IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 102

Civil Appeals Nos 11 and 43 of 2021

Between

(1) CAJ
(2) CAK

… *Appellants*

And

CAI

… *Respondent*

In the matter of Originating Summons No 1103 of 2019

Between

CAI

… *Plaintiff*

And

(1) CAJ
(2) CAK

… *Defendants*

GROUNDS OF DECISION

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

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CAJ and another
v
CAI and another appeal

[2021] SGCA 102

Court of Appeal — Civil Appeals Nos 11 and 43 of 2021
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Steven Chong JCA
22 September 2021

11 November 2021

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 Under Singapore law, the scope for judicial intervention in arbitration proceedings is narrowly circumscribed. In the context of applications to set aside arbitral awards, this is borne out by the fact that a party seeking to challenge an award may only do so on limited statutorily-prescribed grounds. Even then, the court will exercise its power with restraint, setting aside awards *only* when there is good reason to do so. This strikes a balance between the need to respect the autonomy of arbitration proceedings and to give effect to the principle of minimal curial intervention, while ensuring that meritorious challenges are properly ventilated.

2 A perusal of the published decisions of the Singapore court would show that, over the past 20 years, approximately only 20% of applications to set aside

arbitral awards have been allowed. This attests to the fact that it is not common in Singapore for awards to be set aside, and the courts have only done so in *exceptional* cases when the grounds are clearly made out. In these cases, the awards were typically set aside on grounds of breach of natural justice and/or excess of jurisdiction. In this case, the High Court judge below ("the Judge") found that both these grounds were satisfied and accordingly set aside the offending portion of the tribunal's award. CA/CA 11/2021 ("CA 11") is the appeal against the Judge's decision on the merits, and CA/CA 43/2021 ("CA 43") is the appeal against the Judge's decision on costs.

3 The heart of these appeals concerns the tribunal's decision to allow an extension of time to the appellants in respect of a construction project, which had the effect of cutting down the quantum of the liquidated damages for the delay which were otherwise payable to the respondent in full. However, it was undisputed that the issue of an extension of time was not raised in the parties' pleadings and consequently it did not feature in the Terms of Reference for the arbitration or in the parties' respective List of Issues. We heard and dismissed the appeals on 22 September 2021. In our view, the Judge was eminently right in holding that the tribunal's decision to allow the extension of time was in excess of its jurisdiction and in breach of natural justice. We now furnish the full grounds of our decision.

The facts

4 The material facts are comprehensively set out in the Judge's decision in *CAI v CAJ and another* [2021] SGHC 21 ("the Judgment"). It suffices for us to highlight the salient facts, as follows.

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5 The parties' dispute arose from two contracts ("the Agreements") for the construction of a polycrystalline silicon plant ("the Plant"). The respondent's subsidiary was the owner of the Plant and the appellants were the contractors responsible for the construction of the Plant. During the construction of the Plant, issues arose in connection with excessive vibrations in the compressors which were located in the hydrogen unit of the Plant, which remained unresolved as at the contractual date of mechanical completion. Rectification works were eventually carried out in a piecemeal fashion pursuant to the instructions of the respondent's subsidiary ("the Admitted Instruction").

6 Subsequently, the respondent's subsidiary commenced an arbitration ("the Arbitration") against the appellants. The Arbitration was seated and conducted in Singapore under the auspices of the International Chamber of Commerce ("ICC"), pursuant to the 2012 ICC Rules ("ICC Rules"). It was heard by a three-member arbitral tribunal consisting of Professor Colin Ong QC (the presiding arbitrator), Professor Doug Jones AO and Dr Reinhard Neumann (collectively, "the Tribunal"). The respondent was subsequently joined to the Arbitration, as the assignee of its subsidiary's claim against the appellants.

7 In the Arbitration, the respondent sought liquidated damages from the appellants, alleging that the appellants had caused a 144-day delay in the mechanical completion of the Plant due to the excessive vibrations in the compressors within the hydrogen unit. The appellants' defence in the Arbitration was two-fold. First, the appellants argued that mechanical completion had been achieved on time, as the vibrations did not materially affect the operation or safety of the Plant. Second, the appellants also contended that any delay was a result of the Admitted Instruction, such that the respondent had waived its right to claim liquidated damages or, alternatively, was estopped from doing so ("the Estoppel Defence").

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8 It bears emphasis that the appellants' pleadings *did not* contain any assertion that they were contractually entitled to an extension of time so as to reduce the amount of liquidated damages payable. Indeed, the respondent expressly pointed out in its pleadings in the Arbitration that the appellants had *not* advanced any such argument. Conspicuously, this was not disputed by the appellants at any point in time. In fact, the appellants conceded both in the proceedings below and at the hearing before us that their defence claiming an extension of time ("the EOT Defence") had been raised *for the first time* in their written *closing* submissions in the Arbitration (see the Judgment at [193]). The EOT Defence was based on General Condition 40 ("GC 40") of the Agreements, which we shall explain in greater detail below. It suffices for now to note that pursuant to GC 40, the time for mechanical completion could be extended if the delay was by reason of any act or omission of or any default or breach of the Agreements by the respondent's subsidiary.

9 In the respondent's written closing submissions in the Arbitration, the respondent objected to the appellants' raising of the EOT Defence, in the following terms:

> 94. [The appellants] assert several new arguments for the first time in their Written Closing. On the basis of procedural fairness alone, when each of these points would turn on detailed issues of fact that were not addressed at the hearing, and in particular where [the appellants] have made no application to amend, each of these new arguments should be dismissed by the Tribunal. Each is dealt with briefly below.
>
> …
>
> 97. [The appellants'] third new argument advances a claim for a retrospective order for an extension of time pursuant to GC 40 to complete these works. This argument was never pleaded, nor raised at any point during the 8-day hearing, until it appeared in the Written Closing. For that reason alone, it should not be considered by the Tribunal. The procedural unfairness point is particularly acute with this final new claim, as [the appellants] attempt to put more and more emphasis on

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> discussions or alleged agreements which have not been the subject of pleadings, focused document production, witness evidence or cross-examination. This includes the fact that not only [was the respondent] denied the opportunity in this regard, but also the fact that [the appellants] did not subject [the respondent's] witnesses to any cross-examination to give them a chance to explain their positions (on the unpled issues). This approach runs entirely contrary to the purpose of the detailed Procedural Orders.
>
> 98. In any event, this new GC 40 claim has three insurmountable flaws:
>
> …
>
> [emphasis in original]

10 In its final award and the addendum to the final award (collectively, "the Award"), the Tribunal found that the appellants had failed to achieve mechanical completion on time. The Tribunal also rejected the Estoppel Defence. However, the Tribunal accepted the EOT Defence, finding that the EOT Defence was "perfectly capable of consideration by the Tribunal" because the respondent had been given the opportunity to make submissions in response to the appellants' arguments in its written closing submissions. The Tribunal further observed that the appellants were entitled to make use of the existing evidence in the Arbitration to make good the EOT Defence. The Tribunal thus went on to consider the substance of the EOT Defence and eventually decided to extend the time for mechanical completion by a period of 25 days, such that the respondent was only entitled to receive liquidated damages for 74 days instead of 99 days.

