IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA(I) 3

Civil Appeal No 136 of 2020

Between

(1) CBX
(2) CBY

… *Appellants*

And

(1) CBZ
(2) CCA
(3) CCB

… *Respondents*

In the matter of Originating Summons No 1 of 2020

In the matters of Section 24 of the International Arbitration Act (Cap 143A) read with Articles 34(2)(*a*) and 34(2)(*b*) of the UNCITRAL Model Law on International Commercial Arbitration and Order 69A rule 2(1)(d) of the Rules of Court (Cap 322, R5, 2014 Rev Ed)

And

In the matter of a Partial Award dated 5 June 2019 made in an ICC International Court of Arbitration Case between CBZ as Claimant and (1) CBX and (2) CBY as Respondents, as clarified in a further award dated 5 August 2019

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And

In the matter of a Partial Award dated 5 June 2019 made in an ICC International Court of Arbitration Case between (1) CCA and (2) CCB as Claimants and (1) CBX and (2) CBY as Respondents, as clarified in a further award dated 5 August 2019

And

In the matter of a consolidated Final Award (Costs) dated 9 August 2019 made in two ICC International Court of Arbitration Cases between (1) CBZ (2) CCA and (3) CCB as Claimants and (1) CBX and (2) CBY as Respondents

Between

(1) CBX
(2) CBY

… *Plaintiffs*

And

(1) CBZ
(2) CCA
(3) CCB

… *Defendants*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

[Arbitration] — [Costs] — [Awarded]

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CBX and another
v
CBZ and others

[2021] SGCA(I) 3

Court of Appeal — Civil Appeal No 136 of 2020
Judith Prakash JCA, Quentin Loh JAD, Jonathan Mance IJ
5 February 2021

21 June 2021 Judgment reserved.

Jonathan Mance IJ (delivering the judgment of the court):

Introduction

1 The Court has before it two related appeals from a judgment of the Singapore International Commercial Court dated 16 July 2020. CA/CA 136/2020 ("CA 136") arises from the decision of the International Judge ("the Judge") regarding the validity of two arbitration awards. CA/CA 197/2020 ("CA 197") arises from the Judge's order for costs regarding the proceedings before him leading to that decision. This judgment addresses the issues arising in and from appeal CA 136, and a separate judgment delivered by Prakash JCA addresses the issues in appeal CA 197. The complex background can usefully be found in the opening paragraphs of the judgment below, which was published as *CBX and another v CBZ and others* [2020] SGHC(I) 17. For present purposes, some simplification is appropriate. We will largely adopt the acronyms used in the Judge's judgment.

2 The parties' disputes arise from two sale and purchase agreements (which the Court will call "SPA I" and "SPA II") dated 19 June 2015 and governed by Thai law. The SPAs were for the sale and purchase of, respectively, 49% and 48.94% interests in company AAA, which in turn owned 59.46% of company BBB, which through various "project companies" owned eight windfarm projects (three existing and five in progress and incomplete at the time when the SPAs were entered into) in Thailand. SPA I was between company CBZ as seller and CBX as buyer. SPA II was between two companies, CCA and CCB, as sellers and company CBY as buyer. For ease of reference, I will refer collectively to the sellers as the "Sellers", and to the buyers as the "Buyers".

3 The SPAs each made provision for there to be ICC arbitration seated in Singapore in the event of any dispute (Clause 12.14). Disputes arose which gave rise in June 2016 to two arbitrations (the "arbitrations"), heard together by the same arbitral tribunal (the "Tribunal"), in which the Sellers under the two SPAs (respondents before the Judge and on the present appeals) claimed various forms of relief against the Buyers (applicants below and appellants now). The arbitrations led to two Phase I Partial Awards dated 22 September 2017, two Phase II Partial Awards dated 5 June 2019 and to a Final Award (Costs) (the "Costs Award") dated 9 August 2019.[1]

4 The Buyers' applications to the Judge were to set aside parts of the Phase II Partial Awards dated 5 June 2019 and, consequentially, the whole of the Final Award (Costs). The relevant parts of the Phase II Partial Awards consist of the Tribunal's decisions, first, that the Buyers pay the Sellers certain amounts described as the "Remaining Amounts" and, second, that interest should run on

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those amounts at the rate of 15% compounded annually from the date of the Awards until payment.

5 The Remaining Amounts had originally been claimed in the arbitrations on the basis that their due dates had been accelerated by reason of the Buyers' defaults or conduct. What the Tribunal actually ordered by [329(g)] and [281(f)] of the Phase II Partial Awards arising out of SPA I and SPA II respectively, was that the Buyers make payment in accordance with Clause 3.1(ii) of the SPAs. That involved payments in respect of each of the five incomplete windfarm projects in three tranches as set out in Schedule 5 to the SPAs. Schedule 5 of SPA I will serve as an example:

Schedule 5
Purchase Price

Name of Project Company	**Remaining Amounts (US$)**				
	Milestone Dates:	**COD**	**1 Year Post COD**	**2 Years Post COD**	**Total**
Company "FKW"		-	-	-	22,890,000
Company "KR2"		-	-	-	18,400,000
Company "WTB"		-	-	-	28,180,000
Company "T1"		34,330,000	10,560,000	10,560,000	58,960,000
Company "T2"		35,040,000	10,780,000	10,780,000	60,180,000
Company "T3"		33,790,000	10,400,000	10,400,000	58,040,000
Company "T4"		28,320,000	8,710,000	8.710,000	48,640,000
Company "NKS"		27,770,000	8,550,000	8,550,000	47,710,000
Total		**159,250,000**	**49,000,000**	**49,000,000**	**343,000,000**

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6 The tranches relating to the five projects in progress were due for payment within 45 days of three dates in successive years, the first such date being the project's Commercial Operation Date ("COD"), the second a year post-COD and the third two years post-COD. At the time when the arbitrations were begun, the hearing took place, and post-hearing briefs ("PHBs") were exchanged in October/November 2018, none of the payment dates for any of the tranches had been reached. However, by the date of the Phase II Partial Awards, 5 June 2019, the payment dates for the first tranches had been passed. The Tribunal's orders for payment of the tranches in accordance with Schedule 5 were therefore made on the basis that the first tranches of the Remaining Amounts were already due, and the second and third tranches would in the ordinary course become due, independently of any acceleration. However, it referred to all the payments under Schedule 5 as having "now become due and payable, from the date of the Partial Award with interest", and the compound interest on them which it awarded (as set out in the next paragraph) was ordered to run "as from the date of this Partial Award". This could, on the face of it, itself be problematic, even in the absence of any other objection to the Tribunal's approach, in circumstances where the last two tranches were not on any view due until 1 and 2 years post-COD. But it is unnecessary to go further into that here, in view of the decision the Court has reached on the other issues which were argued.

7 In addition to the orders for payment of part of the Remaining Amounts, the Tribunal by its Phase II Partial Awards also awarded Compound Interest on those amounts. The awards of Compound Interest were made under the terms of Clause 12.9 of the SPAs. They were made following what the Tribunal later described as a "regrettable oversight" on its part, since the parties had in fact agreed that compounding was unlawful and unenforceable under Thai law, and

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had informed the Tribunal accordingly during the proceedings leading up to the issue of the Phase II Partial Awards.

8 The applications to set aside were made on the grounds that, as regards the relevant parts of the Phase II Partial Awards, the Tribunal (a) exceeded its jurisdiction; (b) failed to afford the Buyers a reasonable opportunity to present their case; and/or (c) contravened Singapore public policy. As regards the Costs Award, its setting aside was sought on the basis that it cannot stand if the relevant parts of the Phase II Partial Awards, on which it was predicated, are set aside in whole or part.

9 The Judge dismissed the applications. He held that the Tribunal had jurisdiction over claims to the Remaining Amounts existing independently of any claims for accelerated payment of the sums due. He held that, although the Buyers had in fact commenced another ICC arbitration (referred to as "the ALRO arbitration") to establish that the Remaining Amounts could not and would not fall due on what would otherwise be their relevant payment dates, they had neglected to make clear to the present Tribunal the nature and grounds of such relief, and had therefore not suffered any undue prejudice or failure of natural justice. As for compound interest, he held that (a) the Tribunal had the (procedural) power to award compound interest under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"); (b) the Buyers had had a reasonable opportunity to present their case; and (c) what had happened was a wrong exercise of an undoubted power, the risk of an error of this sort being "a routine hazard of arbitration". He further held that the illegality of compounding interest under Thai law was not the type of "palpable and indisputable" illegality which could, under either the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") appended to the IAA or the 1958 Convention on the Recognition and Enforcement of Foreign

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Arbitral Awards (the "New York Convention"), make the award of compound interest contrary to Singapore public policy. The Buyers now appeal these conclusions, as well as the Judge's orders as to costs.

The Legal Framework

10 The relevant legal framework is found in Article 34 of the Model Law, which provides:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> > (*a*) the party making the application furnishes proof that:
> >
> > …
> >
> > (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; …

11 As indicated in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [40], Article 34(2)(*a*)(iii) involves a two-stage process: first, identification of the scope of the submission to arbitration and, second, consideration of whether the award involved matters within the scope or a "new difference … outside the scope of the submission to arbitration". The issue of jurisdiction, or the scope of the parties' submission to arbitration, is ultimately a hard-edged issue which is for the Court to decide *de novo*: *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [112];

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Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763. The words "may be set aside" indicate that there may be some circumstances where the court may not set aside an award made in excess of jurisdiction. One example would be where a party had, by subsequent conduct, precluded itself from relying on or waived the excess of jurisdiction. It is unnecessary in this case to consider precisely what sort of factors might preclude a party from obtaining an order setting aside an award in excess of jurisdiction. Normally, annulment will be "virtually automatic": see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [97]. It is also clear that, once an order is shown to have been made in excess of an arbitrator's jurisdiction, there is no further logical or legal requirement, on an application to set the order aside, to show prejudice (beyond the fact of the order itself): *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 ("*GD Midea*") at [60] (decision affirmed on appeal without written reasons), citing *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon ed) (Sweet & Maxwell, 2014) at [14.041]. The situation where an arbitral tribunal has not dealt with all the issues submitted to it for decision, addressed in *CRW* at [32], is conceptually distinct and presently irrelevant.

