Claim No. ARB 015/2026
ARB 027/2026

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

PRINCETON

Claimant/Applicant in ARB-015-2026
Defendant/Respondent in ARB-027-2026

and

PERSEPHONE

Defendant/Respondent in ARB-015-2026
Claimant/Applicant in ARB-027-2026

ORDER WITH REASONS OF H.E. JUSTICE MARK PELLING

UPON a final majority arbitral award dated 19 January 2026 ("Final Award") being issued in a Dubai International Arbitration Centre ("DIAC") arbitration between the parties ("the Arbitration")

AND UPON the Claimant's arbitration Claim No. ARB-015-2026 dated 2 March 2026 under Article 41 of DIFC Law No.1 of 2008 ("Arbitration Law") to set aside the Final Award ("Set- Aside Claim")

AND UPON the without-notice arbitration Claim No. ARB-027-2026 dated 20 April 2026 filed by the Defendant under Article 42(1) of the Arbitration Law and RDC 43.62 for recognition and enforcement of the Final Award ("Recognition Claim")

AND UPON the Defendant's informal application made by email on 29 April 2026 for the Set- Aside Claim to be determined on the papers ("Informal Application")

AND UPON the Order of H.E. Justice Mark Pelling dated 6 May 2026, made without notice and on the papers, granting the Recognition Claim ("Recognition Order")

AND UPON the Order of H.E. Justice Mark Pelling dated 11 May 2026, refusing the Informal Application, giving directions for the hearing of the Set-Aside Claim and reserving costs

AND UPON the Claimant's Application No. ARB-027-2026/1 dated 1 June 2026 under paragraph 4 of the Recognition Order, under RDC 4.2(6) and 43.70(1) and under Article 44(2) of the Arbitration Law to stay/set aside the Recognition Order ("Application No. ARB-027-2026/1")

AND UPON the Defendant's Application No. ARB-027-2026/2 dated 5 June 2026 under Article 44(2) of the Arbitration Law for security in the event the Court is minded to grant Application No. ARB-027-2026/1 (the "Security Application")

AND UPON the Order of H.E. Justice Mark Pelling dated 1 July 2026, made after hearings in private on 23 and 25 June 2026, dismissing the Security Application and prohibiting the enforcement of the Final Award until after the final determination of the Set-Aside Claim

AND UPON the Court hearing Counsel for the Claimant and Counsel for the Defendant at a hearing in private of the Set-Aside Claim Application on 21 July 2026 before H.E. Justice Mark Pelling

IT IS HEREBY ORDERED THAT:

1. The Final Award shall be set aside.

2. The Recognition Order shall be set aside and the Recognition Claim is dismissed.

3. The following directions shall apply in relation to the costs of and occasioned by these proceedings:

   (a) The Claimant is to file and serve written submissions concerning the incidence of costs and (if applied for) any application for a payment on account by no later than 4pm (GST) 7 days after the date of service of this Order.

   (b) The Defendant is to file written submissions in answer by no later than 4pm (GST), 7 days thereafter.

   (c) The Claimant is to file any written submission in reply (if so advised) by no later than 4pm (GST), 7 days thereafter.

   (d) The costs applications will be determined without a hearing unless either (a) the Court concludes that it is more appropriate for the applications to be determined at a hearing; or (b) either party requests a hearing of the costs applications.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 14 August 2026
At: 2pm

SCHEDULE OF REASONS

Introduction

1. This is the hearing of a claim by the Claimant under Articles 41(2)(a)(ii) and (iii) of the DIFC Arbitration Law No.1 of 2008 (the "Arbitration Law") to set aside a majority arbitral award dated 19 January 2026 (the "Majority Award") in a DIFC seated arbitration (the "Arbitration") conducted under the Rules of the Dubai International Arbitration Centre (the "DIAC"). By the Majority Award the Tribunal found the Claimant liable to pay the Defendant USD 18,493,065 plus interest and costs.

2. The Claimant's case is that the majority arrived at that conclusion by reference to issues which had not been pleaded and were not argued before the Tribunal and in respect of which the Claimant has been denied any right to be heard. The Defendant denies that the Claimant is entitled to any of the relief it seeks on the basis that the challenge is nothing other than a disguised challenge to the factual and legal conclusions reached by the Tribunal but in any event any order should be confined *". to the specific severable decision affected, or suspend the proceedings under Article 41(4) for remission to the Tribunal."*

The Index Dispute and Reference to Arbitration

3. The index dispute is concerned with the disputed sale by the Claimant to the Defendant of 65,000mt (+/-10% at the Claimant's option) of ultra-low sulphur diesel of Russian origin (the "Cargo"). The Cargo had been loaded on board an identified ship ("Penny ") by the time negotiations commenced.

4. On 29 January 2024 the Claimant sent a final draft fixture recap to the Defendant. It provided for payment of 100% of the "provisional value" within 1 business day of confirmation of the recap. On 30 January 2024 the Claimant sent to the Defendant 3 invoices for the provisional value of the cargo, totalling USD 51,563,543.61. The Defendant confirmed on 31 January 2024 and (on the Claimant's case) the Defendant was required to pay the price by 1 February 2024. However, various corrective invoices were sent thereafter and on 7 February 2024, the Claimant sent the Defendant a formal contract recording the terms in the recap and the revised price. It included a term to the effect that payment was due no later than one day after presentation by the Claimant to the Defendant of the bill of lading, invoice and certificates of quantity and quality. Both parties signed that agreement. The relevant documents had been supplied to the Defendant on 16 January 2024. Thereafter, on 7 February 2024 the Defendant paid USD 40,909,665.02 and on 9 February 2024 a further USD 4,083,400. That left a balance due to the Claimant from the Defendant which the Defendant failed to pay.