11 Subsequently, the respondent applied to the High Court to partially set aside the Award on the basis that (a) by ruling upon and allowing the EOT Defence, the Tribunal had exceeded the scope of the parties' submission to arbitration; and/or (b) the Award had been made in breach of natural justice.

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The decision below

12 In the proceedings below, the Judge allowed the respondent's setting aside application. As the Judgment itself is quite comprehensive, we highlight only those findings which are relevant to the present appeals.

13 First, the Judge found that the respondent did not have a fair and reasonable opportunity to respond to the EOT Defence. This was referred to by the Judge as the "Primary NJ Breach". In the Judge's view, the EOT Defence was a completely new defence, which was factually and conceptually distinct from the Estoppel Defence. Although the appellants had raised some facts, evidence and arguments as to the time that rectification works would have taken but for the Admitted Instruction, the respondent's decision not to engage with these points could not be faulted as it did not have to do so in the context of the Estoppel Defence (see the Judgment at [90]–[100]).

14 Second, the Judge found that the Tribunal had relied substantially on its professed experience in reaching its decision on the EOT Defence (see the Judgment at [167]–[168]). However, the Tribunal did not explain what its experience entailed or what it encompassed, and the parties were not given any opportunity to address the Tribunal on the same. This affected the Award and occasioned prejudice to the respondent, constituting what the Judge termed as the "Secondary NJ Breach" (see the Judgment at [172], [175]–[176]).

15 Third, the Judge held that the EOT Defence was not within the scope of the parties' submission to arbitration (see the Judgment at [182]). The appellants had conceded that the EOT Defence was not expressly mentioned anywhere in the request for arbitration, the answer to the request for arbitration, the Terms of Reference, the pleadings, the draft Lists of Issues, the witness statements, the

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opening submissions and the oral hearing before the Tribunal (see the Judgment at [186]). Furthermore, considering the substance of the dispute in the Arbitration, it was evident that the EOT Defence was not an issue that had been submitted to the Tribunal for determination (see the Judgment at [188]–[189]).

16 For the above reasons, the Judge set aside the Tribunal's decision to grant the appellants an extension of time of 25 days, and consequently ordered that "the number of days of delay set out in the Award for which liquidated damages are payable is to read as 99 days" (see the Judgment at [250]–[251]).

The parties' cases

The appellants' case

17 On appeal, the appellants submitted that the Judge had erred in several respects. To begin with, the Judge ought to have found that the EOT Defence fell within the scope of the Tribunal's jurisdiction. According to the appellants, the Judge took too narrow a view of the scope of the parties' submission to arbitration, as well as the Terms of Reference, the pleadings and the draft Lists of Issues.

18 Further, the appellants submitted that there had been no breach of natural justice in the making of the Award. In relation to the Primary NJ Breach, the respondent had been given a fair and reasonable opportunity to respond to the EOT Defence, especially since the extent of delay caused by the Admitted Instruction was directly in issue in the Arbitration. In relation to the Secondary NJ Breach, the respondent had been given the opportunity to address the chain of reasoning adopted by the Tribunal. Furthermore, the Judge had erred in finding that the Tribunal had rejected the appellants' evidence, such that there was no evidence before the Tribunal regarding the EOT Defence.

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19 In addition, the appellants submitted that the respondent was precluded from seeking to set aside the Tribunal's decision on the EOT Defence because it had engaged in "hedging", a concept explained by this court in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*"). Specifically, the appellants argued that although the respondent did ask the Tribunal not to consider the EOT Defence, it nevertheless proceeded to make substantive submissions on the merits of the same.

20 Finally, the appellants submitted that if they failed on the breach of natural justice issue but succeeded on the jurisdiction issue, the EOT Defence ought to be remitted to the Tribunal. The appellants further submitted that, even if they failed on both issues, the Judge did not have the power to make the consequential order that he did (*ie*, that the number of days of delay in the Award for which liquidated damages were payable be read as 99 days).

The respondent's case

21 In response, the respondent first submitted that the Judge was correct in finding that, by deciding on the EOT Defence, the Tribunal had exceeded the scope of the parties' submission to arbitration. The Judge had properly considered the substance of the dispute, and the EOT Defence could not be shoehorned into the Terms of Reference and the draft Lists of Issues.

22 The Judge was also correct in finding that the respondent did not have a fair opportunity to address the EOT Defence. In relation to the Primary NJ Breach, the appellants never put into issue the amount of time it would have taken to complete the rectification works otherwise than on a piecemeal basis. It was also reasonable for the respondent not to have engaged fully on the delay

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caused by the Admitted Instruction. In relation to the Secondary NJ Breach, the Judge was correct in finding that the Tribunal did not rely on any of the evidence adduced by the appellants in reaching a view on the EOT Defence.

23 The respondent further submitted that it had unequivocally objected to the EOT Defence and did not engage in hedging at any point in time. In its written closing submissions in the Arbitration, it had simply highlighted some threshold objections to the EOT Defence, in addition to its jurisdictional and procedural objections.

24 Finally, the respondent submitted that even if the appellants succeeded on the jurisdiction issue but failed on the breach of natural justice issue, it would not be appropriate to remit the EOT Defence to the Tribunal. Furthermore, the Judge was empowered to make the consequential orders that he had made.

Issues before this court

25 The issues that arose for this court's consideration were thus as follows:

(a) whether, by ruling on the EOT Defence, the Tribunal had exceeded the scope of its jurisdiction;

(b) whether, by ruling on the EOT Defence, the Tribunal had acted in breach of natural justice;

(c) whether the respondent was precluded from seeking to set aside the Award on the basis of its conduct in the Arbitration; and

(d) if any of the grounds for setting aside were satisfied and the respondent was not precluded from seeking to set aside the Award, what

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the appropriate recourse was and what consequential orders should be made.

Our decision

The true nature of the EOT Defence

26 It is of paramount importance to understand the true nature of the EOT Defence. Once properly understood, it would be self-evident that the Tribunal's decision in allowing a 25-day extension of time to the appellants was unequivocally in excess of its jurisdiction and in breach of natural justice.

27 We first set out the relevant parts of GC 40 in full, as follows:

> 40.1 The Time for Completion specified in Article 5.1 of the Agreement shall be extended if [the appellants] shall be delayed or impeded in the performance of any of [their] obligations under the Contract by reason of any of the following:
>
> …
>
> (e) any act or omission of or any default or breach of the Contract by [the respondent's subsidiary] or any activity, act or omission of any other contractors employed by [the respondent's subsidiary] (excluding [the appellants]); …
>
> …
>
> by such period as shall be fair and reasonable in all the circumstances and as shall fairly reflect the delay or impediment sustained by [the appellants].
>
> 40.2 Except where otherwise specifically provided elsewhere in the Contract, [the appellants] shall submit to [the respondent's subsidiary] a notice of a claim for an extension of the Time for Completion, together with particulars of the event or circumstance justifying such extension as soon as reasonably practicable after the commencement of such event or circumstance.
>
> 40.3 [The appellants] shall at all times use [their] reasonable efforts to minimize any delay in the performance of [their] obligations under the Contract.

