: THE SUCCESSFUL CLAIM

37. The Majority's decision on the Successful Claim is contained in the Award at [352], as already set out. The Majority's reasoning is encapsulated in the Award at [298] and [302] - [308], as follows:

"298. The Claimant says that the cases show that the duty to provide information which is clear, fair and not misleading may arise even where the Bank is under no duty to advise but has volunteered an explanation. It relies upon *Crestsign Ltd v National Westminster Bank* [2014] EWHC 3043 (Ch). In that case the Court found that there was no common law duty on the bank to advise, but that nonetheless the bank's representative "came under a duty to explain fully and accurately the nature of the products in respect of which he chose to volunteer an explanation": see [153]..

...

302. The Tribunal has already found that Mr Sean did not pass on to the Claimant the information received by him on 26 and 27 May 2020 that the Bonds were illiquid and untradeable. The Tribunal has also concluded that the lack of liquidity was not a red flag given the repeated representations made by Oritse both before and after that date that Oritse was prepared to lend on the security of the Bonds.

303. However, that is not an end of the matter. There was another material piece of information which Mr Sean failed to pass on to Mr Stanley, namely that the Bank would not be willing to take the Bonds into custody without the execution of an indemnity because they were illiquid and untradeable.

304. Mr Sean and Mr Khawar could easily have explained to Mr Stanley why the Bank required an indemnity. However, neither of them did so. Instead, on 28 May 2020 Mr Sean informed Mr Stanley that Mr Khawar was going to send him a form which he wanted Mr Stanley to sign and return immediately, without sleeping on it. Mr Khawar then sent Mr Stanley a blank form of indemnity under cover of an email (copied to Mr Sean) which stated only that it was required `with reference to the security transfer in.'

305. In the Tribunal's view, this is a very clear case of the Bank volunteering information which was misleading because it was incomplete. In failing to explain why it was asking for the indemnity the Bank failed to comply with its duty to communicate with the Claimant in a way that was clear, fair and not misleading. There was no good reason for Mr Sean and Mr Khawar not to give that explanation to the Claimant. The experts agreed that it is not good practice to send a blank indemnity. The breach of duty was compounded by Mr Sean's stress on the urgency of completing the indemnity, which was also not explained by him or Mr Khawar. The Tribunal finds that the Bank's breach of duty in this respect was negligent.

306. The Tribunal also considers that there is no inconsistency between its finding that the illiquidity of the Bonds was not a red flag raising the possibility that the Claimant was being defrauded and its finding that the Bank was under a duty to explain that the Indemnity was required

because of their illiquidity. Even though the illiquidity of the Bonds did not point to a fraud in all the circumstances, including the apparent willingness of Oritse to accept them as security, it was a matter which the Bank ought to have drawn to the attention of its customer when asking it to give the Indemnity.

307. The next, and critical, question is whether the Bank's breach of duty caused the Claimant's loss. In the Tribunal's view, having seen Mr Stanley give evidence, if Mr Stanley had been informed that the Bank was unwilling to take custody of the Bonds without an indemnity because they were illiquid and untradeable, this would have rung alarm bells. Mr Stanley would probably have raised the matter with his internal advisers and with Oritse, and it is likely that Oritse would then have communicated its unwillingness to lend at this stage, rather than in July 2020 after the Claimant had paid EUR 1 million for the Deeksha Bond.

308. The Tribunal is therefore satisfied on the balance of probabilities that the Bank's failure, through Mr Sean and Mr Khawar, to explain the purpose for which the indemnity was required was a material cause of the loss for which the Claimant claims in this arbitration."

38. Reference should additionally be made to paragraphs [332] - [333] and [335] of the Award:

"332. In summary, the Tribunal has found a single regulatory breach to be proven and to have been a material cause of the loss claimed by the Claimant: namely, the Bank's negligent failure, in breach of GEN 4.2.6 and COBS 3.2.1, to provide information as to the reasons why the Indemnity was required which was clear, fair and not misleading.

333. When Mr Sean and Mr Khawar sent the Indemnity to the Claimant and caused the Claimant to execute it, they were clearly acting within the scope of their employment and their authority from the Bank to communicate with its customers. Accordingly, their breaches of the relevant rules amount to breaches on the part of the Bank.

.

335. The Bank is accordingly liable to compensate the Claimant in the amount of its loss of EUR 1 million."

39. As Mr Bheeroo (for the Bank) submitted and we accept, the Successful Claim comprised five essential *"building blocks"*, namely:

"(1) That the duty established in *Crestsign Ltd v National Westminster Bank* [2014] EWHC 3043 (Ch), [2015] 2 All ER (Comm) 133 (the `Crestsign Duty') applied to Oheo Bank as a matter of DIFC law, such that Oheo Bank "came under a duty to explain fully and accurately the nature of the products in respect of which [it] chose to volunteer an explanation";

(2) That, in requesting that Parker execute the Indemnity, Oheo Bank had "volunteered" information to Parker;

(3) That the information "volunteered" by Oheo Bank was "misleading because it was incomplete";

(4) That, in those circumstances, Oheo Bank had breached the Crestsign Duty; and

(5) That if Oheo Bank had breached the Crestsign Duty, that necessarily entailed a breach of Oheo Bank's duty under COB 3.2.1 and GEN 4.2.6 to communicate with Parker in a way that was clear, fair and not misleading."

THE DISSENTING OPINION

40. In the Dissenting Opinion, the Dissenting Arbitrator differed from the Majority as to: (1) the decision to permit Parker to advance the Unpleaded Allegation, giving rise to the Successful Claim; (2) the merits of the Successful Claim. In our judgment, the merits of the Successful Claim (i.e., (2)) are irrelevant, as our jurisdiction does not extend to revisiting the merits of the parties' dispute in the arbitration.

41. By contrast, the decision to permit Parker to advance the Successful Claim (i.e., (1)) goes to the heart of the dispute before us. In a nutshell, the Dissenting Arbitrator's concerns in this regard were twofold. First, the Bank had not considered that the Successful Claim formed part of the Parker claim on regulatory breaches and had not responded to it; this was *"unsurprising"* because *"it was not pleaded"*. Secondly, Parker's pleaded claim for regulatory breaches had appeared to be advanced on the basis that Mr Sean had provided advice and information that was *"deliberately opaque"* and *"designed to mislead"*. Had the Bank appreciated that the claim for regulatory breaches was framed in negligence, the Bank would likely have relied on defences of contributory negligence and/or voluntary assumption of risk, which would have been *"well arguable"*.

42. These concerns were fully set out in the Dissenting Opinion at [13] - [17], as follows:

"13. I have two serious concerns with that last permission.

14. First, the Bank does not appear to have considered this specific claim in the "three elements" of [the] Claimant's case as to breach of regulatory duty to which it responds in any detail in the Bank's Closing, which is unsurprising because it was not pleaded.

15. Secondly, and more significantly, there may in my view be real procedural unfairness in permitting the Claimant in closing to particularise a case that the Bank's failure to advise of its reasons for requiring the Indemnity was unclear, unfair and/or misleading:

a. The Claimant's pleaded claim of regulatory breach appeared to be made in SOC 83(a) in terms of advice and information that was deliberately opaque and unclear and designed to mislead the Claimant. That is consistent with the likelihood that Mr Sean's failure to give an explanation was in fact a deliberate decision by him.

b. If the Bank had appreciated in pleading its Defence that the claim of Regulatory Breach would later be framed instead in negligence, then the Bank would be likely to have used the right it had expressly reserved in SOD 15.14 to particularise a claim in contributory negligence under Article 17(2) of the Law of Obligations and/or a defence that the Claimant voluntarily assumed the relevant risk for the

purposes of Article 55 of the Law of Obligations.

c. If the relevant negligence is failing to advise of the Bank's concerns that the Bond was illiquid and had no market value, in circumstances where it is said that would have prompted the Claimant to make enquiries of Oritse, it seems to me to have been well arguable that the Claimant was contributorily negligent in failing to appreciate those issues with the Bond and voluntarily assumed the associated risks.

d. However, where the Claimant's claim of regulatory breach appeared to be made in SOC 83(a) in terms of advice and information that was deliberately opaque and unclear and designed to mislead the Claimant, it is unsurprising that the Bank did not particularise such defences to the new claim, and similarly unfair that the Bank should then be unable to rely on such a defence where the Claimant only belatedly advanced the claim of Regulatory Breach as being in essence a claim in negligence.

16. In these circumstances, while I would accept that the Claimant's belated allegation of the Regulatory Breach was capable of argument and consideration on the evidence on record, I dissent from the permission given to the Claimant to particularise its claim in respect of the Regulatory Breach. The late particularisation of that allegation had the unfortunate consequence that the Bank did not particularise the relevant defences that it has already pleaded in general terms.

17. I would accept that it may be said that the Bank was not prevented from itself seeking to particularise its defences at that late stage. However, the Claimant's particularisation of the Regulatory Breach in C's Closing 167 was not sufficiently clear, being presented as "[a] further example of that approach [being] apparent in the way in which [Mr Sean] procured the signature of the Indemnity". The relevant breach is said to be that "the Bank failed to disclose the actual purpose for which [the Indemnity] was being sought" and "the circumstances surrounding the execution of the Indemnity". The reader of that Closing has to go back to C's Closing at 165 to pick up the earlier reference to "a breach of the DFSA Rules and a coexistent duty in negligence when communicating information .to ensure that its communications were clear, fair and not misleading".