5. On 14 February 2024, the Claimant gave notice to the Defendant that it was in material breach by failing to pay the balance and that it was attempting to mitigate its losses by selling the Cargo to third parties. Further debate by email followed down to 21 February 2024, when the Defendant emailed the Claimant saying that it had paid 95% of the price and that *". [b]alance payment will execute after authorisation of final receivers of payments."* by which it meant that the balance of the price would be paid only once it had been paid by those to whom it was selling the Cargo. The Claimant maintains that this was a wrongful repudiation of the contact that it accepted by an email of 22 February 2024. The Defendant denied that it had repudiated the contract and demanded the return of all the sums it had paid because (it maintained) the Claimant had itself renounced the contract. On various dates in April and May 2024, the Claimant repaid sums totalling about USD 26.5m being what it maintained was the difference between the sale price agreed between the Claimant and the Defendant and the sums recovered from its mitigatory sales third parties, less irrecoverable shipping and allied costs.

6. On 10 July 2024, the Defendant requested arbitration of its claim against the Claimant alleging that the Claimant was not entitled to withhold delivery, had wrongfully repudiated the contract which the Defendant claimed to have accepted so as to entitle it to damages alternatively repayment of the balance of the sum paid by the Defendant to the Claimant namely USD 18,493,065 plus interest and costs. In relation to late payment, its case as set out in the Request was that:

> "The Respondent's remedy under the Contract was to charge interest at the rate of 15% per annum. It bears emphasis that even on the Respondent's case, the Claimant had paid 85% of the total amount due and had done so within 48 hours of the Parties signing the Contract at the latest."

7. By its Answer dated 29 August 2024, the Claimant alleged that the Defendant had breached the contract by failing to make full payment for the Cargo within the time fixed by the contract, that title did not pass until payment in full had been made so that the Claimant never came under an obligation to deliver the Cargo and that since by its email of 21 February 2024, the Defendant had made clear that it did not intend to pay in accordance with the terms of the contract, it had no alternative but to accept the Claimant's repudiation of the contract and mitigate its losses by selling the Cargo elsewhere.

The Arbitration

8. The arbitral proceedings commenced with a preliminary hearing on 20 March 2025 which resulted in Procedural Order No. 1. By Section H, the parties were directed to lodge written submissions in accordance with the procedural timetable annexed to the Order and the parties were directed that *"[t]he Parties' pleadings shall contain a full statement of their respective factual and legal case, and the relief requested from the Tribunal. The Parties shall particularize their prayers for relief in a separate section of their submissions."* This suggests that the Tribunal intended that on any view the primary source for determining the scope of the dispute the subject of the arbitration would be the parties' pleadings. The Tribunal also directed that:

"31. When making factual allegations, the Parties shall specify the evidence supporting each allegation. The Parties shall clearly indicate and cross- reference the evidence and supporting documents upon which they rely (with an indication of relevant page numbers), including expert reports and witness statements.

32. Rebuttals of arguments or statements by one Party shall be made with clear reference (page or paragraph) to where the argument or statement of the other Party can be found.

33. The electronic versions of the Parties' submissions and exhibits shall be submitted as text-searchable PDFs (and/or in Word format if expressly requested by the Tribunal).

34. With any submission, a Party shall submit all documents, factual witness statements, legal authorities, translations and other materials upon which it relies to support its case.

35. In its discretion, at any time during the proceedings (but in no case later than the evidentiary hearing), after consulting with the Parties, the Tribunal may summon any party to provide additional evidence or make additional submissions with respect to any issue of fact or law."

9. As is apparent from the directions set out above, the Tribunal expected the parties to set out the whole of their respective cases in the submissions referred to and reserved the right (and thereby created a legitimate expectation) that if there was any issue not covered by the parties' submissions that the Tribunal considered should be addressed, the Tribunal would invite the parties to provide any additional evidence and/or make any additional submissions necessary to address those issues.

10. On 25 April 2025, the Defendant filed and served its Statement of Claim and Answer to Counterclaims as provided for by line 2 in Annex 1 to Procedural Order No. 1. In that pleading the Defendant alleged that:

"7. The total Contract price is USD 52,493,772.39 (the "Purchase Price"). That amount was invoiced for payment to different entities as requested by the Respondent in the final set of invoices sent on 6 February 2024.

8. On 7 February 2024, the Claimant made an initial payment of USD 40,909,665.02, and on 9 February 2024, the Claimant paid an additional AED 14,996,286.50 (equivalent to US$4,083,400). These payments are undisputed by the Respondent."

Reading paragraphs 9-10 together, it is clear that no fact, matter or event was relied on by the Defendant that occurred between 14 February and 27 March 2024 that was relevant to the payment obligation, and the effect of any noncompliance because nothing at all is pleaded as happening between those dates.

11. The effect of paragraphs 7-8 was that there was no dispute concerning the amount that had been and should have been paid, and the underpayment was admitted since the sums paid as set out in paragraph 8 are less than the invoiced sums referred to in paragraph 7. Notwithstanding that, by paragraph 23 of the Statement of Claim, the Defendant asserted that the Claimant:

". was contractually obliged to deliver the Goods to the Claimant upon payment of the Purchase Price. The Claimant fulfilled its payment obligations by transferring USD 44,993,065.02 in two payments on 7 February 2024 and 9 February 2024 for a total amount of USD 44,993,065.02. This amount is undisputed by the Parties and represents 85.7% of the Purchase Price."