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28 As an extension of time provision, GC 40 contractually allows the time for mechanical completion to be extended, thereby setting a new date for completion from which liquidated damages will begin to run in the event of further delay (see *Halsbury's Laws of Singapore – Building and Construction (Volume 2)* (LexisNexis Singapore) ("*Halsbury's Laws of Singapore*") at para 30.197). It is apparent from the face of GC 40 that its invocation is subject to specific express conditions. These include the requirements that there must have been some delay or impediment to the appellants' performance of their contractual obligations, and that such delay or impediment had been caused by, among other things, any act, omission, default or breach of contract by the respondent's subsidiary. There is also the procedural requirement that the appellants submit a notice of a claim for an extension of time, along with the requisite particulars justifying such extension. The appellants must also at all times use reasonable efforts to minimise any delay in the performance of their contractual obligations.

29 It is therefore clear that a defence based on GC 40 is necessarily fact-sensitive. Evidence would have to be led to (a) identify the act, omission, default or breach of contract by the respondent's subsidiary; (b) explain how the appellants were delayed by such act, omission, default or breach of contract; (c) explain what a fair and reasonable period of extension would be to reflect the delay or impediment caused to the appellants; and (d) explain that the appellants had used their reasonable efforts to minimise any such delay caused by the act, omission, default or breach of contract of the respondent's subsidiary.

30 It cannot be overemphasised that a defence based on GC 40 is not merely an issue which arose naturally from the Arbitration. This was the critical factor which distinguished the present case from previous cases where the issues in question were found to have already been "live" in the arbitration. A useful

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example in this regard is *BSM v BSN and another matter* [2019] SGHC 185 ("*BSM*"). In that case, the arbitration claimants were granted leave to amend their statement of claim to introduce a claim for repudiatory breach, which had been raised for the first time in the claimants' written opening submissions. The arbitration respondent was also granted leave to amend its defence and counterclaim. It did so, and claimed that it should be awarded the costs thrown away. However, the tribunal omitted to deal with such costs in its award. The arbitration respondent then applied to the High Court to set aside the award on the basis that such an omission constituted a breach of natural justice. Instead of setting aside the award, Belinda Ang Saw Ean J (as she then was) remitted the issue of wasted costs to the tribunal (see *BSM* at [21]). It bears emphasis that in *BSM*, the tribunal had granted the claimants leave to *amend* their pleadings, and the respondent had been given a similar opportunity to make consequential amendments to its own pleadings. In the circumstances, the issue in relation to the wasted costs had arisen from the parties' amended pleadings and there was no doubt that it had been placed before the tribunal for its determination.

31 In contrast, it is apparent here that the EOT Defence was a creature of a contractual provision. In order to rely on GC 40, it was incumbent on the appellants to satisfy the contractual conditions stipulated therein. It also goes without saying that such a defence *must be pleaded*. For the same reason, GC 40 required the appellants to provide express notice of their claim to the respondent at the relevant time (*ie*, as soon as reasonably practicable after the commencement of the event or circumstance that allegedly caused the appellants delay). In other words, the claim for an extension of time must have been made contemporaneously and not at the Arbitration. This is important because such notification enables the employer, the architect or other certifier to verify the claim for extension (*ie*, to determine whether the alleged cause of

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the delay falls within the prescribed list of events, whether it resulted in delay, and whether the contractor had taken steps to mitigate the effects of the delay). It also allows the relevant party to monitor the event and its impact on the progress of the works. Indeed, this notice requirement is so important that it may even operate as a condition precedent to the grant of an extension of time (see *Halsbury's Laws of Singapore* at paras 30.198–30.199). However, the appellants did *none* of this.

32 We raise this not to say that, on the merits of their claim, the appellants should not have been granted an extension of time because these contractual conditions had not been satisfied. Rather, it is to highlight the fact that, despite the appellants' invocation of GC 40 being dependent on the fulfilment of several conditions, none of them was pleaded. Indeed, none of these issues was even canvassed in the course of the Arbitration *until* the appellants' written closing submissions. In light of this, the relevant inquiry was not whether the Tribunal had the power to invite the parties to address it on the EOT Defence by way of evidence and/or submissions. The answer to this question would categorically be in the affirmative *provided* that such an issue had been properly placed before the Tribunal. Instead, the correct and anterior inquiry was as to when and how a tribunal would be entitled to rule on an unpleaded defence.

33 In answering this inquiry, it is first relevant to examine Art 23(4) of the ICC Rules, which governed the conduct of the Arbitration. Article 23(4) provides 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. [emphasis added]

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34 It is apparent that there are at least two elements at play in determining whether Art 23(4) applies: (a) the claim must be a "new claim"; and (b) the claim must "fall outside the limits of the Terms of Reference". For present purposes, we focus on the first element, in particular, whether the phrase "new claims" applies also to new *defences* that are raised by a party to the arbitration.

35 The authorities do not all speak with one voice on this issue. This is unsurprising, given that different jurisdictions may have varying conceptions of what constitutes a "claim". Nevertheless, some commentators have suggested that the phrase "new claims" has generally been construed narrowly, such that it does not include requests for interim or conservatory relief, the raising of new factual or legal arguments, requests to increase or modify relief which had been previously sought, and even claims founded upon an altered legal basis as long as such claims are for identical relief and based on facts already asserted in the arbitration (see Eric A Schwartz, "New Claims in ICC Arbitration: Navigating Article 19 of the ICC Rules" (2006) 17(2) ICC Ct Bull 55 ("*Schwartz*")). Instead, "new claims" encompasses only new requests for *relief* based on an entirely new ground, or "an entirely new complex of facts and circumstances" (see Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (International Chamber of Commerce, 2012) at paras 3-897–3.898; Nadja Jaisli Kull, "Chapter 17, Part II: Commentary on the ICC Rules, Article 23 [Terms of reference]" in *Arbitration in Switzerland: The Practitioner's Guide* (Manuel Arroyo, ed) (Kluwer Law International, 2nd Ed, 2018) ch 17 ("*Kull*") at para 29).

36 In our view, the historical origins of Art 23(4) support this narrow interpretation of the phrase "new claims". The starting point is Art 16 of the 1975 ICC Rules of Arbitration ("the 1975 ICC Rules") which, similar to its predecessors, provided as follows:

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> The parties may make new claims or counterclaims before the arbitrator on condition that these remain within the limits fixed by the Terms of Reference provided for in Article 13 or that they are specified in a rider to that document, signed by the parties and communicated to the Court.

37 Article 16 thus represented a relatively rigid approach – parties could not introduce new claims or counterclaims unless such claims or counterclaims fell within the limits of the Terms of Reference *or* if the parties consented to their introduction. This was intended to ensure that the parties' claims and counterclaims would be set out comprehensively in the Terms of Reference, so as to minimise any delay to the proceedings caused by the introduction of new claims (see *Schwartz* at pp 55–56). Subsequently, in order to allow for greater flexibility, Art 19 of the 1998 ICC Rules of Arbitration ("the 1998 ICC Rules") was introduced to replace Art 16 (see *Kull* at para 27), as follows:

> After the Terms of Reference have been signed or approved by the Court, no party shall make *new claims or counterclaims* 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 or counterclaims, the stage of the arbitration and other relevant circumstances. [emphasis added]

38 It is particularly significant that both Art 16 of the 1975 ICC Rules and Art 19 of the 1998 ICC Rules referred specifically to "new claims or counterclaims". The use of the word "claims" *together* with the word "counterclaims" suggests that these provisions were directed towards claims in the legal or technical sense (*ie*, requests for *relief*), rather than claims in the layman sense (*ie*, assertions). We note that Art 19 of the 1998 ICC Rules is in exactly the same terms as Art 23(4) of the ICC Rules, save that the phrase "new claims or counterclaims" has been amended to "new claims". In our view, this does not change the analysis. The amendment simply reflects the fact that Art 2(iv) of the ICC Rules introduced a "new, broad definition" of the word

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"claim" (see *Kull* at para 27), which is that it "includes any claim by any party against any other party". Given that this new definition of "claim" was broad enough to encompass counterclaims, it was hence not necessary to include the word "counterclaim" in Art 23(4).