THE MAJORITY RESPONSE

43. The status of the Majority Response has already been recorded: it neither forms part of the Award nor the Dissenting Opinion. That said, de bene esse, the Majority Response bears noting.

44. At [4], the Majority Response underlined that the only area of disagreement (between the Majority and the Dissenting Arbitrator) related to the Successful Claim; the Tribunal had unanimously agreed that the Parker claims for fraudulent and statutory misrepresentation, and for breach of the *Quincecare* duty, must be dismissed.

45. Addressing the Dissenting Arbitrator's concerns, the Majority Response said this (at [7]):

"The Majority concurs that the claim for regulatory breaches is poorly pleaded. It considers, however, that it was sufficiently clear from the Claimant's evidence that it was complaining that while it was asked to sign the Indemnity, it was not given any explanation as to why the Indemnity was required and the Claimant was not informed by Mr Sean about the Bank's internal discussions and the information that the Bonds were not tradeable. This was covered in paragraphs 37 to 42 of Mr Stanley's Second Witness Statement, where he said in terms that if the contents of the Bank's discussions had been brought to his attention at the time, he would not have proceeded with the transaction. The Bank had the opportunity to cross-examine Mr Stanley on his evidence and did so."

Accordingly (at [8]), the Majority took the view that the Bank:

"did have fair notice that the Claimant was saying that the Bank's communications with it about the Indemnity were not clear, fair and not misleading, even if the claim was not pleaded in precisely those terms".

46. Furthermore (at [9]), it had been clear that the Parker allegations of regulatory breach had been couched in negligence only. It was a matter of speculation why the Bank had not followed up on its expressly reserved intention and pleaded contributory negligence and/or voluntary assumption of risk. Had the Bank done so, *"it is likely that the Majority would have been sympathetic to such a plea"*.

THE CONSEQUENTIALS AWARD

47. As already foreshadowed, the Consequentials Award is of interest and importance. First, it provides the Tribunal's (unanimous) views on Parker's pleaded case. Secondly, it reveals the Tribunal's (again unanimous) view on the lateness of the introduction of the Successful Claim, a feature which had a significant bearing on the Tribunal's overall decision on costs.

48. The Tribunal was sharply critical of the pleading of Parker's claims. So far as concerned the unsuccessful claims in deceit and misrepresentation, the pleadings had been *"seriously flawed"* (at [37]). More generally, at [39], *".the diffuse and unclear pleading of the Claimant's case"* had unnecessarily increased the cost of the proceedings - a sentiment repeated (*"diffuse and inadequate"*) at [63]. At [66], the Tribunal returned to the same theme, commenting on *"a large number of poorly pleaded claims"*.

49. The lateness of the introduction of the Successful Claim was heavily underlined by the Tribunal in the Consequentials Award:

(a) At [28], the Tribunal said this:

"Although the Claimant did ultimately succeed in its claim for breach of regulatory duty, it did so on a basis which was never pleaded by it and which was articulated by it for the first time only in closing submissions (albeit that the majority of the Tribunal took the view that the Respondent had a fair opportunity to address the unpleaded claim), and it was wholly unsuccessful in the claims which it did plead."

(b) At [30], the Tribunal rejected the Parker submission that the Successful Claim arose from facts which were common to the unsuccessful

claims:

> ".The main thrust of the pleaded claim was that Mr Sean was a party to a conspiracy to defraud the Claimant by inducing it to buy valueless bonds, for which the Bank was vicariously liable, and that there were circumstances which ought to have put the Bank on notice of the fraud. The claim which has succeeded arose out of the very different finding that Mr Sean and his deputy failed to provide a clear, fair and not misleading explanation to the Claimant that the Bank was asking it to provide an indemnity because the Deeksha Bond was considered to be illiquid. Even the pleaded regulatory breach claims were off the mark, relying on supposed red flags which the Tribunal has rejected."

(c) At [31], the Tribunal said this:

> ".In short, the Claimant succeeded by the skin of its teeth after its arguments on breach of regulatory duty were recast in closing, no doubt in an appreciation of the manifest difficulties with the pleaded case."

(d) Although (at [37]) the Tribunal did not go so far as to say that the unsuccessful claims should never have been made, even though their pleading was seriously flawed; however:

> ".the Claimant ought to have reviewed the evidence following the document production exercise and concluded that.its regulatory breach claims needed to *be repleaded to focus on the actual facts.*"

(e) In the Tribunal's view (at [42]), very little of the overall costs incurred by either party could be attributed to the Successful Claim:

> "It was not pleaded by the Claimant, and therefore not responded by the Respondent."

50. The impact of these conclusions on costs was significant. Parker was ordered (at [80]) to pay 75% of the Bank's costs of the Arbitration and the Bank was ordered to pay 25% of Parker's costs of the Arbitration. These sums were to be netted off; the upshot was that Parker incurred a net liability to pay the Bank the sum of USD 567,208.50 in respect of costs.

THE EMERGENCE OF THE SUCCESSFUL CLAIM

51. *(A) The ramifications of the Consequentials Award*: At least at first blush, the Consequentials Award precludes argument that the Successful Claim had been pleaded and emerged prior to Parker's Post-Hearing Brief, hence its description as the Unpleaded Allegation.

52. Although Mr Doherty (for Parker) contended otherwise, in our view, there is no escape from the fact findings in the Consequentials Award. There is no appeal from that Award and no basis under DIFC Law for impugning these findings of fact. Strictly, therefore, that should be the end of this issue. Nonetheless, as Mr Doherty strenuously maintained that the Unpleaded Allegation did not first emerge in Parker's Post-Hearing Brief and that, instead, it had been pleaded and/or was referred to in the evidence, we have (*de bene esse*) considered his argument on the merits.

53. Suffice to say, we are wholly unpersuaded that the Tribunal's conclusion in the Consequentials Award was mistaken and that the Unpleaded Allegation was either pleaded or emerged prior to Parker's Post-Hearing Brief. Our reasons follow.

54. *(B) The phases of the Arbitration*: For present purposes, the Arbitration can conveniently be divided into a number of phases:

(1) The Pleadings (including the Amended Request for Arbitration).

(2) Document production, witness statements and expert reports.

(3) Pre-hearing written submissions and Lists of Issues.

(4) The final hearing.

(5) Post-Hearing Briefs.

55. *(C) Phases* (1) - (4): As to Phase (1) (the "Pleadings"), the Amended Request for Arbitration alleged breach of the Bank's regulatory duties but in a manner very different from the Successful Claim. So too, in the Statement of Claim (at paras. 81-86), Parker alleged a breach of Art. 94 of *DIFC Law No. 1 of 2004* (the "Regulatory Law") but focused on advice and information supplied by Mr Sean; it was alleged, *inter alia*, that the advice was *"deliberately opaque and designed to mislead"*. The allegations were, again, far removed from the Successful Claim. In its Reply, Parker advanced the claim for regulatory breaches but without pleading any of the building blocks (see above) of the Successful Claim. Although the Indemnity was mentioned in the Reply (at para. 221(a)), it was essentially addressed by way of answer to the Bank's reliance upon it as a *defence*, and to assert its irrelevance. It is impossible to conjure out of the Reply any suggestion that the Indemnity was *the trigger* for a duty giving rise to an additional disclosure obligation, which is the key to the Successful Claim.

56. Turning to Phase (2) (document production, witness statements and expert reports), Mr Doherty placed particular emphasis on Mr Stanley's second witness statement (at paras. 37 - 42). It would not of course be expected that a witness statement would resemble a pleading. The Majority's view of this passage, may with respect, be described as somewhat unclear. Thus, at [7] - [8] of the Majority Response, the Majority stated that this evidence went to Parker's complaint as to the Bank's communications such that the Bank had fair notice of the Successful Claim. In the Consequentials Award, however, the Tribunal, having repeated (at [28]) the Majority's view as to fair notice, expressed the conclusion (unanimously, at [30]) that the facts underlying the Successful Claim were not common to those underpinning the unsuccessful claims. However, that may be regarding the questions of fair notice and the scope of the submission to the Arbitration, matters to which we return, on any view there is no basis for undermining the Tribunal's (unanimous) conclusion that the Successful Claim remained unpleaded until the Post- Hearing Brief.

57. Phase (3) (pre-hearing written submissions and Lists of Issues) similarly does not assist Parker's case. The submissions were framed in terms of the Bank not spotting or acting upon alleged *"red flags"*. References to the Indemnity went to the question of whether it furnished the Bank

with a defence, rather than whether Parker had a claim arising out of the manner in which the Indemnity was procured.

58. As to Phase (4), it is plain from the transcript of Day 3 of the final hearing that the Indemnity was very much *"in play"*: see, e.g., F/24/50-51. Again, however, the focus was on Mr Sean's (alleged) reprehensible conduct, in terms of advice given and not given. Again, the debate is some way removed from the Successful Claim. It is further clear that the Tribunal was struggling to understand Parker's case (e.g., F/24/31). Meanwhile, the Bank had been expressing concern as to (other) unpleaded allegations it alleged Parker was seeking to advance (e.g., F/22/79-81; F/24/41). For its part, the Tribunal expressed serious concerns as to Parker's pleadings (e.g., at F/22/24 and F/24/56) and observed to Mr Doherty (F/22/24) that, generally, *"If you have got an argument it should be pleaded rather than raised at the hearing..."* It was on the third and last day of the final hearing that the Tribunal - for the first time - indicated that it would require Post- Hearing Briefs (F/24/23).

