

ENGLAND AND WALES / JUDGMENT

Indus Powertech Inc v Echjay Industries Private Limited

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Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited Neutral Citation Number:

[2026] EWHC 827 (Comm) IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES COMMERCIAL COURT Case No: CL-2025-000156 Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL Date: 10/04/2026 Before: Sean O'Sullivan KC (sitting as a Deputy High Court Judge)

- ----- Between: INDUS POWERTECH INC.
- and - ECHJAY INDUSTRIES PRIVATE LIMITED Claimant Defendant
- -----
- ----- RICKY DIWAN KC (instructed by Stewarts Law LLP) for the Claimant THOMAS PLEWMAN KC and CHINTAN CHANDRACHUD (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) for the Defendant Hearing dates: 9 and 10 March 2026 (Draft Judgment circulated on 24 March 2026)
- ----- APPROVED JUDGMENT This judgment was handed down remotely at 10.30am on Friday 10 April 2026 by circulation to the parties or their representatives by e-mail
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- ----- Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited Sean O'Sullivan KC (sitting as a Deputy High Court Judge): 1. 2. The Claimant ("Indus") has brought a challenge pursuant to s.68 of the Arbitration Act 1996 ("the 1996 Act") to an arbitral award dated 13 March 2025 ("the Award") rendered by a three-member Tribunal comprising Professor Nadarajah, Justice Sikri and Dr. Bodenheimer ("the Tribunal"). The Tribunal upheld 12 of the Defendant ("Echjay")'s claims, rejected Indus's counterclaims, and awarded Echjay damages of US\$4.4m and various forms of injunctive relief. Indus's challenge is brought pursuant to s.68(2)(d) of the 1996 Act. It contends that the Tribunal failed to address two essential issues of causation that arose in respect of Echjay's claims for alleged loss of profit in respect of the lost opportunity to manufacture certain component parts to be used for automobile

manufacture. 3. The two issues that Indus says the Tribunal failed to address were: 3.1. 3.2. whether Echjay had any available manufacturing capacity to manufacture what the parties called “Shafts 1 and 2” (i.e. Echjay’s product numbers HL3P-7015-DA and 68598155AA); and whether any required design and production validation process required for Echjay to manufacture four particular gear components (i.e. gear rings 0065080 and 0065147 and gear pinions 0065122 and 0067022, together “the gear rings and pinions”) could have been completed within the 2-year horizon for damages identified by the Tribunal. Introduction to the dispute 4. 5. 6. 7. 8. 9. I will have to dig more deeply into the procedural history of the arbitration in due course, but for now I only need to provide a bird’s-eye view of the parties’ dispute. The claims arose out of a Master Supply Agreement entered into between Indus and Echjay dated 31 March 2015 (“the MSA”) and a subsequent Memorandum of Understanding dated 2 January 2019 (“the MOU”). The MSA is governed by Indian law, but provides for disputes to be submitted to arbitration under the ICC Rules, with a London seat. Indus is a company incorporated in North Carolina, USA, specializing in supplying engineering components to North American manufacturers by sourcing them from India. This includes the procuring of forgings for automotive and non-automotive parts for automotive manufacturers. Echjay is a company incorporated in Mumbai, India, that manufactures forgings for automotive, non-automotive and engineering applications. Pursuant to the MSA, Echjay became the “master” or exclusive supplier of forgings from India to Indus and its customers within the USA, Canada and Mexico. 10. Disputes arose between the parties, leading to Echjay issuing a notice of termination on 27 January 2023 on various alleged grounds. This resulted in claims being filed by Echjay and counterclaims being filed by Indus. The claims Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited 11. 12. 13. 14. and counterclaims gave rise to a substantial evidentiary and submission record (with many of the pleadings and written submissions running to in excess of 100 pages). This perhaps explains why the Award itself spans 308 pages (1857 paragraphs). The claim that gives rise to the present challenge was concerned with whether Indus had breached clause 3 of the MSA (which was a non-compete/non-solicitation obligation) by sourcing forgings (shafts and gears) from another Indian supplier, Ramkrishna Forgings Limited (“RKFL”) and, if so, what (if any) damages flowed from that breach. Echjay advanced a claim for damages in a total amount of US\$17,908,163, or alternatively US\$15,455,588, on the basis of a 7-year period during which Echjay would allegedly have manufactured these shafts and gear components for Indus. The Tribunal found Indus to be in breach of clause 3. They held that clause 3 was unenforceable under Indian law after termination of the MSA. The horizon for awarding damages was limited to two years. The Tribunal awarded damages in the sum of US\$4,132,895 by way of loss of profits resulting from breach of clause 3 of the MSA, on the basis that such profits would have accrued to Echjay during the two-year period, if Indus had not diverted orders for forgings to RKFL. That total was made up of six individual damages calculations, two for shafts, two for gear pinions, and two for gear rings. The law 15. Section 68(2)(d) of the 1996 Act provides as follows: “(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to

the applicant...

- (d) failure by the tribunal to deal with all the issues that were put to it...” 16. 17. There is no shortage of authority on s.68 challenges generally, or challenges under s.68(2)(d) of the 1996 Act in particular. Most of the principles relevant to the current challenge were common ground. For example, it was accepted by everyone that the test for s.68 challenges represents a high bar; that it is intended to limit intervention by the English Court to “extreme” cases (see especially the 1996 Report of the Departmental Advisory Committee at paragraph 280). It was also agreed that there are in effect four questions for the Court to answer in a s.68(2)(d) case, namely (i) whether the relevant point or argument was an ‘issue’, (ii) whether the issue was ‘put to’ the tribunal, (iii) whether the tribunal failed to deal with it, and (iv) if so, whether that failure has or will cause substantial prejudice to the applicant. 18. To the extent that there were differences between the parties as to the test (as opposed to its application to the facts of this case), they coalesced around two Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* sub-ingredients of questions (i) and (iii) above. The first was how to draw a line between an ‘issue’ and something less than an ‘issue’ (i.e. an argument, or a point or line of reasoning). There is no doubt that this is conceptually difficult, as a number of the cases make clear, although I was not convinced that the conceptual difficulties made very much difference to the end result here. The second was the extent to which the Court should give the arbitration tribunal what might be called the benefit of the doubt when reading an award for the purposes of deciding whether an issue has been dealt with. I will focus on those two points in my review of the key cases, although I will also remind myself of a few more general aspects of the test. I will take the cases to which I was referred in chronological order, because that reduces the need for repetition and for explaining cross-references. In *World Trade v. Czarnikow Sugar* [2004] EWHC 2332 (Comm), Colman J made some introductory comments about the operation of s.68(2)(d) of the 1996 Act, before dismissing the challenges which had been made (most of which seem to have concerned the tribunal’s approach to the evidence). My attention was drawn to [20], where he suggested (perhaps a little optimistically) that: “The fact that Section 68(2)(d) is confined in its application to essential issues as distinct from the reasons for determining them should give rise no practical difficulties. If one simply approaches that provision by asking whether that which has not been dealt with is capable of being formulated as an essential issue of the nature of what would be included in an agreed list of issues prepared for the purposes of a case management conference if instead of an arbitration the matters were to be determined in court, the answer should normally be obvious.” In the case with which he was concerned, that was certainly a helpful test. Hence (at [31]): “...whether the arbitrators accorded to any particular evidence more weight or less weight or no weight at all was not an “issue” within the meaning of section 68(2)(d). It was merely the process of resolving the issue of what loss, if any, had been suffered by Czarnikow”. Nobody asked to draw up a list of issues for a case management conference in this Court would include, as an ‘issue’, a question about the weight that should be accorded to particular evidence. The assessment of the evidence would instead be the subject matter

of the submissions directed to how the Court should resolve the substantive issue to which that evidence was said to be relevant. I was referred to *Torch Offshore v. Cable Shipping* [2004] EWHC 7878 (Comm). But, save in relation to the operation and potential exclusionary effect of ss.57 and 70(2) of the 1996 Act (which provisions are not directly relied upon by Echjay in this case), Cooke J did not say very much about the principles for s.68(2)(d) challenges. He observed (at [21]) that “...section 68(2)(d) did not require a Tribunal to set out each step by which it reached its conclusion or deal with each point made by a party in an arbitration. A failure in that respect was not a failure to deal with an issue that was put to it, although it might amount to a criticism of the 19. 20. 21. 22. 23. 24. Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* reasoning”. He also made clear (at [22]) that, if the arbitrator did not decide whether the second representation relied upon induced Torch to enter into the charter, that would “amount to a serious irregularity which is capable of giving rise to serious injustice, since it would affect the right to rescind and the final result of the arbitration”. He then explained, by reference to the way the award was structured, the discussion of the evidence in it, and also the way the arguments had been presented, that the tribunal’s conclusions did in fact encompass both the first and the second representations, and hence the challenge failed. 25. In *Van Der Giessen-De-Noord v Imtech Marine & Offshore BV* [2008] EWHC 2904, Christopher Clarke J explained (at [14]) that: “It is likely to be a serious irregularity under section 68 for the tribunal to fail to deal with all essential issues. But it may do so concisely. A failure to deal with an issue is not the same as a failure to set out the reasoning for rejecting a particular argument. Such a failure is remediable under section 70 (4): see Colman J in *Margulead Ltd v Exide Technologies* [2004] 2 All ER (Comm) 727 and in *World Trade Corporation Ltd v Czarnikow Sugar Ltd* [2004] 2 All R (Comm) 813; and Morison J in *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm).”

26. When he came to decide whether a failure to deal with a waiver/ estoppel defence engaged s.68(2)(d) (at [43]), he described his approach as follows: “In my view there has been a serious irregularity in that the Tribunal, in not addressing the waiver/estoppel defence or its Dutch equivalent at all, has failed to deal with all of the issues that were put to it and has thereby acted in a way which was unfair. The distinction between an issue, on the one hand, and a point or a line of reasoning, on the other, may on occasion be difficult to draw. But I am satisfied that the Tribunal could not deal fairly with the present case without resolving, as part of its adjudication on Claim 1, Variation 1, the issue as to whether or not Imtech had, in either of the ways asserted, precluded itself from claiming for work done between Revision 5 and Revision 23. I do not accept that the issues put to the Tribunal can be limited to the headings used for the respective claims.”

27. Mr Diwan KC, Counsel for Indus, emphasised that the distinction between an “issue” and a “point or a line of reasoning” which is suggested here was that “the Tribunal could not deal fairly with the present case without resolving, as part of its adjudication..., the issue”. He also observed that the learned judge did not accept that “the issues put to the Tribunal can be limited to the headings used for the respective claims”. 28.
- [2011] Bus. LR Digest D99 (at [38]), *Buyuk Camlica v Progress Bulk Carriers* Gavin Kealey QC, sitting as a Deputy High Court Judge, made clear that it did not work for the party defending the award to suggest that the point was so unmeritorious that it must have been summarily rejected: Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* “...it should not be left to the parties, or the task of the court, to engage in speculation of that kind. If the determination of an issue is crucial to the result, as in these references waiver was crucial to the question whether there was an actionable breach of contractual warranty, then however unmeritorious the arguments might be in favour of that issue the arbitral tribunal is bound to deal with it and, in my view, to do so in such a way, normally by reference in the award or reasons, as to make it evident to the parties that the tribunal has indeed dealt with it... there should be some form of communication, normally in the form of a decision, by an arbitral tribunal to the parties from which the latter can ascertain whether or not an essential issue has been dealt with. It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section 68(2)(b) is to ensure that all those issues the determination of which are crucial to the tribunal’s decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the award or reasons) that those crucial issues have indeed been determined.” 29. 30. 31. This statement, and especially “It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore”¹ was relied upon heavily by Mr Diwan, who suggested that this revealed the limit to the extent to which the Court could give the Tribunal the benefit of the doubt. Mr Plewman KC, Counsel for Echjay, was critical of the way in which (he submitted) this decision was being glossed by Mr Diwan. Mr Plewman said that the need to “make it evident to the parties” did not mean that it was not possible to infer that the tribunal had dealt with an issue. However, he made clear that he was not suggesting that the deputy judge had been incorrect in his description of the test for s.68(2)(d). In *Petrochemical Industries v Dow Chemical* [2012] EWHC 2739 (Comm), there was a debate about whether the disagreement over assumption of responsibility (for the purposes of remoteness) qualified as a separate issue. Andrew Smith J identified at [16] that: “A distinction is drawn in the authorities between, on the one hand, ‘issues’ and, on the other hand, what are variously referred to as (for example) ‘arguments’ advanced or ‘points’ made by parties to an arbitration or ‘lines of reasoning’ or ‘steps’ in an argument”. At [20], he observed that “general issues can often be broken down into more specific issues. An ‘issue’ of remoteness, itself an aspect of the ‘issue’ whether damages are recoverable, might well embrace sub-issues, and I think that sub-section 68(2)(d) can cover