39 The purpose of Art 23(4) and the way in which the word "claim" is used in other parts of the ICC Rules further reinforce the view that "claim" was intended to be given its legal and technical meaning. The arbitration process starts with a claimant's notice of arbitration which sets out the "claims" against a respondent. Any defences raised by such a respondent would be in response to these "claims", and a respondent may also raise any "counterclaims" it has against the claimant. These claims and counterclaims delimit the scope of the tribunal's eventual decision. The history of Art 23(4) shows that its role in this entire process is to ensure that claims and counterclaims are set out comprehensively, while giving the tribunal the flexibility to allow new claims and/or counterclaims in appropriate circumstances. Viewed from this perspective, we think that the phrase "new claims" does not extend to new defences. That being said, as this point was not crucial to our decision, it is not necessary for us to arrive at a conclusive view on the proper interpretation of Art 23(4) of the ICC Rules. It suffices for us to express some tentative views on this provision and leave it open for determination in a future case when it arises squarely for consideration.

40 Ultimately, a holding that Art 23(4) does not extend to new defences has no material effect on the outcome of these appeals. To decide on the EOT Defence (which was admittedly not pleaded) and given its fact-sensitive nature, the correct procedure would have been for the Tribunal to invite submissions from the parties as to whether an amendment to the pleadings to include the EOT Defence should be allowed. In our view, any such invitation must also

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involve an application by the appellants to amend the defence to plead the EOT Defence with full particulars. This step must be undertaken *prior* to the Tribunal's consideration as to whether fresh evidence and/or submissions should be permitted to address the EOT Defence. If allowed, it would lead to various consequential orders such as consequential amendments to the respondent's pleadings, specific discovery, leave to adduce fresh evidence (both factual and expert) to meet the new EOT Defence, and recalling witnesses for cross-examination. This was not done at any stage of the Arbitration.

41 Given the above state of affairs, when the Arbitration was declared closed, it was common ground that the EOT Defence remained unpleaded and there was also no ruling by the Tribunal that the appellants were allowed to rely on the EOT Defence. As such, at this time, the respondent was none the wiser as to whether the Tribunal would entertain the EOT Defence.

42 Having situated the EOT Defence in its proper context, it will be apposite to examine the two grounds which the Judge had relied upon to set aside the 25-day extension of time granted by the Tribunal. In the proceedings below, the Judge had dealt first with the breach of natural justice issue followed by the jurisdiction issue because that was the order of the arguments advanced by the respondent. However, on appeal, counsel for the appellants, Mr Thio Shen Yi SC ("Mr Thio"), sought to address us in the reverse order. He correctly observed that if the appellants did not succeed on the jurisdiction point, it would not be possible to remit the Award to the Tribunal irrespective of this court's decision on the breach of natural justice issue. We agree with Mr Thio and will therefore address the jurisdiction issue first.

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Excess of jurisdiction

43 The starting point in the analysis is that the EOT Defence was only raised *for the first time* in the appellants' written closing submissions in the Arbitration. We accept that the court should not construe the parties' pleadings, the Lists of Issues and the Terms of Reference too narrowly. However, since the appellants conceded that the EOT Defence had not been expressly raised in the pleadings, the Lists of Issues or the Terms of Reference, there was simply no room to argue that the EOT Defence was somehow nonetheless within the scope of the Arbitration. We make three points in this regard.

44 First, it was impermissible for the appellants to invite the court to adopt a broad reading of the pleadings, the Lists of Issues and the Terms of Reference *in order* to read into them a defence which was admittedly not pleaded. Any proper interpretation of these documents, however broad, could not possibly allow the Tribunal to adjudicate on a specific and fact-sensitive contractual defence which had *not* been expressly raised. The purpose of adopting a broad interpretation of these documents is to avoid an inflexible and rigid analysis of the issues raised in the arbitration, so that issues which arise from or are natural consequences of the pleaded issues are not excluded. If the pleadings, the Lists of Issues and the Terms of Reference in the Arbitration could be "broadly" construed to encompass the EOT Defence even though the EOT Defence did not arise from and was not a natural consequence of the existing pleaded defences, it would make nonsense of the role of pleadings and other related documents (see [51] below).

45 Second, it was untenable for the appellants to suggest that the EOT Defence fell within the scope of the submission to arbitration simply because it would have a bearing on the respondent's claim for liquidated damages. There

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can be no serious dispute that many defences could have an impact on the extent of a claim for liquidated damages. If the appellants' submission was correct, many unpleaded defences which somehow have a bearing on claims for damages (liquidated or otherwise) would automatically fall within the scope of the submission to arbitration. Intuitively, such an approach does not make sense. Indeed, it would undermine the very purpose of pleadings, as we have explained above. During the parties' oral submissions, we referred to the doctrine of *force majeure* as an example to illustrate the point that such specific defences which would clearly have an impact on any claim for damages must be pleaded. Mr Thio rightly conceded that such a defence would have to be specifically pleaded and could not be brought in on a broad interpretation of the pleadings and other documents. We saw no meaningful distinction between that hypothetical situation and the present case. Here, as observed at [30]–[31] above, we are concerned with a specific contractual provision which governed the appellants' right to claim for an extension of time. It was common ground that GC 40 was never invoked by the appellants and hence the requirements stipulated in GC 40 were evidently not met. Furthermore, it was not pleaded and did not feature in any of the documents which defined the scope of the Arbitration. In these circumstances, we failed to see how the EOT Defence could conceivably be construed as falling within the scope of the submission to arbitration simply on account of the fact that an extension of time if allowed would have a material bearing on the respondent's claim for liquidated damages.

