**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2022] SGCA 41**

Civil Appeal No 35 of 2021

Between

CJA

… *Appellant*

And

CIZ

… *Respondent*

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# JUDGMENT

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

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# CJA
# v
# CIZ

**[2022] SGCA 41**

Court of Appeal — Civil Appeal No 35 of 2021
Sundaresh Menon CJ, Judith Prakash JCA and Chao Hick Tin SJ
20 January 2022

17 May 2022 Judgment reserved.

**Judith Prakash JCA (delivering the judgment of the court):**

## Introduction

1 It is well established that the grounds for curial intervention in arbitration proceedings are narrowly circumscribed: parties to an arbitration do not have the right to a "correct" decision from an arbitral tribunal that can be vindicated by the courts, but only the right to a decision that is within the ambit of their agreement to arbitrate, and that is arrived at following a fair process. Furthermore, in ascertaining whether that has been the case, the courts accord a margin of deference to the tribunal, which is generally expected to have some independence in controlling the arbitral proceedings and considering the issues before it. The present case underscores the care that needs to be exercised in determining whether the threshold for curial intervention has been reached. It demonstrates in particular, in regard to challenges to jurisdiction, the importance of looking at the arbitration in the round to see whether or not an

issue was live, and in relation to challenges based on natural justice, the question of whether an issue had been sufficiently raised by or to the parties.

2 The present appeal arises out of the decision of the judge in the General Division of the High Court (the "Judge") in *CIZ v CJA* [2021] SGHC 178 (the "GD") to set aside part of an arbitral award (the "Award") on the basis that the tribunal (the "Tribunal") had exceeded its jurisdiction. The Judge held that the Tribunal had, in finding in favour of the appellant on one of its two claims, interpreted certain articles in an agreement in a manner contrary to the case advanced by the appellant in the arbitration. In particular, he held that since the appellant had run its entire case on the premise that there was a subsisting agreement and therefore no issue of expiry of the original agreement arose, it was an excess of jurisdiction for the Tribunal to have found that there was no subsisting agreement, but that the original agreement could be interpreted in a manner which allowed the appellant's claim.

3 The main issue in this appeal is therefore whether the Judge had correctly held that the Tribunal's findings and in particular its interpretations of these articles were not within the scope of submission to the Tribunal. The respondent has also sought to affirm the Judge's decision on the grounds of a breach of natural justice in the making of the Award, an argument which it had canvassed at the proceedings below. Having considered the parties' arguments, we are of the view that the Judge erred in characterising the appellant's case in the arbitration as entirely run on the basis of a subsisting agreement. Further, the Tribunal had sufficiently apprised the parties of its provisional thinking. That indication was also picked up in part by the appellant in its closing submissions in the arbitration. The respondent therefore had the opportunity to



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address these points. We accordingly arrive at a different conclusion from the Judge and allow the appeal. We give our reasons below.

## Facts

### *Background to commencement of arbitration*

4 In this judgment, all names and identifying details of the parties have been changed to protect the confidentiality of the parties.

5 Three corporate entities, incorporated in three different jurisdictions, were involved in the transactions that led up to the arbitration. First, there was Z Co, which initially transacted with the respondent, a state-owned company. Then, the appellant, a company in the business of providing business and management consultancy services came onto the scene at the request of one Mr PM, who is the person who controls Z Co and the appellant.

6 On or around 7 September 2012, the respondent and Z Co entered into a consultancy agreement (the "Consultancy Agreement"). Pursuant to the Consultancy Agreement, Z Co was to provide consultancy services to the respondent in relation to mergers and acquisitions of oil and gas fields around the world. In exchange, the respondent would pay Z Co a fee ("Success Fee") upon the latter's presentation of an "Opportunity" and the respondent's completion of an acquisition of an interest in an oil field pursuant to a sale and purchase agreement or similar document ("SPA").

7 On or around 21 October 2013, the respondent, Z Co and the appellant executed a Deed of Novation, pursuant to which the Consultancy Agreement was novated to the appellant and the respondent and its term extended from 31 December 2012 to 31 December 2013. By the Deed of Novation, the appellant



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undertook to perform the terms of the Consultancy Agreement as if it were Z Co, and the respondent agreed to perform the terms of the Consultancy Agreement as if the appellant had been an original party thereto in place of Z Co. Additionally, the appellant and the respondent entered into an Assignment, Amended and Restated Consultancy Agreement (the "Amended Agreement"). The terms of the Amended Agreement were, in substance, the same as those of the Consultancy Agreement and, like the Consultancy Agreement, it was to expire at the end of 2013. The three contracts all provided for disputes to be finally resolved by arbitration before the Singapore International Arbitration Centre ("SIAC").

8 Thereafter, a dispute arose over whether the appellant was entitled to payment of Success Fees under the Amended Agreement. The appellant sought payment for the following opportunities which it contended it had presented to the respondent:

(a) The acquisition of shares by the respondent in X Co, an operator and owner of oil fields (the "X Opportunity"); and

(b) A collaboration between the respondent with Y Co, an integrated energy company.

(collectively, the "Opportunities").

9 The respondent rebuffed the appellant's claim on the basis that the Consultancy Agreement and the Amended Agreement had expired and nothing was due thereunder.

10 By way of a Notice of Arbitration dated 17 April 2018, the appellant commenced arbitration proceedings against the respondent in the SIAC. The



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appellant alleged that "[d]espite the successful completion of the Opportunities, and repeated requests … [the respondent] ha[d] failed, refused, and/or neglected to pay [it] the corresponding Success Fees under Article 2" of the Consultancy Agreement. The three-member Tribunal was constituted on 1 October 2018. It comprised Mr Lok Vi Ming SC, Mr Christopher Lau SC and Mr VK Rajah SC (Presiding Arbitrator).