The final sentence implicitly admits however that the whole of the purchase price that was payable under the contract had not been paid by the Defendant to the Claimant by 9 February 2024. As is obvious it was not suggested in this paragraph (or anywhere else) that the Defendant was not obliged to under its contract with the Claimant to pay the whole of the sum the Claimant had alleged should have been paid or that the obligation to pay the whole of that sum had not arisen. Its case in light of this obvious point is set out in paragraph 26 in these terms:

"It is undisputed that the Claimant made payments totalling USD 44,993,065.02, representing 85.7% of the total Purchase Price of USD 52,493,772.39. This constitutes substantial performance of its primary financial obligation under the Agreement."

and that:

". the alleged breach involved only partial non-payment, the Claimant had already paid 85.7% of the Purchase Price under the Agreement. Moreover, the Agreement expressly entitles the seller to interest on delayed sums. This supports the conclusion that the payment clause of the Agreement is a warranty. A breach of warranty does not entitle the Respondent to terminate the Agreement."

Thus, the case being advanced was that the obligation to pay was a warranty not a condition and as such the Claimant was not entitled to rely on its breach as entitling it to terminate the contract. It was not being alleged that there had not been a breach nor that there was no obligation to pay (or that there had ceased to be an obligation to pay) the whole of the price by on or before the due date. That is why at paragraph 30, the Defendant pleaded that *". payment of 85.7% of the Purchase Price constitutes substantial performance of its payment obligation under the Agreement."* and that the admitted shortfall could not be *". classified as a breach of condition or as repudiatory."* Based on this reasoning it was asserted at paragraph 36 that the only remedy for the admitted nonpayment in breach of contract *". lay in claiming interest for the delayed payment, not in terminating the Agreement."*

12. At Paragraph 28-42 of the Statement of Claim, the Defendant alleged that the Claimant's termination of the contract had been invalid for failing to follow various contractual procedural rules and was itself repudiatory. Whilst it is alleged at paragraph 43 that the sale of the Cargo to third party purchasers was a breach of an obligation said to require the Claimant to give the Defendant 15 days grace to remedy the breach, it was not alleged that the sales meant that the Claimant was unable to perform its obligations under the contract. It is also not anywhere pleaded in this section of the pleading or at all that the Defendant was either willing or able to pay the shortfall otherwise than as and when it received payment in respect of its onward sales. There were alternatives pleaded in the form of set off and unjust enrichment neither is material for present purposes.

13. On 3 June 2025, the Claimant filed and served its Statement of Defence and Counterclaim. Its understanding of the dispute as set out in paragraph 3 was that it concerned whether the Claimant had been entitled to terminate the *". the Penny Sale Contract and resell the goods to third parties, and claim damages from the Respondent for losses suffered as a result."* or whether the Claimant was liable to the Defendant for breach of contract in failing to deliver the Cargo. At paragraph 4 it recorded what it understood to be common ground between the parties as being that *". the Claimant had failed, in breach of the Penny Sale Contract, to pay the full amount of the price. The parties agree that the price of the goods under the Penny Sale Contract was USD 52,493,772.39."*

14. It went on to record an issue concerning whether the Claimant was entitled to set off part of the sums paid against sums due under another contract that is not material for present purposes before recording a dispute between the parties as to whether the price had become payable (as the Claimant alleged) on 1 February 2024 or whether it had become due (as the Defendant contended) on 7 February 2024, when the formal agreement had been signed as described above. It also recorded that it was common ground between the parties that:

> ". a substantial portion of the sale price remained unpaid, and remained outstanding when, on 14 February 2024, the Respondent served a written notice of material breach and informed the Claimant that it was seeking to sell the goods on the best possible terms. It is also common ground that, notwithstanding that message, the Claimant did not make any further payment, and that the Respondent again wrote to the Claimant on 21 February 2024 again stating that it was seeking to mitigate its losses. Rather than make payment, the Claimant responded on 21 February 2024 to say "Balance payment will execute after authorisation of final receivers of payments", therefore indicating that it was unwilling or unable to make payment, notwithstanding that the payment was (on any view) long overdue."

This is the first time the Defendant's email of 21 February had been mentioned. The Claimant's purpose in relying on it was set out explicitly in paragraph 46.5 as being that by its 21 February email, the Defendant *". evinced an intention not to be bound by the Penny Sale Contract in accordance with its terms, in particular it stated that it would only make payment of the balance "after authorisation of final receivers of payments". As explained further below, that statement constituted a renunciation of the Penny Sale Contract by the Claimant."*

15. The Statement of Defence then set out the Claimant's case that had been entitled to terminate the contract on the basis that the admitted failure by the Defendant to pay the whole of the price by the due date (whether 1 or 7 February) was a breach of condition or repudiatory or became so once the Defendant had made clear that it was unable or unwilling to pay the balance until after it had received payment from those to whom it had or would be selling the Cargo; or alternatively, pursuant to s.48 of the Sale of Goods Act 1979, because the Defendant had failed to pay the outstanding sum within a reasonable time following the 14 February email from the Claimant to the Defendant. On this basis the Claimant alleged that it had validly terminated the contract on either 14 or 21 or 22 February 2024 because a notice that the Cargo was to be sold to third parties was inconsistent with the contract continuing and therefore was the communication of a clear intention to terminate the contract. The Claimant set out the essence of its case in the various paragraphs that followed. In substance it alleged that it was common ground that the obligation to pay the whole of the price arose on either 1 or 7 February, that it was common ground that the whole price has not been paid and that in those circumstances the real dispute concerned the nature and effect of that breach (i.e. whether the non-payment was a breach of condition or repudiatory). Thereafter the Claimant set out in some detail why it submitted that it was either a breach of condition or in any event repudiatory.

16. That was the close of the initial written procedure contemplated by lines 2 and 3 of Procedural Order No. 1. There was provision at lines 10-12 for reply and rejoinder submissions to be exchanged but in the end neither party took advantage of those provisions. Lines 4-9 were concerned with document disclosure which can be ignored since both parties informed the Tribunal that they were not seeking disclosure. By an email dated 8 August 2025, the Tribunal confirmed that it did not require a hearing because neither party wanted such a hearing. It followed that there were no written submissions in aid of such a hearing.