12 Section 24 of the IAA provides:

> Notwithstanding Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> > (*a*) the making of the award was induced or affected by fraud or corruption; or
> >
> > (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

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In striking an appropriate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are observed, the Court will bear in mind the policy of "minimal curial intervention" which is commonly accepted in international practice and underlies the Model Law: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(c)] and [65(d)].

Background and History

13 The two SPAs each provided, by Clause 3.1(i), for payment of a first instalment of the price (US$85.75m and US$89.25m respectively), to occur within 60 days of closing (which took place in one case on 27 July 2015 and in the other on 24 August 2015), and, by Clause 3.1(ii) and Schedule 5, for payment of the Remaining Amounts (US$257.25m and US$267.75m respectively) in the three tranches to which reference has already been made.

14 The parties discussed postponement of the dates for payment of the first instalment. What, if anything, they agreed to was in issue in the arbitrations. The Buyers did not pay the first instalment under SPA I, and only paid sums towards the first instalment under SPA II in two stages, without interest for late payment. The Sellers contended that the Buyers were in default. Their initial claim in respect of SPA I was to rescind and recover the shares, but during Phase I it was expanded to include claims (founded on allegations of abuse of rights, conduct frustrating, and other breaches or misconduct) that the payment conditions should be deemed fulfilled, and that the Buyers should pay the Remaining Amounts on an accelerated basis.[2] The Seller's claim under SPA II

[2] See, for example, III(D) RA 279 *et seq* in relation to abuse of right, and III(D) RA 284 *et seq* in relation to conduct frustrating. See in addition, III(K) RA 126 for Transcript of Phase I Hearing on 10 February 2017, Page 915, Line 7 *et seq*. See further, III(F) RA 64 *et seq*.

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at all times included similar claims to the Remaining Amounts on an accelerated basis. The Buyers' case in response was that agreements had been reached regarding the postponement and/or payment of interest on the first instalments and that no acceleration had occurred. They also raised set-offs and/or counterclaims for alleged wrongful rescission and/or "wrongful attacks" diminishing the commercial value of the companies whose shares they were acquiring.

15 By its Phase I Partial Awards dated 22 September 2017, the Tribunal dismissed the Sellers' claims for rescission and ordered payment of the first instalment and compound interest under SPA I. It dismissed the Sellers' claims for alleged shortfall in respect of the first instalment, and ordered Compound Interest on the first instalment which had been paid under SPA II. In each case, it ordered that "the issues of liability for [Sellers'] Claim for Remaining Payments … be joined to the second (damages) phase of this arbitration", and also that "[a]ll other claims and counterclaims are reserved for a second part of this arbitration".

16 As part of the Phase II proceedings, the parties exchanged further pleadings, with a view to a hearing which took place in Singapore from 30 August to 4 September 2018. In a First Submission dated 19 February 2018, the Sellers relied upon "the revelation" on 24 October 2017 that the Buyers had disposed of their indirect interests in company BBB in 2016 as a further ground for acceleration of the Remaining Amounts. On 22 December 2017, the Tribunal ordered that US$85.75m be paid into an escrow account in respect of the non-payment of the first instalment under SPA I. The ICC Secretariat acknowledged receipt of this sum on 6 March 2018. The Buyers filed their Defence and Counterclaim on 26 March 2018. The Counterclaim alleged that the disposal of shares in company BBB had been forced on the Buyers by the

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Sellers' conduct. On 13 April 2018, the Sellers applied for an order for security for the global purchase price and damages by way of an interim measure under Article 28(1) of the ICC Rules, and on 1 June 2018, the tribunal dismissed this application as moot or premature.

17 In a Reply dated 15 July 2018, in addition to maintaining their primary claim to acceleration, the Sellers for the first time noted on "a very subsidiary basis" or as a "very subsidiary claim" that the "Remaining Amount of the [company BBB] Future Projects will be contractually due and payable by the expected time of the Final Award", and that, as two of the five Projects "have been confirmed to reach COD by the time of the Singapore Hearing", they "deemed it necessary" that the Buyers give a guarantee or undertaking to ensure timely payment (see [13.2.1], [211] and [265]).[3] However, when it came to summarising their claims in Section XI at the end of the Reply, the only relevant claim not based on acceleration was in [336.5] for an order for "such form of security as the Arbitral Tribunal deems appropriate" to cover the Global Purchase Price and Damages due … (or alternatively any other amounts awarded by the Tribunal)".

18 In a Rejoinder and Reply dated 11 August 2018, the Buyers took issue with any attempt to introduce new claims in respect of the Remaining Amounts not based on acceleration. Under the heading "NO BASIS FOR SEEKING GUARANTEE / UNDERTAKING OF PAYMENTS THAT HAVE NOT EVEN COME DUE", they wrote:

> 94. Realising that their Accelerated Payment Claims are now certainly hopeless (in light of [77]-[93] above), [Sellers] have sought to contrive a new claim for the Remaining Amounts, by asserting that [Buyers] should in any case be made to provide a 'suitable form of guarantee or undertaking' in order to pre-

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> emptively 'ensure timely payment of [the Remaining Amounts]' when those Amounts eventually come due ('Belated Claim for Remaining Amounts').
>
> 95. *[Buyers] object to any attempt by [Sellers] to improperly introduce this new claim (over which the Tribunal has no jurisdiction)* into the Arbitrations at this very late stage – the present Arbitrations have been afoot for more than 2 years and should remain limited only to [Sellers'] claim for acceleration of the Remaining Amounts.
>
> 96. Without prejudice to this objection, we simply note at this juncture that there is no basis for this new claim and indeed [Sellers] have provided none. Since the Remaining Amounts are not yet due under the SPAs, there has not been any breach of the payment timelines concerning the Remaining Amounts, and there can therefore be no cause of action *vis-à-vis* those Amounts.
>
> 97. With respect, [Sellers'] hope of obtaining a higher degree of commercial certainty than they bargained for (by way of the requested 'suitable form of guarantee or undertaking') does not ground a cause of action – not even if [Sellers] have the prescient ability to foretell that the 'Final Awards [are] expected to be delivered [in] early/mid-2019'. *[Buyers] reserve the right to elaborate on their defences (both factual and legal) to this new claim (if and when it is properly made) at the appropriate juncture and forum.*
>
> [Emphasis added by italics]

19 In written Opening Statements exchanged on 30 August 2018, the Sellers listed seven claims, one for "incidental fraud" in causing the Sellers to enter the SPAs, one for abuse of right under Thai law, four for accelerated payment under both SPAs and the last for rescission of SPA I. The Sellers did not identify any claim for the Remaining Amounts, other than by way of acceleration. The Buyers in their Statement summarised their jurisdictional objection to any claim to the Remaining Amounts other than by way of acceleration, and added that any such claim was anyway without substance, since the Remaining Amounts were not yet due.

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20 During the hearing, references were made to the Remaining Amounts. The Judge saw these as indications that these were being treated as in issue generally before the Tribunal. The Buyers' counsel said for example on the opening day that:

> [W]e accept that payment is to be made according to the milestones, we simply say we should be allowed to set off our counterclaim against those payments, whatever is the counterclaim, this tribunal decides. What we disagree with them is that they have any basis to claim an acceleration.

21 The Court cannot, however, see this or any other of counsel's statements as any form of acceptance that it was or would be within the Tribunal's power to order payment of the Remaining Amounts. To read them in such a sense would also fly in the face of the Buyers' own concurrent Opening Statement. All counsel was on the face of it saying was that the Buyers resisted acceleration, and hoped to be allowed to succeed on their counterclaims and to be able to set them off against the Remaining Payments as and when they became due.

22 During the hearing, the Tribunal were also told by the Buyers that there was a problem with the use of the land on which the windfarm projects were sited. The problem was that the Thai Supreme Administrative Court had held on 26 January 2017 that windfarm usage fell outside the relevant land's agricultural zoning. While the Thai National Council for Peace and Order ("NCPO") had, by Order No 31/2560 dated 23 June 2017, responded by indicating that the position would be rectified, the relevant ministerial regulations were only issued in December 2017. The Buyers had therefore only been able to apply for new leases in February 2018, and the position regarding new leases and terms remained open pending the approval of the Agricultural Land Reform Office ("ALRO") required under the new regulations. The

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problem was explained to the Tribunal in opening by counsel for the Buyers as follows:

> [T]he [Sellers] have stated in their Phase II statement of claim ... that the Agricultural Land Reform Office issue has been definitively resolved by 23 June 2017 [that is, the date of the NCPO Order]. Not so.
>
> We have taken the position that it only began to be resolved because essentially that's when parties could start applying for permission to have wind farms on their agricultural lease.
>
> Members of the tribunal, for completeness, I would inform you our clients have applied to the ALRO for these leases to carry out wind farm projects, but we have not received final approval or these lease terms. We have not.
>
> *We were hoping to resolve this issue because we would have then brought this claim in this arbitration, but the lease terms have not been approved or finalised and it may well be the subject of a further arbitration we will bring*, and I just want to mention it not because it's before this tribunal, but I don't want it to be said that somehow we have waived our rights or treated this issue as settled in this arbitration. It is a live issue. It is not before the tribunal. It may well be the subject of a further arbitration our clients will bring against the [Sellers].
>
> [Emphasis added in italics]

23 The positions regarding the Remaining Amounts and the lease were also referred to in re-examination by CC, called on behalf of the Buyers:

> [P]: … Just before [the Seller's counsel ("D")] ended his cross-examination…., the question is put…:
>
> > [D]: So it means you are promising that in your personal capacity, [CC], you intend to pay whatever [CBX] and [CBY] are ordered to pay?
> >
> > [CC]: I intend to pay and I believe you know, subject to whatever damage, that up to tribunal to decide.
>
> When you said "subject to whatever damage", what did you mean?
>
> [CC]: The -- I think all along, you know, if you look at the timeline since beginning of January [2016], the letter is flying around to many people not only in Thailand, even landed in Middle East to someone that I really don't know, and that's also

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> damage my reputation, the company reputation. And not only that, with the media campaign attack on me and the company.
>
> …
>
> [P]: … after you said 'Subject to whatever damage, that's up to tribunal to decide' …, [D] goes on to say:
>
> > [D]: And it means doing whatever it takes to pay; right?
> >
> > [CC]: I'll try my best to pay.
>
> How will you try, Mr. [CC]?
>
> [CC]: I think if we can achieve the target and everything goes smoothly which -- for example, for the land issue, if we can solve the land issue, I think I'll live up to my obligation.
>
> …
>
> [The Chairman seeks clarification of whether CC was referring to the "lend" or "land" issue.]
>
> …
>
> [CC]: In early 2017, the Thai court decided the land that we use to build wind farm, it's illegal. So we have to resubmit and we're still waiting for the new regulations to come out.
>
> [P]: When you say you are waiting for the new regulations to come out, what regulations are those?
>
> [CC]: The existing land lease, basically it's illegal now and it's covered by section 44 in Thailand temporary for us to operate and then they'll come out with the new rules and regulations for that.