sub-issues of this kind”. This is an important example, because one of the arguments in that case (see [20]) was that the ‘issue’ was remoteness and that was said to be “the proper place to draw the line between what is an ‘issue’ (within the meaning of the sub- section) and what is not an ‘issue’ but merely a sub-question or a line of argument”. One of Mr Plewman’s points was that, while it is always possible to draft a “more granular” list, the correct approach to s.68(2)(d) is to define the 1 The Latin “in pectore”, meaning “in the heart” or secretly, was historically used to refer to the practice of appointing cardinals (by a pope), but not making the appointment public, perhaps to protect the individual from persecution. Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* issues at a relatively high level. Yet in *Petrochemical Industries*, as Mr Diwan pointed out, the judge was not merely descending down the decision tree from ‘What loss did Dow suffer?’ to ‘Was any of that loss too remote?’, but continuing down to ‘Did PIC assume responsibility for Dow’s additional funding costs?’. 32. He then held (at [21]): “The assumption of responsibility question, as it was identified and presented by PIC on this application is, to my mind, an ‘issue’ within the meaning of sub-section 68(2)(d). It is not simply a way of presenting the question of foreseeability, and not simply an argument in support of a contention that losses were not within the First Limb or the Second Limb of *Hadley v Baxendale*. It can be difficult to decide quite where the line demarking issues from arguments falls, but here almost the whole of Dow’s claim could have depended (and on the Tribunal’s other conclusions did depend) upon how the assumption of responsibility question was resolved. I accept PIC’s submissions about whether it was an issue because this accords with what I consider to be the ordinary and natural meaning of the word, and I find support for this conclusion in that, as I see it, fairness demanded that the question be ‘dealt with’ and not ignored or overlooked by the Tribunal, assuming it was put to them.” 33. 34. It is interesting to see how the learned judge approached a submission that the list of issues agreed by the parties in the arbitration had not broken down the general remoteness question into sub-questions that arose from it. He observed (at [18]) that this might assist to determine whether an issue was ‘put to’ the tribunal, but “I do not accept that it helps to decide whether a question is an ‘issue’ within the meaning sub-section 68(2) (d). Otherwise parties would be able to modify the application of the mandatory provisions of section 68 by their formulation of issues in the course of a reference and I cannot accept that they can”. It seemed to me that Mr Plewman was correct to submit that there was no inconsistency between this observation, and Colman J’s reference to lists of issues at case management conferences in the *World Trade* case (see paragraph 21 above). Andrew Smith J was talking here about the limited usefulness of the actual lists of issues which happened to have been prepared in the underlying arbitration. Colman J had in mind a hypothetical list of issues which might have been drawn up if the dispute had instead been litigated in the English Commercial Court. 35. I will also pick up three of the considerations which Andrew Smith J set out at [27]: “...(iii) A tribunal is not required to deal with each issue seriatim: it can sometimes deal with a number of issues in a composite disposal of them. (iv) In considering an award to decide whether a tribunal has dealt with an issue, the approach of the court (on this as

on other questions) is to read it in a 'reasonable and commercial way expecting, as is usually the case, that there Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited will be no substantial fault that can be found with it': Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14 at p. 14F per Bingham J.

- (v) This approach may involve taking account of the parties' submissions when deciding whether, properly understood, an award deals with an issue. Although submissions do not dictate how a tribunal is to structure the disposal of a dispute referred to it, often awards (like judgments) do respond to the parties' submissions and they are not to be interpreted in a vacuum." 36. In *Transition Feeds v. Itochu Europe* [2013] EWHC 3629 (Comm), Field J was concerned with a challenge to an award in relation to a FOSFA contract, on the basis that the Board of Appeal had not dealt with two points about quantum. One of them concerned the board's use of the Rotterdam resale price as representing the market value of the goods. Field J observed (at [30]): "Mr Parsons also argued that the buyers' contentions as to the inapplicability of the Rotterdam resale prices were not an 'issue' before the board but instead were an argument or a step in the argument in respect of a broader issue, namely: what was the sellers' correct measure of damages for breach of contract. I reject this submission. In my judgment, the buyers' contentions with respect to the inapplicability of the prices achieved on resale in Rotterdam constituted a distinct 'issue' before the board." 37. 38. That is another example of a question, which could undoubtedly be characterised as a 'quantum sub-issue', being held to engage s.68(2)(d) of the 1996 Act. Just because a 'higher tier issue' (correct measure of damages) can be identified, does not mean that a 'sub-issue' (whether Rotterdam resale price represented the market price) is not sufficient for the purposes of s.68(2)(d). The most comprehensive summary of the principles which apply to s.68(2)(d) challenges was provided by Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33]. It has been endorsed (see below) by the Privy Council, and I make no apology for setting it out in full because I have had careful regard to all of it: "(a) Section 68 reflects "the internationally accepted view that the Court should be able to correct serious failures to comply with the "due process" of arbitral proceedings: cf art 34 of the Model Law." (see *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, Paragraph 27); relief under Section 68 will be appropriate only where the tribunal has gone so wrong in the conduct of the arbitration that "justice calls out for it to be corrected." (ibid).
- (b) The test will not be applied by reference to what would have happened if the matter had been litigated (see *ABB v Hochtief Airport* [2006] 2 Lloyd's Rep 1, paragraph 18).
- (c) The serious irregularity requirement sets a "high threshold" and the requirement that the serious irregularity has caused or will cause substantial Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* injustice to the applicant is designed to eliminate technical and unmeritorious challenges (Lesotho, paragraph 28).

- (d) The focus of the enquiry under Section 68 is due process and not the correctness of the Tribunal's decision (*Sonatrach v Statoil Natural Gas* [2014] 2 Lloyd's Rep 252 paragraph 11).
- (e) Section 68 should not be used to circumvent the prohibition or limitations on appeals on law or of appeals on points of fact (see, for example, *Magdalena Oldendorff* [2008] 1 Lloyd's Rep 7, Paragraph 38, and *Sonatrach* Paragraph 45).
- (f) Whilst arbitrators should deal at least concisely with all essential issues (*Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 Toulson J at 284D), courts should strive to uphold arbitration awards (*Zermalt Holdings SA v and Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at page 15, Bingham J quoted with approval in 2005 in the *Fidelity* case [2005] 2 Lloyd's Rep 508 paragraph 2) and should not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults on awards with the objective of upsetting or frustrating the process of arbitration".
- (g) As to Section 68(2)(d):
 - (i) There must be a "failure by the tribunal to deal" with all of the "issues" that were "put" to it.
 - (ii) There is a distinction to be drawn between "issues" on the one hand and "arguments", "points", "lines of reasoning" or "steps" in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a "high threshold" that has been said to be required for establishing a serious irregularity (*Petrochemical Industries v Dow* [2012] 2 Lloyd's Rep 691 paragraph 15; *Primera v Jiangsu* [2014] 1 Lloyd's Rep 255 paragraph 7).
 - (iii) While there is no expressed statutory requirement that the Section 68(2)(d) issue must be "essential", "key" or "crucial", a matter will constitute an "issue" where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with (*Petrochemical Industries* at paragraph 21).
 - (iv) However, there will be a failure to deal with an "issue" where the determination of that "issue" is essential to the decision reached in the award (*World Trade Corporation v C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422 at paragraph 16). An essential issue arises in this context where the decision cannot be justified as a particular key issue Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (*Weldon Plan Ltd v The Commission for the New Towns* [2000] BLR 496 at paragraph 21).
- (v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the Section 68(2) application (*Primera* at paragraphs 12 and 17).
- (vi) If the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry (*Primera* at paragraphs 40-1); it does not matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.
- (vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the

essential issues at greater length (*Latvian Shipping v Russian People's Insurance Co* [2012] 2 Lloyd's Rep 181, paragraph 30). (viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue (*Fidelity Management v Myriad International* [2005] 2 Lloyd's Rep 508, paragraph 10, *World Trade Corporation*, paragraph 19). A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it (*Hussman v Al Ameen* [2000] 2 Lloyds Rep 83). (ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences (*World Trade Corporation* at paragraph 45). The fact that the reasoning is wrong does not as such ground a complaint under Section 68(2)(d) (*Petro Ranger* [2001] 2 Lloyd's Rep 348, *Atkins v Sec of State for Transport* [2013] EWHC 139 (TCC), paragraph 24).

- (x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise (*Petrochemical Industries* at paragraph 27. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues (*Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), paragraph 30). (xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the Tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will be engaged. (xii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) (*Ascot Commodities v Olam* [2002] CLC 277 and *Atkins*, paragraph 36). The Court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard.
- (h) In relation to the requirement for substantial injustice to have arisen, this is to eliminate technical and unmeritorious challenges (*Lesotho*, paragraph 28). It is inherently likely that substantial injustice would have occurred if the tribunal has failed to deal with essential issues (*Ascot*, 284H-285A).

- (i) For the purposes of meeting the “substantial injustice” test, an applicant need not show that it would have succeeded on the issue with which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it necessary only for him to show that (i) his position was “reasonably arguable”, and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award (*Vee Networks Limited v Econet Wireless International* [2005] 1 Lloyd’s Rep 192, paragraph 40).
- (h) The substantial injustice requirement will not be met in the event that, even if the applicant had succeeded on the issue with which the tribunal failed to deal, the Court is satisfied that the result of the arbitration would have been the same by reason of other of the tribunal’s findings not the subject of the challenge.” 39. That summary was endorsed by the Privy Council in *RAV Bahamas Ltd v Therapy Beach Club Inc.* [2021] AC 907 (PC). That case concerned section 90 of the Bahamas Arbitration Act 2009, under which challenges to an arbitration award may be made on the ground of serious irregularity. The provision is modelled on and is materially identical to section 68 of the 1996 Act. 40. Some additional observations were made by their Lordships about the test, such as: 40.1. 40.2. (at [41]) that “the arbitrators should deal with an issue that is essential or crucial to the determination of a claim or defence upon which the resolution of the dispute or disputes depends, such that fairness demanded that the issue be dealt with”; (at [42]) “There is a degree of overlap between the considerations relevant to whether there is an ‘issue’ and whether it has been ‘put to’ to the tribunal. It is clear that this does not require the issue to have been pleaded or included in a list of issues. It is necessary to consider the Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general, what is required is that the tribunal’s attention has been sufficiently clearly drawn to the issue, as one which it is required to determine, that it would reasonably be expected to deal with it”; and 40.3. (at [44]): “while the arbitrators must deal with an issue, it does not matter for these purposes that they have dealt with the issue badly; and that a court must be very careful not to be hypercritical in determining whether the issue has been dealt with by the arbitrators”. The Privy Council rejected an argument that the fact that a point (the “lease renewal point”) had not been pleaded meant that it was not an issue and had not been put to the tribunal. See [60]: “It was expressly raised in oral submissions and the arbitrator acknowledged that it had been so raised and that, if correct, it meant that no damages could be claimed for the period after December 2014. Although the argument that the renewal option was illusory was only raised in closing submissions, this was a purely legal argument and, despite objection, the arbitrator never ruled that it could not be raised. The lease renewal point was essential and crucial to the determination of Therapy’s entitlement to damages as, if accepted, it would mean that it would not be entitled to damages for three years of the six-year claim period”. It was held that the tribunal had not dealt with that issue: “The arbitrator awarded damages for loss of profits over a six-year period, including the three- year renewal period. After adjustments, this amounted to \$6.8m. She made no reference to or ruling upon the lease renewal point. It cannot be

inferred that she rejected the point in circumstances where she did not refer to it at all, still less provide any reasons for its rejection. She therefore failed to deal with an 'issue' which had been 'put to' her" (see [61]). 41. 42. 43. In *Czech Republic v Diag Human Se* [2024] EWHC 503 (Comm), Foxton J summarised the guidance provided by the Privy Council as follows (at [163]): "Turning to s.68(2)(d)) challenges in particular, the Board in *RAV Bahamas* observed:

- i) Section 68(2)(d) can be broken down into three questions. What is an issue? Has the issue been put to the arbitrators? Have the arbitrators failed to deal with it? ([38]). ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning' or 'steps' in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity ([40(ii)]). iii) A matter will constitute an 'issue' where the whole of the applicant's claim could have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with ([40(iii)]). Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* iv) There will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award. An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes ([40(iv)]).
- v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the section 68(2) application ([42]). It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue as one which it is required to determine, such that it would reasonably be expected to deal with it. vi) If the tribunal has dealt with the issue in any way, section 68(2)(d) is inapplicable and that is the end of the enquiry; it does not matter for the purposes of section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently ([43]). It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length. A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue. Nor is a failure by a tribunal to set out each step by which it reached its conclusion or deal with each point made by a party a failure to deal with an issue that was put to it. vii) A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues ([43]). viii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) ([43]). The court can consider the pleadings

and the written and oral submissions of the parties to the tribunal in this regard.” 44. At [186], he explained his conclusion on the question of whether the matter raised in the second s.68 challenge was an argument or an issue as follows: “An argument that a claimant does not have title or standing to claim for 30% of the amount in issue is clearly an issue, not merely an argument. Save where the claim fails altogether, it has a clear, distinct and significant impact on the extent of recovery independent of the outcome of other issues and is critical to Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited an assessment of the amount awarded, and fairness demands that it be addressed”. 45. He then described how he arrived at the view that the tribunal had failed to deal with it (at [192]-[193]): “192. There are three references in the Award to the alleged assignment, all when summarising the parties' arguments:

- i) At [466], when summarising the Czech Republic's case as to what the 2014 Resolution decided. ii) At [959], when noting the Claimants' case that the assignment was invalid "so there is no reason to reduce Claimants' claim by 30% (as Mr Laputa suggests)". iii) At [1006], when noting the Czech Republic's case that there were no documents confirming the alleged invalidity of the assignment.
193. While it might be said of any issue which would impact the relief granted that the tribunal must have rejected the argument because it is not reflected in the relief, I do not think that inference cannot fairly be drawn on this occasion. On a fair, commercial and commonsense reading of the Award in question in the factual context of what was argued or put to the tribunal by the parties, I am satisfied that the tribunal did not deal with this issue in the Award” 46. In *The Republic of Kazakhstan v World Wide Minerals Ltd* [2025] EWHC 452 (Comm), Bryan J was concerned with Kazakhstan's s.68(2)(d) challenge, the basis for which was that the tribunal had failed to deal with Kazakhstan's causation argument, to the effect that, regardless of the so-called “Export License Breach”, the relevant agreement would still have been terminated (referred to as the “Counterfactual Case”).
47. My attention was drawn to the way that the learned judge, in his very detailed and careful consideration of the effect of the award, drew attention to differences in the way in which the tribunal had addressed different components of the claim, describing the tribunal's approach to the first two components as “methodological”, as contrasted with the third where (on WWM's best case) there was only a single paragraph, and really only a single sentence, which addressed the effect of there being no license (see [119] – [125]). 48. He then concluded (at [127]): “I am in no doubt whatsoever that the Tribunal did not deal with the Counterfactual Case either in paragraph 293 or indeed, anywhere else in the Award. In this regard there is no reference to the factual matters that Kazakhstan relied upon, the disputed issues of Kazakh law that were addressed extensively by both parties in expert evidence (both in writing and in cross-examination at the July 2022 oral hearing), the extensive submissions of the parties' uranium experts which addressed (amongst other matters) whether WWM would have been able to fulfil the CE Contract, or the submissions of the parties' quantum experts addressing (amongst other matters) WWM's inability Judgment

Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* to fund TKG and satisfy its outstanding liabilities. One would expect all such matters to be dealt with as part of addressing the Counterfactual Case.” 49. He rejected the submission that the tribunal must have dealt with the issue implicitly (at [136]): “Nor is there any substance in WWM’s submission that the Tribunal must have dealt with the Counterfactual Case “implicitly” on the basis that it would have had the Counterfactual Case “well in mind”. The relevant factual context was a Counterfactual Case that was ventilated in a five-day oral hearing in front of the Tribunal, with hundreds of pages of submissions, expert evidence, cross-examination of experts and closing submissions on the Counterfactual Case, yet there is not one reference to any of this in paragraph 293, and (fundamentally) no reference whatsoever to the central aspect of the Counterfactual Case as to whether Kazakhstan would have terminated the Management Agreement in any event, an issue that arose, was put to the Tribunal, and the Tribunal had to deal with. It is also to be contrasted with the length and care with which the Tribunal dealt with other components...” 50. It probably goes without saying, but I do not understand the learned judge to have been suggesting that the problem was that the tribunal had not given reasons. Nor was he implying that the nature of the evidence meant that this issue necessarily needed to be dealt with in any particular way by the tribunal. Rather, he was making two much more basic observations, namely: (a) that, in the absence of any clear words indicating that the issue was being addressed, one had to look for other signs that that was what was happening, such as references to the relevant evidence or submissions; and (b) it was legitimate to look at how other issues were addressed, in order to see whether it was the practice of the particular tribunal to answer questions very shortly, or in an oblique way. 51. Bryan J also indicated the answer to the familiar plea from respondents that it is not likely that an experienced tribunal would fail to deal with an important issue (at [140]-[141]): “140.... Experienced tribunals do fail to deal with issues that are put to them. With the greatest of respect to the eminent arbitrators in this case, even Homer nods, and experience does not bring with it infallibility, and even the most knowledgeable and skilled arbitrators can fall into error or have lapses of judgment. It is because experience shows that tribunals do fail to deal with issues that are put to them that Parliament has legislated that there will be a serious irregularity where there is “a failure by the tribunal to deal with all the issues that were put to it” (in the very words of section 68(2)(d)). This is a statutory recognition (if one were needed) that tribunals do, indeed, fail to deal with important issues that were put to them. Indeed the law reports are replete with examples where a tribunal has failed to deal with an essential issue that was put to it...

141. The issue is whether, on a fair, commercial and commonsense reading of the Award in the factual context of what was argued by the parties having Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* regard to the evidence and the written and oral submissions of the parties, the Tribunal has failed to deal with the issue (Raytheon at [33(g)(xii)] as approved in *RAV Bahamas* at [43])...” 52. Having set out these helpful summaries (and summaries of summaries) of the principles relevant to

s.68(2)(d) challenges, there is no need for me to attempt my own. However, without in any way losing sight of the wider picture, it may be useful if I draw the threads together in relation to the two aspects which are of primary importance in the present case. 53. First, in relation to the identification of an 'issue': 53.1. the line may not be easy to draw (Van Der Giessen-De-Noord at [43]); 53.2. 53.3. 53.4. 53.5. an 'issue' is a question which the tribunal could not deal fairly with the claim before it without resolving (Van Der Giessen-De-Noord at [43]) or which fairness demanded be dealt with and not ignored or overlooked (Petrochemical Industries at [21]); this topic should be approached so as to maintain a high threshold for establishing serious irregularity (Raytheon at [33(g)(ii)] and Czech Republic at [163(ii)]); if the whole or a substantial part of the claim depends on the answer to a question, it is likely to be an issue (Petrochemical Industries at [21] and Czech Republic at [163(iii)]); and the fact that a question can be characterised as a 'sub-issue' to a wider issue does not prevent it engaging s.68(2)(b) (Petrochemical Industries at [20]). I found an example given by Mr Plewman useful, although perhaps not quite in the way that he intended. He posited an 'issue' as to credibility of a witness on which the whole case might turn. He said that this would still not be an 'issue' for the purposes of a s.68(2)(d) challenge. It seems to me that he is right about that, because the proper analysis is that credibility would be the subject matter of submissions, which would in turn be directed to some substantive 'issue'. If a case turned, for example, on which witness was believed about what was said at a meeting, the substantive 'issue' would be "what was orally agreed at the meeting between x and y?", for which purpose each party might advance arguments to the effect that x or y was the more credible witness. This seems to me to fit with the distinction drawn by Colman J in the World Trade case and to reveal why it might sometimes be useful to ask whether the question should feature on a properly drawn list of issues (whether or not the question actually featured on any list drawn up in the particular case). It is tempting to use a shorthand, such as to say that 'issues' are the substantive questions which the tribunal must decide, as opposed to the reasons the parties might offer for deciding those issues one way or another. It is certainly true that, for the purposes of s.68(2)(d), the tribunal only needs to answer the question (i.e. "The parties agreed x"). It does not need to explain why ("because we believe witness y"). But, as ever with such shorthand, it must be used with care, 54. 55. 56. Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited 57. because that way of expressing it is not especially helpful when distinguishing sub-issues from mere arguments. For example, one could say that remoteness is a substantive issue, whereas the fact there was an assumption of responsibility is a reason why that issue should be decided in a particular way. But that approach would be wrong, because (at least in Petrochemical Industries) the question of whether there had been an assumption of responsibility was itself a substantive issue which the Tribunal needed to address. Speaking for myself, I found the concept of a properly drawn up, appropriately (but not excessively) granular, list of issues a helpful way of drawing a line between the substantive questions (issues) and the submissions which are directed to them (not issues). That statement might be said to be conclusory, since, by definition, if a question belongs on a properly drawn list of issues, it must be an 'issue'. But it helps to frame the test by reference

to a practical exercise with which we are all familiar, rather than just to express it in abstract terms, or in terms of what is 'fair' or what 'fairness' demands, although in the end the result should be the same. 58. Turning to the extent to which a tribunal should be given the benefit of the doubt when deciding whether it can be said to have failed to deal with an issue, I suggest that, on the one hand: 58.1. 58.2. 58.3. 58.4. 58.5. 58.6. 58.7. the right approach is to read the award in a fair, commercial and commonsense (not hypercritical or excessively syntactical) way, expecting that no substantial fault will be found with it and hence that all of the issues will have been dealt with (Petrochemical Industries at [27(iv)] and Raytheon at [33(g)(xii)]); the Court must be very careful not to be hypercritical in determining whether the issue has been dealt with by the arbitrators (RAV at [44]); the focus of the enquiry under s.68 is due process and not the correctness of the Tribunal's decision (Raytheon at [33(d)]); if the tribunal has dealt with the issue in any way, that is the end of the enquiry. It does not matter that the tribunal has dealt with it well, badly or indifferently (Raytheon at [33(g)(vi)]). The fact that the reasoning is wrong, or involves the tribunal misdirecting themselves on the facts is not a failure to deal with the issue (Raytheon at [33(g)(ix)]); the award should not be interpreted in a vacuum, but by taking into account the way in which the issues were presented in the parties' submissions (Petrochemical Industries at [27(v)] and Raytheon at [33(g)(xii)]); a failure to provide reasons is not the same as failing to deal with an issue (Raytheon at [33(g)(viii)]); issues do not need to be dealt with one by one; they can be dealt with in a composite or compendious way. It is up to the tribunal to decide how to structure the disposal of the dispute referred to it (Petrochemical Industries at [27(iii) and (v)]). 59. On the other hand: Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 59.1. it needs to be made apparent to the parties that the issue has indeed been determined. The parties should not be left to guess whether it has been dealt with or overlooked. They should not be required to speculate about what was in the tribunal's heart (Buyuk Camlica at [38]); and 59.2. while it could always be said of an issue which would impact the relief granted, that the tribunal 'must' have rejected party x's argument, given the relief that has ultimately been awarded to party y, something more is required before that inference can be drawn, even if the award contains references to the parties' arguments (Czech Republic at [192]-[193]). As I have said, Mr Plewman was critical of Mr Diwan for glossing what was said in Buyuk Camlica as amounting to a requirement that the tribunal's conclusion be "clear and evident". I agree that none of the cases suggest that it must always be stated expressly in the award that the issue has been identified and answered. But, if an inference is to be drawn, there must be some proper basis for doing so. It is not enough to say that the tribunal appears to have been aware of the issue, so they must have decided it, or that the answer given by the tribunal to the ultimate question assumes a particular answer in relation to an ingredient of the relief which has (or has not) been granted, so that can be inferred to be the view they must have formed. Taken to an extreme, that approach would render the protection offered by s.68(2)(d) of the 1996 Act worthless. Another way of expressing this is that it cannot be inferred that the tribunal has rejected a point where it does not refer to it in its analysis at all, still less provide any reasons for its rejection (see RAV at [61]). Mr Diwan submitted (by reference in particular to the Kazakhstan

case) that there can be said to be two stages to the investigation. First, one considers whether, reading the award in a fair, commercial and commonsense way, the tribunal has made clear that it has decided the issue, most obviously by stating its conclusion. If so, that is the end of that. There is no scope for complaining that evidence has been wrongly preferred or ignored. However, if it is not clear from the words of the award that the issue has been decided, one then looks for what Mr Diwan called other “indicia” that that is what the tribunal were doing. That might include signs that they were evaluating the evidence, or analysing the submissions, relevant to that issue. But Mr Plewman is right to emphasise that one is only looking for clues that the tribunal were indeed engaging with the issue. The Court should not allow itself to be drawn into any assessment of the evidence or submissions. There is no scope for the Court to say: “the tribunal cannot have found x, because the evidence all points to y”. For completeness, I should note that the final stage of the s.68(2)(d) test is to consider whether any failure to deal with an issue has caused substantial injustice. However, it will be obvious from the way in which other ingredients of the test are described that, where there has been a failure to deal with an issue, that is likely to result in substantial injustice. If an ‘issue’ is a question which fairness demands be dealt with and not ignored or overlooked, it is hardly surprising that it has been said to be “inherently likely that substantial injustice 60. 61. 62. 63. Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 64. would have occurred if the tribunal has failed to deal with essential issues” (Raytheon at [33(h)]). Further, I repeat that: “For the purposes of meeting the “substantial injustice” test, an applicant need not show that it would have succeeded on the issue with which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it necessary only for him to show that (i) his position was “reasonably arguable”, and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award” (Raytheon at [33(i)]). Shafts 1-2