17. The Claimant submits and I accept that in the pleadings as I have summarised them above, it was not suggested by the Defendant that there was no obligation to pay the whole of the price it had agreed to pay on either 1 or 7 February 2024 or that the Defendant's obligation to pay had been waived or that it was willing or able to pay other than as set out in its 21 February email. No answer had been deployed by the Defendant to the point that there was no obligation on the Claimant to deliver unless and until the full price had been paid, nor had it been alleged by the Defendant that by selling on the Cargo to third parties it could not perform its delivery obligations.

18. The only other event of significance prior to publication of the Final Award was a request for further submissions from the Tribunal to the parties. By an email dated 8 July 2025, the Tribunal's chairman emailed the parties in the following terms:

> ". After initial deliberations, the Tribunal is of the view that it would be assisted by further submissions from the parties on the following points:
>
> 1. What is parties' position in relation to the "Entire Agreement" clause in the Contract. How do the parties reconcile their respective positions considering the provisional invoices issued, and payments made, under the Recap and prior to the signing of the Contract?
>
> 2. What is the position under the English law in regard to the interpretation of the "Entire Agreement" clauses? Is there case law supporting the strict narrow, or conversely, broad interpretation of such clauses.
>
> The parties are requested to provide simultaneous written submissions, and copies of relevant case law, within 15 days from today, i.e. by 4 PM (UAE time) on 23 July 2025.
>
> The Tribunal may, upon its consideration of the requested submissions, direct a half-day hearing to hear oral submissions from both parties. The Tribunal will endeavour to issue its further directions within 15 days of the filing of such submissions."

19. In its response dated 22 July 2025, the Defendant confirmed at paragraph 3 that its position was that:

> ". the formally executed Agreement dated 7 February 2024 constitutes the sole and exclusive agreement between the Parties. The Agreement's Entire Agreement clause is unambiguous and, as a matter of English law, operates to supersede all prior negotiations and agreements, including the email Recap of 31 January 2024. Princeton, the Respondent, seeks to resurrect the superseded payment terms of the Recap, which is contrary to the express terms of the Agreement and the governing principles of English law that prioritise contractual

certainty."

and that the 7 February agreement was the final, complete, and binding agreement between the Parties. In consequence its case was that the payments it made *". on 7 and 9 February 2024 were made under, and in performance of, the new, binding Agreement signed on 7 February 2024."* It also acknowledged that payment was required not later than 1 day after presentation of the shipping documents. As I have said earlier, the documents had been presented on 16 January 2024. It followed that it was apparently accepted by the Defendant that payment was due on signature of the 7 February agreement.

20. The Claimant's response is also dated 22 July 2025. At paragraph 10, it submitted that the price was due immediately on execution of the formal agreement and that neither party suggested that the date for payment or the amount changed when the formal agreement was signed on 7 February 2024. Its point is that there was no material difference between the recap dated 1 February and the formal agreement dated 7 February. As the Claimant put it in paragraph 12 of its answer to the Tribunal:

> "The Claimant was obliged to pay the price under the Penny Sale Contract, just as it was obliged to pay it before that contract was signed. The Claimant never asserted that the price was not due and rather conceded that the price was due. It failed to do so and was in repudiatory breach of the contract as explained in detail in the Respondent's Statement of Defence and Counterclaim."

21. Whilst the Defendant had contended in paragraph 21 of its response to the Tribunal that there were differences between the recap and the formal agreements, none of them were material to any of the issues that the parties had identified in the pleadings referred to earlier.

The Award

22. The Final Award was published on 19 January 2026. At paragraph 13.1, the Tribunal identified the issues that it had to resolve as being:

> "For purposes of this Final Award, and based on the Claimant's and the Respondent's written submissions, the Tribunal considers the following issues to be pertinent and shall consider the same in turn:
>
> "a. Issue No. 1 - Which instrument governs the relationship between the Parties, i.e., the Recap or the Contract?
>
> b. Issue No. 2 - Did the Claimant commit a repudiatory breach of the Contract by not making the payment of the entire Purchase Price?
>
> c. Issue No. 3 - Did the Respondent have the right to terminate the Contract due to (i) the Claimant committing a repudiatory breach or (ii) under SOGA 1979? If not, then did the Respondent validly terminate the Contract?
>
> d. Issue No. 4 - Is the Claimant entitled to receive the Balance Amount from the Respondent?
>
> e. Issue No. 5 - Could the Respondent appropriate any fund from the Paid Amount towards the Paislee Sale Contract?
>
> f. Issue No. 6 - Is the Respondent entitled to receive the Counterclaimed Amount from the Claimant?"

23. The Tribunal resolved Issue 1 by concluding that the relationship of the parties was governed by the formal agreement dated 7 February.

24. Issue 2 was concerned with the repudiatory breach issue. The Tribunal concluded at paragraph 14.13.k of the Award that payment was governed ultimately by the terms of the 7 February agreement and that:

> "Based on the "Payment Terms" set out in the Contract, the Tribunal observes that the final instalment of the Purchase Price became due upon the Respondent's presentation to the Claimant of (i) the bill of lading and (ii) the invoice and the certificates of quantity and quality. The Tribunal further notes that these documents were provided by the Respondent to the Claimant on 16 January 2024. Accordingly, subject to the analysis in the following paragraph, the Purchase Price was, in technical terms, due and payable by 17 January 2024"

These conclusions were in accordance with the submissions made by the Claimant (summarised above) as to the position on the assumption that the relationship was governed by the 7 February agreement. It remains only to consider then whether the failure to pay then was either a breach of condition or repudiatory.