59. Summary: *Phases (1) - (4)*: It follows from our summary of Phases (1) - (4) that, even were it open to us to depart from the Tribunal's fact findings in the Consequential Award that the Successful Claim had not been raised in advance of the Parker Post-Hearing Brief, we would not have been persuaded to do so. We entirely agree with the Tribunal in this regard.

60. *(D) Phase (5) - the Post-Hearing Briefs*: The Post-Hearing Briefs were produced sequentially, Parker's on 10 June 2024 and the Bank's on 1 July 2024.

61. As it transpired, the key paragraph in the Parker Post-Hearing Brief for making good the Successful Claim was para. 167, read together by the Majority, it would appear, with paras. 161-163. Para. 167, it will be noted, contained no reference to the *Crestsign duty*. Paras. 161-163 and 167 were in these terms:

> "161. The Conduct of Business Sourcebook (`COBS') reiterates what is set out in the Principles, and states that:
>
> > `When communicating information to a Person in relation to a financial product or financial service, an Authorised Firm must take reasonable steps to ensure that the communication is clear, fair and not misleading.'
>
> 162. For a bank to be liable it is not necessary for it to operate under a duty to advise, nor is it necessary for a bank to actually provide advice. The Bank can equally attract liability for what was said about the Transactions, even if it fell short of being advice or a recommendation.
>
> 163. In the past the duty has been referred to (e.g. in swaps cases) as the `mezzanine duty'. Whilst the English Court has discouraged the use of that terminology, it is accepted that it describes a continuous spectrum of duty, stretching from `not misleading', at one end, through to full advice at the other.Depending on the particular factual context, the relevant duty might be engaged by:
>
> > a. A failure to take reasonable steps not to misstate or mislead: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
> >
> > b. A duty to explain fully and accurately the nature and effect of transactions in which an explanation was volunteered by the Bank, as well as correcting any obvious misunderstandings communicated by C, and answering any reasonable questions asked: *Crestsign Ltd v National Westminster Bank plc* [2014] EWHC 3043 at [153]-[155].
>
> ...
>
> 167. A further example of that approach is apparent in the way in which SS procured the signature of the Indemnity. In particular (as set out in detail below) on 28 May 2020, JJ informed C that it needed to execute the Indemnity immediately so that the Bonds would be settled `in your account by tomorrow'.In explaining to C why the Indemnity was required, the Bank failed to disclose the actual purpose for which it was being sought, namely that the Bank had identified that the Bonds were non-tradeable and illiquid, and so the Indemnity was required before Oheo Bank would consider taking custody. Short of excusing the Bank's conduct, the circumstances surrounding the execution of the Indemnity is, itself, a breach of duty on the part of the Bank."

62. It may further be noted that, whereas, hitherto, Parker's claim for breach of regulatory duties had rested on the Bank providing advice to Parker in connection with the intended financing of the purchase of the Vessel, the Successful Claim was not similarly premised: see, para. 162.

63. The Bank's Post-Hearing Brief objected to what it alleged was Parker's continuing attempt to raise numerous unpleaded allegations. The Bank submitted that the Tribunal should not permit Parker to advance unpleaded allegations and claims at this late stage. It was a fundamental requirement of arbitration that each party should have a reasonable opportunity to present its case, so that the Tribunal's determination should be based on the pleadings. The Bank's stance in this regard was outlined at para. 8:

> "The Respondent therefore does not engage substantively below with the unpleaded allegations and claims raised by the Claimant. The unpleaded allegations and claims are instead listed in the table in Appendix A to this Post- Hearing Brief. To the extent that the Tribunal considers that the Respondent has had proper notice of any of these unpleaded points and that the Tribunal wishes to be addressed on them, it is submitted that the appropriate course would be for the Tribunal to direct the Respondent to file a Supplemental Post- Hearing Brief dealing substantively with any such points. However, for the reasons above, the Respondent maintains that that is unnecessary, and that the Tribunal should determine the dispute based on each party's case as pleaded."

64. Appendix A to the Bank's Post-Hearing Brief listed something in the order of 20 unpleaded claims and allegations raised by Parker's. Importantly for our purposes, it included (at F26/85) the allegation contained at para. 167 of the Parker Post-Hearing Brief, with which it would not be engaging substantively.

65. It is convenient to record here that in taking the stance that it did, the Bank maintains the following (Skeleton Argument, at para. 45):

> "The approach Oheo Bank took to dealing with the Successful Claim was informed by, and consistent with: (i) the contents of PO1, whereby the Tribunal had `strictly' confined the allegations the parties were entitled to advance to those raised in their first-round pleadings.(ii) the

Chair's comment at the final hearing that, as a matter of principle, `.If you have got an argument, it should be pleaded rather than raised at the hearing.'; (iii) The Tribunal's indication to the parties at the final hearing that it had `very, very serious concerns' with the inadequacies in Parker's pleadings and wanted to `look at the regulatory pleadings'; and (iv) Parker having consistently framed its claim for breach of regulatory duties as being premised upon advice provided by Oheo Bank in respect of the Transactions (rather than Oheo Bank having `volunteered' misleading information to Parker when procuring the Indemnity)."

66. In general terms, the Tribunal's Procedural Order No. 1, dated 30 May 2023 (i.e., "PO1"), was in a form familiar in international arbitration. Annex 1 to PO1 comprised a Procedural Timetable, dealing (*inter alia*) with the service of pleadings. Points 5 and 6 of the Procedural Timetable provided as follows:

"5. Claimant to serve Statement of Reply (and Defence to Counterclaim, if any) to be strictly limited to responding to points raised in and arising from the Statement of Defence.

6. Respondent to serve Statement of Rejoinder (and Reply to Defence to Counterclaim, if any), to be strictly limited to responding to points raised in and arising from the Reply."

67. We turn to the Principal Issues, commencing with an overview of the legal framework (as here relevant) impacting on Grounds I and II.

THE LEGAL FRAMEWORK

68. (A) Overview: We invited counsel to review the position in various common law jurisdictions, and we are grateful to them for doing so. We have been helpfully supplied with authorities and some textbooks drawn from jurisdictions including the DIFC, Australia, Canada, England and Wales, Hong Kong, Ireland, New Zealand and Singapore. We necessarily refer to only a small selection of the authorities cited to us.

69. Demonstrating the truly international nature of international commercial arbitration, the authorities speak with broadly one voice, save in respect of a single matter to which we shall come, concerning the emphasis placed on pleadings when considering the scope of a submission to arbitration. Overall, it is apparent that there is a broad consensus on light touch court supervision of international arbitrations and the exercise of judicial restraint before interfering with arbitral decisions, underlining the interests of party and tribunal autonomy together with finality; that said, international norms accept that a supervisory court will be entitled to intervene when the high threshold has been crossed of demonstrating real practical injustice or real unfairness, where minimum standards of due process and fairness have not been met.

70. *(B) The (DIAC) Rules and the (DIFC) Arbitration Law*: To recap, the Arbitration was conducted under the (DIAC) Rules and the (DIFC) Arbitration Law is the law of the seat of the Arbitration.

71. Arts. 17.1 - 17.3 of the Rules highlight the interests at stake and the balance to be struck between them. Art. 17.1 provides that *"The core objective of the rules is for all arbitrations to be conducted justly, fairly, impartially, efficiently and proportionately."*. Art. 17.2 provides that, in applying the core objective, *".the Tribunal shall ensure that each party is given a reasonable opportunity to present its case."* Art. 17.3 stipulates that in complying with its obligations under the Rules, *".the Tribunal shall have the discretion to adopt procedures it considers necessary, having due regard to the relevant circumstances."* Summarising, Tribunals operating under the Rules are given procedural flexibility and autonomy, subject to ensuring that each party is given a reasonable opportunity to present its case, so as to comply with the objective that all arbitrations are conducted justly and fairly.

72. As already set out, Art. 41 of the (DIFC) Arbitration Law is exhaustive, restricting recourse to a Court against a DIFC seated arbitration award[8]. Our concern lies with Art. 41(2)(a)(ii) and (iii) of the Arbitration Law - whether the Bank was unable to present its case and/or whether the Award contained decisions on matters beyond the scope of the submission to Arbitration.

73. As a matter of language, the DIFC Court's power to set aside an Award under Art. 41(2)(a)(ii) and/or (iii) is *discretionary*, in that the relevant provisions are introduced by the wording *"may be set aside"*. For our part, we doubt whether, realistically, the Court would refuse to exercise that discretion where an applicant has otherwise clearly brought his claim within the scope of one or more of those provisions (as would be required for their invocation, see below). All that, however, is for another day.

74. The provisions of Art. 41(2)(a)(ii) and (iii) are derived from Art. 34(2)(a)(ii) and (iii) of the UNCITRAL Model Law on International Commercial Law 1985, as amended (the "Model Law"). In turn, the grounds for setting aside an award under Art. 34 of the Model Law (and Art. 41(2) of the Arbitration Law) essentially match the grounds for refusing recognition and enforcement of an Award under Art. V.1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").

75. In interpreting Art. 41(2)(a) of the Arbitration Law, given that it is based on the Model Law, the Court is entitled to treat as persuasive authorities from other common law jurisdictions which have adopted Art. 34(2)(a) of the Model Law[9]. This approach is, at the least, fortified by the terms of Arts. 8B(1)(a) and 8B(3) of the *Law on the Application of Civil and Commercial Laws in the DIFC - Law No. 3 of 2004 (as amended)* ("the 2004 Law"), which provide as follows:

"8B. Interpretation of DIFC Statutes

(1) The interpretation of DIFC Statutes may be guided by:

(a) Jurisprudence from common law jurisdictions regarding the interpretation and application of analogous laws;

..