46 Third, we found that the authorities relied upon by the appellants were distinguishable from the present case. We highlight a few cases in particular. The first is this court's decision in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*"). In *AKN*, the arbitration claimants had

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prayed for damages, among other things. In its award, the tribunal concluded that the claimants could not prove any actual loss, however, the claim for lost profits could be recharacterised as one for loss of an opportunity to earn profits. The issue for our consideration in *AKN* was whether it was open to the tribunal to recharacterise the claim as such. We held that it was open to the tribunal to do so because such a claim was within the scope of the arbitration. The claimants had made a "generic claim for damages", which was "broad enough to encompass a claim that might be characterised as one for loss of a chance" (see *AKN* at [74]). In the course of our reasoning, we also made the following observations (see *AKN* at [70] and [74]):

> 70 The Judge … reasoned as follows:
>
> (a) First, a generic prayer for 'damages', such as that in the Notice of Arbitration, was not broad enough to include damages for loss characterised as a lost opportunity to earn profits.
>
> (b) Second, the Tribunal had, all throughout the proceedings, understood the Purchasers' claim to be one for loss of profits.
>
> (c) Third, notwithstanding the aforesaid understanding, the Tribunal took it upon itself to re-characterise the Purchasers' claim as one for loss of an opportunity to earn profits.
>
> …
>
> 74 … [T]he Judge erred at the first step when he held that a generic claim for damages was not broad enough to encompass a claim that might be characterised as one for loss of a chance. … We agree with the second and third steps in the Judge's reasoning; but, as shall shortly become apparent, these go to issues such as fair process, notice and natural justice, rather than to jurisdiction. The point can be tested in this way: had the Purchasers brought an application to amend their claim from one for lost profits to one for loss of a chance to earn profits, then it cannot be doubted that the Tribunal would have had the *discretionary jurisdiction* to permit this amendment, subject to giving due opportunity to the Respondents affected

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> by the amendment to make consequential amendments in their respective cases and their evidence. …
>
> [emphasis in original]

47 The appellants relied on this excerpt from *AKN* to argue that a claim is within the scope of the submission to arbitration as long as the party could have, in principle, advanced that claim by way of an amendment to its pleadings and where the tribunal would have had the discretionary jurisdiction to permit such amendment. In our view, this was an erroneous interpretation of our observation in *AKN*. The crucial premise of the analysis in *AKN* was that *damages had already been pleaded*; the loss of a chance analysis was merely a *measure* of the pleaded claim for damages. As such, the loss of a chance analysis fell within the scope of the submission to arbitration and the tribunal's decision on it had not been made in excess of jurisdiction. The hypothetical we raised thereafter was simply to *illustrate* the point that, since the loss of a chance analysis fell within the scope of the submission to arbitration, the objections raised by the appellants went towards the question of breach of natural justice rather than excess of jurisdiction. It should not be taken as a strict test in determining whether an issue falls within the scope of the parties' submission to arbitration. That anterior question had already been answered in the affirmative in *AKN*, which was why we observed that the tribunal would have had the *discretionary jurisdiction* to permit an amendment to the pleadings to incorporate the loss of a chance analysis. On this view, *AKN* offered no assistance to the appellants as the EOT Defence was clearly not within the scope of any defences that the appellants had pleaded. Accordingly, the appellants' reliance on *AKN* was misplaced.

48 In similar vein, the appellants had sought to rely on the recent decision of the General Division of the High Court in *CEF and another v CEH* [2021]

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SGHC 114 ("*CEF*"), where the same excerpt of *AKN* was cited at [93]. Given that the appeal against the decision in *CEF* is currently pending, we shall say no more on the decision save that, for the reasons given in [47] above, the appellants' reliance on [93] of *CEF* was similarly misplaced.

49 Finally, we turn to our recent decision in *CDM and another v CDP* [2021] 2 SLR 235 ("*CDM*"). In that case, we held that the jurisdiction of a tribunal is not defined solely by the notice of arbitration and the statement of claim (see *CDM* at [1]–[2]). Rather, the parties' *subsequent pleadings* are equally relevant to determine the scope of the tribunal's jurisdiction. In *CDM*, the dispute between the parties involved a vessel which was purportedly launched on 20 January 2015, and then relaunched on 3 May 2015. The claimant in the arbitration had not referred to the second launch in its Statement of Claim and the Notice of Arbitration. However, the respondents in the arbitration, in anticipation that the point might subsequently be raised, referred to this second launch and expressly denied it in their Statement of Defence and Counterclaim. Thereafter, the issue in relation to the second launch was featured in the subsequent pleadings, the agreed List of Issues, the parties' respective opening statements, the evidence in the arbitration, and the parties' respective closing submissions. In these circumstances, we concluded that the issue in relation to the second launch fell within the tribunal's jurisdiction (see *CDM* at [46]).

50 The appellants sought to rely on *CDM* to argue that the dominant consideration in assessing the scope of the submission to arbitration is whether the parties had joined issue or directly clashed on the issue in question. In this case, since the parties had made substantive arguments in relation to the EOT Defence in their written closing submissions, the appellants submitted that the EOT Defence fell within the scope of the submission to arbitration. In our view,

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this argument was wholly misguided. While it is correct that this court did refer to the fact that the second launch was dealt with in the closing submissions (see *CDM* at [37]–[40]), it would plainly be wrong to construe our decision to mean that so long as the point was covered in the closing submissions, that would be sufficient for it to come within the scope of the submission to arbitration *even if it was not pleaded*. This court's remark in *CDM* was made in the context of closing submissions which were filed to address issues that were *already pleaded*. In other words, the five sources referred to at [18] of *CDM* are not *discrete or independent* sources. It would not suffice for the purposes of determining the tribunal's jurisdiction that the issue in question had been raised in *any one* of the five sources. Instead, the overriding consideration is to determine whether the relevant issues had been properly pleaded before the tribunal.

51 Indeed, in relation to the importance of pleadings, we had cited at [19] of *CDM* this court's decision in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*"). It is worth reiterating some of the principles set out in *Kempinski*:

> (a) The scope of an arbitration agreement in the broad sense is not the same as the scope of the submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply. Thus, only disputes which the parties *choose* to submit for arbitration will demarcate the jurisdiction of the tribunal in the arbitration proceedings between them (see *Kempinski* at [32]).
>
> (b) The role of pleadings in arbitration proceedings is to provide a convenient way for the parties to define the jurisdiction of the tribunal by setting out the precise nature and scope of the disputes in respect of

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which they seek the tribunal's adjudication. In order to determine whether a tribunal has the jurisdiction to adjudicate on a particular dispute, it is necessary to refer to each party's pleaded case in the arbitration to see whether the issues of law or fact raised in the pleadings encompass that dispute (see *Kempinski* at [33]–[34]).

(c) Even where a new issue is raised by the court (or the tribunal) on its own motion as a result of the evidence adduced during the trial, the defence should, for the sake of good order, be amended so that the claimant may file an amended reply and, if necessary, call rebuttal evidence on the new issue. This is an *established process* to ensure fairness to the party affected by the new issue (see *Kempinski* at [37]). Only a 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 need not be pleaded, as it is already part of that dispute (see *Kempinski* at [47]; *CBX and another v CBZ and others* [2020] 5 SLR 184 at [48]; *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] SGCA 94 at [71])

52 Here, it was common ground that the EOT Defence did not feature anywhere except in the appellants' written closing submissions in the Arbitration. Thus, it would have been plain and obvious that, until then, the respondent simply had no prior notice that it had to deal with the EOT Defence. The EOT Defence would *only* fall within the scope of the parties' submission to arbitration *upon* the introduction of the EOT Defence (by way of an amendment to the pleadings, if so permitted by the Tribunal) and *not any earlier*. This is subject of course to compliance with any directions made by the Tribunal in relation to the consequential orders arising from a decision to allow

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the introduction of the EOT Defence (see [40] above). Absent this process, our view was that the EOT Defence could not possibly fall within the scope of the parties' submission to arbitration. Therefore, the Judge was correct in finding that the Tribunal's decision on the EOT Defence had been made in excess of jurisdiction.