25. However, the Tribunal then continued at paragraph 14.13 i:

> "However, the Tribunal finds it imperative to consider the Parties' conduct with each other, to ascertain whether they considered this deadline of 17 January 2024 to be the applicable deadline by which the entire Purchase Price should have been paid by the Claimant."

The difficulty is that neither party had advanced any case based on conduct or any case to the effect that whatever had been agreed as the date for payment had been waived or varied. Indeed, as I have explained it was common ground that the obligation to pay had arisen. The Defendant's case is that its failure to pay the whole of the price was not a breach of a condition or a repudiatory breach of contract. Notwithstanding this, the majority of the Tribunal concluded at paragraph 14.13 m-n, that:

> "m. . Based on the above, the Tribunal finds that both Parties, by their conduct, rendered the deadline of 17 January 2024, moot. The Contract was signed after this deadline and albeit delayed, two (2) payments of part of the Purchase Price (i.e., the Paid Amount) were accepted by the Respondent on 7 and 9 February 2024 without any objection that the payments were not made on 17 January 2024 or 1 February 2024.
>
> n. As such, the Tribunal is not convinced that the deadline for making the entire payment of the Purchase Price was either 17 January 2024, or 1 February 2024 (as claimed by the Respondent)."

26. Two points emerge from this - (i) it had not been alleged by the Defendant that the acceptance of payments on 7 and 9 February constituted a

waiver of the requirement to pay by 1 or 7 February and (ii) the Tribunal appears to have ignored altogether the Claimant's case that payment was due on 7 February following signature of the formal agreement on that date. It would appear (although this is nowhere stated in the Award) that the Claimant's case concerning payment being due on 7 February was rejected by reference to either a variation, waiver or estoppel by conduct based on acceptance of the payment made on 9 February. If that was the basis on which the Tribunal proceeded that is nowhere articulated in the Award and more importantly for present purposes was not a case run by the Defendant or which the Claimant as given any opportunity to address given the parameters of the dispute as set out in the pleadings exchanged between the Claimant and Defendant.

27. The Claimant submits that since conduct (and the legal consequences that the Tribunal considered followed from the conduct to which it referred) was never a pleaded issue in this case, the Claimant was not given any opportunity to address how the events the Tribunal has identified in paragraph 14.13 r impacted on the obligation to pay. It also submits that the majority have ignored altogether its alternative case that if the formal agreement governed the relationship then payment had fallen due no later than 7 February - a point that the Defendant has not disputed. This permeates the finding made by the Tribunal at paragraphs 14.13 aa and bb, each of which is focussed exclusively on the question whether payment had become due by 1 February 2024. In substance the Tribunal has decided that the Claimant's case was exclusively that payment was due on 1 February and that payment by that date had been in effect waived by the subsequent conduct of the parties even though no case based on waiver had been pleaded or argued. As I have explained, I consider a possible reading of the Award is that the Claimant's case that payment became due on 7 February was to be rejected for the same reason its case as to payment on 1 February was rejected but as I have said already (a) that is nowhere expressly started in the Award and (ii) that conclusion suffers from the same problem that the Tribunal's conclusion concerning payment being due on 1 February - that the Defendant had not pleaded any case relating to or based on conduct and so the Claimant had no opportunity to address the point.

28. At paragraph 14.13 cc, the majority concluded that:

> "The Contract, the Final Invoices, or the correspondence between the Parties does not identify any specific timeline within which the Claimant was to make the payment of the entire Purchase Price. The Tribunal finds this to be relevant in light of the previous dealings between the Parties which showed that the Respondent was not particularly concerned with the date on which the entire payment was to be received by the Claimant. This is evidenced by the fact that the Respondent received two (2) payments from the Claimant on 7 and 9 February 2024, which is after the Respondent claims that the Claimant was in breach. It is also important to note that on 7 and 9 February 2024, when the Respondent did receive payments, the Respondent did not raise any objection or concern in respect of the payments being delayed or late or informed the Claimant that the remaining payments are to be made within a certain time period."

The Claimant contends that these findings were not open to the Tribunal because none of them formed part of the Defendant's case and in consequence the Claimant did not have the opportunity to adduce any evidence or make any submissions in relation to any of these points. I accept that submission because as the Claimant submits, it was common ground that the Defendant had breached its contract to pay with the only issue between the parties being whether the payment obligation was a condition or whether the failure to pay was in all the circumstances repudiatory. A particularly stark element of this was that the Tribunal reached conclusions in respect of *". previous dealings."* (which are unparticularised in the Award) between the parties that did not form any part of the Defendant's case and which in consequence the Claimant had no opportunity to address. It was this part of the Tribunal's analysis that led it to conclude that *". based on the conduct between the Parties, there was no specific agreement between the Parties in respect of the actual due date for the entire payment of the Purchase Price or what a reasonable period of time was for the payment of the entire Purchase Price."* On the Claimant's case that was a finding that was simply not open to the Tribunal on the Defendant's pleaded case because no such allegation had been made by the Defendant. Indeed, it is contrary to the Tribunal's findings at paragraph 14.13.k of the Award, summarised earlier.

29. At paragraph 14.13 kk of the Award, the majority of the Tribunal rejected the Claimant's case based on the effect of the 21 February 2024 email on the basis that the Respondent did not have any valid reason to doubt the Defendant's ability to pay the balance of the purchase price. However, that had never been any part of the Defendant's case. Its case, as I have said, was that its admitted failure to pay in breach of contract was not a breach of condition or repudiatory, not that the parties by their conduct had waived the obligation to pay by a fixed date and it was ready willing and able to pay the purchase price that remained outstanding.