(3) If a DIFC Statute is based on an international model law, its interpretation may also be guided by international jurisprudence interpreting and applying the international model law, as well as interpretative aids and commentary published by international bodies regarding the international model law."

76. *(C) International commercial arbitration awards and the Curial role of the DIFC Courts:* In the absence of prior Appellate authority in the DIFC jurisdiction, and always subject to DIFC Statute law, it is for this Court to provide authoritative guidance on the approach to be adopted to Arts. 41(2)(a)(ii) and (iii) of the Arbitration Law. In formulating that guidance, we treat as persuasive the authorities from the comparative survey of common law jurisdictions furnished by counsel. The context for the approach to Arts. 41(2)(a)(ii) and (iii) is provided by a consideration of the curial approach to international commercial arbitration awards more generally.

77. Our starting point is a passage from an English decision, pre-dating the *Arbitration Act 1996* ("the 1996 Act") but as valid today as it was then. In *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, Bingham J (as he then was) said this:

> *".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."*

78. A further valuable statement of principle is found in *Reliance Industries v Union of India* [2018] EWHC 822 (Comm), where at [12] - [15] Popplewell J (as he then was), drawing on his own earlier decision in *Terna Bahrain Holding Co. v Al Shamsi* [2012] EWHC 3283, synthesised various guiding considerations. Popplewell J was dealing with an challenge to an award alleging serious irregularity under s.68(2)(a) of the Arbitration Act 1996 which, unlike the Arbitration Act (and the Model Law) includes the additional requirement that *"substantial injustice"* has or will be caused to the applicant; thus, serious irregularity is not, *per se*, sufficient. Again, though not a matter we need to resolve, it may be wondered how much *practical* difference is made by the different wordings and the absence of the *"substantial injustice"* requirement in the Arbitration Act; we do, however, keep that different wording in mind.

79. At all events, Popplewell J said this in *Reliance*, at [14], taken from *Terna*, at [85]:

> "(2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.
>
> (3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under s.68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls out for it to be corrected.
>
> (4) There will generally be a breach of s.33[10] where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.
>
> (5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s.33 or a serious irregularity.
>
> (6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.
>
> (7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

80. In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, the Federal Court of Australia faced an application to set aside an arbitration award under Art. 34 for (compendiously) breach of the rules of natural justice. The application and the appeal raised matters of some importance for the operation of the (Australian) *International Arbitration Act 1974* ("the IAA") and to applications of the kind there made (concerning alleged breach of the rules of natural justice). A number of matters of principle can be distilled from TCL.

81. First, the Court would be slow to intervene when faced with an application to set aside an international commercial arbitration award under the Model Law. It would intervene *"prudently, sparingly and responsibly"* (at [109]).

82. Secondly, the starting point was one of non-interference. The Model Law (and New York Convention) were designed (at [109]) to *".place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties."*

83. Thirdly, the touchstone for Court intervention was the demonstration by a party that it had suffered *"real unfairness or real practical injustice"* ([55], [110] and [111]) in the conduct or resolution of the arbitration. Court intervention was not a matter of formalism ([110]); a fundamental principle of all arbitration was that *".it has to be fair"* ([68]).

84. Fourthly, whether unfairness had been demonstrated was a fact specific matter ([110]).

85. The Canadian decision in *Nelson v The Government of the United Mexican States* 2022 ONSC 1193 is to like effect, neatly encapsulating the balance to be struck (at [33]):

> "Article 34(2)(a)(ii)[11] embodies well-established principles of fairness and natural justice. While decisions of an international arbitral tribunal generally attract a high level of deference, they are not immune from being set aside by the courts of the seat of arbitration if minimum standards of due process and substantive fairness are not met."

The Ontario Courts had posed the question of whether a tribunal's conduct had been sufficiently serious to offend *"our most basic notions of morality and justice"* such that it could not be *"condoned under the law of the enforcing State"*. An example where a party had been unable to present his case arose where an award was based on a theory of liability that either or both parties were not given an opportunity to address.

86. In our judgment, the DIFC Courts' curial role in respect of international commercial arbitration should accord with the mainstream of thinking adopted by leading commercial courts internationally, which we seek to articulate as follows:

(a) *First*, the Court will be slow to intervene and, when it does so, it will not be seeking to find errors in an Award.

(b) *Secondly*, the starting principle is to minimise Court interference with arbitration and the arbitration process, so furthering the interests of arbitral autonomy and finality. This principle manifests itself by the requirement that there be a high threshold for Court interference - a test we prefer to that of *"only extreme cases"*, which risks placing undue weight on labels.

(c) Thirdly, the justification for intervention will not be formalistic or, as we infer, unduly influenced by the procedural rules of domestic litigation. The Court's concern will lie instead with whether the applicant for relief by way of setting aside an award can demonstrate *"real unfairness or real practical injustice"* involving a failure to meet *"minimum standards of due process and substantive fairness"*. In such circumstances, the State will not lend its aid to enforcement of an offending award. Furthermore, and to state the obvious, an application to set aside an award is anything but an appeal on or a rehearing of the merits.

(d) *Fourthly*, as always in the common law, whether real unfairness or real practical injustice has been demonstrated, requires a fact specific inquiry and may well involve matters of degree.

87. *(D) Art. 41(2)(a)(ii): The legal framework*: Informed by our consideration of the curial approach to international commercial arbitration more generally, we turn to the first provision with which we are specifically concerned. The key words of this Article are whether an applicant has proved, the burden being on the applicant to do so, that he was *"unable to present his case"*. In our judgment, this provision is of fundamental importance. It goes to the heart of whether, in any given case, there was *"real unfairness or real practical injustice"*. If a party had the opportunity to present its case, it would likely require an unusual example to make good an argument that the dispute was beyond the scope of the submission to arbitration. If, *per contra*, a party was unable to present its case, that the dispute was within the scope of the submission to arbitration might be of no more than academic importance. In a passage with resonance for both this Issue and the Issue arising next under Art. 41(2)(a)(iii), *Born on International Commercial Arbitration* (3rd ed.), ch. 25, [F][4][a], at p. 94, observed:

"Some annulment courts have adopted unduly formalistic approaches to the question whether a particular issue or argument was submitted to the tribunal. For example, one recent Singaporean decision held that issues not raised in the parties' `pleadings' had not been submitted to the tribunal, notwithstanding the fact that these issues had been raised in argument during the arbitration. The better view is not to look to local rules of civil procedure or litigation practices in determining whether an issue was presented to the arbitrators; the proper inquiry is instead a pragmatic one into whether the parties and tribunal had a reasonable opportunity to consider and submit evidence and argument on a particular issue."

88. The judgment in the Hong Kong decision of *X v Y* [2020] HKCFI 2782, at [62] encapsulates the relevant considerations:

".the Court is not concerned with the merits of the award or the correctness of the reasoning of the tribunal.what concerns the Court is the due process and structural integrity of the arbitral proceedings. The conduct complained of, when a party complains of its inability to present its case, must be `serious or even egregious' before a Court might take the view that a party had been denied due process. The fundamental basis underlying the ground of setting aside for inability to present one's case is that there should be a fair hearing, and that the arbitral tribunal is required to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents, a duty expressed under Article 18 of the Model Law."

89. The purpose of Art. 41(2)(a)(ii) of the Arbitration Law is to protect a party from injustice, not from the consequences of its own decisions: *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, at [29]; it is not designed to "bail out" parties who have made choices they come to regret: *Amasya*, at [23], citing Menon CJ (of Singapore) delivering the judgment of the Singapore Court of Appeal in AKN v ALC [2015] SGCA 18, at [37]. Accordingly, there is an important distinction between a party not having an opportunity to present its case and a party not recognising or taking an opportunity which exists to do so: *Reliance (supra)*, at [14(5)].

90. In *Terna (supra)*, Popplewell J addressed the nature of the opportunity, at [106]:

".it is important to keep in mind that whilst s.33[12] requires a party to be given a reasonable opportunity of addressing his opponent's case, that does not mean that the tribunal is acting unfairly in deciding a case on a point to which the party raising it does not give any great emphasis, or which is not the subject matter of any great exposition. If a point is raised only briefly, that is in accordance with the ideal of speedy resolution which is an objective of the arbitral procedure.It is none the less so if a host of what turn out to be bad points are also raised and it is on those other points that the party raising the issues concentrates his exposition. Provided the issue is raised, however briefly, the opposing party has an opportunity to address it at whatever length and in whatever detail he chooses. If he chooses to invite the tribunal to reject it without addressing it in detail, that may well be a sensible tactic, in order to avoid the risk of giving it more weight and prominence that the party advancing it has done. But that is not the same as having been deprived of an opportunity of addressing it, still less of an unfair procedure having been adopted."

91. We agree with the principle as stated by Popplewell J; the opportunity does not need to satisfy some minimum requirement. Were it otherwise, an impossible burden would be placed on arbitrators, and any such requirement would obstruct, or create a trap for, the expeditious conduct of arbitrations. Throughout, a Court will be astute to guard against a disguised appeal on merits, masquerading as a complaint of procedural unfairness. That said, with respect, these observations are not to be read as a statute. The question whether a party had an opportunity to put its case is, in our judgment, necessarily one of fact and degree, so that the answer will hinge on the circumstances of the individual case. Moreover, Popplewell J's formulation may require some adjustment to cope with the situation where there has been a misunderstanding between the tribunal

and one of the parties, entailing the need for the tribunal to draw a point to the party's attention.