Breach of natural justice

53 We turn next to the breach of natural justice issue. In our view, the Primary NJ Breach and the Secondary NJ Breach were related and one should follow the other.

The Primary NJ Breach

54 As regards the Primary NJ Breach, this was a classic case of a breach of natural justice. For the reasons articulated by the Judge, the Primary NJ Breach was clearly made out. We highlight the Judge's main findings in this regard.

(a) Preliminarily, the Judge rejected the appellants' submission that they had raised the defence of partial estoppel in the Arbitration (*ie*, that the respondent was estopped from enforcing any right to liquidated damages after the date by which the appellants would have completed the rectification works but for the Admitted Instruction) (see the Judgment at [83]).

(b) Next, the Judge held that the EOT Defence was a completely new defence, which was factually and conceptually distinct from the Estoppel Defence. The latter was based on an equitable doctrine, whereas the former hinged on a contractual entitlement based on GC 40. Although the practical effect of both defences might have been the same, their different legal and factual bases meant that they could be dealt with

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differently. Specifically, the respondent could deal with the Estoppel Defence simply by relying on GC 3.9 (a provision requiring any waiver to be in writing). Thus, although the appellants had raised some facts, evidence and arguments as to the time that the rectification works would have taken but for the Admitted Instruction, this was not in issue in any meaningful way during the Arbitration. The respondent did not have reasonable notice that it was necessary to engage with this issue until the EOT Defence belatedly appeared in the appellants' written closing submissions (see the Judgment at [93]–[96], [100]). As such, the respondent did not have a fair and reasonable opportunity to respond to the EOT Defence (see the Judgment at [119]).

(c) This breach of natural justice was connected to the making of the Award and materially prejudiced the respondent's rights. If the respondent had been given the opportunity to lead further evidence, test the appellants' evidence and tender further legal submissions, this could have reasonably made a difference to the Tribunal's determination (see the Judgment at [157]–[158]).

The Secondary NJ Breach

55 As regards the Secondary NJ Breach, we saw no reason to disturb the Judge's finding that the Tribunal had not actually relied on any of the evidence adduced by the appellants in the Arbitration when it granted the 25-day extension of time (see the Judgment at [167]). In any event, even if the Tribunal had purported to rely on some of the evidence already adduced in the Arbitration (*ie*, the Tribunal only *partially* and not *solely* relied on its experience), there was no doubt that the Tribunal *did* rely on its "experience" to some extent in arriving at its decision to grant a 25-day extension of time. So long as the Tribunal's

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decision on the EOT Defence was based in part on its "unarticulated experience" (see the Judgment at [162]), in relation to which the respondent had not been afforded any opportunity to address, that in itself constituted a breach of natural justice. As we have emphasised, any claim for an extension of time in a construction project is often fact-sensitive and subject to a variety of moving parts. The Tribunal's *prior experience* dealing with extension of time claims for *other construction projects* would be immaterial in deciding on the appropriate extension of time *in this case* without the benefit of pleadings, specific evidence (both factual and expert) and arguments to determine the proper extension of time to be granted. Once this glaring fact is placed in the correct perspective, it would be immediately apparent that the failure of the Tribunal to inform the parties as to how its "experience" would bear on the extension of time issue was another classic case of breach of natural justice.

56 This point may also be illustrated by reference to paras 334–335 of the Award, where the Tribunal granted a 25-day extension of time on the basis that this represented the appellants' culpability of around 25% for the delay. With respect, this was a somewhat puzzling finding for the following reasons:

(a) Even on the EOT Defence, there was simply no legal basis for the Tribunal to apportion the length of the delay on account of the respective parties' culpability. GC 40 clearly states that the period of extension shall be that which is fair and reasonable in all the circumstances and which *fairly reflects the delay sustained* (see [27] above). This has nothing to do with the parties' culpability *per se*. It was plainly wrong for the Tribunal to rely on the phrase "fair and reasonable in all the circumstances" in GC 40 to attribute 25% fault to the appellants.

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(b) Furthermore, even on an examination of culpability, the attribution of culpability to the *appellants* was the wrong approach. Upon finding that the Admitted Instruction given by the respondent's subsidiary caused delay to the appellants in carrying out the rectification works, the correct inquiry should have been how much fault should be attributed to the *respondent* (or its subsidiary) in respect of this delay.

(c) In any case, taking the Tribunal's reasoning at its highest, it was also odd to grant a 25-day extension of time (out of a total of 99 days of delay) if the appellants' culpability was only 25%. Logically, it should have been the reverse – the extension of time should have been 74 days instead of 25 days if the appellants' alleged culpability was only 25%. In our view, the Tribunal obviously made a mistake when they purported to attribute 25% culpability to the appellants. Perhaps, the Tribunal intended to refer to the respondent instead.

57 Of course, it is trite that mere errors of fact or law are not sufficient to warrant setting aside an award (see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [33]). By highlighting the apparent flaws in the Tribunal's reasoning, we are in no way seeking to substitute the Tribunal's decision for our own on the merits. Our point is simply this: the fact that the Tribunal's reason for granting a 25-day extension of time to the appellants made no sense at all only served to highlight (a) the importance of the parties' pleadings, evidence and submissions in supplementing the Tribunal's purported "experience"; and (b) the prejudice suffered by the respondent when the Tribunal failed to invite the parties, especially the respondent, to address the Tribunal on its purported "experience".

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The appellants' other arguments

58 In light of the above, we make several observations on the other arguments raised by the appellants on appeal. First, it was no answer for the appellants to say that the respondent had responded to the EOT Defence in its written closing submissions in the Arbitration. As the Judge rightly pointed out at [116] of the Judgment, "[a] chance to respond to the counterparty's *legal submissions* on a newly raised defence cannot constitute a reasonable opportunity to present one's case" [emphasis added].

59 Second, it was similarly no answer to say that the appellants were content to rely on the existing evidence to advance the EOT Defence. Again, as correctly observed by the Judge at [116] of the Judgment, the Tribunal was wrong in focussing on the "[appellants'] right to use the existing evidence" when the correct inquiry should have been whether the *respondent* had been given sufficient opportunity to "marshal their own evidence to meet the EOT Defence". In other words, what was "sauce for the goose" was not necessarily "sauce for the gander" in this case. It was the prerogative of the respondent to decide what evidence it intended to call to meet any *pleaded* point. As the EOT Defence was not pleaded, the respondent did not lead any evidence to meet this specific defence. In our view, having raised an admittedly unpleaded point, the burden was squarely on the appellants and not the respondent to satisfy the Tribunal and the court that the evidence to be adduced in the Arbitration to address this new defence would have been *no different* even if the point had been pleaded. In this regard, it was not necessary for the Tribunal or the court to examine or assess whether any additional evidence would have made a difference. There was no doubt that such a burden had not been discharged by the appellants in this case.