30. In paragraph 14.13 nn of the Award, the majority concluded that if the Defendant *". considered that the Claimant committed a repudiatory breach by not making the payment on 1 February 2024, then the Respondent should have considered the Contract repudiated at that date and not accepted delayed payments."* However, the Claimant submits and I agree that this formed no part of the Defendant's case. It ignores the Claimant's alternative case that payment was due on 7 February and it ignores the effect of the 21 February email and the absence from the Defendant's pleaded case of any submissions based on conduct, on acceptance of a payment on 9 February or on waiver or estoppel. The point that the Claimant makes time and again is that the arbitrators had set down a procedural framework which the parties complied with and the issues that the Tribunal was mandated to resolve were those (and only those) that the parties have deployed in their written pleadings. The Claimant submits and I accept that the Claimant cannot be expected to engage with issues that appear only for the first time in an award.

31. Ultimately the Tribunal decided in paragraph 14.13 pp of the Award that *". based on the Parties' conduct, the Tribunal is not convinced that the period between 6 February 2024 - 14 February 2024 was considered by them as a reasonable period of time."* However, no part of the Defendant's case had been based on the conduct of the parties or that payment was being sought unreasonably. As I have said a number of times already, the Defendant's case was that it had admittedly failed to pay in breach of contract but the failure was not either a breach of a condition or repudiatory. It was never in dispute that the Defendant had breached its contract with the Claimant by failing to pay.

32. At paragraph 14.13 rr and ss, the majority concluded that the Claimant had *". in essence terminated the contract on 14 February 2024."* and that down to that date

> ". the Parties were dealing with each other on the basis that the Respondent was agreeable to accept delayed payments, even after the previously agreed deadlines. This establishes that the Parties did not have an agreed deadline for the payment of the entire Purchase Price or an agreement as to what may constitute a reasonable period of time to make such payment."

However, that was not the Defendant's case. Its case required the Tribunal to engage with whether the payment obligation in the formal contract (which it appears to have been common ground was 7 February 2024) was a condition or whether the breach as set out in the 21 February email was repudiatory. The finding in this paragraph does not reflect either party's case because it amounts apparently to a finding that there had been an (unpleaded) waiver, estoppel or variation to the formal agreement. As I have said that formed no part of the Defendant's case.

33. The dissenting opinion is itself a lengthy document. It is however necessary for present purposes to note only the conclusion at paragraph 3.1 that the majority decided the case on the basis of an unpleaded case and thereby has sought to improve the Defendant's pleaded case - see paragraph 3.1 (the claimant there referred to being the Defendant in these proceedings). It is clear from a reading of the whole of the dissenting opinion that the dissenting arbitrator considered the majority were to be criticised for multiple errors of law and fact as well as proceeding by reference to allegations that were unpleaded. To an extent these are intermingled. I am not concerned with whether the majority made errors of law or fact, only with whether they conducted themselves in a manner that was procedurally unfair. Whilst a dissenting opinion can be valuable where it is focussed exclusively on the reliance by the majority on unpleaded issues or other procedural fairness issues, it is less so where it is concerned with supposed errors of law or fact where the supervisory court has no jurisdiction to entertain appeals on matters of law or fact and that is all the more the case where the issues of procedural unfairness and alleged errors of law and fact are addressed intermingled. That being so, I have resolved this claim on the basis of the parties' submissions without regard to the contents of the minority opinion.

Legal Framework

34. The applicable principles are those set out in the Arbitration Law, the relevant parts of which provide as follows:

> **"CHAPTER 7 - RECOURSE AGAINST AWARD**
>
> **41 Application for setting aside as exclusive recourse against arbitral award**
>
> (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:
>
> (i) a party to the Arbitration Agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication thereon, under the law of the DIFC;
>
> (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; ." [Emphasis supplied]

The remedy available when the court finds one of the grounds referred to above made out is to order that the Award in issue be set aside, unless the challenge is under Article 41(2)(a)(iii), where the court is permitted to set aside a severable part of the Award where the part being severed deals with a dispute not falling within the terms of the submission to Arbitration, or contains decisions on matters beyond the scope of the submission to Arbitration. The power to suspend set aside proceedings is conferred by Article 41(4), which empowers the court to *". suspend the setting aside proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the Arbitral Tribunal's opinion will eliminate the grounds for setting aside."*.

35. The power to set aside is discretionary - see the use of the word "may" in Article 41(2). However, the limits of that were noted in the recent decision of the Court of Appeal in Oheo Bank v Parker [2025] DIFC CA 006, where at [73], whilst noting the discretionary effect of the language used, the Court of Appeal nonetheless observed that *". 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."* Arts. 41(2)(a)(ii) and/or (iii). I respectfully agree. There is a distinction of principle to be drawn between (a) errors and omissions (whether formal, technical or otherwise) made by tribunals that come within the scope of one or more of the grounds set out in Article 41(2) but cannot be shown to have had at least a possible material effect on the dispositive terms of the challenged award on the one hand and (b) such errors and omissions which either had or may have had such an effect on the other. In my judgment, cases falling within (a) should generally result in a court refusing to exercise its discretion to set aside the award, whereas in cases falling within (b) it is probable that a court will exercise its discretion to set aside the award. This approach will (i) preclude a party from relying on an error or omission by the tribunal which had no material effect simply because it is dissatisfied with the outcome, but (ii) protect a party from the possibility of an adverse dispositive outcome resulting from an error or omission by the tribunal that comes within the scope of one or more of the Article 41(2) grounds, and (iii) give effect to the discretionary nature of the remedy provided by Art, 41(2).