24 At the end of the hearing on 3 September 2018, a discussion took place, during which the Tribunal made some remarks about the Remaining Amounts:

> We have considered the situation, we have to set the follow-up procedure. What we also considered and which the parties are obviously quite aware of, is that some of these various milestones come up fairly soon, some apparently by end of September, with payment dates, if you remember correctly, somewhere in November; others come up early next year. We also have taken note of Mr. [CC's] position, that he will pay, under the sale agreement, which stipulates the $700 million, he will pay. That will of course also be important to see. So we do not think that it is necessary to have an accelerated post-hearing process, because that will allow the parties to update us on what is going to happen. Yes? And for the tribunal to take

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> that onboard. That is a possibility. I think claimants have all the time been pushing for a very, very quick award.

In the ensuing discussion, the Tribunal indicated that it had resolved that there should be two rounds of PHBs, exchanged simultaneously. The Sellers submit that, since the Buyers did not take issue with these remarks, they must be taken to have waived any right to set aside the Partial Awards for excess of jurisdiction in so far as the Partial Awards included orders to pay the Remaining Amounts not based on acceleration. The Judge, when addressing the issue of prejudice, also thought that this was an occasion for the Buyers to clarify "their true position on the ALRO issue". In the Court's view, both points read more into the remarks than can be justified. Part of the Sellers' case on acceleration involved reliance on the Buyers' good faith or asserted lack thereof, and whether or not the Buyers paid the Remaining Amounts as and when they fell due was potentially relevant to that. Again, it is also unlikely that the Buyers would abandon the jurisdictional objection that they had made at the outset of the hearing: see [18] and [19] above. In any event, their jurisdictional objection was repeated shortly thereafter in their PHBs, and the parties' PHBs also made the position regarding the ALRO issue clear: see [27], [30] to [33], and [41] below.

25 On 26 September 2018, the Buyers commenced the separate ALRO arbitration against the Sellers, the possibility of which they had indicated at the hearing on 30 August 2018. On 8 October 2018, the Buyers' request for arbitration was received by the Sellers. In the said request, the Buyers claimed:

> a) A declaration that the Admin Court Ruling, NCPO Order and/or Ministerial Regulations rendered the Payment Conditions [under the SPAs] incapable of performance pursuant to parties' true intentions, and consequently, payment of the Remaining Amount can no longer be triggered;
>
> b) Further and/or alternatively, a declaration that the [company AAA] Shares were defective under Section 472 Thai CCC, and consequently

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> (i) [the Buyers] are entitled to withhold the Remaining Amount (as and when the Payment Conditions materialize);
>
> (ii) [the Buyers] are entitled to damages suffered as a result of the defective Acquisition […].

26 The commencement of the ALRO arbitration to determine whether, in the light of the land lease problem, the Remaining Amounts were due or could be withheld, was consistent with the Buyers' case on jurisdiction, namely that the only issue in the present arbitrations regarding those Amounts was whether they had been accelerated by conduct on the Sellers' part alleged to have had that effect.

27 On 15 October 2018 the parties exchanged the first round of PHBs. The Buyers' PHB addressed the Sellers' seven heads of claim, which, as mentioned at [19] above, did not include any claim to the Remaining Amounts except on an accelerated basis. At [133] of the Buyers' PHB, summarising the relief sought, the Buyers included a request for the dismissal of the Sellers' "Belated Claim for Remaining Amounts", with a footnote referencing the Sellers' Phase II Reply, and a note that the "claim" appeared to have been dropped as it was not included in the Opening Statements at the hearing. It was also clearly stated that the Buyers maintained their position in respect of the Sellers' "claim", as set out in the Buyers' Phase II Reply and Phase II Opening Statement, *ie,* their jurisdictional objection: see [18] and [19] above.

28 At [3] and [8], the Sellers' PHB also referred to and annexed an overview of the Sellers' seven heads of claim. In Section VI.C, at [221], the Sellers' PHB summarised their claims as being as set out in Section XI of the Reply. However, [221] of the Sellers' PHB added a reference to [20] of the same document, where a limited claim appears to be for the release of some of the monies held in escrow. More specifically:

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(a) [5] and [19] of the Seller's PHB relied on the ALRO arbitration as indicating that the Buyers did not intend to pay the Remaining Amounts;

(b) [5] "acknowledge[d] the merits" of waiting for the last COD, "as this will eliminate any uncertainty as to the financial valuation of [company BBB] and the disputed [company BBB] shares", but said that, in view of the clear indication that the Buyers did not intend to pay, the Sellers "should therefore not be compelled to wait several additional months to receive the monies due under the SPAs, in particular given that certain funds are readily available in the ICC account";

(c) [5.2] alleged that as from 7 December 2018, the Buyers "will undisputably [*sic*] owe" US$71.64m, as a result of two of the Projects (T2 and T3) officially reaching their CODs on 28 September 2018, and will also owe a further US$2,223,597 under the Partial Awards (making a total of US$73,863,597);

(d) [5.2] and [18] further described the ALRO arbitration claims as frivolous (relying on the dating of the Thai Supreme Administrative Court's decision, the Thai NCPO's reaction, the subsequent windfarm development, and a suggested time bar), and stated that the Buyers "do not articulate any other ground to oppose" the said payments totalling US$73,863,597, aside from their Counterclaims, which the Sellers' PHB also submitted (in Section V) were baseless and should fail;

(e) [19] and [20] asked the Tribunal in these circumstances to ignore the ALRO arbitration claims and to make a prompt award releasing US$73,863,597, plus "simple 15% interest" from the escrow account.

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29 In their second PHB dated 5 November 2018 at [48], the Sellers maintained their claims as set out in Section VI.C and [20] of their first PHB. In short, they limited themselves for present purposes to a claim for security in relation to the Remaining Amounts becoming due and a claim for release from the escrow account of US$73,863,597, plus simple interest at 15% per annum.

30 The Buyers, for their part, responded in some detail to those parts of the Sellers' first PHB summarised at [28] above. They submitted in their second PHB that:

> IV. NO BASIS FOR [SELLERS'] REQUEST FOR EXPEDITED DISMISSAL OF COUNTERCLAIMS & RELEASE OF ESCROW FUNDS
>
> 56. There is no basis for [Sellers'] Request for Expedited Dismissal of Counterclaims & Release of Escrow Funds; indeed, it is premised on three misconceived assertions:
>
> > (a) That [Buyers] have purportedly 'clarified their intention not to perform their obligations under the SPAs' by commencing [the ALRO Arbitration] on 26 September 2018;
> >
> > (b) That Counterclaims 1 & 2 'can easily be dismissed', so as to justify release of the escrow funds;
> >
> > (c) The complaint that the non-interest-bearing nature of the ICC Escrow Account 'is highly detrimental to both Parties' and call for 'a release as soon as legally and procedurally possible'.
>
> 57. The first assertion (at [56(a)] above) mischaracterises [Buyers'] position, which has all along been that they remain ready and willing to fulfil their payment obligations under the SPAs (as and when instalments come due), subject to the resolution the outstanding issues impinging upon those obligations. In particular: (a) in respect of the [CBX] 1st Instalment (which is pending release from the Escrow Account), resolution of [Buyers'] Set-Off Claim against [Sellers], and (b) in respect of the Remaining Amounts under the SPAs, resolution of [Buyers'] Counterclaims as well as issues concerning the terms of the land leases obtained for [company BBB]'s projects.
>
> 58. On the last point, the Tribunal would recall that, on Day 1 of the Phase II Hearing, [Buyers] highlighted that [Sellers] had wrongly informed the Tribunal that the issue concerning the

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> land leases issued by the Agricultural Land Reform Office of Thailand (ALRO) for [company BBB]'s projects (first highlighted to the Tribunal by way of [Sellers'] letter of 6 July 2017) 'has been definitely resolved on June 23, 2017' (an impression sought to be perpetuated in [Sellers'] Phase II PHB at [18.2]); in fact, the issue remained live and ALRO's approval of the new lease terms (which are the subject of applications filed in February 2018, pursuant to ministerial regulations that were only promulgated in December 2017) is still pending.
>
> 59. As [Buyers] explained at the Phase II Hearing, and contrary to the aspersions sought to be cast on [Buyers'] motives in [Sellers'] Phase II PHB at [19.2], the ALRO issue could not have been made the subject-matter of the current Arbitrations as the facts underlying the issue continued to evolve. [Buyers] thus indicated at the Phase II Hearing they may need to commence a fresh arbitration to address those separate issues.
>
> 60. However, in view of a possible approaching time bar in December 2018, [Buyers] eventually decided to commence that arbitration on 26 September 2018 *vide* [the ALRO Arbitration] to seek declaratory relief in respect of the Remaining Amounts under the SPAs and/or damages suffered by [Buyers] arising from the ALRO issue (to be quantified when the underlying facts are finally crystallised).
>
> 61. Pending the resolution of the ALRO issue in the ALRO Arbitration, [Buyers] have responded to [Sellers'] 9 October 2018 payment notices to re-affirm that they stand ready and willing to perform their payment obligations thereunder, once the pending issues impinging upon those obligations are resolved: see letters dated 5 November 2018 from [Buyers] to [Sellers] at Exhibits R-179 and R-180. This is consistent with the undertakings given by Mr [CC] at the Phase II Hearing; …
>
> [Emphasis in original omitted]

31 In their final summary of the relief claimed, the Buyers maintained their position as set out at [133] of their first PHB (see [27] above) and, in a footnote, noted that "[Sellers] are indeed not pursuing the Belated Claim for Remaining Amounts (which was not addressed at the Phase II Hearing, nor in [the Sellers'] Phase II PHB". That footnote again referred to the Buyers' previous Phase II Rejoinder and Reply, Opening Statement, and first Phase II PHB (see above at [18], [19], and [30] respectively).