92. Such a situation arose in the English decision *Interbulk Ltd v Aiden Shipping Co. Ltd* [1984] 2 Lloyd's Rep 66 (*"The Vimeira"*). The Court of Appeal held that the issue, on which the arbitration had been decided, namely, whether the turning space at the entry to the dock was insufficiently wide, had not been raised in the arbitration; the charterers' application succeeded and the award was set aside on what was then technical misconduct. The observations of both Robert Goff LJ and Ackner LJ (as they then were) remain of real significance and relevance. Robert Goff LJ said this (at p.75):

> "In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. In my judgment, the arbitrators in the present case failed to give that opportunity to the charterers in respect of an issue not raised in the arbitration.Here, it appears that there may well have been some misunderstanding on the part of the arbitrators; but the fact remains that, in the result, there was unfairness to the charterers."

For his part, Ackner LJ put the matter this way (at p.76):

> "If an arbitrator considers that the parties or their experts have missed the real point.then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it."

93. In similar vein, Bingham J in *Zermalt* (supra), at 15, said this:

> "If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment."

94. The required interaction between a tribunal and the parties was reviewed in *X v Y (supra)*, at [82] - [85]. Mimmie Chan J put the matter succinctly (at [82]):

> "It is accepted that the arbitrators do not have the obligation to point out to the parties each and every aspect of the claim or evidence which they consider unsatisfactory, but in respect of matters which have never been in issue between the parties, and which do feature significantly in the arbitrators' decision, great care should be taken to ensure that the parties are given a fair and ample opportunity to comment and deal with such matters."

At [84], Mimmie Chan J drew attention to the observations contained in the judgment of Gloster J (as she then was) in *OAO Northern Shipping v Remolcadores de Marin* [2007] 2 Lloyd's Rep 302, at [22], that while it was not necessary for a tribunal to draw the attention of the parties to each and every legal inference it intended to draw, it was under a duty to give the parties a fair opportunity to address all the essential *"building blocks"* in its conclusion.

95. The decision of the Singapore Court of Appeal in *CJA v CIZ* [2022] SGCA 41, on the question of breach of natural justice, was to like effect. It contains (at [68] and following) a helpful reminder that a tribunal is not bound to slavishly adopt the position advocated by one party or another. The balance is, with respect, neatly captured in the following passage (at [72]): *".an arbitral tribunal is entitled to arrive at conclusions that are different from views adopted by the parties.. This is provided that these conclusions are based on evidence that was before the tribunal and that it consults the parties where the conclusions may involve a `dramatic departure' from what has been presented to it."* See too, *Reliance (supra)*, at [32].

96. Inescapably, therefore, the question of whether a party has been *"unable to present his case"* will be fact specific and may well require a carefully nuanced consideration of the state of play in the arbitration. We certainly wish to underline that a tribunal is not to be regarded as slavishly constrained by the manner in which the parties' arguments are formulated or articulated.

97. As does not appear to be in dispute, in order to establish that there has been unfairness arising from the denial of a party's right to be heard, that party is not required to establish that the outcome *would* have been different. It suffices for that party to show that the submissions it would have made (had it been granted the opportunity to make them) were reasonably arguable and *could* reasonably (not fancifully) have made a difference[13].

98. *(E) Art. 41(2)(a)(iii): The legal framework*: We are concerned here with the second limb of this provision, namely, whether the Award *"contains decisions on matters beyond the scope of the submission to Arbitration"*. In respect of this provision (and its Model Law equivalent), there is a divergence of opinion. Thus, in *CAJ v CAI* [2021] SGCA 102, together with subsequent authorities, the Singapore Court of Appeal appears to have taken a stricter view on pleadings than that found elsewhere. For the reasons which follow, we think that on this Issue, DIFC law ought not to follow the Singapore line of authority but should adopt a less confined and broader approach of looking at matters in the round.

99. In *CAJ*, the respondent (the claimant in the arbitration) claimed liquidated damages from the appellants (respondents in the arbitration), alleging that they caused delays in the completion of a plant. The appellants raised two principal defences during the arbitration: (i) completion had been achieved on time; (ii) the respondent was estopped from claiming liquidated damages as the delay had been caused by the respondent's own conduct. In written closing submissions, produced after an 8-day evidentiary hearing, the appellants sought to raise a new defence: namely, that they were contractually entitled to an extension of time ("EOT"), so reducing the quantum of damages payable. This defence had not been raised before and met strong objection from the respondent on procedural fairness grounds, including that it would have required factual evidence that was neither submitted nor explored. The tribunal rejected the appellants' original defences but accepted the EOT defence, on the basis that the respondent had an opportunity to deal with it in its closing submissions and because the appellants were entitled to utilise the existing evidence in the arbitration to make it good. The respondent's application to set aside the award succeeded in the High Court and that decision was upheld on

appeal.

100. Giving the judgment of the Court of Appeal, Steven Chong JCA (at [43]) took as the starting point the concession by the appellants that the EOT defence had not been expressly raised in the pleadings, lists of issues or terms of reference. There was thus *"simply no room to argue that the EOT Defence was somehow nonetheless within the scope of the Arbitration."*

101. The Court emphasised the importance of the pleadings in the context of defining the scope of the submission to arbitration. Thus (at [51]), with reference to a further Singaporean decision in *Kempinski* [2012] 4 SLR 98, the Court drew a distinction between the scope of an arbitration agreement and the scope of the *submission to arbitration: "The former must encompass the latter, but the converse does not necessarily apply."* The pleadings provided a convenient way (ibid) *"to define the jurisdiction of the tribunal by setting out the precise nature and scope of the disputes in respect of which they seek the tribunal's adjudication."* To ascertain whether a tribunal had jurisdiction in respect of any particular dispute, it was necessary to refer to each party's pleaded case to see whether the issues of law or fact raised in the pleadings encompassed that dispute. If a new issue was raised in the course of the proceedings, even by the tribunal, the pleadings (save for immaterial exceptions) must be amended to ensure fairness for the party affected by the new issue. In CAJ itself (at [52]), *"The EOT Defence would only fall within the scope of the parties' submission to arbitration upon the introduction of the EOT Defence (by way of an amendment to the pleadings.) and not any earlier."*

102. The Court in *CAJ*, further rejected the argument that the decision in *CDM v CDP* [2021] 2 SLR 235, another decision of the Singapore Court of Appeal, meant that a wider approach was permissible. In *CDM*, the Court held that the jurisdiction of a tribunal was not defined solely by the notice of arbitration and the statement of claim; rather, the subsequent pleadings were equally relevant. Moreover, the Court in *CDM* had referred to *"the five sources"*, at [18], in these terms:

> "The question of what matters were within the scope of the parties' submission to arbitration was answerable by reference to five sources: the parties' pleadings, ALOI [i.e., lists of issues], opening statements, evidence adduced, and closing submissions at the Arbitration."

The fact that an issue was canvassed in closing submissions did *not*, however, suffice, according to the Court in *CAJ*, unless the issue had *already* been pleaded.

103. Subsequently, in CJA (supra), the Singapore Court of Appeal considered an appeal from the decision of a Judge, setting aside part of an award on the ground that the tribunal had exceeded its jurisdiction. Setting the scene, Judith Prakash JCA, giving the judgment of the Court, underlined (at [1]) that the grounds for curial intervention in arbitration proceedings were *"narrowly circumscribed"*. The Courts accorded a margin of deference to the arbitration tribunal. When considering challenges to the tribunal's jurisdiction it was important and necessary to look at the arbitration in the round (ibid). Differing from the Judge, the Court of Appeal allowed the appeal.

104. In assessing whether an award should be set aside for excess of jurisdiction (at [37] - [38]), a *"practical view"* was to be taken of the substance of the dispute. This involved a two-stage process. First, the Court needed to identify what matters were within the scope of the submission to the arbitral tribunal. Secondly, it was necessary to decide whether the award involved such matters or whether (citing from *CDM, supra*) it involved a *"new difference"* outside the scope of the submission to arbitration and *"irrelevant to the issues requiring determination"*. In determining which matters were within the scope of the submission to the tribunal, the Court had regard to the *"five sources"*, set out in *CDM (supra)*, at [18]. Tellingly, the Court added this (at [38]):

> "In doing so, it does not apply an unduly narrow view of what the issues were: rather it is to have regard to the totality of what was presented to the tribunal whether by way of evidence, submissions, pleadings or otherwise and consider whether, in the light of all that, these points were live."

The issues had been clearly canvassed before the tribunal, so that this case was distinguishable from *CAJ*.

105. We turn next to the Hong Kong decision in *C1 v IBS* [2025] HKCFI 227. Having been referred to the various Singapore authorities and the *"five sources"* (discussed above), Mimmie Chan J set out the (Hong Kong) Court's approach as follows (at [27]):

> "I do not consider that it is necessary to set down any particular or exhaustive list of sources, or to confine the court's consideration in any given case. Pleadings are of course an important starting point when the court reviews the nature of the claims made and the relief sought by a party, bearing in mind the essential role pleadings play in any adversarial system of dispute resolution. However, I agree with the statement made by the Court of Appeal in CJA v CIZ, that the correct approach must be for the court to `look at matters in the round', to decide what were the live issues in dispute in the arbitration, in the best way it can."

Adopting the terminology already encountered elsewhere, such an approach should reveal whether a particular issue is *"in play"*.

106. Having regard to the overlapping criteria for setting aside an award under Arts. 32(2)(a)(ii) and (iii) (of the Model Law), the touchstone was *"fairness"*: at [28] - [29].