Introduction

65. Indus says that one part of its case in the arbitration was that Echjay could not have suffered the alleged loss of profits that it claimed because its capacity to manufacture the shafts in question during the relevant two-year period was constrained, given that its machines were fully utilised manufacturing existing orders and it did not have any additional capacity to manufacture the forgings actually sourced by Indus from RKFL. Indus complains that the Tribunal did not deal with this ‘issue’, but appears instead to have thought it was common ground that Echjay had sufficient capacity to manufacture at least Shafts 1 and 2 (if not Shaft 3). The procedural history and the Award 66. 67. It was agreed by both parties that the procedural history is relevant. There was also, as might be expected, a large measure of agreement about what had happened, albeit with some points of difference. In what follows, I will make clear my conclusions in this regard, most of which is just a matter of recording what the documents say. The question² about capacity was not raised in the pleadings. Echjay says, and I do not understand this to be controversial, that Indus did not advance the

capacity argument in any of its pre-hearing submissions, which spanned 708 pages. But it is fair to say that neither side's pleadings descended into any detail on quantum. Echjay's Claim Submissions said that it would quantify its claim for damages at a later date. 68. On 9 June 2024, the parties provided their respective lists of issues. In relation to damages, each expressed the issue in a general or headline way: 68.1. 68.2. for Echjay: "Whether [Echjay] is entitled to damages on account of [Indus's] breach of Clause 3 of the MSA, and, if so, in what sum?" and for Indus: "Whether [Echjay] is entitled to any damages, and, if so, in what sum?" 2 Given that one of the matters I have to decide is whether this was an "issue", I will avoid using that word. My references to it as a "point", "question" or "argument" should not be taken as expressing any conclusion as to whether or not it is also an "issue". Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited 69. 70. 71. Echjay points out that these lists do not refer specifically to the capacity argument. That is true, but it is not very surprising when both parties have chosen to identify the quantum issue in this compendious way. The same issues were then reproduced when the parties were directed to produce a Schedule of Issues in October 2024. The October 2024 Schedule of Issues was a very substantial document, comprising 432 pages in total, and included detailed summaries of each party's position. But it did not contain any specific articulation of, or reference to, the capacity question. My sense is that, while no doubt a good idea in principle, the Schedule of Issues did not end up being an especially useful tool for the Tribunal. The text was mostly generated by cutting and pasting from the pleadings or other documents, and the references to the evidence and then the transcripts were inserted in too compendious a way to be accessible to the reader. In any event, it is clear that the dispute about capacity really emerged in the expert evidence. In his first report dated 11 July 2024, Echjay's quantum expert, Mr Patel, indicated that Shafts 1 and 2 (and the gear rings and pinions) could be manufactured using Echjay's existing capacity, but some new machinery would be required for Shaft 3 – i.e. part no. 52854451AA – which was also being procured by Indus from RKFL. So Mr Patel's initial position was that Echjay had the available capacity to manufacture Shafts 1 and 2, but not Shaft 3.3 72. In a report dated 21 July 2024, Indus's expert, Mr Jain, suggested that Echjay's capacity to manufacture these components was constrained. For example, in paragraph 18, he said: "I note that Claimant has stated that existing capacity is fully utilised [Document 5 and 6] and so I believe the Claimant Expert has been mistaken in assuming even partial capacity available for such Shaft Items". 73. 74. 75. I understand documents 5 and 6 to be what are called "capacity verifications", or "run@rate studies" (to refer to the rate at which the machines can run). They were created by Echjay contemporaneously, but for other customers. They were said by Indus to show that Echjay's capacity utilization was already very high (i.e. 98% or 99%). In a rebuttal expert report dated 5 August 2024, Mr Patel responded that additional capacity could be made available by moving from a 5-day to 6-day program, shifting production in between machines, and operating at 100% efficiency, which combination would mean that production of Shaft 3 could be accommodated without Echjay investing in new machinery. In its written closing submissions dated 14 October 2024, Indus argued that Echjay had no capacity to manufacture any of the three shafts in question. As part of this, it said (at

paragraphs 44 - 46): “44. The Respondent’s Quantum Expert has relied upon the run@rate studies in respect of two Cold Forging Press currently available with the Claimant (refer 3 In fact, as a point of detail, Mr Patel’s first report suggested that 7,775 pieces from a requirement of 48,750 in respect of Shaft 3 could be “Fulfilled by Old Capacity” (see his Table 4). But the Tribunal largely ignored this and so will I. Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited F/5.5.5/7416 - Capacity for 900MT Cold Forging Press that clearly shows the capacity of 900 MT Press is used to the extent of 98.2% and F/5.5.6/7418 regarding 2500 MT Cold Press, which shows that the existing capacity for the Press is also fully tied-up.

45. It is respectfully submitted that these two documents have not been controverted by the Claimant. Thus, both as per Claimant’s Quantum Expert’s First Report as well as Rebuttal Report, in so far as the two Cold Press machines existing with Claimant is concerned, the Claimant does not have the additional spare capacity. This destroys the very basis of Claimant Expert’s quantification of losses, as the Claimant does not have the additional capacity and therefore, under the circumstances, was/is not able to fulfil the quantities and volumes that it is claiming a loss of profit for. 46....the Claimant’s Expert proposes the idea that the capacity can be freed by shifting non-Linamar parts to other machines and seeks to rely on Annexure-24 (of the Claimant’s Quantum Expert’s Rebuttal Report dated 05.08.2024 - I/46) which the Claimant’s Expert claims is for the 900 MT Cold Forging Press to say that it has the capacity and production efficiency for both the machines, ignoring that for Linamar parts, that the Claimant is currently manufacturing, the Claimant has to ensure the capacity in place is 120% of the volume projections based on 5 days 3 shifts operating pattern...”. 76. 77. 78. There are two points being put forward here: first, that Mr Jain’s evidence relied upon the “run@rate studies in respect of two Cold Forging Press currently available with the Claimant”, which had (it was said) not been controverted by Echjay, and second that Mr Patel’s suggested shift to a 6-day week ran into the problem that Echjay had agreed with another purchaser of its forgings that it would maintain a capacity of “120% of the volume projections based on 5 days 3 shifts operating pattern”. In oral closing, Indus focussed more on the points that (a) Mr Patel’s first report had conceded that Echjay did not have the additional capacity for all of Shafts 1- 3 (although, of course, this concession only affected recovery in respect of Shaft
- 3) and (b) the difficulties for Echjay with the proposed shift to a 6-day schedule. I will come back to this. But I should make clear that I do not read these oral submissions as in any way disavowing the broader way in which the case had been put in Indus’s written closing. In its written closing submissions, dated 14 October 2024, Echjay put forward a series of points said to be “In response to the Respondent’s Valuation Expert’s contention regarding the capacity to manufacture the shafts...” (see paragraph 253). These points focussed on, but were not limited to, the argument that Echjay could use a 6-day programme to increase capacity. Little seems to have been said about capacity if using a 5-day programme, although there is an argument (in (c)) that document 6 suggested an existing capacity of 13% which was available to be used. Judgment Approved by the court for handing down Indus

Powertech Inc. v Echjay Industries Private Limited 79. In oral closing (transcript for 20 October 2024, p.105), however, Echjay made clear that it was still advancing an alternative to its primary argument that it could use a 6-day programme, based on Mr Patel's first report: "... Even in the first report, capacity was identified as a factor for one out of seven products. For six out of seven products, even in the first report, the report proceeds on the basis that the existing capacity is adequate and sufficient to meet the RKFL order." 80. The Award, as is common in ICC arbitration (where the ICC Secretariat provides considerable guidance and assistance to its tribunals, aimed at avoiding errors of the type alleged here), contains a detailed procedural history and then a very extensive summary of the parties' competing arguments. The latter takes each party's written, and then oral, closing submissions section by section, with footnoted references to the paragraphs of the written document or the timestamps for the oral submissions. 81. In these sections, there is no doubt that the Tribunal identify and summarise the parties' competing positions. Both aspects of Echjay's case as identified above are captured, for example: 81.1. at paragraphs 329-330: "329. The Claimant submits that the Respondent's Valuation Expert neglected that the Claimant's facilities actually operate six days a week and that existing capacity is sufficient to produce the shaft parts mentioned in the meeting minutes without additional investment.

330. The Claimant argues that recalculating capacity on a six-day week basis dispels any perceived capacity shortfall..." 81.2. then at paragraph 343: "The Claimant further notes that, even if the expert's Rebuttal Report approach were rejected, any adverse impact would affect only one shaft (Shaft No. 52854451AA) that might require new machinery for monthly outputs of 40,975 units..." I note that the footnoted reference in this paragraph is incorrect, referring to paragraph 275 of Echjay's written closing, which does not say anything about this; 81.3. and at paragraph 421: "He further clarifies that even the first expert report demonstrated adequate capacity for six out of seven products. Only one product had a capacity deficit, which was addressed in the damages analysis..." 82. Similarly, paragraphs 450-452 of the Award largely reproduce paragraphs 44 – 46 of Indus's written closing, including its reliance upon the "run@rate" studies. Paragraph 496 picks up Indus's oral closing: "The Respondent argues that the Claimant lacked sufficient capacity to fulfil the projected volumes without additional machinery, as acknowledged in the Claimant's quantum expert's initial report. In the expert's initial report, it was acknowledged that the Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited Claimant lacked the capacity to meet the required volumes and would need to invest INR 60 crores in additional machinery, requiring at least 15 months for installation and commissioning". 83. In the section of the Award dealing with the Tribunal's analysis of the quantum issue, the relevant discussion starts at paragraph 632: "Next, the Parties have contentions with regards to whether the Claimant can legitimately work six days a week to enhance capacity of Shaft No. 52854451AA." 84. The Tribunal found that Echjay "has not met its burden of establishing that a switch to six-day operations is readily available and contractually permissible. The Tribunal therefore proceeds on the assumption that a five-day baseline is the appropriate measure for capacity assessment in this

dispute...” (paragraph 639). 85. However, the only further comments made about capacity concern Shaft 3: “672. As of product reference number Shaft 52854451AA, in light of the Claimant’s acknowledgment during oral submissions that Shaft 52854451AA is the only product affected by capacity constraints²⁶⁷, the Tribunal determines that the Claimant would not be entitled to profits for this product in the event the Tribunal finds that the existing machinery cannot accommodate its production.