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32 Subsequent to the exchanges of PHBs, projects T1, NKS, and T4 reached their CODs on 23 November 2018, 28 December 2018, and 14 March 2019 respectively. The Sellers sent notices to pay to the Buyers, which the Buyers rejected by reference to [61] of their second PHB (see [30] above). The Buyers also informed the Tribunal of the notices and the reason for their rejection by emails dated 2 February and 21 March 2019. The latter email further stated:

> As the Tribunal is aware, the issue of [Sellers'] entitlement to the remaining purchase price under the SPAs in light of judicial and administrative developments in Thailand following the commencement of the present proceedings is further pending before the separate tribunal in [the ALRO Arbitration]. [Buyers] will fully elaborate on their position on that issue (which is not before this Tribunal) in the ALRO Arbitration. In the meantime, [Buyers'] position as set out in [61] of their Reply PHB dated 5 November 2019 remains unchanged.

33 At this point, therefore, the Buyers' expressed understanding and case was that the Tribunal had no jurisdiction over, and that the Sellers were not pursuing, any general claim to the Remaining Amounts, other than by way of acceleration. Further, the issue of entitlement to the Remaining Amounts as and when they fell due was being resolved in the separate ALRO arbitration commenced for that purpose, where that issue would be determined in the light of matters occurring after the commencement of the present arbitrations.

34 In addition, by reference to the Sellers' restatements of their case in their own Opening Statement and PHBs (see [19], [27], and [28] above), if the Buyers were in any respect mistaken about the Sellers' position, it was only to the extent that the Sellers were in fact seeking security and/or release from the escrow account of the first tranche payments relating to two projects.

35 Whatever the position in that respect, however, it is clear that there was an unresolved jurisdictional issue as to whether the Sellers should be permitted

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in Phase II to advance any claim to the Remaining Amounts, other than by way of acceleration. That issue was inevitably linked with consideration of the relationship between the Tribunal's and the ALRO tribunal's jurisdiction, and the issues which were before, or ought properly to be decided by, each arbitral tribunal. As will appear, these points were not at any stage directly or satisfactorily addressed.

The Phase II Partial Awards

36 In the Phase II Partial Awards (at [212] to [213] and [199] to [200] respectively), the Tribunal described the issues in the ALRO arbitration as follows:

> On 26 September 2018, [Buyers] filed a request for arbitration against [Sellers] in [the ALRO Arbitration]. [Buyers'] position in said arbitration is summarised as follows in the letter sent by [Buyers] to [Sellers]:
>
> > '(i) Payment of the Remaining Amounts can no longer be triggered under Thai law, in the light of the Supreme Administrative Court of Thailand's decision on 26 January 2017, Order No 31/2560 of the Head of the National Council for Peace and Order dated 23 June 2017 and/or Ministerial Regulations promulgated on 29 December 2017 (2017 Developments) which altered the fundamental promise of the … SPA and rendered the payment condition in Clause 3.1(ii) therein incapable of performance pursuant to the parties' true intentions (under Sections 5, 171 and 368 of the Thai Civil and Commercial Code). Indeed, even if [company BBB's] project companies are granted new leases for their windfarm projects pursuant to their new applications filed under the said Regulations (which remain pending), such leases would likely be subject to different / additional terms from those which [company BBB's] project companies originally had at the time the …. SPA was entered into.
> >
> > (ii) Further or alternatively, the defectiveness of the [AAA] shares transacted under the … SPA (in light of the 2017 Development) entitles us to withhold the Remaining Amounts and claim for damages suffered

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> (under Section 473 and 488 of the Thai Civil and Commercial Code).'
>
> As of the date of this Partial Award, these proceedings appear to continue and were invoked by [Buyers] as of 21 March 2019, as part of the reason for the refusal of payment of [Sellers'] Demand Notices, as set out … above.
>
> [Emphasis in original omitted]

37 Before addressing the bases on which the Sellers submitted that acceleration had occurred, the Tribunal observed that:

> It has to be noted at this juncture that this Award will not deal with the claims raised … in the parallel ICC arbitration [*i.e.* the ALRO Arbitration]. Those claims are subject to a different procedure and award.

38 At [219] and [206] *et seq* of the two Phase II Awards, respectively, the Tribunal then considered the bases relied on for acceleration *seriatim*. After rejecting the Sellers' case that the Remaining Amounts had been accelerated by virtue of the Buyers' conduct, it cited [13.2.1] and [265] of the Sellers' Reply dated 15 July 2018. It then, without addressing any subsequent material or the Buyers' jurisdictional objection, went on to state, at [292] and [252] respectively:

> Accordingly, the Arbitral Tribunal accepts [Sellers'] alternative prayer for relief for the payment of the Remaining Amounts in accordance with the CODs achievement schedule in the present arbitration and turns to the merit of the [Buyers'] Counterclaims, if any, as they have a direct effect on whether [Buyers'] obligations under the CODs [*sic*] become due.

39 After considering and also rejecting the Buyers' Counterclaims, the Tribunal, in Section X of the Phase II Partial Awards, further stated:

> X. THE CONTRACTUAL PAYMENTS OF [BUYERS]
>
> 308. The Arbitral Tribunal has established above that [Sellers] have not been successful in their claims for Rescission (Claimant [CBZ]), incidental fraud and the abuse of right claim. At the same time, the Tribunal has dismissed [Buyers'] claims

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> for lack of sufficient evidence and causality, as well as the justifiable nature of Mr. DDD's and [Sellers'] conduct.
>
> 309. Accordingly, and since in the absence of a contractual or statutory breach by [Buyers], [Sellers'] claims for accelerated payments under the Schedules 5 of the SPAs cannot be granted. [Sellers] have a right to request payments under Schedules 5 of the … SPAs, since there is no dispute that the CODs for all Wind Farm Projects have now been fully reached. As has been set out in para. 195, [Buyers] have not submitted any evidence or otherwise challenged [Sellers'] assertions that all of the CODs have now been reached. Further, as has been set out in para. 289 above, the Payment of the Remaining Amounts in accordance with the achievement of the CODs under Schedules 5 of the SPAs becomes the primary obligation for [Buyers] under the SPAs.
>
> 310. Accordingly, pursuant to [Clause] 3.1(ii) of the SPAs, the payments are now due in accordance with Schedules 5 of each SPAs:
>
> [Tables omitted]
>
> 311. The Arbitral Tribunal recalls that [Sellers] have made payment demands on the basis of the CODs and that [Buyers] while not refusing payment in principle, consider that such payment is premature due to, *inter alia*, the pending counterclaims in this arbitration, pending proceedings before the Thai courts, as well as the third ALRO arbitration.
>
> 312. The Arbitral Tribunal cannot rule on the pending claims before other fora or arbitral tribunals, however, as far as these two parallel arbitrations are concerned, and more importantly for the present arbitration proceedings, the payments set out in … Schedule 5 above have now become due and payable, from the date of this Partial Award with interest. The question of the applicable interest shall be examined below.
>
> 313. With respect to [Sellers'] request for Security of Payment of the Global Purchase Price, as set out in para. 129 above, this request has already been dismissed by the Arbitral Tribunal in its Procedural Order No. 3 (see para. 77 above) and the Tribunal sees no reason to depart from its prior decision.

For completeness, the paragraph numbers referenced in the extract above are those in the Award relating to SPA I. The equivalent paragraphs in the Award relating to SPA II are at [268] to [273] of that Award.

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The Court's Analysis

40 The Tribunal based its conclusion that it had jurisdiction to order payment of the Remaining Amounts, irrespective of any acceleration, upon the terms of the Sellers' Reply. The Judge did likewise, though he added to those terms a reference to the Buyers' counsel's remarks in opening quoted in substance at [20] above. For the reasons stated at [21] above, however, we cannot accept his interpretation of those remarks.

41 In our view, it is clear that the Buyers never accepted the claims for the Remaining Amounts as being or coming within the Tribunal's jurisdiction. On the contrary, the Buyers had made repeated objection to those claims being considered by the Tribunal. The Judge considered that the Tribunal's remarks at the close of the oral hearing on 3 September 2018 referring to CC's evidence ought, if there was such an objection, to have led to the Buyers "unambiguously clarify[ing] their true position on the ALRO issue". This reads the Chairman's remarks as if they were a clear indication that the Tribunal was contemplating an award of the Remaining Amounts independently of acceleration. That is not how we would view them. But, in any event, the Buyers *did* go on to make their position on jurisdiction fully clear, by commencing the ALRO arbitration and, most importantly, in both their PHBs: see [27], [30], and [31] above.

42 The Judge did not refer to the concluding summaries and footnotes in either of the Buyers' PHBs, and discounted the clear references to the ALRO arbitration in the second PHB dated 5 November 2018, on the basis that the relevant paragraphs "did not provide particulars of the declaration sought, the nature of the damages claimed, or the grounds relied upon for those reliefs". There was, he thought, a "mismatch between what the Tribunal was told about the ALRO issue and what the [Buyers] had claimed in the ALRO arbitration"

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That is not, with respect, a sustainable analysis. First, the Buyers had, at the oral hearing, explained the general picture, and that a fresh arbitration was in contemplation. Second, the Sellers' own first PHB dated 15 October 2018, to which the Buyers' PHB dated 5 November 2018 was responding, set out the precise relief sought by the Buyers in the ALRO arbitration. Third, this included the grounds, namely that the problem regarding the land leases rendered the Payment Conditions incapable of performance and entitled the Buyers, at least unless and until the said problem could be resolved, to withhold the Remaining Amounts. Fourth, the Sellers expressly recognised that the ALRO arbitration had been brought to establish that there was no liability for the Remaining Amounts. The Sellers' argument was that the ALRO arbitration was frivolous. The Tribunal did not, however, go into or accept that.

43 In the Court's view, far from there being a mismatch between what the Tribunal had been told about the ALRO issue and what the Buyers had claimed in the ALRO arbitration, the Tribunal was under no misunderstanding at all. It well understood the nature of the issue under the SPAs regarding the land leases which was being litigated in the ALRO arbitration. It took the trouble to summarise it in the paragraphs of its Awards quoted at [36] above. However, having taken the view that (a) the terms of the Sellers' Reply meant that it was charged with a "very subsidiary" claim to the Remaining Amounts, independently of acceleration, it also took the view that (b) the land lease issue could and should be litigated before the ALRO tribunal.