107. In the DIFC Court, in *Mahmood v Standard Chartered Bank DIFC* [2021] DIFC CFI 044, Chief Justice Wayne Martin made this observation at [7], albeit in a different context but relevant to the present discussion:

> ".in the context of contemporary case management, when an issue arises with respect to the adequacy of a pleading, the question is not whether the pleading alone has provided adequate notice of the case which has to be advanced and which has to be met, but rather, whether the pleading read in conjunction with all the other materials which have been served and exchanged prior to trial, has provided adequate notice of the case which is to be advanced at trial."

108. Pulling the threads together on Art. 41(2)(a)(iii) of the Arbitration Law:

(a) As a matter of principle and whether *"deference"* expresses the concept appropriately or not, a curial court should not lightly intervene

when faced with a challenge to an award based on the arbitral tribunal having exceeded its jurisdiction regarding the scope of the submission to arbitration. The reason is that the autonomy of the parties and, hence, the arbitral process is a matter of the first importance. It must be kept in mind both (i) that "mere" errors of law or errors of fact do not of themselves justify setting aside an award for excess of jurisdiction and (ii) that there is an important distinction (CJA, *supra*, at [37]) between the erroneous exercise of a power by a tribunal and the purported exercise of a power it did not have.

(b) When an application *does* meet a high threshold, Court intervention may well be justified; a tribunal's undue indulgence to one party regarding the scope of a submission to arbitration can readily entail unfairness to the other.

(c) In deciding what is within the scope of a submission to arbitration and what is not, DIFC Law should *"look at matters in the round"*, having regard to all the *"five sources"* (see above), to determine what issues or disputes are *"in play"*. Fact specific questions of degree may well be involved. While pleadings are necessarily the starting point in delineating the scope of the submission to arbitration, in our judgment, they are not, or not necessarily, the finishing point. To the extent that the Singapore authorities suggest that a matter not initially pleaded can *only* be brought into play by an amendment to the pleadings, we respectfully disagree. In our judgment that is an unduly rigid approach. Using the present dispute as an example, had the Tribunal expressly canvassed the Successful Claim with the Bank and invited further submissions upon it but had not required an amendment to the pleadings, an argument that there had been an excess of jurisdiction based on the state of the pleadings would, realistically, have been doomed to fail. For these reasons, we prefer the more flexible approach adopted in Hong Kong in *C1 v IBS (supra)*, as providing a more practical and surer guide to the scope of the disputes in play before an arbitration tribunal.

(d) Such an approach, moreover, accords more readily with the views expressed in *Born (supra)*, that international arbitration should not be tied to local rules of civil procedure in determining whether an issue was properly before a tribunal.

DISCUSSION AND CONCLUSIONS

GROUND II: REASONABLE OPPORTUNITY TO PRESENT CASE

109. We now apply the law to the facts of the individual Grounds, having already identified the crucial importance of the Issue underlying Ground II, namely, whether the Bank was unable to present its case, thus engaging Art. 41(2)(a)(ii) of the Arbitration Law.

110. Mindful though we are of the requisite caution before interference with the Award would be justified, we are persuaded, on a very narrow, fact specific basis, that the high threshold for intervention (*Reliance, supra*) is met. We are satisfied that amidst the continuing confusion surrounding the nature of Parker's case, there was a misunderstanding resulting in real unfairness or real practical injustice to the Bank. Our reasons follow.

111. *First*, the starting point is that, as the Tribunal held (unanimously) in the Consequentials Award (at [28], [31] and [42]), the Successful Claim was not pleaded prior to Parker's Post-Hearing Brief. These conclusions were pointedly reflected in the Tribunal's order as to costs (at [80]). As already indicated, though the Consequentials Award is and ought to be conclusive on this matter, we in any event agree with these Tribunal conclusions.

112. *Secondly*, we accept that in the light of a significant number of unpleaded claims contained in Parker's Post-Hearing Brief, the Bank, in its Post-Hearing Brief, clearly (as set out above) conveyed its concerns and the approach it was adopting. In Appendix A to the Bank's Post-Hearing Brief, the Bank listed in the order of 20 unpleaded claims and allegations; amongst these was the crucial (as it turned out) para. 167 of Parker's Post-Hearing Brief. At para. 8 of its Post-Hearing Brief, the Bank indicated its stance to these listed unpleaded claims and allegations, stating in terms that it was not engaging substantively with them but that if the Tribunal wished to be addressed on them, the appropriate course would be for the Tribunal to direct the Bank to file a Supplemental Post-Hearing Brief.

113. *Thirdly*, in our judgment, this was a reasonable stance for the Bank to take. Having regard to the Bank's Skeleton Argument (at para. 45, set out above):

(a) We would not have been persuaded by the Bank's reliance on points (i) and (ii) of para. 45 (namely, the contents of PO1 and the Chair's comment at the final hearing). Those arguments place more weight on both PO1 and the Chair's comment than either can appropriately bear. PO1 was in a fairly standard form in international commercial arbitration; it provides no more than a working guide to the conduct of the arbitration. In any event, paras. 5 and 6 of PO1 (also set out above) are narrowly directed at the pleading of the Statements of Reply and Rejoinder respectively, rather than providing general guidance for, let alone determining, the conduct of the final hearing as a whole. So too, the Chair's comment is best seen as exhortatory and cautionary; but, again, we cannot regard it as a direction, capable of being relied upon in the manner for which the Bank contends.

(b) Points (iii) and (iv) of para. 45 of the Bank's Skeleton argument are, however, a very different matter. They bring together the continuing difficulties of grappling with Parker's pleading and the significant shift in Parker's case away from the hitherto crucial element of advice (as further discussed below). In those circumstances, we see the force of the stance taken by the Bank in its Post- Hearing Brief regarding Parker's unpleaded claims and allegations. It is, of course, only with hindsight that it is known that the Tribunal was attracted to the Successful Claim.

114. *Fourthly*, aside from the Successful Claim, the Tribunal dismissed all the remaining Parker claims and allegations, pleaded and unpleaded.

115. *Fifthly*, the Successful Claim involved a *"dramatic"* departure (*CJA, supra*) from the advice claim hitherto advanced by Parker. Regardless of whether the underlying facts were sufficiently similar so that the Successful Claim came within the scope of the submission to arbitration (dealt with below under Ground I), it seems clear to us that the Successful Claim with its building blocks had not previously been put. Accordingly, and as persuasively expressed by the Dissenting Arbitrator (para. 14 of the Dissenting Opinion, set out above), it was *"unsurprising"* that the Bank had not considered or responded to the Successful Claim because it had not been pleaded. Moreover, the Successful Claim emerged from a single

paragraph (para. 167) in the Parker Post- Hearing Brief, but did not suffice on its own. It therefore cannot be said that, without more, para. 167 yielded the Successful Claim as held by the Tribunal; it is noteworthy that, when finding in favour of Parker, the Tribunal read para. 167 in combination with paras. 161-163.

116. *Sixthly*, in all the circumstances, we think that this is an instance of a party (the Bank) not having an opportunity to present its case in response to the Successful Claim rather than falling on the other side of the line, involving the Bank not recognising or taking an existing opportunity to do so.

(

a) We have, with respect, sympathy with the Majority of the Tribunal; doubtless unimpressed by the Bank's conduct, the Majority saw a route to do justice by upholding (what became) the Successful Claim. But, in the result the Majority, by a misunderstanding, overlooked the unfairness to the Bank, given the stance it has reasonably and clearly flagged, of not having an opportunity to address the very much altered claim (together with its building blocks) now advanced.

(b) While it is correct, as the Majority said (Majority Response, at para.7) that the Bank had the opportunity to cross-examine Mr Stanley on his evidence as to the Indemnity, as the Tribunal itself held, at that stage the Successful Claim remained unpleaded; the Bank was not in a position to know the correct target at which to direct cross-examination. It is to be recollected that, in the Tribunal's view (Consequentials Award, at [30]), the Successful Claim did not arise from facts which were common to the unsuccessful claims. Further, it is distinctly possible that an explicit allegation of a breach of the *Crestsign* duty would have brought into focus questions as to the limits of that duty. Those questions concern whether there is a line between the volunteering of information by a bank about the fitness or quality of its financial products and a statement of the bank's requirement, terms and conditions; and as to whether a bank's failure to state its reasons for its requirements terms and conditions amounts to a breach of the duty to communicate its requirements clearly. These are large questions

(c) The practical solution to this conundrum, to achieve fairness for both Parker and the Bank, drawing on *The Vimeira, Zermalt and X v Y* (all supra), was for the Majority if impressed with the Unpleaded Claim, to put it to the Bank - as the Bank had expressly requested in its Post-Hearing Brief - for it to deal with by way of a supplemental Brief.

(d) To say this is not, in any way, to suggest that a Tribunal is slavishly bound to follow the parties' presentations of their cases; it is instead to accommodate the situation which had arisen by reason of the change in Parker's case, to which the Tribunal itself had particular regard as appears from the Consequentials Award. As a matter of degree, the problem requiring resolution went altogether beyond a mere question of the "formulation" of the Parker case.

(e) Accordingly, with great respect, we are driven to conclude that the Majority's decision, that the Bank had a fair opportunity to address the Unpleaded Claim, is untenable.

117. *Seventhly*, we are persuaded that had the Bank been given the opportunity of addressing the Unpleaded Claim, the submissions it would have made as to contributory negligence and/or voluntary assumption of risk, were reasonably arguable and could realistically have made a difference. Indeed, as recognised in the Majority Response (see above and whatever its formal status), it is likely that the Majority would have been sympathetic to such a plea. The touchstone (*TCL, supra*) of *"real unfairness or real practical injustice"* was therefore satisfied.