673. Considering the evidence and submissions, the Tribunal concludes that, in this case, no damages will be awarded for Shaft 52854451AA, as the Claimant has not sufficiently demonstrated its capacity to produce this product without additional investment or adjustments”. 86. I should note that footnote 267 in paragraph 672 of the Award refers again to “Para 275 of Claimant’s written closing submissions dated 14th October 2024”. That would appear to be a consequence of the earlier error to which I have referred at paragraph 81.2 above (or possibly a consequence of the same noting error which underlay it). Paragraph 275 of Echjay’s written closing contains only a general comment about the work done by Mr Patel. The Tribunal must instead have intended to refer to Echjay’s oral closing and probably had in mind something around p.105 of the transcript for 20 October 2024 (to which I have referred at paragraph 79 above). 87. In relation to Shafts 1 and 2, there is no discussion of capacity at all. There is simply a calculation, at paragraphs 670 and 671 of the Award, which uses an identified price and profit margin (both of which are explained in the earlier part of the Tribunal’s analysis). Stages 1 and 2: Issue put to Tribunal? 88. The parties differed as to whether there had properly been an ‘issue’ put to the Tribunal as to Echjay’s available capacity to manufacture Shaft 1 and Shaft 2 during the two-year period. The parties’ submissions were focussed on the first Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* stage of the analysis (is it an ‘issue?’), rather than the second (‘was it put to the Tribunal?’), although both parties relied upon the way the case had been presented under both headings. In practice, the disagreement concerned whether the capacity point qualified as an ‘issue’. It was not really suggested by Echjay that, if it was, that issue had not been ‘put’ to the Tribunal. On the contrary, as I will explain in the next section, Echjay relied heavily upon the Tribunal’s references in the Award to the parties’ arguments, in support of the submission that the point was in fact addressed by the Tribunal. Indus’ submissions: Indus argued that Echjay’s capacity to manufacture further parts was an essential issue that had to be determined by the Tribunal in order to ascertain whether any loss at all had been suffered by Echjay with respect to Shafts 1 and 2. If Echjay had no available manufacturing capacity, then it can have suffered no loss as a matter of causation: it could not have supplied Shafts 1 and 2, and could not have earned the profit which would have come from doing so. Indus acknowledged that the Tribunal might be able to address available manufacturing capacity on a composite basis, given that Indus’s case was that there was no available manufacturing capacity for any of the shafts, but argued they could not simply ignore available capacity in relation to any one or more of the shafts. It contended that, by its nature, this was an independent ‘issue’, not an argument, since it could on its own give rise to the dismissal of the claim in respect of

each shaft. It said that this question about capacity could not be lumped together under the heading of quantum, with the Tribunal simply arriving at a figure for damages. Indus relied upon the way in which the question as to capacity emerged in the arbitration, with Mr Patel, Echjay's expert, having recognised that the damages claim was dependent upon establishing that Echjay already had sufficient available manufacturing capacity or could bring on such capacity within the appropriate time frame to manufacture the shafts, and then shifting his position to meet Mr Jain's evidence that Echjay's own documents (i.e. the "run@rate" studies), demonstrated that its existing manufacturing capacity was fully utilized. In his skeleton, Mr Diwan described Mr Patel's arguments based on switching to a 6-day schedule as "designed to address the lack of any available capacity for any of the Shafts as demonstrated by the run rate studies with no other answer ever presented in response to the run rate studies". Indus also pointed to the fact that it had summarised this case in its written and oral closing submissions. I have described that above. It is certainly true that the points about the run rate studies being relevant to capacity for all of the Shafts was clearly taken in the written closing submissions, even if Indus's focus in the oral closings seems to have been on attacking the 6-day schedule. Echjay's submissions: Echjay also submitted that it is important to identify the way in which those arguments arose and were brought to bear in the arbitration. It suggested that these were points which first emerged in the expert evidence, 89. 90. 91. 92. 93. 94. 95. Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 96. 97. 98. and that they were never given the prominence which the present application might suggest. Echjay emphasised that the points were not pleaded, and repeated that the capacity point was first identified by Echjay's quantum expert, Mr Patel, before Indus's expert, Mr Jain, contended that Echjay had no available capacity to produce any of the shafts. Even after that, it noted, these points were not included in the Schedule of Issues from October 2024. Echjay described the capacity argument as, in substance, one limited point among a series of arguments pursued by Indus in relation to the quantification of Echjay's loss. It accepted that it was a point which affected the quantification of damages. But it argued that it does not follow that these were "issues" within the meaning of s. 68(2)(d) of the 1996 Act. To characterise them as such would be at odds with the "high threshold" required to establish a serious irregularity. On the contrary, this (and the question about lead time for the gear rings and pinions) were said to be not important enough to qualify as separate 'issues' in the sense that the 1996 Act contemplates. In the end, however, Mr Plewman accepted that this point was what he called "a component enquiry of the loss of profits point". Indeed, he accepted: "...that a decision as to damages involved a decision as to loss of profits and that involved a decision as to both capacity and lead time". His final words on the topic were to make clear that he was not seeking to put his case on this part of the test unrealistically high: "...I advance this section of the submissions with diffidence because I recognise the slipperiness of the concept".

99. My analysis: I am in no real doubt that the question of capacity was an issue and that it was put to the Tribunal. 100. 101. It is correct to describe it as a sub-issue under the headline of quantum and perhaps causation, or (if you prefer) the identification of the “no-breach counterfactual”. But characterising it as a ‘sub-issue’ does not mean that it cannot engage s.68(2)(d), any more than it did in relation to the sub-issue about assumption of responsibility in Petrochemical Industries. There also seems to me to be an analogy to be drawn with the counterfactual analysis which was identified as an ‘issue’ in Kazakhstan. If one were drawing up a list of issues for this case, by reference to the arguments as presented by the parties in their closing submissions, I am in no doubt that it would be appropriate to include an issue as to Echjay’s capacity to manufacture Shafts 1-3, in the “no breach” scenario where those orders for parts were being offered to Echjay. Indeed, I struggle to see any basis for distinguishing between the capacity to manufacture Shafts 1 and 2 on the one hand, and the capacity to manufacture Shaft 3 on the other, such that the latter might represent a question which needed to be answered by the Tribunal, whereas the former did not. 102. The counterfactual availability of capacity to manufacture all of the shafts seems to me clearly an independent or freestanding question which needed to be answered by the Tribunal, rather than being only a reason or argument which is relevant to the determination of some other question. There is, for example, an Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 103. important difference between the Tribunal not dealing with the question of capacity at all, and (say) the Tribunal ignoring the “run@rate” studies when it did so. The former was an issue which needed to be decided; the latter was merely evidence said to be relevant to that issue, as to which it was up to the Tribunal to decide what weight should be given. Indeed, one can test this by imagining (for this purpose) that the Tribunal had mistakenly believed it to be common ground that Echjay had capacity to manufacture Shafts 1 and 2, and then asking whether deciding the case on the basis of a mistake of that kind in the decision-making process would be sufficiently unfair on Indus to trigger the protection of s.68 of the 1996 Act. My answer would be an unhesitating “yes”. That would not be merely an error in the assessment of evidence by the Tribunal, which is a risk that it might be said the parties agree to accept by signing up to arbitration. Such an error would go to the heart of the decision-making process, depriving Indus of any chance that the Tribunal would conclude that Echjay could not have fulfilled those orders, and on that basis rejecting the whole of the claims for lost profits in relation to Shafts 1 and 2. It would not be fair for the Tribunal to decide whether to award damages for those lost profits, without first deciding this question about capacity.
104. By contrast, it does not seem to me to take matters very far on its own to point out that this point was not pleaded or included in the lists of issues. I see that, on different facts, that might suggest that the issue had not been ‘put’ to the Tribunal. But here the point emerged (without complaint on either side) in the exchanges between the experts, and then was canvassed in the parties’ closing submissions. The Tribunal picked up and made reference to the parties’ arguments in the Award. The issue was put to them.

105. As I have said, I agree that the question of capacity can be characterised as a sub-issue to the headline issue of quantum which was pleaded. But it was nevertheless an ‘issue’ for the purposes of s.68(2)(d), and one which, as emerges clearly from the written and oral closing submissions, was ‘put’ to the Tribunal. Stage 3: Did the Tribunal deal with the issue? 106.
107. Indus’s submissions: Indus submitted that there had been a failure by the Tribunal to deal with the identified issue. Its basic point was that there is no paragraph of the Award addressing whether or not there was any available capacity to manufacture Shafts 1 and 2. It suggested that the Tribunal failed to appreciate that the way in which the expert evidence on available manufacturing capacity unfolded effectively left the Tribunal with a “binary decision”: either there was available capacity for all 3 shafts (i.e. by moving to a 6-day schedule) or there was none. Indus said that Mr Patel had had no answer to the “run@rate” studies, save the proposed shift to a 6-day week. Despite this, Indus contended, the Tribunal wrongly limited the issue of available capacity to Shaft 3. It argued that the Tribunal needed to address Indus’s case on capacity, and especially the run@rate studies, but failed to do.
- Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited
108. Mr Diwan acknowledged that the rights and wrongs of the substantive arguments were ultimately a matter for the Tribunal, but emphasised that I needed to consider the Award through the prism of the parties’ competing submissions about this issue. He pointed out in particular that there was no reference by the Tribunal to the “run@rate” studies in their analysis. 109. Indus said that the Tribunal’s characterisation of Echjay’s position as an “acknowledgment” revealed that the Tribunal had failed to appreciate that this was a disputed contention and not simply a matter of concession for Echjay unilaterally to make. Mr Diwan suggested that merely recording a supposed “acknowledgment” was the opposite of identifying and addressing an issue.
110. Echjay’s submissions: Echjay criticised Indus’s approach, which it said amounted to working through the evidence and submissions for the purposes of trying to show that the Tribunal had not sufficiently engaged with that material. Echjay said this was an appeal on the merits dressed up as a s.68 challenge. It used Indus’s submission that there was supposedly a “binary decision” for the Tribunal as an example. Echjay said this submission amounted to saying that the Tribunal ought to have reasoned differently, and hence was of no force in the context of a s.68 challenge. 111. 112. 113. Echjay argued that Mr Patel developed two alternative counterfactuals in relation to the capacity argument: namely (a) what it called the “5-Day Baseline Counterfactual”, which assumed that Echjay would operate its manufacturing unit on a standard 5-day working week, and on which basis Mr Patel’s evidence was that Echjay had sufficient spare capacity to produce six of the seven products (but not Shaft 3); and (b) the “6-Day Baseline Counterfactual”, which assumed that Echjay would operate its manufacturing unit for a 6-day working week, allowing it sufficient capacity to produce all of the Shafts (including Shaft 3). It said that it had pursued both of these counterfactuals by way of alternatives in its closing submissions to the Tribunal. Echjay relied heavily upon the fact that the Tribunal recorded in detail the parties’

arguments, including Echjay's arguments on the "5-Day Baseline Counterfactual" to the effect that, even on the basis of a 5-day week, "any adverse impact would affect only one shaft (Shaft No. 52854451AA)" (at paragraph 343) and "Only one product had a capacity deficit" (paragraphs 420- 421). This was said to be an important point of distinction from cases such as Kazakhstan. I have already referred above to the key examples of the Tribunal cataloguing the parties' submissions on this topic. Echjay said that the Tribunal then dealt with those arguments in paragraphs 672 and 673 of the Award, which I have set out in paragraph 85 above. Its starting point was that the Tribunal's reference to the "Claimant's acknowledgment during oral submissions that Shaft 52854451AA is the only product affected by capacity constraints" was to Echjay's oral closing submissions advancing the alternative case on the 5-day baseline.