44 These two positions are, in reality, irreconcilable. The Tribunal's expressed intention was to leave unto the ALRO tribunal the matters raised before it. But, by ordering payment of the Remaining Amounts, it has enabled the Sellers to submit in the ALRO arbitration, as they are doing, that the present Phase II Partial Awards give rise to a *res judicata* binding on the ALRO tribunal.

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That is the opposite of what the present Tribunal on its face contemplated, but has on its face considerable plausibility (though it is irrelevant for the present Court to reach any conclusion on the point), if the present Partial Awards stand in this respect.

45 Approaching the matter from a jurisdictional perspective, the present situation arises from the absence of any clear identification of or ruling on the issue or exercise of the Tribunal's jurisdiction over any claims to the Remaining Amounts, other than on an accelerated basis. The Terms of Reference ("ToRs") dated 11 August 2016 and 8 September 2016 in the two arbitrations arising from the SPAs recorded claims by the Sellers along the lines summarised at [14] above. Those did not include any claims to the Remaining Amounts save, in the case of SPA II and later in the case of both SPAs, by way of acceleration. It is true that the arbitration clauses provided that "[t]he [ToRs] shall not include a list of issues to be determined" and that, consistently with this, the ToRs recorded that the Tribunal had:

> … not deemed it appropriate at this stage to establish a list of issues to be decided. Consequently, the issues to determined will be those contained in the Parties' pleadings, including forthcoming submissions, and such other issues as may arise during the course of the arbitration, subject to Article 23(4) of the ICC Rules.

Article 23(4) of the ICC Rules (in force as of 2017, though the 2021 edition does not effect any change) reads as follows:

> After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

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46 On the face of it, therefore, new claims not identified in the ToRs required the tribunal's permission. What Article 23(4) clearly contemplated in the event of a party wishing to make a new claim was express consideration and determination by the arbitral tribunal of the question of whether this should be permitted having regard to its nature, the stage of the arbitration, and all other relevant circumstances. The provision in the ToRs foregoing any list of issues must be read in the context of the claims identified in the ToRs. The Tribunal and parties cannot, especially in the light of their express reservation as to the application of Article 23(4), have meant that any party could raise *any* new claim or issue whatsoever at *any* time without *any* arbitral input or control. This is underlined by the decision to bifurcate the arbitral proceedings under Procedural Order No 1 into two Phases: Phase I addressing all liability issues, and Phase II the issues as to quantum.

47 At the close of Phase I, the only issues of liability stood over by the tribunal to Phase II, apart from questions of damages, were those relating to acceleration of the Remaining Amounts and any other claims or counterclaims (particularly the Buyers' set-off and counterclaims) already raised in Phase I. If the Sellers were to seek to introduce any other claim, this would have been expected to be done in their initial claim submissions for Phase II and by way of express application to the Tribunal. This is even clearer in the context of a claim for the Remaining Amounts independent of any acceleration, in that such a claim was not yet due, and might or would not become due until after the award was made – a matter which, as noted above, the Tribunal was aware was before the ALRO Tribunal, whose jurisdiction the Tribunal did not question. Either way, whenever such a claim was sought to be introduced, it should, if its introduction was challenged, have led to a clear jurisdictional ruling.

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48 To justify what happened, we were referred to *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*PT Prima*") for the proposition that the Sellers had the right at any time to introduce any new matter, including any claims that might have arisen or might accrue prospectively by the time of any final award. We do not accept this as a correct analysis of that case. At [47] of *PT Prima*, the Court of Appeal observed that:

> … In our view, any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded. It may be raised in the arbitration, as Prima did when it raised the New Management Contract as part of its *force majeure* defence to Kempinski's claim. We should also point out that Kempinski was given sufficient notice of and opportunity to meet Prima's *force majeure* defence.

Quite apart from the fact that the present arbitrations are governed by their ToRs and Article 23(4) of the ICC Rules, the Court of Appeal was not, at [47] of *PT Prima*, giving an unrestrained licence to introduce new claims. It was addressing new and unpleaded facts or changes of an "ancillary" nature (in that case, new facts or changes potentially affecting an existing claim), which were furthermore "known to all the parties" in that case (being facts or changes which were in fact addressed expressly and without any jurisdictional objection by both parties with the tribunal). Pleadings generally serve the valuable function of defining the parameters of the issues which the parties have to address and, in so doing, precluding unexpected surprises which a party does not have a fair opportunity to address. The challenge to the award in *PT Prima* was not based on any complaint of that nature. It was, in contrast and as will appear, of the most formal and unmeritorious nature. The conduct of parties to litigation before an arbitrator or judge may and does on occasion widen the scope of the issues falling for determination in a way which deprives a pleading objection of any force. *PT Prima* was such a case, the present is not.

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49 In *PT Prima*, the claimant (hereinafter "Kempinski") was appointed manager of an Indonesian hotel under a 20-year management contract entered into with the hotel owner (herein "Prima"). In an arbitration commenced on 20 May 2002, Kempinski claimed damages for Prima's purported termination of the contract, including loss of profits for remainder of the contract term. Prima contended that changes in Indonesian law rendered performance of the contract impossible, but the arbitrator held (by a second award) on 12 December 2006 that such changes did not preclude all methods of performance, and therefore that Kempinski's claim to damages remained open. Prima then discovered that Kempinski had, on 28 April 2006, already entered into a contract with a third party to manage another Indonesian hotel, and wrote on 28 March 2007 raising this as a potential bar to any claim by Kempinski for damages for continuing inability to perform the contract with Prima. The arbitrator directed the parties to make written submissions. From March 2007 to May 2008, there were extensive exchanges between the parties and arbitrator, the parties made submissions, and expert evidence was adduced, all on the issue of whether Kempinski could still perform its contract with Prima in the light of its third party commitment. On 20 May 2008, the arbitrator ruled (by a third award) that the third party contract was inconsistent with the original contract, and that Kempinski's claim for damages was accordingly limited to the period up to 28 April 2006.

50 The arbitrator's award was challenged in *PT Prima* on the ground that there had been no application by Prima to amend its pleaded defence and no order by the arbitrator permitting any amendment to raise the issue which the arbitrator decided against Kempinski. The challenge succeeded before the judge, but failed in the Court of Appeal. In the light of what we have already said, it will be clear that *PT Prima* and the present case involve very different factual situations and raise very different considerations.

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51 First, *PT Prima* concerned a new development occurring during an arbitration and providing a further potential defence to a claim made from its outset. The present appeal concerns the introduction into a pre-existing arbitration of different issues of new or potential causes of action relating to payments becoming due, if at all, largely in the future and in many cases after any award. Any new claim or cause of action (such as, in the present case, a claim to the Remaining Amounts independently of acceleration) must require, in the present Court's view, clear identification and admission by the arbitration tribunal, even if that were only to occur by conduct rather than express words or a pleading amendment. To introduce a new claim or claims into a current arbitration involves both substantive and procedural risks, including risks of confusion. That is particularly so with a claim only allegedly arising after commencement of an arbitration. Problems are even more likely if a claim sought to be advanced is prospective and will or may only arise at some future date between the close of submissions and the issue of an award, or (*a fortiori*) even thereafter. A tribunal's jurisdiction cannot cover all developments subsequent to its award, and its award cannot exclude the possibility that subsequent developments may prevent a prospective claim arising. Such problems are also especially likely to exist if there are already proceedings afoot before another tribunal to determine whether such a claim can or will arise at all.

52 Second, in *PT Prima*, the issue was raised by Prima with the arbitrator and was the subject of specific directions by him and very extensive submissions and evidence before him. As appears by the first instance judgment at [2011] 4 SLR 633 at [18] and [20] to [23], the arbitrator, during the course of these exchanges, kept the parties very closely informed about his thinking in relation to this issue, and invited their reactions and expert evidence. This course of events then led to his third award in May 2008. No pleading point, let alone

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any jurisdictional objection, was raised. All concerned proceeded by conduct, if not by words, on the basis that the issue was open for decision. The present case is wholly different. Here, there was no clear identification of any claims regarding the Remaining Amounts other than by way of acceleration which the Sellers may have been seeking to have embraced in the Partial Awards, let alone any common conduct treating any such claims as open for determination in the arbitrations. The Buyers, on the contrary, made clear their jurisdictional objection to any such claims, as well as their ultimate understanding that no such claims were any longer being pursued by the time of the PHBs. Their conduct was, as stated, also consistent with their expressed view that any issue of entitlement to the Remaining Amounts, other than by way of acceleration, would fall to be litigated in the ALRO arbitration.

53 The permissibility of any claims to recover the Remaining Amounts other than by way of acceleration, and the Buyers' jurisdictional objections, were not identified or addressed by the Tribunal at any point in the present arbitrations in the manner contemplated by Article 23(4) of the ICC Rules. The Tribunal simply referred to the prospective claims which the Sellers mentioned in a "very subsidiary" way in their Phase II Reply. It made no reference to the Buyers' subsequent clear jurisdictional objections. The Tribunal also made no reference to the fact that the Sellers' later statements of the relief prayed for had not repeated or referred to any such claims, save in so far as they sought release from the escrow account of US$71.64m (and interest) on the basis that a period of 45 days after the CODs of projects T2 and T3 would have passed by the time that the Partial Awards were issued. The Tribunal further made no reference to the fact that the Buyers had made clear that they understood that any general claims to the Remaining Amounts (other than by way of acceleration) were no longer pursued. While the Tribunal recognised the role of the tribunal in the

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ALRO arbitration in relation to the issues before it, the Tribunal did not identify or rule on what this meant for its own jurisdiction or its exercise.

54 Instead of addressing these points, the Tribunal in its Partial Awards simply proceeded on the basis that it had jurisdiction as a result of the Sellers' Reply. But, it also proceeded on the basis that the tribunal in the ALRO arbitration had jurisdiction over the matters before that tribunal. As already indicated, these positions are irreconcilable.

55 Bearing in mind that the issue of jurisdiction had been squarely raised before it, it was incumbent on the Tribunal to rule on it by determining whether or not the Sellers were or should be permitted to pursue any claim to the Remaining Amounts in the present arbitrations, other than on an accelerated basis. Had the Tribunal identified this issue as requiring determination, the Buyers' case that the tribunal in the ALRO arbitration was seized of the issue of whether the Remaining Amounts would become payable would inevitably have called for and received attention. It is improbable that the present irreconcilable positions arising from the Tribunal's actual Awards could or would then have arisen.