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60 Third, the dispute as to whether the EOT Defence had been raised at the invitation of one member of the Tribunal was a red herring. It was clear that there was in fact no such invitation. A comment by a *member* of the Tribunal for the parties to consider expanding certain oral arguments in the written closing submissions could hardly constitute an invitation by the *Tribunal* to submit on an unpleaded defence (see the Judgment at [214]). In any case, any such invitation by the Tribunal must involve an application to amend the defence so as to plead the EOT Defence. As we have mentioned, if such an application had been allowed, it would have led to various consequential orders such as consequential amendments to the respondent's pleadings, specific discovery and leave to introduce further evidence (both factual and expert) to meet the new defence. Nothing of the sort happened here. Short of the Tribunal granting leave to amend the defence, any invitation by the Tribunal to the parties to submit on an unpleaded point would equally be a breach of natural justice. Again, we reiterate that we are not concerned here with a legal or technical defence which can be determined without reference to evidence (*eg*, the proper construction of a written contractual provision). Instead, the EOT Defence was necessarily fact-sensitive. Although para 24 of the Terms of Reference permitted the Tribunal to "take into consideration any further allegations, arguments and contentions", this could not possibly be a licence for the Tribunal to consider an unpleaded defence. Otherwise, it would defeat the purpose of pleadings, as we have already outlined above.

61 Finally, at the hearing of the appeals before us, Mr Thio submitted that there were various other courses of action open to the respondent upon the appellants raising the EOT Defence. For instance, he suggested that the proper course of action for the respondent would have been to object to the EOT Defence and to seek a formal amendment of the pleadings by the appellants, or

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to ask the Tribunal to convene a further directions hearing or a case management conference. This was a misdirected submission. The correct inquiry was not what the *respondent* could or should have done when it was confronted with the unpleaded EOT Defence. In our view, the correct inquiry was what the *appellants* should have done if they wanted to advance the EOT Defence in the Arbitration despite not having pleaded it beforehand. Clearly, as alluded to above, the appellants should have applied to amend their defence. For reasons best known to the appellants, this was not done. Until that was done, it would be premature for the respondent to seek directions from the Tribunal as regards the unpleaded EOT Defence. That would be putting the cart before the horse, and it was disingenuous for the appellants to suggest otherwise. The respondent bore no such burden, as the EOT Defence remained unpleaded throughout the Arbitration.

62 For these reasons, we affirmed the Judge's finding that the Award had been made in breach of natural justice, both in relation to the Primary NJ Breach and the Secondary NJ Breach.

The hedging argument

63 Next, we turn to the appellants' argument that the respondent was precluded from seeking to set aside the Award because its conduct in the Arbitration amounted to "hedging". The concept of "hedging" was explained by this court in *China Machine*, where we observed at [168] and [170] that:

> 168 … An assertion that the tribunal has acted in material breach of natural justice is a very serious charge, not just for the imputation that such an allegation makes as to the *bona fides* and professionalism of the tribunal, but also for the grave consequence it might have for the validity of the award. For this reason, ***there can be no room for equivocality in such matters***. An aggrieved party cannot complain after the fact that its hopes for a fair trial had been irretrievably dashed by the

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> acts of the tribunal, and yet conduct itself before that tribunal 'in real time' on the footing that it remains content to proceed with the arbitration and obtain an award, only to then challenge it after realising that the award has been made against it. In our judgment, such tactics simply cannot be countenanced.
>
> …
>
> 170 In our judgment, there is a principle to be drawn from this and it is this: ***if a party intends to contend that there has been a fatal failure in the process of the arbitration, then there must be a fair intimation to the tribunal*** that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding. This would ordinarily require that the complaining party, at the very least, seek to suspend the proceedings until the breach has been satisfactorily remedied (if indeed the breach is capable of remedy) so that the tribunal and the non-complaining party has the opportunity to consider the position. This must be so because if indeed there has been such a fatal failure against a party, then ***it cannot simply 'reserve' its position until after the award and if the result turns out to be palatable to it, not pursue the point, or if it were otherwise to then take the point.*** After all, the requirement of a fair process avails both parties in the arbitration and to countenance such hedging would be fundamentally unfair to the process itself, to the tribunal and to the other party. In the final analysis, it is a contradiction in terms for a party to claim … that the proceedings had been irretrievably tainted by a breach of natural justice, when at the material time it presented itself as a party ready, able and willing to carry on to the award. If a party chooses to carry on in such circumstances, it does so at its own peril. The courts must not allow parties to hedge against an adverse result in the arbitration in this way.
>
> [emphasis in original in italics; emphasis added in bold italics]

64 Here, the appellants pointed to the fact that although the respondent had asked the Tribunal not to consider the EOT Defence, it also made substantive submissions on the merits of the EOT Defence. The appellants submitted that this amounted to hedging, such that the respondent was now precluded from seeking to set aside the Award. In our view, the Judge correctly rejected this argument.

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65 The EOT Defence was undoubtedly foisted upon the respondent at the eleventh hour in the Arbitration. There can be no dispute that the respondent had seriously opposed the raising of this new defence. In its written closing submissions, the respondent highlighted that (a) the EOT Defence "was never pleaded, nor raised at any point during the 8-day hearing, until it appeared in the Written Closing"; (b) no application had been made by the appellants to amend their pleadings; and (c) the EOT Defence had not been the "subject of pleadings, focused document production, witness evidence or cross-examination" (see [9] above). In our view, this was an unequivocal and fair intimation to the Tribunal of the respondent's objections to the EOT Defence. Saddled with this unpleaded defence which had been belatedly raised by the appellants, the respondent did its best to meet the new defence by objecting to it and raising several threshold arguments. It would be manifestly unfair to treat the respondent's reaction as equivalent to a fair opportunity to address the EOT Defence, or as an attempt to hedge its position.

66 While the respondent referred only to procedural unfairness (*ie*, breach of natural justice) and did not expressly mention excess of jurisdiction, we agreed with counsel for the respondent, Mr Cavinder Bull SC ("Mr Bull"), that the Tribunal nevertheless had sufficient notice of the gist of the respondent's objection, *ie*, that the EOT Defence was new and unpleaded. Such an objection was equally relevant to the excess of jurisdiction point. In other words, we did not think it necessary in this case for the respondent to have explicitly identified the specific *ground* for setting aside (*eg*, breach of natural justice or excess of jurisdiction). It was sufficient that the respondent had set out the *substance* of its objection. This was unlike in *China Machine* where, despite the setting aside applicant's contention that "the prospects of a fair arbitration had been irretrievably lost as a result of the [t]ribunal's management of its procedure",

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the applicant never raised this objection at all to the tribunal for its consideration. Instead, the applicant's conduct during the arbitration had at all times suggested that it was ready, able and willing to proceed with the hearing (see *China Machine* at [165]–[172]). This was clearly not the case here.

67 Finally, we took the view that it was not necessary for the respondent to have specifically intimated to the Tribunal that it intended to commence setting aside proceedings if its objections were ignored. In this regard, our observation in *China Machine* that a complaining party would ordinarily be required to "seek to suspend the proceedings until the breach has been satisfactorily remedied" must be understood in the context of that case, where the complaint in question was that there had been a "fatal failure in the process of the arbitration" such that the "prospects of a fair arbitration had been irretrievably lost" (see *China Machine* at [165] and [170]). Furthermore, the alleged breach of natural justice in *China Machine* pertained to a relatively early stage of the arbitration, before the main evidentiary hearing had commenced. In those circumstances, it was only fair that the complaining party should have raised its objections rather than keeping silent and proceeding with the arbitration.