114. Mr Chandrachud, whose oral submissions on behalf of Echjay on this issue were advanced with great enthusiasm and skill, suggested that, on a commonsense and commercial reading of the Award, the Tribunal was accepting Indus's position (and rejected Echjay's position) in relation to the "6-Day Baseline Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited 115. Counterfactual", but then accepting Echjay's argument that, on a "5-Day Baseline Counterfactual", Echjay's capacity constraints would only affect Shaft 3. Echjay's skeleton described Indus's argument that the Tribunal failed to deal with capacity in relation to Shaft 1 and Shaft 2 as "premised upon on an unduly forensic and hypercritical reading of the Award". Mr Chandrachud said that points made by Indus about the "5-Day Baseline Counterfactual" only being mentioned to the Tribunal as an afterthought in oral submissions took Indus nowhere. The issue was live and, he contended, it was decided. If Indus wanted to make a complaint about unfairness in this regard, it had made the wrong s.68 application.
116. Mr Chandrachud argued that Mr Diwan's points about the Tribunal's use of the word "acknowledgment" involved the type of hypercritical reading of an award that is deprecated by the authorities. He submitted that the Court should not place too much emphasis on the words of paragraph 672 of the Award, but should instead focus on the substance of what the Tribunal was dealing with here. In other words, I should look at the passage in Echjay's oral closings to which the Tribunal must have intended to refer in their footnote, and pay regard to the substance of the submission which was made in that passage. I understood that to mean that I should take this as the Tribunal implicitly accepting everything that Echjay had said in that passage. 117. 118. 119. Echjay was critical of points made by Indus about the Award supposedly being "structurally inconsistent", just because the Tribunal quantified Echjay's damages in relation to Shaft 1 and Shaft 2 before going on to conclude that no damages would be awarded in relation to Shaft 3. It said that the Tribunal addressed the position of all three shafts in four consecutive paragraphs of their Award and that there is no significance in the sequence. To the extent that the underlying premise of Indus's argument was that, on the evidence, Mr Patel did not have any proper basis for disagreeing with Mr Jain's analysis to the effect that the capacity problem related to all of the shafts, Mr Chandrachud said that was beside the point. Detailed analysis of the evidence cannot be a

proper basis for a challenge to the Award under s. 68(2)(d). Echjay suggested that Indus's real complaint was that the Tribunal decided the capacity argument against it in relation to Shafts 1 and 2 without sufficiently articulating their reasons and/or without correctly evaluating the expert evidence. But neither is a proper basis for complaint under s. 68 of the 1996 Act. Mr Chandrachud observed, for example, that the "run@rate" studies are not themselves the issue, but only part of the body of evidence. As such, he said, Indus was wrong to assert that the Tribunal "had to" engage with that evidence, before accepting Mr Patel's evidence on available capacity. On the contrary, that was a matter for the Tribunal. If necessary, he suggested that there were plenty of answers to those studies; the most obvious being that they had been produced at the request of specific customers. But he emphasised that this was not something which I should, or could, decide. He was simply making clear that it was not as simple as Indus being able to say that Echjay/ Mr Patel had no answer to that evidence. Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited 120. Echjay submitted, in essence, that it is not realistic to contend that the Tribunal failed to deal with the capacity argument in relation to Shafts 1 and 2, given that they: (i) recorded both parties' positions in detail; and then (ii) accepted Echjay's case that that the capacity constraints only affected Shaft 3.

121. My analysis: Try as I might, I cannot read paragraph 672 of the Award as amounting to the Tribunal making a finding that only Shaft 3 was affected by Echjay's capacity constraints (once the 6-day week had been rejected). First, the paragraph refers to the "the Claimant's acknowledgment". That phrase is suggestive of a concession being made by Echjay, not an acceptance by the Tribunal of a submission. That remains true notwithstanding the inclusion of the word "only", which can easily be read as simply describing the concession, rather than recognising that something remained to be decided. This is not nit-picking or being hyper-critical of the Tribunal. It is a matter of reading the words which they have used in a commonsense way. 122. 123. Second, even if (as Mr Chandrachud argued) that reference to an acknowledgement means a combined "concession and submission", the paragraph then continues with a single determination, undoubtedly limited to Shaft 3: i.e. "the Tribunal determines that the Claimant would not be entitled to profits for this product" (emphasis added). The Tribunal have missed out the stage where a decision is made as to whether Shaft 3 is indeed "the only product affected by capacity constraints". The structure of this part of the Award suggests to me that there is a gap in the decision-making. Paragraph 639 carefully confirms that the suggestion of using 6-day operations is rejected. It makes clear the Tribunal will proceed on the assumption that "a five-day baseline is the appropriate measure for capacity assessment in this dispute". The Award then works in a systematic way through profit margin, discount rate, pricing and the duration of the relevant period after the breach.
124. When the Tribunal carry out the damages calculation for Shaft 1 in paragraph 670 (opening with the words: "For product reference number HL3P-7015-DA"), they take into account profit margin, discount rate, pricing and the duration of the relevant period. But nothing at all is said about capacity, or the 5-day baseline. The same is true for the calculation in

respect of Shaft 2 in paragraph 671. 125. It is only when they turn to Shaft 3 (“As of product reference number Shaft 52854451AA”) that capacity constraints receive a further mention. That is followed with an express finding about those capacity constraints for Shaft 3, with the determination in paragraph 672 being further explained in paragraph 673: “Considering the evidence and submissions, the Tribunal concludes that, in this case, no damages will be awarded for Shaft 52854451AA, as the Claimant has not sufficiently demonstrated its capacity to produce this product without additional investment or adjustments”. 126. The structure would be entirely logical, if the capacity issue only concerned Shaft 3. Each relevant ingredient is addressed before the final calculation for each shaft is performed. By contrast, it would be confused and confusing for the Tribunal to arrive at final profit figures for Shafts 1 and 2, before reverting to the Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 127. 128. 129. 130. capacity issue which determines whether any of those products could have been manufactured. I should emphasise that I do not mean by this that it was not open to the Tribunal to take the issues in a different order. Rather, I am suggesting that, in the absence of any express words indicating that that is what they have done, the Court is entitled to consider the structure, and the logic, of the decisions which it is apparent that they have in fact reached. Where the structure of the Award reveals a pattern, such that one can see other aspects being resolved in a logical order, together with express statements about what the Tribunal has determined or concluded on each aspect, that encourages the drawing of an inference that, if there is then a gap in that logic, that missing issue has been overlooked. It discourages the drawing of an inference that the issue has been silently decided, together with another, slightly different, topic, to which reference will only be made later in the Award. Similarly, it seems to me that Mr Diwan is right to point out that there is no mention by the Tribunal in their analysis of the expert evidence about capacity (beyond their decision on the 6-day week), of the “run@rate” documents, or of any of the material to which one might have expected them to have regard for the purposes of deciding the capacity issue. Again, I do not say that the Tribunal could not “properly” have decided the issue without mentioning those things. On the contrary, I accept that it was open to them to approach the evidence in any way that seemed to them appropriate. However, I agree with Mr Diwan that the Court is entitled to consider whether the Award contains any ‘indicia’ that the Tribunal were indeed answering that question. My answer is that there is no sign of it, in contrast with the methodical way in which (for example) they have worked through the evidence about the proposed 6-day week. It may not add anything, but it also seems to me relevant to note (a) that Echjay’s own case amounts to saying that the Tribunal used the wrong words when they referred to “the Claimant’s acknowledgment” in paragraph 672 and

- (b) that it is common ground that the footnote in that paragraph contains a mistaken reference. On any view, Homer has nodded here. That being so, it is hardly unthinkable that the Tribunal became confused about the true shape of the issues. Indeed, my own view is that the Tribunal’s error can be explained (albeit not, for the purposes of s.68(2)(d), justified) by the way in which the arguments ended up being presented to them in the oral closing

submissions. It seems to me that Indus, taking the view that the real battleground by that stage was the proposed 6-day week, focussed on making clear that, even on Mr Patel's own initial analysis, there was a problem with capacity, which he had sought to answer by reference to the 6-day week. Echjay, perhaps sensing that the Tribunal was not buying into the 6-day week, emphasised in its oral reply that Mr Patel had only said, even with the 5-day week, that the capacity problem affected Shaft 3, leaving the bulk of its claim intact. 131. I suspect that, as a result, the Tribunal mistakenly believed, when they came to deliberate, that there was no capacity issue in relation to Shafts 1 and 2. That would make sense of the way in which paragraph 672 of the Award is expressed, Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 132. the structure of that section of the Award (especially paragraph 669 – 673), and the absence of any discussion of the evidence relevant to the wider issue about Echjay's capacity to produce these shafts. In the end, however, such speculation about the 'why' does not matter. What matters is that I am satisfied that the Tribunal did not deal with the issue about Echjay's available capacity in relation to Shafts 1 and 2. I reach that conclusion despite giving the Tribunal the benefit of every reasonable doubt. In my view, that conclusion is inevitable, unless one deliberately misreads paragraph 672 of the Award, or simply assumes that, because the Tribunal referred in their long summary to the parties' submissions about the issue, and then calculated damages for Shafts 1 and 2 on the basis that Echjay would have sold the relevant number of products, they must have decided the capacity issue in Echjay's favour. Neither seems to me the correct approach to a s.68(2)(d) challenge. Stage 4: Prejudice 133. 134. 135. There is little more that needs to be said under this last heading. Indus submitted that, if there had been a failure by the Tribunal to deal with an issue which had the potential to undermine the whole of Echjay's remaining claim in relation to Shafts 1 and 2, it is obvious that the substantial injustice test is met. I agree. This is a clear example of a situation where the potential prejudice is self-evident, or flows from my conclusions at the prior stages of the analysis. For the avoidance of doubt, there is no doubt in my mind that Indus's position in relation to the capacity issue for Shafts 1 and 2 is properly arguable. It has the potential, if well-founded, to undermine Echjay's whole claim in relation to Shafts 1 and 2. That does not mean that it will do so. For example, the Tribunal may ultimately take the view (as Mr Chandrachud says they already have) that the "run@rate" documents do not reveal the true extent of Echjay's capacity, because they were created for a different purpose in the context of communications with a different client. That will be a matter entirely for them, rather than for me. But uncertainty as to how the case might turn out following remission to the Tribunal does not affect whether the irregularity causes substantial injustice. Conclusion on Shafts 1 and 2 136. For the reasons I have given, I am driven inexorably to the conclusion that something has gone wrong with the Award in this regard. As I have explained, I am satisfied that the question as to whether Echjay had available capacity to produce the required numbers of Shafts 1 and 2 is properly to be described as an 'issue' in the arbitration and that the same was 'put' to the Tribunal. Unfortunately, the Tribunal did not deal with it. That was a serious irregularity and one which has caused serious prejudice to Indus. That issue must therefore be remitted to the Tribunal, along with the various other issues which

are logically downstream of it. Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited Gear rings and pinions

Introduction

137. Indus says that its case in the arbitration was that Echjay could not have manufactured the gear rings and pinions in question during the 2-year period identified by the Tribunal, because a lead-time of at least 2 years would be needed by Echjay for design validation, process validation / PPAP, in order to manufacture them at a commercial level, as a result of these gear rings and pinions being new products not previously manufactured by Echjay. The procedural history and the Award 138. In its Amended Statement of Defence, Indus submitted that development of a ‘new’ product would take at least 2 years.
139. Mr Patel’s evidence in his first report dated 11 July 2024 was that a total lead time of only 7 months was required (for design validation, PPAP/ process validation, and setting up commercial capacity to manufacture) for the gear rings and pinions (see especially his Table 1).
140. My attention was drawn to Mr Patel’s Annexure 6. This is a detailed table, presumably originally created in Excel, which sets out the number of units supplied, the price per unit and the resulting gross revenue, for each gear pinion and gear ring, in each month after January 2023. For each component, the table then applies a discount factor to arrive at a discounted revenue and finally applies an average profit after tax percentage to the discounted revenue to give a “Discounted Loss of Profit” claim figure. 141. The table has a row per month from January 2023, but the first 8 months (or 7 months from the date of the termination notice) are marked with dashes to denote that no relevant products would be supplied by Echjay in that month. In the comments column for September 2023, it is recorded “End of estimated validation period of seven months”. Then October 2023 is marked as “Start of production @ 50% of Initial Capacity” and May 2024 is marked “End of additional period of seven (07) months of lead time for additional production of 25% leading to total production @ 75%”. The calculation continues for 7 years from start of production: i.e. until September 2030.
142. Mr Jain, in his report of 21 July 2024, expressed the view that the gear pinions and gear rings were new products and that 2 years would be required for Echjay to produce such parts at a commercial level. He included a table to his report, setting out the various steps by way of quality planning and then manufacture preparation (including a “PPAP” approval process) which he said Echjay would have to complete before actually commencing manufacture of the gear rings and pinions.
143. By way of reply, Mr Patel suggested that ‘new products’ is an industry term that refers to products that are not yet being manufactured by any supplier. He suggested that the gear rings and pinions were not ‘new products’ in that sense, but were rather ‘re-sourced products’ – i.e. products that were being manufactured by other suppliers and were already