56 The Judge identified this point with clarity at [34] of his judgment when he considered what the position would have been had the Buyers signalled their true position on the Remaining Amounts to the Tribunal. His analysis of the approach to jurisdiction to be expected, assuming that Buyers they had signalled their true position, is apposite. However, he was wrong to think that the Buyers had *not* signalled their true position. Specifically, the Judge observed that:

> … Had the [Buyers] at least signalled their true position on the Remaining Amounts to the Tribunal and stated that such was specifically being considered in the ALRO arbitration, the Tribunal in consultation with the parties could have determined

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> how far (if at all) it could (and should) order payment of the Remaining Amounts as per Schedule 5 and to what extent (if at all) such question should be left to the tribunal in the ALRO arbitration.

Once it is recognised that the Buyers did signal their true position on the Remaining Amounts, it is clear that the jurisdictional issue was not resolved in a manner which, in this Court's view, ever brought the claims to the Remaining Amounts (still largely prospective at the time when the parties were addressing Phase II) properly within the Tribunal's jurisdiction.

57 On the analysis which the Court therefore adopts, the jurisdictional issue raised by the Buyers should have been, but never was, resolved by a ruling determining whether or not any claim should be permitted to the Remaining Amounts other than by way of acceleration. The Tribunal did not make any ruling admitting such claims, and so the Tribunal had no jurisdiction to rule on them in its Phase II Partial Awards. We have already rejected any suggestion that the Buyers have in some way precluded themselves from objecting to or waived any such excess of jurisdiction. That being so, we see no basis on which the Court could or should do other than set the Partial Awards aside on the grounds of excess of jurisdiction, in so far as they ordered the payment of all Remaining Amounts.

58 Even if there had been any further requirement to show prejudice, the procedural prejudice inherent in the irreconcilable positions which the Tribunal ended up taking is evident. This is also the reason why the Partial Awards should be set aside even if it were said that the Tribunal did in fact rule in favour of an expansion of the issues to embrace an order for payment of all future Remaining Amounts by its very act of assuming jurisdiction in its Phase II Partial Awards without any prior ruling. The following paragraphs amplify our reasoning in this respect.

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59 First, the Tribunal's taking of jurisdiction in the Phase II Partial Awards, without any prior discussion or ruling, meant that neither party had any opportunity to address the Tribunal's approach, namely that both it and the tribunal in the ALRO arbitration could consistently exercise their own separate jurisdiction over what was in essence the same subject matter.

60 Second, the procedure adopted and the Tribunal's Phase II Partial Awards ordering payment of the Remaining Amounts have led to a result for which neither party argued. The Sellers submitted in their PHB of 15 October 2018 that the ALRO arbitration claims were frivolous, an attempt to circumvent the present arbitral proceedings, and a further indication of the Buyers' intention not to honour the SPAs. The Buyers in their PHB explained why, in their submission, these submissions by the Sellers were ill-founded, and why they had themselves on 26 September 2018 commenced the separate ALRO arbitration. The present Tribunal did not in the event adjudicate on any of these rival submissions at all. Whether either of them has any and what actual merit remained undecided.

61 Third, contrary to the Judge's view, the Tribunal understood what the issues were before the tribunal in the ALRO arbitration. But it thought that it could, at one and the same time, (a) leave those issues to be decided by the tribunal in the ALRO arbitration; and (b) order payment by the Buyers of the Remaining Amounts as and when they fell due: see the paragraphs of the Phase II Partial Awards set out at [39] above. Contrary to what the Tribunal contemplated, and because of the principle of *res judicata*, the Tribunal's order meant that there was, on the face of it and at least very arguably, effectively nothing to leave to the tribunal in the ALRO Arbitration. The Tribunal's order involved in this respect an unintended injustice, with a potentially fundamental effect on an issue which the Tribunal did not purport or intend to resolve.

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62 Fourth, the position might look different if the present Tribunal had ordered, or even if the Sellers had volunteered, that the orders made for payment of the Remaining Amounts should be treated as conditional upon the tribunal in the ALRO arbitration determining and dismissing the Buyers' case regarding the Remaining Amounts on the merits and without regard to any argument based on res judicata.. The Sellers, despite the point being put to them by the Court during the hearing of the appeal, volunteered no such solution. They wish, in short, to have the benefit of the present Phase II Partial Awards, without accepting the premise on which those same Partial Awards are founded.

63 In these circumstances and for these reasons, the Court considers that, so far as the present Phase II Partial Awards ordered payment of the Remaining Amounts:

(a) the Tribunal dealt with disputes not properly brought within the terms of, and beyond the scope of, the relevant submissions by the parties to arbitration, within the meaning of Article 34(2)(*a*)(iii) of the Model Law; and

(b) in any event, even if that were not so, the making of the Partial Awards by the Tribunal involved breaches of the rules of natural justice by which the Buyers' rights were prejudiced, within the meaning of s 24(*b*) of the IAA.

Conclusion on Order for Payment of Remaining Amounts

64 It follows that the Phase II Partial Awards should be set aside, as having been made in excess of jurisdiction, in so far as they order payment of the Remaining Amounts. There is no basis for any other order. Whether the

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Remaining Amounts became due and/or remain unpaid under the SPAs must, if in dispute, be resolved outside the scope of the present arbitration.

The Costs Award

65 The Costs Award covered the costs of both arbitrations. The parties took starkly opposed positions regarding costs. The Sellers relied on their success in recovering the unpaid first instalment and the Remaining Amounts (with Compound Interest) and claimed all the costs. The Buyers pointed out that they had defeated the Sellers' primary claim to rescission of both SPAs, as well as the claims to accelerated payment of the Remaining Amounts, and that the claims on which the Sellers had succeeded had only ever been mentioned as alternatives, in the case of the Remaining Amounts as a "very subsidiary" alternative; the Buyers claimed that the Sellers should in all the circumstances pay 80% of the Buyers' costs.

66 The Tribunal undertook a careful analysis, reciting the parties' positions. It concluded that "fundamentally, the bulk of [Sellers'] pleas for contractual rights to be recognized and confirmed have been granted": Costs Award at [61], and that it should apply the "international practice of 'costs follows the event'": at [63]. In doing so, it also took into account both that the Sellers' costs were significantly higher than the Buyers' and that the Sellers had presented "numerous alternative theories which were not ultimately recognized by the Arbitral Tribunal while also failing in their rescission claims". In the upshot, it considered that the Buyers must bear, not 100% as the Sellers had claimed, but only 66% of the Sellers' costs.

67 The Sellers' primary position before us is that there is no basis on which this Court can interfere with the Costs Award, since the IAA and Model Law provide the exclusive means by which an arbitral award may be set aside and

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neither Article 34(2)(*a*)(iii) of the Model Law annexed to the IAA nor s 24(*b*) of the IAA has any application here. Alternatively, they submit that, if any basis for interference exists, it is limited to parts of a Tribunal's decision which are "inextricably linked to" and "flowed from" the part set aside. For a test based on these words, they invoke *GD Midea*. In the present case, they submit, the test is not met, because the Costs Award was arrived at by taking into account a whole variety of considerations, including others unrelated to the Remaining Amounts and Compound Interest, on which the Buyers have now succeeded.

68 A number of authorities were cited. In *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"), the High Court, after concluding that a tribunal's dismissal of a counterclaim had involved a breach of the rules of natural justice, simply "ordered that the part of the Award dealing with Front Row's counterclaim and with costs of the Arbitration be set aside as a whole" and "further ordered that the part of the Award so set aside be tried afresh by a newly appointed arbitrator" (at [54]). In *CRW*, the tribunal by its award determined a preliminary issue and does not appear to have made any costs award. The court, after setting aside the whole award, said simply that: "All costs and disbursements incurred in the Arbitration are to be borne by CRW [*ie*, the claimant, which had won before the tribunal but failed to uphold the award in court]" (at [102]).

69 *In re City of Vancouver and Walsh* [1961] BCJ No 110 ("*City of Vancouver*"), the British Columbia Supreme Court addressed more specifically the consequences of setting aside the whole of an award. The tribunal had awarded the claimant the costs of the arbitration, although the claimant had only succeeded as to 25% of its claim (at [53]). The substantive award having been set aside, the court addressed the arbitral costs, by saying simply:

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> 54 In view of the fact that the award must be set aside, the question of the costs of the arbitration are no longer relevant because the proceedings being a nullity, no costs can be awarded to either side. The costs of the appeal before me will, of course, be costs to the successful applicant to be paid by the owner after taxation.

As in *Front Row*, therefore, the court appears to have treated the setting aside as leading axiomatically to the nullity of any consequential costs order made by the arbitral tribunal.

70 More extensive guidance as to the position regarding any arbitral costs order following setting aside of the substantive award is found in *Martin and others v Harris* [2019] EWHC 2735 (Ch) ("*Martin*"). As in the present case, so there the tribunal's award regarding costs was made separately from and subsequently to its substantive award. The judge cited previous authority, *Davis v Witney Urban Council* (1899) 63 JP 279 ("*Davis*"), where the English Court of Appeal held that, when a substantive award is set aside for want of jurisdiction, the costs awarded go with it. In that case the costs order was part of the same award as the substantive award. As to that, the Court in *Martin* observed (at [24]):

> Whether or not the costs award is included in the substantive award or not, should make no difference to the principle that a costs award that is consequential on the substantive award falls with it.

The court also went on to say that it made no difference that *Davis* was a want of jurisdiction case, whereas *Martin* involved an application to set aside for error of law (under the jurisdiction in that respect contained in s 69 of the English Arbitration Act 1996).

71 The case where a whole award is in excess of jurisdiction stands at one end of a spectrum. In such a case any costs award may indeed, in some

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circumstances, itself be in excess of jurisdiction; but, even if it is not, it will inevitably or almost inevitably be inextricably linked with the invalid substantive award. The case of a whole award set aside for breach of natural justice comes next on the spectrum. Any costs award will normally have depended on the substantive award now set aside. Then comes the case of an award capable of being and actually set aside for error of law, which is subject to similar comment.

72 The present case differs from all these cases, because only part of the substantive award is in excess of jurisdiction and so set aside and the costs order made took into account a range of considerations, including considerations relating to substantive aspects of the award not set aside, the conduct of the case and the overall costs. Nevertheless, the Tribunal's conclusions regarding the substantive aspects now set aside (the award for the Remaining Amounts independently of acceleration and the Compound Interest award) were clearly a significant matter in the Tribunal's mind when it made its Costs Award. An award which is based in material part on illegitimate considerations is flawed and cannot in fairness stand.