118. Overall conclusion on Ground II: For the reasons given, we allow the Bank's Appeal on Ground II. It follows that the Award must be set aside.

119. It follows further that the Judgment, so far as it upheld the Majority on Ground II, likewise cannot stand.

GROUND I: SCOPE OF SUBMISSION TO ARBITRATION

120. Strictly speaking, Ground I is academic; in the light of our decision on Ground II, the Appeal must be allowed and the Award set aside. Nonetheless, we propose to indicate our views on Ground I, given its practical importance.

121. Nothing we say should be taken as disparaging the importance of pleadings in crystallising the issues before a Court or Tribunal; equally, however, we have no wish to lend undue encouragement to a trawl for pleading points, with a view to undermining awards in international commercial arbitration. There will be occasional cases where egregious issues arise in connection with the pleadings, necessitating curial intervention. But the autonomy of arbitration proceedings, the work of tribunals, the finality of awards and the task of the curial court will not be assisted by over-ready recourse to the pleadings to mount court challenges to otherwise unexceptionable awards.

122. Recognising, as we do, that in the generality of cases a conclusion that a party was unable to present its case may well overlap with the conclusion that a tribunal exceeded its jurisdiction by entertaining a dispute outside the scope of the submission to arbitration, we are not persuaded that that is the case here. Our reasons are these.

123. First, our approach - as already outlined - is to have regard to all of the *"five sources"* (set out above) to determine what issues or disputes are *"in play" (Reliance*, at [32]). On this approach, while pleadings furnish the *starting point* they do not, or not necessarily, represent the *finishing point* or the only matter to be considered.

124. *Secondly*, applying this approach, we are, if very much on balance, not minded to interfere with the Majority conclusion on this Issue.

(a) Intriguingly, in the Dissenting Opinion (at [16]), the Dissenting Arbitrator accepted that the Successful Claim *"was capable of argument and consideration on the evidence on record."*. On this footing, the Dissenting Arbitrator's conclusion was founded, we surmise, on Issue I more or rather than on Issue II.

(b) For its part, as we have seen, the Majority Response (at [7]) highlighted the discussion of the Indemnity found in Mr Stanley's second

witness statement (at paras. 37-42), holding that it had given the Bank a fair opportunity to address the Unpleaded Claim. In the Consequentials Award, while reiterating the Majority's view as to that fair opportunity, the Tribunal (at [28]) rejected the Parker submission that the Successful Claim had arisen from facts common to the unsuccessful claims.

(c) It is not altogether easy to know what to make of all this and we find the Tribunal's views, with respect, rather opaque. Ultimately, we have had recourse to Mr Stanley's second witness statement (*loc cit*) itself. Treating this evidence as the high-water mark of Parker's case on this Issue, and having regard to the *"totality of what was presented to the tribunal"* (CJA, at [38]), we are unwilling to reject the argument that the Indemnity was sufficiently *"in play"*, so that it could not safely be concluded that the Successful Claim fell outside the scope of the submission to the Arbitration.

125. *Thirdly*, in our view, the real vice concerning the Successful Claim was not that it fell outside the scope of the submission to the Arbitration but rather that (for the reasons already given) the Bank was not given the opportunity to deal with it. To reiterate, had the Bank been given the opportunity to deal with the Successful Claim, it is unreal to suppose that we would have set the Award aside on the alleged ground that it dealt with a dispute beyond the scope of the submission to the Arbitration.

126. *Overall conclusion on Ground I*: Accordingly, insofar as it matters, we dismiss the Bank's Appeal on Ground I.

127. On Ground I, we would not have interfered with the Judgment but for Ground III, to which we next turn.

GROUND III: FAILING TO GIVE ADEQUATE REASONS

128. Ground III contends that the Judge erred in failing to give adequate reasons for his conclusion that neither Article 41(2)(a)(iii) nor Article 41(2)(a)(ii) was satisfied.

Adequacy of reasons - applicable legal principles

129. The English cases establish a number of principles which are applied when an appeal is brought on the ground of inadequacy of reasons. The established principles relevant to the application of the ground to the circumstances of this case are set out below, and are not intended to be an exhaustive analysis of the subject:

(a) Failure to provide adequate reasons may itself be a good ground of appeal;[14]

(b) The duty to give reasons is a function of due process;[15]

(c) Fairness requires that the parties, and especially the losing party, should be left in no doubt as to why they have won or lost;[16]

(d) The provision of adequate reasons is an essential precondition to the satisfactory operation of the appellate process.[17] The reasons must be sufficient to enable the appellate court to assess whether the Judge has addressed all determinative issues, taken into account all considerations relevant to those issues and reasoned logically and rationally to his or her conclusion. Without such reasons, the efficacy of the appellate process is significantly constrained;

(e) This does not mean that every factor which weighed with the Judge in his or her appraisal of the evidence has to be identified and explained, but the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained;[18]

(f) What is required in any case will depend on the nature and circumstances of the case and no universal template is possible;[19] and

(g) The best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected.[20] It is the experience of many judges, including the members of this Court, that the "reasoned judicial process" is an invaluable aid to correct decision making - if that process is not applied, the risk of error increases significantly.

The Judge's reasons

130. The Judge's reasons comprise a total of five pages. Three of those pages are devoted to setting out the procedural context in which the issues for determination arose and to summarising the submissions made by the parties. The Judge's reasons are found under the heading "Discussion" and comprise two pages. The extent to which the Judge's reasons are elucidated within those pages will be addressed in detail below.

The Bank's submissions

131. The Bank submits that the extent of the reasons required will depend on the subject matter and circumstances of the case, which is not a contentious proposition. The Bank further submits that its challenge to the arbitral award was complex and required detailed consideration, in particular, of:

(a) The relevant legal principles to be applied under the applicable Articles of the Arbitration Law;

(b) The procedural history of the arbitration; and

(c) The nature of the claim which succeeded in the arbitration.

132. The Bank further submits that the complexity of the case was reflected in the fact that the oral hearing occupied more than a normal day of

court time and is further reflected in the detail contained within the skeleton arguments submitted by the parties and the fact that the hearing bundle ran to over 2,500 pages. The Bank submits, implicitly, that the complexity of the case required the Judge to provide reasons which addressed the many complexities raised by the parties in the course of their submissions. 133. The Bank accepts that the length of a judgment alone is not determinative but contends that reasons which run to only two pages cannot have properly addressed the issues raised by the proceedings and elucidated the Judge's reasons for the conclusions at which he arrived.

134. Third, the Bank accepts that there are some types of discretionary decisions where first instance judges may be economical with their reasons without appellate intervention. However, these proceedings did not involve discretionary determinations. The Bank submits that the critical elements of the Judge's decision making, and in particular the reasons why the Bank's arguments on the challenge were not accepted by the Judge are not capable of being understood from the reasons, which leads to the conclusion that they are inadequate.

135. In its skeleton the Bank addresses various paragraphs contained within the Judge's reasons and provides submissions with respect to their inadequacy. As already foreshadowed, this Court will also address the particular paragraphs of the Judge's reasons for the purpose of ascertaining whether, as a whole, the reasons were adequate.

Parker's Submissions

136. Parker submits that the Judge's reasons are adequate and clear for what was essentially a claim with one underlying allegation - namely, the Tribunal's determination of an unpleaded issue. Parker further submits that the Bank's arbitration claim was not complex and was a speculative claim lacking in merit (although the skeleton does not explain how the latter proposition is relevant to the adequacy of the reasons given).

137. Parker also relies upon the uncontentious proposition that the Court's role did not include evaluation of the merits of the Tribunal's findings, again without explanation as to how that fact impacts upon the assessment of the adequacy of the Judge's reasons.

138. Parker submits that the Judge complied with the principles summarised in *Simetra*, and that the essential elements of the Judge's reasoning are readily ascertainable.

Analysis

139. The adequacy of the Judge's reasons must be assessed by reference to the circumstances of the case and the matters which he was required to determine. Parker is correct to observe that the central issue in the case was whether the Bank had been put on notice of the claim which ultimately succeeded such that the Bank had a reasonable opportunity to present its case in opposition to that claim and such that it fell within the scope of the matters referred to arbitration.

140. However, the fact that the issues can be expressed succinctly in this way belies the complexity of the issues which must be assessed in order to arrive at a fully reasoned conclusion on those issues. As the Bank submits, that includes the entire history of the arbitration, including:

(a) Its foundational documents (the request for arbitration and response);

(b) The pleadings (which were lengthy and complex);

(c) The documentary evidence adduced by the parties;

(d) The written testimonial evidence adduced by the parties;

(e) The expert evidence adduced by the parties;

(f) The list of issues prepared by the parties;

(g) The written opening submissions provided by the parties;

(h) The oral evidence adduced at the hearing from witnesses of fact and expert witnesses;

(i) The oral closing submissions; and

(j) The written closing submissions.

141. Analysis of each of these steps in the arbitral process is necessary in order to ascertain the extent to which:

(a) The Bank was prejudiced in its ability to deal with the claim which was ultimately successful in the various respects contended.

(b) The facts upon which the claim which was ultimately successful were "in play"; and

(c) The legal propositions embodied in the successful claim were "in play".

142. While brevity is to be encouraged, it is difficult to imagine how the Judge could have elucidated his reasons with respect to these issues in two pages, and as will be seen, he did not.