being supplied to, and used Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited 144. by, the end customer. On this basis, Mr Patel repeated his suggested lead time of 7 months. In cross-examination, it was put to Mr Doshi of Echjay that the design was ‘new’; i.e. that these were indeed ‘new products’ as far as Echjay knew. It was put to Mr Patel that what he had said about the gear rings and pinions not being ‘new products’ was based solely on his instructions from Echjay and that he had no knowledge of his own as to whether these gear rings and pinions were previously being sourced from anywhere else. He made clear in his responses that he did not have any knowledge of his own about this; he said he was not a technical expert in that sense. 145. In its written closing submissions, Indus criticised Mr Patel for using a lead time of 7 months, suggesting that he had no proper evidential basis for his view that these were ‘re-sourced products’, given that all he knew for sure was that Echjay was not making them (see paragraph 42): “Given that the Claimant is not making these parts undisputedly, the basis for the Claimant’s Quantum Expert to assert 7 months of lead time which includes validation/ PPAP, is completely based out of thin air.” 146. For its part, Echjay maintained that Mr Jain had confused ‘new’ products with products already being supplied to the end user (see paragraph 274a of its written closing): “...the products being sourced from RKFL, are not products which are being developed for the first time – they are existing products viz. products which are presently being supplied to and used by the end customers. The PPAP process for changing the supplier for existing products would be a significantly truncated and shorter process than for products which are being developed for the first time. The validation period taken into consideration by the Respondent’s Valuation Expert is therefore completely wrong.” 147. In its oral closing, Echjay sought to buttress its argument for a 6 or 7 month lead time with a contention that Indus had failed to provide the information which would enable the Tribunal to ascertain whether the products were new or not (page 112 of the transcript for 20 October 2024): “...The point that I’m trying to make is that if they suppress the evidence which is in their possession, our expert has gone on the basis that if these parts are resourced parts, the lead time for approval and PPAP could be six months or seven months, which is well within the notice termination period and certainly within the two-year sunset period.” 148. In the Award, the Tribunal made specific reference to Echjay’s position in this regard (e.g. at paragraph 345), which they correctly identified as Echjay inviting them to draw an adverse inference: “Regarding lead times, the Claimant distinguishes “re-sourced” products from genuinely new parts. In the Claimant’s submission, re-sourced parts need Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited shorter PPAP approvals, meaning reduced validation...Because the Respondent controls evidence proving whether disputed parts are truly re-sourced or new, and has withheld such data despite Tribunal orders, the Claimant maintains that an adverse inference is warranted: these parts are likely re-sourced, requiring less than a year for PPAP.”. 149. The Tribunal also identified the arguments being advanced by Indus, for example: 149.1. at paragraph 449 of the Award: “The Respondent states that for other shafts and gear parts, the Claimant’s expert merely relied on the Claimant’s instructions (i.e. lead times of 6 months for the shafts and 7 months for gear ring

and gear pinions) without verification and that new parts or designs would need validation” 149.2. at paragraph 493: “The Respondent critiques the methodology adopted by the Claimant’s quantum expert, particularly regarding lead times for product development and validation. For instance, the expert assumes that shafts and gear pinions not currently supplied by the Claimant can be developed within six to seven months based solely on the Claimant’s instructions, without conducting independent research or consulting industry specialists. The Respondent argues this assumption is flawed, as product development in the automotive industry typically involves lengthy validation processes, often taking years” 149.3. and then at paragraph 661: “...The Respondent contends that a lead time of approximately two years is necessary to organise the specialised machinery required to meet the production requirements, and that the Claimant was unable to demonstrate that it could commence production within the two-year timeframe.” 150. 151. This last example is perhaps slightly ambiguous, with Indus suggesting this comment was only concerned with capacity (i.e. for the shafts – see above). I am not sure about that, given the reference to lead time. But it may not matter. In terms of analysis, the Tribunal discussed the use of a two year “damages horizon” or “transition period” in paragraphs 663-668 and concluded that “a two-year period is the most reasonable and defensible measure for assessing damages” (paragraph 667), rejecting Echjay’s argument that it should use a 5-7 year period. 152. Then, having worked through the claims in relation to Shafts 1-3, the Tribunal set out its conclusions on the gear rings and pinions (at paragraphs 674-677): “674. For Gear Pinion (0065122), the Tribunal has adopted the calculation in Annexure 6 of the Claimant’s Quantum Expert Report dated 11th July Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited 2024 for the period of two years and with the profit after tax of 12%, the total is USD 392,063.

675. For product reference number Gear Pinion (0067022), the Tribunal adopts the calculation in Annexure 6 of the Claimant’s Quantum Expert Report dated 11th July 2024. Applying the profit after tax of 12%, the total loss of profit for the two-year period is determined to be USD 606,862.
676. For product reference number Gear Ring (0065080), the Tribunal adopts the calculation in Annexure 6 of the Claimant’s Quantum Expert Report dated 11th July 2024. Applying the profit after tax of 12%, the total loss of profit for the two-year period is determined to be USD 575,563.
677. For product reference number Gear Ring (0065147), the Tribunal adopts the calculation in Annexure 6 of the Claimant’s Quantum Expert Report dated 11th July 2024. Applying the profit after tax of 12%, the total loss of profit for the two-year period is determined to be USD 685,980.”
153. As can be seen, each of these conclusions uses the calculation found in Annexure 6 to Mr Patel’s first report, but making adjustments to the overall period (2 years rather than 7 years) and the profit after tax (12% rather than 15.9%).

154. During the hearing, when I asked about how this calculation worked in practice, I was told by Mr Plewman that the two year period used by the Tribunal to arrive at their numbers ran from the termination becoming effective in July 2023 until the end of July 2025: i.e. matching the contractual two year period (even though the Tribunal's reason for using that period cannot have been because it was contractually binding). 155. 156. I understood this to mean that the Tribunal had calculated those lost profits on the basis of the period from October 2023 until the end of July 2025, thereby reflecting⁴ the impact of Mr Patel's 7-month lead time or validation period, which ran until October 2023. I have to say that, in the course of preparing this judgment, and as a result of some difficulties with making their numbers work, I have wondered whether what the Tribunal might in fact have done is use a period of two years from the date of the start of production (i.e. a two year period from Oct 2023 until September 2025). But I should make clear that neither party suggested that to me as an explanation for why the Tribunal did not grapple with whether the calculation used those dates (i.e. Oct 2023 – Sept 2025) or a different two-year period. I will say a little more about this possibility, which I acknowledge may ultimately be a red herring, below. ⁴ I use that word to refer to the practical effect of awarding lost profits having regard to a 7-month lead time, leaving to one side for now whether that was the Tribunal's conscious intent. Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* Stages 1 and 2: Issue put to Tribunal? 157. 158. Indus' submissions: Indus submitted that this was an essential issue that had to be resolved in order to determine whether any loss at all had been suffered by Echjay by reason of it being deprived of the opportunity to manufacture the gear rings and pinions. If the lead time required by Echjay to manufacture them was 2 years or more (as Indus contended, on the basis that these were new products) then Echjay can have suffered little or no loss. Indus pointed out that Echjay's contrary case was that the total lead time was 7 months. As such, it said the Tribunal had to decide that issue by reference to those opposing cases. It agreed that the Tribunal might have been able to address the four gear rings and pinions on a composite basis, since both parties were taking the same position across all four parts, but the issue still had to be addressed.
159. Mr Diwan took the Court through the various procedural stages, which I have already outlined in some detail above. He pointed to the fact that there was a clearcut difference of view between the experts, which had the potential to affect significantly their respective quantifications of Echjay's loss, and that this difference was addressed by the parties in their written and oral closing submissions. He submitted that the Tribunal could not decide whether Echjay lost any profits in respect of the gear rings and pinions in that two year period without resolving that difference between the experts (which, he suggested, ultimately turned on a factual disagreement as to whether the gear rings and pinions were 'new' products, or 're-sourced' products).
160. Echjay's submissions: Echjay did not really distinguish in its submissions between the points about the 'issue' in relation to the shafts and the similar points which could be made about the gear rings and pinions: it relied for each upon the fact that the question only arose late in the day and was not included on any list of issues. It accepted for both that the question

formed part of the decision tree for the Tribunal but contended that this topic was not important enough in the scheme of the case as a whole to qualify as an ‘issue’ for the purposes of s.68(2)(d), while recognising that this was a “slippery concept”.

161. My analysis: Again, I am in no real doubt that the question about lead time – i.e. how quickly Echjay could start mass production of the gear rings and pinions - is properly to be characterised as an ‘issue’, and that that issue was ‘put’ to the Tribunal. 162. 163. I doubt that it is useful to repeat the points which I have made at paragraphs 99- 105 above, but many of those points apply in exactly the same way here. The question concerns another “no breach” counterfactual: if the orders had been placed with Echjay, what hoops would it have had to jump through before fulfilling them? How long would that process have taken? I accept those can be described as ‘sub-issues’ by comparison to a headline issue about the quantification of the claims for lost profits in relation to the gear rings and pinions. But, for the reasons I have explained before, I do not see why that matters. Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 164. 165. 166. If I had been drawing up a list of issues for this dispute, I would have included the lead time, or the timings for the no-breach counterfactual, on that list. The dispute about that gave rise to a question which the Tribunal needed to answer. It was not merely a submission, or a point on the evidence, which they were being asked to take into account when deciding some different issue. It may be that the arguments about whether the various gear rings and pinions were ‘new’ or ‘re-sourced’, or about the drawing of adverse inferences, fall the other side of that line. I do not need to decide that. All I need to say is that, if they do, it is because they represent reasons put forward by the parties as to why the Tribunal should reach a particular conclusion on the issue about how quickly Echjay could start mass production of the gear rings and pinions. It seems to me to follow that it would not be fair for the Tribunal to seek to come to a conclusion as to the profits which would have been earned by Echjay without first deciding when Echjay could in practice have begun to supply those parts and hence start to earn any profits, especially if the relevant two year “damages horizon” or “transition period” begins from the date of termination (i.e. end of January 2023), rather than simply running for two years from whenever production happens to begin. Stage 3: Did the Tribunal deal with the issue? 167. 168. Indus’s submissions: Indus again started with the simple submission that there is no paragraph, or even sentence, of the Award addressing the issue of lead time. It made much of the distinction between the approach taken by the Tribunal to deciding whether Echjay was already supplying Shaft 1, and its approach to what Indus said was a similar issue about whether the gear rings and pinions were ‘new’ products. Mr Diwan called this a “methodological point”, because it was concerned with the Tribunal’s (supposedly different) methodologies in different parts of the Award.
169. A similar point was also made about the difference between the Tribunal’s approach to Echjay’s case that an adverse inference should be drawn as a result of Indus withholding documents about supposed “sample” shipments, and Echjay’s argument that an adverse inference should be drawn regarding RKFL’s production of the gear rings and pinions on the

basis of lack of information from Indus in this regard. The former argument was discussed over a series of paragraphs (paragraphs 542 – 548) before the Tribunal finally explained why they would draw an adverse inference “grounded on Section 114(g) of the Indian Evidence Act and Articles 9(6) and 9(7) of the IBA Rules on the Taking of Evidence in International Arbitration” (paragraph 549). The latter is not mentioned at all in the analysis section of the Award. 170. Indus’s case is that it is not sufficient for Echjay to point to the Tribunal’s ultimate conclusion on damages and say that, by accepting the calculations contained in Mr Patel’s report, it was thereby rejecting the contention that the gear rings and pinions were ‘new’ products. Mr Diwan submitted that this “implicit” case fell foul of the requirement in the authorities for something clear and evident. Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 171. It was also argued that the structure of the Award did not fit with Echjay’s suggestion that the Tribunal dealt with the lead time issue in that implicit way, since they had dealt with the other similar point about Shaft 1 much earlier in paragraphs 623 – 626 before “Moving on” to a series of different aspects of quantification, such as profit margin, discount rate and price.