36. This approach is entirely consistent with the Court of Appeal's approach in Oheo Bank (ibid), which is to require a party seeking a set aside order not merely to demonstrate an error or omission coming within the scope of Articles 41(2)(a)(ii) and (iii) but also (following Australian Federal Court authority to similar effect) that the error or omission caused the applying party *". real unfairness or real practical injustice"* - see [86(c)]. Whether that is so will depend on *".a fact specific inquiry and may well involve matters of degree."* - see [86(d)]. As to what a party seeking an order setting aside an award must show, 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."* - see Oheo Bank (ibid) at [97]. My preference would be to focus that part of the exercise on the discretionary nature of the remedy for the reasons I have explained but ultimately it does not matter - as the Court of Appeal emphasised the effect of this analysis is to impose a high threshold for interference in the interests of protecting arbitral autonomy and finality whilst recognising that a State court exercising a supervisory (or

enforcement) jurisdiction *". will not lend its aid to enforcement of an offending award."*

37. Turning to Article 41(2)(a)(ii), its purpose is to *". protect a party from injustice, not from the consequences of its own decisions."* with the consequence that a court faced with an application under this provision will distinguish *". 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."* - see Oheo Bank (ibid) at [89]. That said *". 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."* - see Oheo Bank (ibid) at [91]. The ultimate point is that 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."* - see *Interbulk Ltd v Aiden Shipping Co. Ltd* [1984] 2 Lloyd's Rep 66 approved in *Oheo Bank* (ibid) at [92].

38. Finally, turning to Article 41(2)(a)(iii), there is a debate across the common law world as to the source or sources to be used for the purpose of ascertaining the *".scope of the submission to arbitration."*. The issue is whether the search should be confined to the pleadings generated in the course of the reference or whether the net should be more widely cast.

39. The Court of Appeal in *Oheo Bank* (ibid) at [108] has decided that in determining what issues or disputes were in play, the court should look in the round at the parties' pleadings, agreed lists of issues, opening statements, evidence adduced, and closing submissions at the Arbitration. Approaching the issue in this way is capable of creating real world difficulties in a complex reference because experience suggests that a never ending proliferation of issues particularly when raised late in the process and in obscure terms (as for example in a footnote in a closing submission) can be a recipe for delay, excessive cost and unfairness, particularly if a restrictive approach is to be taken as to whether a party has had a fair opportunity to put its case for the purposes of Article 41(2)(a)(ii). It is not necessary to consider this issue further in this case however, because, as I have explained, ultimately this reference was conducted without a hearing so there were no opening or closing statements or written submissions and no witness statements, there was only one pleading produced by each party, with each filing a single response to the Tribunal's questions and there were no requests for disclosure. The scope of what has been submitted to arbitration for the purposes of considering the applicability of Article 41(2)(a)(iii) to this reference is to be confined to the four documents I have mentioned - that is each party's pleading and each party's response to the Tribunals request for assistance.

Discussion

40. I conclude that applying the principles set out above, the Award in this case must be set aside. I reach that conclusion for the following reasons.

41. As will be apparent from what I have set out above, the majority found that (a) there was no agreed date for payment by the Defendant to the Claimant; and (b) that there was no reason to doubt that the Defendant would pay the balance of the price. The Claimant also criticises the tribunal for concluding that the Claimant would not have been able to deliver because it had sold the Cargo to third parties and therefore the Defendant was entitled to restitution but that arises only if the challenge based on grounds (a) and (b) fails. It is to those grounds I turn first.

42. It is fundamental to an arbitration seated in the DIFC that the parties should have a reasonable opportunity to submit evidence and make submissions on the issues between the parties that have led to the dispute that has been referred to arbitration. In consequence where a tribunal considers that the real answer to any particular dispute is to be arrived at by reference to issues other than those raised by the parties, then the tribunal must give the parties an opportunity to consider the point or points in issue and to submit evidence going to that issue if it is not already before or all before the tribunal and/or to provide submissions to the tribunal that addresses the relevant issues. If a tribunal resolves a dispute by reference to an issue that has not been raised by the parties without according to the parties such an opportunity that is highly likely to result in an award being set aside where the evidence or submissions available to the applying party could have had at least a possible material effect on the dispositive terms of the challenged award.

43. As I have explained at some length already, the arbitration was ultimately conducted on paper by reference to the Defendant's Request for Arbitration, the Claimant's Answer, the Defendant's Statement of Claim and the Claimant's Statement of Defence, the documents annexed to each and the parties respective responses to the Tribunal's questions. It is necessary to look at all these documents in the round in order to arrive at a conclusion as to whether the dispute the parties had referred to arbitration has been resolved by the Tribunal other than by reference to the issues that parties had identified and provided evidence and submissions about.

44. As I have explained at length already it was common ground that there was a contractually binding date by which payment was to be made - being either 1 February, or 7 February assuming the Claimant's case as to the binding effect of the fixture recap was rejected. As I have explained the Claimant's case concerning the binding effect of the recap failed because the Tribunal concluded (as they were fully entitled to) that the relationship of the parties was governed by the 7 February agreement. It was never in dispute between the parties that there was a contractual payment date which was no later than 7 February. It was not at any stage suggested by the Defendant in any of its request for Arbitration, Statement of Claim or response to the Tribunal's questions that either there was no agreed date for payment or that such date as had been agreed had been varied or waived or that the Claimant was estopped from relying on the agreed date by its conduct or the mutual conduct of the parties. As I have explained, the Defendant's case was throughout that although it was in breach of contract by not paying, its conduct was not a breach of condition and was not repudiatory because either (i) it had substantially performed its payment obligation and/or (ii) the sole remedy for late payment was the payment of contractual interest.