73 In terms of the IAA and Model Law, we consider that this conclusion follows from first principle. The fruit falls with the tree. Where a later order is ancillary to and depends upon the validity and premises of a prior order, the legislature cannot have intended that the later order should survive the setting aside of the former. Whether the two orders are or are not physically combined in one award or are made in separate awards, the latter is integral to the former. Any other conclusion would have the potential for extraordinary anomalies and serious injustice. That would serve neither the cause of, nor the sensitive supportive role which courts have towards, arbitration.

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74 Ultimately, the test whether a costs order can survive must therefore be one of materiality and judgment. We do not regard the reasoning or decision in *GD Midea* as in any way inconsistent with this. The judge in that case was not concerned with costs at all. He was considering whether, having set aside some of the tribunal's findings, other findings could stand. The argument actually advanced was that the other findings did not "depend" on the findings set aside: at [72]. In addressing that argument, the judge used a variety of phrases, ranging from "inextricably linked" (at [73]); to "clearly linked" (at [74]); to "an important part" (at [75]); to "linked to and flowed from" (at [76]). All these are phrases addressing the fundamental question whether one finding or part of an award is so related to or dependant on another finding or part of the award that the former cannot continue to stand once the latter is set aside.

75 The same basic principle applies when considering whether a costs award can survive the setting aside of an element or elements of the substantive award. But costs awards are usually ancillary to and reflective of the outcome of the substantive issues. The likelihood that they can survive any significant change in the substantive outcome is therefore greatly diminished. Justice will commonly require their setting aside.

76 The question is what then happens. In *Front Row*, the court, after setting aside the whole of the award, simply set aside the costs order and ordered trial afresh of the part of the award set aside before a new arbitrator. It is unclear whether (and, if so, on what basis) it contemplated that the new arbitrator might address the costs of the first trial. In *CRW*, the court without explanation as to the basis of its jurisdiction simply ordered the party losing in court on the issue of the arbitrator's jurisdiction to pay the costs of the arbitration. In *City of Vancouver*, the court assumed that, if the proceedings were a nullity, neither side could obtain any costs. That approach cannot guarantee a fair result, since

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it may leave a respondent who has justifiably resisted jurisdiction without apparent recourse in respect of the arbitral costs. Had the objection succeeded before the arbitrator, whose jurisdiction was invoked by the claimant and so had jurisdiction to rule on its existence, the respondent could probably have expected a costs order in its favour. But it is unnecessary in this case to consider whether a similarly fair result can be achieved where the objection is only upheld in court proceedings to set aside.

77 In the present case, there is no question about the Tribunal's jurisdiction over the parts of the Phase II Partial Awards which are not set aside. Had the Tribunal appreciated the proper scope of its jurisdiction and remembered the agreed change of position by the parties in relation to Compound Interest, the Tribunal would still have made a costs award, albeit very likely not the one it actually made. It is therefore particularly obvious that it would be unfair if matters simply lay where they fall after the setting aside of that Costs Award. In an English context, this position is expressly addressed by the court's statutory power to remit to the tribunal for further consideration and a fresh order, a power invoked by the court in *Martin*.

78 In this jurisdiction, there is under the IAA and Model Law no equivalent power to remit to the same tribunal after setting aside. The only power of remission contained in Article 34(4) of the Model Law operates as an alternative to, and is designed to avoid, any setting aside. This was decided in *AKN v ALC* at [25] and [39]. In that case, the Court of Appeal had set aside certain substantive parts of an award – one relating to a claim that had never been "squarely advanced", the other relating to the "Lost Land Claims", where the tribunal mistakenly thought that one party had made a material concession – for breaches of natural justice. The Court of Appeal was then asked to make various declarations or an order for remission enabling the original tribunal to

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redetermine those issues, in relation to which its first award had been set aside. Ultimately, the Court concluded that it did not have any power to remit, and refused to make any declaration, save that "arising from the setting aside of that part of the Award that concerns the Lost Land Claims, those claims and any relevant defences remain to be determined as between the parties": at [68].

79 Before reaching this conclusion, the Court considered the effects of a court's decision to set aside part of an award in three respects: on the award itself, on the arbitration agreement, and on the mandate of the tribunal which made that award. The effect on the award, namely that that part was invalid, was clear. As to the tribunal's mandate, the Court expressed the view that the issue of the original award, part of which was now set aside, rendered the tribunal *functus officio*. No doubt on that basis, it does not appear to have been suggested that Article 33(3) to (5) of the Model Law could assist. However, the Court also concluded that, although the tribunal's invalid award rendered that tribunal *functus officio*, it did not create any *res judicata*. It held in these circumstances that the arbitration agreement itself remained in force, so that the parties (or either of them) could commence fresh arbitration proceedings before a freshly constituted tribunal to have the outstanding issues determined. On that basis, the Court made the limited declaration already mentioned to the effect that the outstanding claims and defences remained as yet undetermined. Those issues could be and were treated as separate and outstanding, and capable accordingly as being addressed separately and severally by a new tribunal under the continuing agreement to arbitrate.

80 The present appeal involves the different area of costs and the question may arise whether the reasoning and conclusions in *AKN v ALC* cover it. The point has not been argued out before us, and no declaration has been sought as it was in *AKN v ALC*. We have determined that part of the Phase II Partial

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Awards and the whole of the Costs Award must be set aside. The parties will have to advise themselves and to agree or decide how to proceed. They might of course resolve the issue by agreeing that, whatever might otherwise be the position, the Tribunal which issued the Costs Award now set aside should sit to determine the question of costs by a fresh costs award, made in the light of the setting aside of parts of the Phase II Partial Awards and the Costs Award. Short of such agreement, we think that we can do no more than identify some of the considerations that are in play.

81 First, it would be a matter of regret if some sensible method of addressing the issues of costs does not exist in situations such as the present. Secondly, any costs award is normally integral to the outcome of the arbitration, and so is made by the arbitral tribunal charged with the substantive award in the exercise of a discretion conferred upon it alone. It is, at the least, strange to conceive of such an issue being litigated as a separate and several claim or in a separate arbitration, although we should not be taken to be expressing any view, either way, as to whether that is in the present context possible.

82 As we have indicated, even courts have on occasion, though without identifying any basis, assumed jurisdiction over arbitral costs: see *CRW* and *City of Vancouver*. Section 10 of the IAA enables an arbitral tribunal's own ruling on jurisdiction to be appealed to the Court, and subsection (7) provides:

> In making a ruling or decision under this section that the arbitral tribunal has no jurisdiction, the arbitral tribunal, the General Division of the High Court or the appellate court (as the case may be) may make an award or order of costs of the proceedings, including the arbitral proceedings (as the case may be), against any party.

There is, however, no express equivalent tailpiece to either s 24 of the IAA or Article 34 of the Model Law.

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83 Thirdly, the second point is underlined in the context of the ICC arbitrations, with which this appeal is concerned, by the relevant procedural rules. The ICC Arbitration Rules 2012, under which the present arbitrations were held, provided in Article 37 as follows:

> 1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court … as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.
>
> …
>
> 3. At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.
>
> 4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
>
> 5. In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

These Rules assign responsibility for making an appropriate costs award to the arbitral tribunal which has conducted and determined the substantive issues.

84 Fourth, arbitration is essentially consensual. It operates here by agreement under the ICC Rules and, as a result of the parties' choice of a Singapore seat, within the relaxed legal framework of the IAA and the Model Law. There may, perhaps, be scope for argument whether an arbitration tribunal whose costs award is set aside as invalid consequentially upon the setting aside of a distinct part of its substantive award is really *functus officio* in relation to the making of a valid costs award consequential upon the issues which were properly before it. Whether a tribunal or body is *functus officio* must be considered in the light of the nature and terms of the particular "office" or role.

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Had the parties catered by an express terms for the present situation, the question would have been whether there was any reason why their agreement should not be given effect. Where nothing has been expressed, the relevant question might be what the parties must be taken to have contemplated. We recognise however that, although the decision in *AKN v ALC* does not directly address costs, it may well be taken to cover all situations including costs. It may indicate that, as a matter of law and irrespective of whatever the parties expressly or impliedly contemplated, the issue of an invalid or partially invalid award renders a tribunal *functus officio* even in respect of matters such as costs in respect of which it would be expected to make, but has not made, a valid award. We must therefore, as stated, leave it to the parties to agree or decide individually how to proceed.

85 We would only conclude by repeating that it would appear to be a matter of regret if, after the setting aside in whole or part of an award, accompanied consequentially by the setting aside of a costs order, it were not possible in one way or another to find a means, where appropriate, for a party to seek and for some tribunal (or even the court) to make a valid costs order, where appropriate according to the circumstances. The area is one which those having an oversight of arbitration law might wish to consider. Our own role and order is, as stated, confined to the setting aside of the Costs Award consequential upon the partial setting aside of the Phase II Partial Awards.

Compound Interest

86 In the light of the decisions reached above, the orders made for interest at the rate of 15% per annum compounded payable on the Remaining Amounts ordered to be paid will, in any event, be set aside. However, in case it proves of any significance in some future context, the Court will consider what the

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position would have been, on the hypothesis that the orders for payment of the Remaining Amounts had not anyway been set aside.

87 Clause 12.9 of the SPAs provides:

> If the Seller or Purchaser defaults in the payment when due of any sum payable under this Agreement, its liability shall be increased to include interest on such sum from the date when such payment is due until the date of actual payment (after as well as before judgment) at a rate per annum of 15 per cent. Such interest shall accrue from day to day and shall be compounded monthly.

88 During Phase I, there was consensus between the Buyers and Sellers that annual compounding under Clause 12.9 was permissible under Thai law. Thus, no issue was taken about the awarding by the Tribunal of Compound Interest in respect of the default or late payment relating to the first instalment. The Tribunal made Awards accordingly, making clear that it did this under Clause 12.9 of the SPAs.

89 During Phase II, the parties' Thai law experts came to a different common view which they had not expressed during Phase I. They now concluded and agreed that the provision for Compound Interest in Clause 12.9 was, under Thai law, illegal and unenforceable. The parties followed their experts' advice by aligning their positions regarding Clause 12.9 on this basis. The experts disagreed, however, as to whether this made the whole of Clause 12.9 illegal and invalid, or only the portion providing for compounding. The Sellers' expert argued for the latter position. The Buyers' expert argued for the former, and submitted that the Tribunal could and should therefore only award simple interest at 7.5% per annum.