172. Mr Diwan said there was an absence of any other indicia of a decision in the Award: there was nothing about whether the products were re-sourced or new, nothing about Mr Doshi’s evidence, nothing about the suggestion that Mr Patel’s assumption was based only on his instructions, and nothing about drawing an adverse inference.
173. Echjay’s submission: Mr Plewman emphasised, quite rightly, that the Tribunal had summarised the parties’ arguments on lead time in some detail. I have set out most of the examples on which he relied above. He submitted that “The necessary consequence of that starting point is that Indus’ argument has to be that when the tribunal reached the later stage of the award and provided its decision and analysis, it simply forgot about those points”. His argument was that there was no reason to assume that an error had been made, and that, instead, the Award could be explained as having disposed of various issues compendiously, rather than one by one. 174. 175. 176. 177. Echjay again criticised Indus for its detailed analysis of the evidence and for what Echjay said was an attempt by Indus to persuade the Court that the gear rings and pinions were in fact ‘new’ products. Mr Plewman argued forcefully that that is “not the right kind of analysis”. In substance, he submitted, Indus’s complaint was that the Tribunal did not sufficiently explain its reasons for preferring Echjay’s argument, and/or did not properly evaluate the evidence. As examples, Mr Plewman pointed to complaints from Indus that Mr Patel’s evidence had come out of “thin air”, or that there was a lack of analysis by the Tribunal of the evidence. Echjay set this question up as involving a short point of difference between the two experts. It suggested that, on Mr Patel’s analysis, Echjay’s loss in relation to the gear rings and pinions would begin to run after 7 months following Echjay’s termination of the MSA. On Mr Jain’s analysis, Echjay would not have suffered any loss of profits in the two-year period following Echjay’s termination. It submitted that the Tribunal were presented with a choice as to which expert evidence they preferred on this topic. At paragraphs 674-677 of the Award, they adopted the calculations in Annexure 6 to Mr Patel’s report, with some specific adjustments. Echjay

pointed out that Annexure 6 expressly records in the comments column that the calculation is using a seven-month lead time. Echjay's case might therefore be said to be very simple. The Tribunal expressly adopted the calculation in Annexure 6. That calculation had built into it a lead time of 7 months, rather than of 2 years. As such, Echjay submits, on a commonsense reading of those paragraphs, the Tribunal were preferring Mr Patel's evidence to Mr Jain's evidence in that regard. Mr Plewman said that the Award recognised, when the Tribunal set out the arguments in the earlier Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* section, that there was a conflict on the evidence, and then adopted the calculation put forward by one expert rather than the other. 178. It was said that there was no force in Mr Diwan's structural or methodological points, because the Tribunal were entitled to structure the Award as they wished and there was no reason why they would necessarily want to group the issue about whether Shaft 1 was a 'new' product together with the issues about whether the gear rings and pinions were 'new' or 're-sourced'.

179. My assessment: The problem for Echjay is that the Tribunal have not said anything in their analysis about lead time, about the process of validation, or in relation to the route by which they were supposedly resolving this difference between the experts as to whether to use 7 months or two years as the lead time. 180. 181. Echjay's argument that it is sufficient that they ultimately made an award on a basis which assumed a 7-month lead time ultimately requires me to speculate or guess about what the Tribunal might have decided "in pectore". It is equivalent to arguing that a tribunal 'must' have rejected party x's argument, given the relief that has ultimately been awarded to party y. Even when one is giving the Tribunal the benefit of every doubt, that goes too far. There needs to be some basis for drawing an inference, which goes beyond tautological statements to the effect that it was an issue that the Tribunal needed to decide, so they must have decided it. I was not greatly impressed by Echjay's observation that the Tribunal had identified the competing arguments, as part of their process of cataloguing the various submissions made to them in writing and orally. That is undoubtedly a useful process for an arbitral tribunal, which is intended to avoid issues or arguments being overlooked. But the fact the exercise has been performed does not necessarily mean that it has achieved its ultimate goal. If anything, the sheer number of submissions, responses, rebuttals and alternative cases which are catalogued by the Tribunal in the Award provided an explanation for why something might be missed. The Tribunal certainly has my sympathy and my respect for their efforts to pick the bones out of the parties' various alternative arguments. But I do not take the view that, because reference was made to an argument at (say) paragraph 345 of the Award, it must be inferred that the same was accepted or rejected when it came to the analysis more than 300 paragraphs later.
182. Nor am I able to infer from the fact that the Tribunal used Mr Patel's Annexure 6, which in turn adopted a 7-month lead time, that the Tribunal must have been deciding that issue. It is not as if, for example, Annexure 6 provided two options, and it was clear that the Tribunal picked one of them. To say that the Tribunal 'must have' been alive to the logic underlying the table is to speculate in the absence of any proper way of knowing whether that is

correct. As I have said, the difficulty for Echjay is not showing that the logic of the Tribunal's ultimate conclusion amounted to adopting a lead time of 7 months. The difficulty is showing that the Tribunal was actively deciding to use 7 months, as opposed simply to overlooking the issue and thereby defaulting to what happened to have been done in Annexure 6. Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 183. 184. 185. 186. If I look at every other part of the Annexure 6 calculation in relation to which there was an issue, but in relation to which the Tribunal ended up accepting Echjay's case, their reasons for doing so are explained in the Award. For example, there was a difference of view between the experts as to whether production would "ramp up gradually". The Tribunal rejected Indus's case at paragraphs 627-631 of the Award. There was also a difference about the discount rate. The Tribunal explained its approach to the discounting of future cash flows, and why it was content with Mr Patel's suggested rate of around 13%, at paragraphs 645-650 of the Award. In relation to the prices for the gear rings and pinions, the Tribunal's reasons for agreeing with the prices used by Mr Patel are set out at paragraphs 657-658 of the Award. Far from suggesting to me that the Tribunal might have been content to signal their acceptance of Mr Patel's 7-month lead time merely by accepting, silently, that aspect of Annexure 6, all of this points firmly in the opposite direction. The Tribunal's approach to all of these other issues confirms, as one might expect, that where they were accepting (for example) the prices which he had used in Annexure 6, they would make this clear and explain why they have done so. The absence of anything similar in relation to lead time is therefore striking, and suggests that something has gone wrong. There are other similar points which can be made about the Tribunal's methodology in this regard. I agree with Mr Diwan that it is noteworthy that the Tribunal dealt carefully with Indus's argument that Shaft 1 was a 'new' product, so as to require "at least some new PPAP requirement, implying a drawn-out development cycle including initiate of change request, impact analysis, customer notification and approval, revalidation and testing, submission of updated PPAP and customer review and approval" (paragraph 623 of the Award). In paragraphs 624 – 626 of the Award, the Tribunal observes that Indus had not provided "detailed technical data or a credible, side-by-side comparison", while Echjay had "placed on record a comparison of the two drawings, highlighting that the variations are largely minor". As such: "In the Tribunal's view, the Respondent has not furnished sufficient evidence of major design differences or any OEM directive requiring a full PPAP cycle". This is how I would expect the Tribunal to deal with an allegation of this kind: by looking at the evidence on each side and identifying their route through that evidence to their conclusion. However, their analysis simply moves on to a different topic in paragraph 627: "Moving on to the capacity and ramp up assumptions...". There is no discussion at all, whether here or anywhere else, of the similar issue about the extent to which the gear rings and pinions were 'new' products.

187. Mr Diwan is able to make the same point about the absence of the 'indicia' of decision-making in this regard as he did for Shafts 1-2. There is no mention of the evidence about the time usually taken for PPAP or other verification, of Mr Doshi's evidence as to whether this

was a new design, or of the suggestion that Mr Patel was basing his statement that these parts were ‘re-sourced’ purely on what he had been told by the party appointing him. There is no discussion of whether an adverse inference could properly be drawn on the basis that Indus Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* supposedly had information which it had chosen to withhold. This is to be contrasted with the Tribunal’s careful analysis in relation to a similar invitation to draw an adverse inference (in relation to the sample shipments) at paragraphs 542-549 of the Award.

188. At the risk of repeating myself, I do not make these points about the evidence to suggest that the evidence relied upon by Indus compelled any particular conclusion by the Tribunal. I should not be taken as agreeing with Indus’s criticisms of Mr Patel’s evidence, or as implying that it was not open to the Tribunal to draw an adverse inference. On the contrary, I agree that, if the Award had simply stated that the Tribunal had been persuaded to adopt Mr Patel’s 7-month lead time, then complaints to the effect that the Tribunal did not address any of these particular aspects of the evidence would not have engaged s.68(2)(d). But in the absence of anything express, it is legitimate to look for signs that the issue is nevertheless being dealt with by the Tribunal. If there are no such signs, that further absence must suggest that it was not.
189. As a final point under this heading, to the extent that there is ever much force in the argument that an experienced tribunal (which this undoubtedly was) is unlikely to have made a mistake of this kind, that argument is weakened here by my conclusion on the issue about the capacity to manufacture Shafts 1 and 2, as explained in the previous section of this judgment.
190. My suspicion, which again does not get above the level of speculation, is that the Tribunal lost sight of this lead time issue because they thought it was tied together with the question as to whether damages might extend beyond the so called “two-year sunset period”, meaning the post-termination restriction which the Tribunal actually held was not enforceable as a matter of Indian law. I note that the Tribunal refers (at paragraph 660 of the Award) to Indus presenting two scenarios. The first of these, as set out above, involved an argument that “a lead time of approximately two years is necessary to organise the specialised machinery required to meet the production requirements” (paragraph 661). The second is introduced as follows: “In the second scenario, the Respondent accepts, for the sake of argument, a maximum two-year window as a permissible timeframe for damages. This position is premised on the sunset period stipulated in Clause 3 of the MSA...” (paragraph 662). This then leads into their discussion about whether a longer period (e.g. “The Claimant argues that forging supply programs typically span 5 to 7 years” – paragraph 663) might be relevant, bearing in mind the Tribunal’s decision on the sunset period.

191. Building on this last, I wonder if, when the Tribunal concluded (at paragraph 667 of the Award) that “a two-year period is the most reasonable and defensible measure for assessing damages”, they thought that disposed of the issue about lead time, perhaps on the basis that, if the time period ran for 2 years from whenever production of the parts began, it seems at first sight not to matter whether production began after 7 months, or at some later point. There would still be 2 years of lost profits. 192. I have considered whether, if I were to follow this idea to its natural conclusion, it might mean that the Tribunal did in fact ‘deal’ with the lead time issue, in the Judgment Approved by the court for handing down *Indus Powertech Inc. v Echjay Industries Private Limited* 193. 194. 195. sense that the way in which they decided other issues meant that it did not arise. But, in the end, I decided that conclusion was not open to me, for three reasons. First, this is really only speculation on my part. The Tribunal did not say that they were deciding that the sunset period ran for 2 years from whenever production of the parts began, nor did they intimate that they would not decide the lead time issue because they thought it made no difference. I am simply suggesting that that might explain some of the other things that they have said. Second, that is not the way the case was argued by Echjay, whether in the arbitration, or in the context of this s.68 challenge. One might say that it would have involved a different type of s.68 irregularity for the Tribunal to have taken this path, i.e. deciding the issue on a basis that was not canvassed at all with the parties. A similar objection could be made to the Court suddenly veering in a new direction when none of this was raised with me or by me at the hearing of the s.68 application. Third, if the Tribunal had thought that, if they were simply allowing a two-year period, it did not matter whether that period started 7 months after the termination, or 2 years after the termination, it seems to me that they would have been wrong. Most obviously, it would have affected the discount for accelerated receipt (since the discount factors must be linked to the date when the money would have been received). But it also seems to me that the Tribunal would have had to think about whether an order for these parts in these quantities would still have been available to Echjay, if it could not have started commercial production for 2 years.
196. Accordingly, having examined this possibility carefully, I end up putting it to one side. It does not undermine, and perhaps it even supports, my conclusion that the Tribunal failed to decide the issue as to whether to use 7 months or two years as representing the lead time before Echjay could start supplying gear rings and pinions on a commercial basis. But it is not the reason for that conclusion, which results from the points I have made about the content of the Award, the way that the Tribunal addressed all of the other controversial aspects of the Annexure 6 calculation, even where they ended up adopting Mr Patel’s approach, the structure of the analysis, and the absence of any ‘indicia’ of decision-making in this specific regard. Stage 4: Prejudice
197. As before, my conclusion that there has been a failure to deal with the issue largely answers the final question as to whether this failure has caused Indus substantial injustice. 198. Indus submitted that, if the Tribunal were to find that the lead time was 2 years, that would defeat the whole of the claim in relation to gear rings and pinions. Whether that is right or

wrong might depend on how the Tribunal's two-year sunset period operated. But Indus is undoubtedly right to say that it could undermine that whole claim. 199. Echjay did not seek to suggest that Indus's case in relation to the longer lead time was not properly arguable. That was sensible. It does not follow that Indus's case will succeed. On the contrary, it may very well be that the Tribunal Judgment Approved by the court for handing down Indus Powertech Inc. v Echjay Industries Private Limited will ultimately decide that Mr Patel was correct to use a 7-month lead time. That is a matter for them and not for me. However, I am satisfied that the test for substantial injustice has been met. Conclusions 200. It follows that I must accede to Indus's s.68 application on both limbs, and remit the issues about Echjay's capacity to manufacture Shafts 1 and 2 and the issues about the lead time for Echjay starting commercial manufacture of the gear rings and pinions, to the Tribunal for their decision, together with any other issues (such as awards in respect of interest or costs) which were consequential upon the Tribunal's decisions on the quantum of those claims. 201. I will hear submissions from the parties on the precise form of the order which I should make in this regard.

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