45. The conclusion that there was no breach or the parties had agreed to waive payment by the agreed date was not a finding that the Tribunal could fairly come to because it was not an allegation that had not been made by the Defendant and in consequence had not been addressed by the Claimant. The idea that there was no agreed date for payment first appeared in the Final Award. It was in my judgment a finding that could only fairly have been made by the Tribunal if it had drawn to the attention of the parties that it was considering making a finding in these terms and the evidential or other basis for thinking this was a conclusion that was available to them. Had that occurred the Claimant would have been bound to draw to the attention of the Tribunal the terms of the 7 February agreement including (a) the express obligation to pay not later than 1 day after the presentation of the shipping documentation (which it was common ground had been presented on 16 January 2024); (b) that the Defendant had accepted throughout that there was a contractual obligation to pay by no later than 7 February 2024 and that neither party had suggested that there

was no agreed date for payment; and (c) the entire contract clause (which prohibited changes to the contract other than when confirmed in writing).

46. Turning next to conduct, neither party and certainly the Defendant had not suggested that the conduct of the parties varied the terms of the contract entered into on 7 February or waived the terms therein concerning the obligation to pay or gave rise to any form of estoppel that precluded the claimant for relying on those terms. The notion that the conduct of the parties was such as to relieve the Defendant of the obligation to pay in accordance with the terms of the 7 February agreement was one that first surfaced in the Final Award and was not a finding that the Tribunal could fairly have come to because it was not an allegation that had been made by the Defendant and in consequence had not been addressed by the Claimant. Had this point been made, the Claimant would have been bound to have argued that (a) conduct not amounting to a variation waiver or estoppel does not prevent a contract taking effect in accordance with its terms and the agreed effect of 7 February agreement was to impose on the Defendant the obligation to pay the whole of the price due by that date; (b) that variation waiver and estoppel had been excluded by agreement of the parties by operation of the entire agreement clause in the 7 February agreement unless any change modification or addition had been confirmed by both parties in writing and/or (c) waiver and estoppel was not a defence available to the Defendant because (i) it had not pleaded it so the Claimant had not prepared for or adduced any evidence relevant to it; (ii) none of the critical ingredients for an estoppel (a promise of representation acted on by the promise or representee to its detriment in reliance upon the promise or representation) has either been pleaded or proved by evidence adduced by the Defendant; and (iii) there was nothing in the communications between the parties after 7 February that was alleged to or which in any event amounted to an affirmation of the contract notwithstanding the late part payment or the refusal to pay what was due.

47. In relation to the ability to pay issue, the Defendant had not suggested at any stage that it was ready willing or able to pay what was outstanding. Had the Tribunal invited submissions on that point, the Claimant would have been bound to argue that (a) no such suggestion had been made by the Defendant; in consequence (b) no disclosure had been sought or evidence adduced by either party relevant to that issue and (c) what evidence there was suggested that the Defendant was not able to pay given the terms of the 21 February 2024 email, which made clear that the balancing payment was to come only "after authorisation of final receivers of payments" which implies that the Defendant could not pay the balance until then. There was no evidence the Defendant was willing or able to pay the balance until then. In addition, the Claimant would have been able to make submissions as to the inferences to be drawn from the failure of the defendant to pay other substantial trading debts.

48. In light of these conclusions, it is not necessary for me to consider further the majority's conclusion that the Claimant would not have been able to deliver within the contractual delivery period had payment been tendered. However, in relation to that point, had the Claimant been invited to make submissions on the point the Claimant would have been bound to submit that (a) no such allegation had been made by the Claimant; (b) whether the point was of any relevance would depend on whether the contract had been terminated as the as the Claimant alleged; (c) the contract was not to deliver a specific ascertained cargo but a commodity and thus that it would have been open to the Claimant to purchase a cargo for delivery on the open market. If this last point was disputed, then evidence would have been required which was not available because the point was at no stage "in play" between the parties.

49. For these reasons the Final Award must be set aside under Article 41(2)(a)(ii). For similar reasons, it must be set aside applying Article 41(2)(a)(ii). None of the issues I have considered above were in play when the materials that matter for present parties - the parties respective claim and defence documents and their respective answers to the Tribunal's questions are considered together. These issues simply did not feature at all in any of them.

Discretion

50. In relation to the second question that arises - whether the points that were available to the Claimant *". were reasonably arguable and could reasonably (not fancifully) have made a difference."*, I am satisfied that plainly they were for the reasons that I have set out. It is not for this court to second guess what the Tribunal might have done in the counter factual event that the issues identified above had been drawn to the parties' attention and submissions invited. It is sufficient that they might well have made a difference to the outcome. In my judgment that test is amply met in the circumstances of this case. The issues go to the very heart of the majority's reasoning and each would have been met with a battery of submissions and possibly evidence. They might even have been met by a submission from the Defendant that the points were not one that it relied on or wished to rely on.

Severance

51. If severing the offending parts of the Final Award from the remainder had been possible I would have adopted that course. Accordingly, I have considered whether part of the Award could be saved, but the reality is that it cannot because the points that I have been considering form the foundation of the Tribunal's conclusions. Under the Arbitration Law severance is available only if the challenge is to be a free standing part of the award which if removed will leave the balance intact. Here if I attempted to delete parts of the Award, I would end up leaving the parties with an award that neither party wants or which none of the arbitrators considered appropriate. Much the safer course is to set the Award aside.

Article 9 of the Arbitration Law

52. I address this point only briefly because it was mentioned at one stage by the Defendant. By Article 9 of the Arbitration law:

> "9. **Waiver of right to object**
>
> A party who knows that any provision of this Law, including one from which the parties may derogate, or any requirement under the Arbitration Agreement has not been complied with and yet proceeds with the Arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived his right to object."

Any attempt by the Defendant to rely on this provision is unarguable for the reasons set out above. The points giving rise to the challenge are not points that could have been known to the parties prior to the receipt by them of the Award. Once the Final Award had been received, the Claimant took the steps it was permitted in law to take by the date when such steps should have been taken. Those steps are not even arguably the

Claimant proceeding *". with the Arbitration without stating his objection to such non- compliance."*

Conclusion

53. The Set Aside Application succeeds.