68 The situation in this case was completely different. As the Judge rightly pointed out at [144]–[147] of the Judgment, at the time when the Arbitration was declared closed, there was no indication by the Tribunal that it was agreeable to allowing the EOT Defence. The first time the respondent was made aware of this was when the Award itself was delivered. Prior to that, it would be plainly wrong to expect the respondent to indicate to the Tribunal that any decision to permit the EOT Defence would be vigorously challenged in court. The reality is that parties to an arbitration would be extremely careful not to antagonise the tribunal, especially given that errors of fact or law are generally immune from challenge. Until an adverse ruling was made by the Tribunal in

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relation to the EOT Defence, it would be premature for the respondent to alert the Tribunal of any potential challenge to its decision. It was more than sufficient and appropriate that the respondent had, in its written closing submissions in the Arbitration, clearly set out the reasons why it objected to the Tribunal's consideration of the EOT Defence.

The appropriate recourse

Remission

69 Having agreed with the Judge that the Tribunal's decision on the EOT Defence had been made (a) in excess of the Tribunal's jurisdiction; and (b) in breach of natural justice, there was strictly speaking no need for us to consider the question of remission. As Mr Thio acknowledged at the hearing before us, remission was not possible if the appellants failed to persuade the court that the EOT Defence was within the jurisdiction of the Tribunal. Nevertheless, even if we had disagreed with the Judge on the excess of jurisdiction point and found that there was only a breach of natural justice, we would not have been inclined to remit the matter to the Tribunal. Preliminarily, it bears emphasis that a finding that the Award was not in excess of jurisdiction would have no impact whatsoever on a finding that the Tribunal's decision on the EOT Defence had been in breach of natural justice. These two grounds for setting aside are separate and distinct. In other words, a finding that there was no excess of jurisdiction cannot cure the breach of natural justice.

70 In any event, this was not an appropriate case for remission. The cases show that, on the occasions when awards were remitted to the tribunal, it was to consider fresh evidence or submissions to deal with a point which *was already before the tribunal*. In other words, the point had already been pleaded or arose from existing pleadings. Examples of such cases include *BSM*

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(explained at [30] above) and *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL*"). In *JVL*, the arbitration claimant had advanced a claim for damages for breach of contract, pleading the disputed contracts and that the arbitration respondent had failed to perform any of these contracts. The respondent's defence was based on a price-averaging agreement, which allegedly rendered the disputed contracts void for uncertainty (see *JVL* at [25], [28] and [47]). At the tribunal's direction, two subsidiary issues arose: (a) first, whether the price-averaging arrangement was within the scope of the parol evidence rule; and (b) second, if any exceptions to the parol evidence rule applied (see *JVL* at [104]–[105]). Although the respondent never relied on the collateral contract exception to the parol evidence rule, this exception was eventually adopted by the majority of the tribunal in the award (see *JVL* at [108]). Vinodh Coomaraswamy J took the view that this was in breach of natural justice, and thus remitted the award to the tribunal for it to consider whether to receive further evidence or submissions (see *JVL* at [1] and [128]). Notably, Coomaraswamy J held that in ruling on the collateral contract exception, the tribunal had not exceeded its jurisdiction. We were not shown, nor were we made aware of, any case in which the court had remitted an award to the tribunal to consider an application to amend the pleadings in order to deal with a new point. As correctly observed by Mr Bull, that must be so because, in such a situation, the EOT Defence would be outside the scope of the submission to arbitration and the question of remission should not even arise.

71 In this case, as we have explained above, the only way for the Tribunal to properly adjudicate on the EOT Defence was by way of an application to amend the defence. In our view, it would be manifestly unfair to the respondent to allow any such amendment at this late stage. That being the case, what would be the purpose in remitting the Award to the Tribunal? Certainly, it was not

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appropriate for the court to remit the Award to the Tribunal to *consider* an *application to amend the pleadings* to include the EOT Defence. Therefore, while the court has the power to remit the Award to the Tribunal, on the facts of this case, we would not have exercised our discretion to do so even if the breach had been limited to one of natural justice.

Consequential orders

72 Finally, we turn to the consequential orders that were made by the Judge. Specifically, the Judge ordered that "the number of days of delay set out in the Award for which liquidated damages are payable is to read as 99 days" (see the Judgment at [250]–[251]). The appellants submitted that the Judge had no power to make such an order.

73 In our view, there was no merit to the appellants' submission. We agreed with the Judge that this was simply a consequential order arising from the court's decision to set aside the Tribunal's decision to grant a 25-day extension of time (see the Judgment at [244]–[247]). Such consequential orders are commonplace and there is nothing objectionable about them. We provide a few examples of cases in which other consequential orders have been made.

(a) In *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 ("*GD Midea*"), in addition to setting aside the tribunal's finding on a particular clause of the contract, Chua Lee Ming J also set aside all "the other findings made by the Tribunal … [which] were linked to and flowed from its finding" on that particular clause. This included the tribunal's award on interest, to the extent that the interest related to any of the findings that had been set aside (see *GD Midea* at [76]).

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(b) Similarly, in *Convexity Ltd v Phoenixfin Pte Ltd and others* [2021] SGHC 88, Andre Maniam JC (as he then was) held at [122] that he would "set aside the tribunal's decision on the Penalty Issue, and the parts of the Award affected by it".

(c) Another example is *BZV v BZW and another* [2021] SGHC 60 ("*BZV*"), where the arbitration in question involved certain claims brought by the arbitration claimant and a counterclaim brought by the arbitration respondent. The tribunal dismissed both the claims and the counterclaim. The claimant then applied to set aside the award, save only for that part of the award which had dismissed the counterclaim. In allowing the setting aside application, Coomaraswamy J stated that he would "set aside the entirety of the award … in so far as it dismisses the plaintiff's claims in the arbitration" and that "[t]he award continues to stand in so far as it dismisses the defendants' counterclaim" (see *BZV* at [227]–[228]).

74 In this case, the Tribunal found that there were 99 days of delay and that, given this delay, the respondent was *prima facie* entitled to liquidated damages for the entire period of delay. In doing so, the Tribunal also ruled against the appellants on their pleaded defences of waiver and estoppel. None of these findings had been challenged by the appellants. It would follow that the appellants should be liable to pay liquidated damages for the full period of delay (*ie*, 99 days) and the only reason this period was cut down to 74 days was that the Tribunal wrongly ruled on the 25-day extension of time when it purported to attribute 25% of the delay to the appellants. Therefore, once it was decided that the extension of time granted by the Tribunal was liable to be set aside either on account of a breach of natural justice or on account of excess of jurisdiction, it was inevitable that the respondent's entitlement to liquidated

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damages should be restored to the full period of 99 days. In this regard, the consequential order made by the Judge was similar to that in *BZV*, in so far as it served simply to clarify the effect of the setting aside order. Specifically, it clarified that the setting aside order applied only to the parts of the Award relating to the EOT Defence, and that the rest of the Award remained intact.

Conclusion

75 For completeness, we note that the appellants' appeal in CA 43 against the Judge's decision on costs was independent of the outcome in CA 11 (the appeal against the Judge's decision on the merits). Nevertheless, there was no reason in our view to disturb the costs order made by the Judge.

76 For all of the above reasons, we dismissed the appeals and awarded costs to the respondent in the sum of $60,000 (all-in), with the usual consequential orders to apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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