90 The Sellers informed the Tribunal of the parties' change of position regarding interest and that their claim was now for simple interest only at 15%

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per annum under Clause 12.9. They did this in some detail at [313] to [320] of their Reply dated 15 July 2018, summarising the position forthrightly in [315] as being that "[a] stipulation for compound interest in Article 12.9 of the SPAs is therefore not in accordance with Thai law". They also modified their claim to interest on the Remaining Amounts by deleting the word "compound" and by including claims for "simple" interest in Annex C to their PHB dated 15 October 2018.

91 The Tribunal, due, in its own later words, "to a regrettable oversight", decided that an award of Compound Interest at 15% remained as appropriate in Phase II as it had been thought to be in Phase I. It expressed itself in the Phase II Partial Award relating to SPA I as follows:

> 324. The Arbitral Tribunal has already decided the issue as to the applicable interest to the payments under the [CBX] SPA, by ruling as follows in the first Partial Award:
>
> > [Buyers] do not deny that this rate applies in principle and agree that the rate of 15% is acceptable under Thai law as the maximum allowed rate for loans. Further, the Parties' Thai law experts agree that the interest can only be compounded after the first year of arrears, and can only be compounded on a yearly basis and not monthly.
> >
> > Accordingly, the Tribunal finds that the 15% per annum interest rate is applicable to the First Instalment under the [SPA I] from 23 October 2015. Such interest must be compounded on a yearly basis as from 30 December 2016, however, as [Buyers] have been considered to be in default of its payment obligation from 30 December 2015. From 23 October 2015 until 30 December 2015, the applicable interest rate was a matter of a separate agreement and not a contractual default in payment.
>
> 325. The Tribunal sees no reason to depart from this ruling in these arbitration proceedings and finds that the 15% interest prescribed in Article 12.9 of the SPA shall be compounded on an annualised basis to all payments due under the Schedule 5 as provided for at para. 310 above, from the date of this Award until payment in full, since the payments under Schedule 5 became legally due as of the date of this award and the findings of this Tribunal as to [Sellers'] entitlement to the same. At the

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> same time, as per paragraph 345(c) of the first Partial Award in this arbitration, [Sellers] continues to be entitled to 15% p.a. interest on the First Instalment under the …SPA due to the late payment by [Buyers], as from 23 October 2015, and compounded annually from 30 December 2016.

Equivalent paragraphs appear at [276] and [277] in the Phase II Partial Award relating to SPA II.

92 In these circumstances, it was the Sellers themselves who, mindful no doubt of potential problems in enforcement, applied to the Tribunal to correct the Awards under the then Article 35(2) of the ICC Rules, enabling a tribunal to correct a "clerical, computational or typographical error or any error of similar nature in an award". The Tribunal, by a decision dated 5 August 2019, rejected the application on the basis that, although due to a regrettable oversight, its decision did not involve an error of the nature covered by Article 35(2). It went on to express its expectation that any enforcing court would sever or amend that part of its Partial Awards, especially if the applicant waived any claim to compound interest "as it effectively does with its Application" to the Tribunal.

93 While the Sellers were at that date willing to forego Compound Interest, they no longer are. They maintain that the Partial Awards were deliberate and intended awards on the question of what interest should be granted, reached after full submissions on both sides. The Judge also attached weight to the fact that the parties had been heard. That is all correct, but it does not address the fact that the parties' experts and submissions had reached agreement that there was no power under Thai law to make the Compound Interest awards which had originally been claimed under Clause 12.9. Further, the Judge's view that an error consisting of overlooking the parties' agreement and deciding a point in a manner which both had agreed to be wrong is "a routine hazard of arbitration"

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cannot, with respect, be accepted. Arbitration is basically consensual, and parties are in general entitled to have their agreements on points which are open to agreement between them given effect. By reaching such an agreement, they restrict the scope of the matters on which they need and agree to submit to the decision of the arbitration tribunal. The position could of course be less simple, if parties' agreement were to conflict with some overriding mandatory provision of the law governing the parties' transaction, the *lex arbitri*, or the *lex situs* of their arbitration. The Court need say nothing about the position then. Here, the parties' agreement was actually to give effect to what their experts had agreed to be an overriding provision of the governing substantive law. The Tribunal, by mistakenly treating the question of Compound Interest as open to it to decide, when the parties had reached an agreed position on the point, was necessarily exceeding its jurisdiction – as well as necessarily denying the parties the opportunity to require the Tribunal to adhere to the agreed, and here under Thai law the only legally proper, course.

94 The Tribunal therefore reached a decision which neither party was any longer suggesting that it could or should. Further, the Tribunal as a result wholly overlooked the one remaining issue between the experts to be addressed, which was whether that meant that Clause 12.9 was wholly invalid or only invalid so far as it provided for compounding. That was an important issue since 15% simple interest appears a very high rate, and the tribunal itself in other contexts not involving Clause 12.9, *eg*, when awarding interest on the Sellers' arbitration costs by its Final Costs Award, awarded only 7.5% per annum, this being apparently the normal statutory default rate under Thai law. Even assuming that the Tribunal had been exercising its power to award interest under s 20 of the IAA (see [97] below), a considerably lower interest rate than 15% per annum would, in the Court's view, have been expected.

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Conclusion on Order for Compound Interest

95 The Court has no doubt that the Tribunal's order went beyond the scope of the submission to arbitration within the meaning of Article 34(2)(*a*)(iii) of the Model Law, in that it went (inadvertently) outside the scope of what both parties had agreed that the Tribunal could, under the relevant governing law, or should, afford by way of relief. The awards of Compound Interest would have had to be set aside in any event on that ground. While it is unnecessary to go further, the Court would, independently of the issue of jurisdiction, also regard the making of orders contrary to the parties' agreed position, without first giving the parties warning and an opportunity to make further submissions, as involving an inadvertent breach of natural justice within s 24(*b*) of the IAA.

96 It is also unnecessary to decide whether the Tribunal could (in the face of Clause 12.9 of the SPAs and the agreement that compounded interest is illegal and unenforceable under Thai law) have proceeded instead under s 20 of the IAA. The Sellers maintain that the awards of Compound Interest at 15% per annum were and are within the scope of the Tribunal's power to award interest under s 20 of the IAA. The Sellers support their position with a submission that interest is a procedural matter, and the Judge in his judgment also attached importance to the Tribunal's power under s 20. Section 20 provides as follows:

> **Interest on awards**
>
> 20.—(1) Subject to subsection (3), unless otherwise agreed by the parties, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate, for any period ending not later than the date of payment on the whole or any part of —
>
> (a) any sum which is awarded by the arbitral tribunal in the arbitral proceedings;
>
> (b) any sum which is in issue in the arbitral proceedings but is paid before the date of the award; or

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> (c) costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.
>
> (2) Nothing in subsection (1) shall affect any other power of an arbitral tribunal to award interest.
>
> (3) Where an award directs a sum to be paid, that sum shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

97 The Buyers submit that, in the light of Clause 12.9 of the SPAs, the parties had "otherwise agreed", so that the power under s 20 of the IAA was not available. But, even assuming that the power would have been available if invoked, the fact is that it does not appear to have been invoked by the Sellers, and, whether or not it was ever invoked by them, it certainly was not invoked by the Tribunal when it made its Awards. The Tribunal proceeded and proceeded only on the express basis of Clause 12.9. As has already been observed, it seems improbable that the Tribunal would otherwise have come to so high a rate as 15% per annum, quite apart from compounding.

98 The Sellers' submission that interest is a procedural matter is equally unavailing. That may well be the case when interest is claimed under the IAA. But here it was specifically claimed under the substantive provisions of Clause 12.9 in SPAs governed by Thai law.

99 In short, whatever the position had the Tribunal invoked s 20 of the IAA, it did not in fact do so, but instead acted on a basis which was outside the parties' agreed position as to the unenforceability of the provision for compounding in Clause 12.9 and the consequent limitations on its power under the relevant substantive law of Thailand. That was an inadvertent excess of jurisdiction.

100 This leaves the question of what relief the Court should have given, had this been the only ground for interference with the Tribunal's award of

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compound interest. The starting point is the form of the order actually made in each Phase II Partial Award, which was:

> [Seller] is granted interest on the Schedule 5 payments, on the basis of a 15% per annum rate, compounded annually as from the date of this Partial Award, until payment in full.

The provision that interest be "compounded annually" should certainly be set aside. The question is whether that is all. The Sellers submitted that it is, leaving in effect an order for simple interest at the rate of 15% per annum, and accepting Clause 12.9 as severable in the way that the Tribunal envisaged that an enforcing court would accept. (The incongruity of an order apparently making interest run "as from the date of the Partial Award" on Remaining Amounts only becoming due in some cases over future years after each Partial Award is for present purposes by the by.) However, the Tribunal's expectation that a Thai or other enforcing court might take this course carries no legal force, being no more than a view or hope expressed by the Tribunal not as part of any award, but in the context of an ancillary application to correct its Phase II Partial Awards. The reality is that the Tribunal has not reached any decision on the issue between the parties as to whether severance of Clause 12.9 is possible under Thai law or not. It would therefore have been necessary to consider whether the Tribunal had any further role in this connection. Although we do not suggest that the positions are necessarily precisely parallel, a similar issue, to that which we have discussed in [76] to [85] above in relation to costs, would have arisen as to whether the Tribunal was *functus officio* as regards the power to award interest under s 20 of the IAA and whether, how and in what forum the position regarding interest could be further considered. As it is, however, in the light of the Court's decision to set aside the orders for payment of the Remaining Amounts, that is not an issue which can arise.

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Costs and Consequential Issues

101 In the light of the above, it is necessary to revisit the Judge's order of costs, the quantum of which is the subject of the separate appeal before the Court in appeal CA 197. The separate judgment delivered by Prakash JCA in appeal CA 197 addresses the position as it would have been, had appeal CA 136 failed. As it is, we have allowed appeal CA 136. The whole area of costs before the Judge, and not merely the quantum of costs before the Judge, will therefore require revisiting. The Court will give 14 days for an initial exchange of submissions between the parties on these and any other ancillary matters arising from the Court's present judgment, followed by a further 14 days for an exchange of reply submissions.

Judith Prakash
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Jonathan Mance
International Judge

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