143. The Judge commenced his reasons with the following observation:

> "This analysis focuses on the issues which, in my view, are determinative of the claim. The omission of any other matter from express reference does not indicate that it was disregarded."[21]

144. Parker relies upon this observation in its submissions. However, the question at issue is not whether the Judge failed to take any relevant

matter into account, but whether he has provided reasons which satisfy the legal principles referred to above. A general observation to the effect that all matters placed before him have been taken into account is of little or no assistance in the resolution of that question.

145. After referring to the relevant Articles of the Arbitration Law, the Judge observed:

> "Oheo Bank submits that the Unpleaded Allegation was introduced for the first time in Parker's post-hearing brief, and that it was therefore denied the opportunity to respond. However, I am not persuaded that this submission meets the threshold under Article 41(2)(a)(ii). While Oheo Bank argues that the EUR 1 million claim was wholly new, I accept Parker's submission that the facts referred to in the post-hearing brief were already before the Tribunal. The legal conclusions drawn may have been novel, but I am of the view that the issues raised are merely crystallised legal inferences from material that Oheo Bank had already seen and addressed."[22]

146. This paragraph is, with respect, nothing more than a repetition of the Bank's submission stated earlier in his reasons and the expression of his conclusion that he did not accept the Bank's submission and had accepted Parker's submission. Significantly omitted is any attempt to explain the reasons why he rejected the Bank's submission and accepted the submission made by Parker. In short, although the conclusion is clear, the reasons for that conclusion are not.

147. Further, the paragraph begs many questions which are not addressed, let alone answered, including:

(a) What are "the facts referred to in the post hearing brief";

(b) What evidence had the Judge accepted in order to conclude that those facts were "already before the Tribunal";

(c) What are "the legal conclusions drawn", to which he referred;

(d) What are "the issues raised";

(e) Why did the Judge conclude that those issues were "merely crystallised legal inferences"; and

(f) What is the "material that Oheo Bank had already seen and addressed" and when and how was that material provided to the Bank.

148. The Judge then observed:

> "Under the DIFC Arbitration Law, the Court's function is not to revisit the merits of the Award but to assess whether there has been a serious procedural failure or excess of authority. Based on the facts put before me, I am not satisfied that Oheo Bank was deprived of a fair opportunity to respond."[23]

149. As with the preceding paragraph, the last sentence of this paragraph expresses a conclusion devoid of any attempt to explain why the conclusion was reached.

150. As with the preceding paragraph, the Judge's assertion begs more questions than it answers including:

(a) What were the facts put before him upon which he relied in order to arrive at this conclusion;

(b) Why did the Judge conclude that he was not satisfied that the Bank was deprived of a fair opportunity to respond;

(c) When and how was the Bank provided with a fair opportunity to respond; and

(d) What is it precisely that the Bank was given a fair opportunity to respond to.

151. The Judge then observed:

> "Moreover, it is well established that post-hearing briefs may develop existing lines of argument, particularly where those arguments rely on material that has already been explored in the evidentiary record. I accept Parker's submission that the post-hearing brief did not raise a wholly new factual case, but rather presented a legal conclusion drawn from evidence that had been discussed through the hearing process."[24]

152. Like the preceding paragraphs, this paragraph expresses a conclusion in terms that he had accepted Parker's submission, without any attempt being made to explain why. Further, as with the preceding paragraphs, the conclusion begs a number of unanswered questions including:

(a) Why did the Judge accept Parker's submission;

(b) What was the legal conclusion to which he referred;

(c) What was the "evidence" that the Judge considered had been discussed during the hearing process; and

(d) When and how was that evidence discussed through the hearing process.

153. After referring to an article in the Arbitration Law the Judge observed:

> "While it is true that the list of issues did not include the EUR 1 million claim in precisely the form adopted in the Award, the Tribunal retains latitude to consider all claims that arise from the facts pleaded."[25]

154. This observation suggests that the Judge considered that the successful claim had been included in the list of issues in some form other than that adopted in the Award, without identifying the form in which it was included in the list of issues. The observation also begs the question as to:

(a) What were the relevant facts pleaded;

(b) How and when were those facts pleaded: and

(c) What claims was the Tribunal able to consider arising from those facts.

155. After referring again to the competing submissions of the parties, the Judge observed:

> "In assessing whether a tribunal has exceeded its mandate, the relevant question is whether the determination made by the tribunal was based on factual issues that fell within the scope of the matters submitted to arbitration. A tribunal is not confined to the precise formulations in the pleadings so long as the findings arise from the facts and issues that were properly before it. In my assessment of this, I am not satisfied that this contention meets the threshold under Article 41(2)(a)(iii)."[26]

156. This is another paragraph in which the Judge has expressed a conclusion without elucidating any part of the process of reasoning which led to the conclusion.

157. Further, as with previous paragraphs, the observations beg a number of questions including:

(a) What were the "facts and issues that were properly before" the Tribunal;

(b) How and when were they put before the Tribunal; and

(c) How did the Tribunal's findings arise from those facts and issues.

158. The Judge then observed:

> "The Award expressly analysed the chain of contractual obligations and factual conduct that Parker relied on. The Tribunal's reasoning in paragraphs 303 to 308 and 332 to 335 shows that it considered the matter to fall within the broad ambit of the parties' dispute. The Majority were entitled to draw conclusions from the material before them. Oheo Bank's disagreement with those conclusions does not, in my judgment, constitute a determination beyond the Tribunal's proper remit."[27]

159. This is another paragraph which contains the expression of a conclusion without any elucidation of the reasoning relied upon to arrive at the relevant conclusion.

160. Further, as with previous paragraphs, it begs a number of questions including:

(a) What was the "material" before the Tribunal;

(b) How and when was the relevant "material" put before the Tribunal;

(c) What were the conclusions which the Tribunal was entitled to draw from that material; and

(d) Why was the Tribunal entitled to draw such conclusions from that material.

161. Finally, the Judge observed:

> "While I acknowledge the dissent of Mr. Reed KC alone does not provide a basis for setting aside an award. The fact that two members of the Tribunal reached a different view than the third is part of the ordinary function of deliberative adjudication. Dissent is a feature, not a flaw, of a properly conducted arbitration."[28]

162. The observations made in this paragraph are, with respect, not contentious. However, the relevant matter for the Judge to consider was not whether Mr Reed KC had dissented, but rather, the reasons for his dissent. It was clear that the Bank relied significantly upon those reasons in its challenge to the Award. However, the Judge failed to address the reasons given by Mr Reed for his dissent in any way, thereby failing to address a significant component of the submissions made by the Bank.

Summary

163. The Judge's decision, though clearly expressed, is, with respect, comprised of a series of conclusions. No attempt has been made to explain the reasons for those conclusions. That is obviously the most essential component of any statement of reasons, and it is not to be found in these reasons.

164. The reasons given by the Judge did not provide either party with any explanation or understanding of why they won or lost, other than the general assertion that the Judge accepted the submissions of one party, and rejected the submissions of another. That is not an adequate explanation.

165. Nor do the reasons provide the basis for a satisfactory appellate process. This Court has no way of ascertaining what matters the Judge took into account or of assessing whether the processes of reasoning which led him to his conclusions were logical and rational and consistent with legal principle. To say this is in no way to suggest that a review for the purposes of Article 41(2) should be conducted with an eagerness to discern error, nor that the process of crafting a judgment should be formulaic. Rather, it is to identify the analytical steps required to ensure that the review contemplated by Article 41(2) is meaningful. Provided that is done, this Court does not seek to be prescriptive.

166. Further, the Judge's failure to enunciate the "building blocks of the reasoned judicial process" deprived him of the benefit of that process in arriving at a correct conclusion. It is possible that this explains the difference between the conclusions at which the Judge arrived, and the

conclusions at which this Court has arrived.

167. For these reasons ground III must be upheld.

OVERALL SUBSTANTIVE DISPOSAL

168. For the reasons given:

(a) (a) We dismiss the Bank's Appeal on Ground I; we are unable to conclude that the Successful Claim fell outside the scope of the submission to the Arbitration.

(b) We allow the Bank's Appeal on Gound II; we are persuaded that the Bank was unable to present its case in answer to the Successful Claim as it emerged and that the opportunity of which the Bank was deprived could, realistically, have made a difference. Accordingly, the Bank has suffered real unfairness or real practical injustice.

(c) We therefore set aside parts of the Award, namely, paragraphs [298], [302] - [308], [332] - [333], [335] and [352].

(d) We allow the Bank's Appeal on Ground III.

169. We set aside the Judgment: (1) as a whole, because of our conclusion on Ground III; and (2) would in any event have set it aside in part, because of our conclusion on Ground II.

GROUND IV: COSTS

170. As foreshadowed, the fate of the various costs orders made by the Judge hinges on the overall outcome of the Appeal.

171. We are satisfied that the Bank was the overwhelmingly successful party overall, succeeding on the principal Issues save only for Ground I which was, in the event, academic. In principle, therefore, Parker should pay the Bank its costs of the proceedings, to be assessed by the Registrar if not agreed.

172. Accordingly:

(a) We set aside the costs order in the Judgment and order that Parker pays the Bank its costs of the proceedings before the Court of First Instance.

(b) We order that Parker pays the Bank its costs of the Appeal before this Court.

(c) We set aside the costs order in the August Order.

(d) We set aside the costs order in the September Order.

(e) We set aside the costs order in the October Order.

173. We direct that the parties attempt to agree all questions relating to costs within 28 days of the date of this Judgment, failing which the Registrar is to give directions for the resolution of all such questions, including the orders to be made replacing the August, September and October Orders.