### *The arbitral proceedings*

11 In order to appreciate the respective cases put forward by the parties in the arbitration, one must be familiar with the provisions of the Consultancy Agreement that were in issue. We therefore set out the relevant articles below:

> **ARTICLE 1**
> **SCOPE OF SERVICES**
>
> 1.1 [The appellant] will, at its own cost and expense, provide to [the respondent] information with respect to opportunities that are available to [the respondent] to acquire an interest in producing oil and gas fields around the world where the API gravity of the oil is in excess of 20 degrees ("**Opportunity**"). …
>
> …
>
> 1.3 Any Opportunity presented to [the respondent] by [the appellant] shall be in writing and signed by a representative of [the appellant] and shall contain the following information:
>
> …
>
> …
>
> **ARTICLE 2**
> **SUCCESS FEE**
>
> 2.1 Subject to the conditions in Article 2.3, if following the presentation of an Opportunity, [the respondent] Completes an acquisition for an interest in an oil field that has been identified by [the appellant] pursuant to Article 1.3 ("**Acquired Interest**"), [the respondent] shall pay to



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[the appellant] the fee described in Article 2.2 below ("**Success Fee**").

2.2 The Success Fee shall be calculated as follows:

…

2.3 The Success Fee will only be payable to [the appellant] if:

2.3.1 [The appellant] has presented the Opportunity in the manner described in Article 1.3 ("**Opportunity Notice**");

2.3.2 [The respondent] has not advised [the appellant] in writing within ten (10) business days of receiving notice of the Opportunity that it is already aware of the Opportunity and plans to pursue the Opportunity on its own without the assistance of [the appellant] ("**Rejection Notice**");

2.3.3 [The respondent] or an affiliate or third party designated by [the respondent] has entered into a sale and purchase agreement (or similar form of acquisition document howsoever titled) ("**SPA**") with respect to the Opportunity;

2.3.4 The SPA that includes the acquisition of the Opportunity by [the respondent] has Completed; and

2.3.5 [The appellant] has performed all the Services in the manner requested by [the respondent] and prior to the time the SPA has Completed.

2.4 Notwithstanding the foregoing, [the respondent] shall have no obligation to pay the Success Fee or any other form of compensation to [the appellant] (including without limitation compensation based on any claim of merit or effort by [the appellant]) under the following circumstances:

2.4.1 [The respondent] provides a Rejection Notice to [the appellant] …; or

2.4.2 the SPA that is the subject of the Opportunity does not Complete for any reason …

2.5 The Success Fee shall be payable by [the respondent] upon Completion of the SPA.

2.6 [The respondent] shall have no obligation to reimburse [the appellant] for any out-of-pocket expenses incurred by



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[the appellant] in connection with the presentation of an Opportunity or its performance of the Services.

…

**ARTICLE 3**
**EXCLUSIVITY**

3.1 During the term of this Agreement, the Parties shall not enter into the same or similar arrangements with any third parties regarding the subject matter of this Agreement, provided however, such requirement shall not prevent [the respondent] from pursuing the acquisition of any interest that may be the subject of this Agreement if such interest is presented to [the respondent] independent of an Opportunity presented to [the respondent] by [the appellant].

3.2 Upon the expiration or earlier termination of this Agreement, the exclusivity described in Article 3.1 shall terminate immediately, and the Parties shall no longer have any further obligation to each other under this Agreement, provided however, if a SPA has been executed by [the respondent] that has not Completed at the time this Agreement expires, then, subject to the termination provisions of Article 5, [the respondent] shall be obligated to pay the Success Fee.

**ARTICLE 4**
**TERMS OF AGREEMENT**

The effective date of this Agreement shall commence on 01 September 2012 and expire on 31 December 2013 unless terminated earlier by either Party in accordance with the terms of Article 5.1[.] This Agreement may be extended upon mutual agreement by the Parties.

**ARTICLE 5**
**TERMINATION**

5.1 Either Party may terminate this Agreement if any of the following events occurs:

5.1.1 if the other Party's representations in Article 7 are untrue;

5.1.2 if the other Party fails to perform its obligations under this Agreement; or

5.1.3 if the other Party commences liquidation proceedings …



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> 5.2 …
>
> 5.3 If [the respondent] terminates this Agreement under Articles 5.1.1, 5.1.2, or 5.1.3, no compensation shall be due or payable to [the appellant], even if resulting from [the appellant's] efforts prior to such termination notwithstanding whether an Opportunity Notice has been presented to [the respondent] or a SPA has been executed.
>
> …
>
> **ARTICLE 12**
> **LIMITATION OF ACTIONS**
>
> No action or proceeding arising out of this Agreement may be brought by either Party more than three months after the expiry or termination of this Agreement.

12 In its Statement of Claim in the arbitration, the appellant claimed damages in the form of Success Fees as provided for in Article 2 of the Consultancy Agreement. It pleaded that there was an "Agreement" between it and the respondent comprising the Deed of Novation, the Consultancy Agreement and an oral agreement between the parties' representatives. This reference to an "Agreement" which was partly oral and partly written allowed the appellant to further plead that despite the expiration of the Consultancy Agreement the Success Fees were still payable because:

> (a) It was orally agreed between parties that the Consultancy Agreement would be extended for a further period and that it would continue providing the services in question to the respondent as agreed in the Consultancy Agreement. The respondent had also promised it that the said agreement would be reflected in a written contract to be executed in due course.
>
> (b) Further or in the alternative, there was an implied contract between parties on the same terms as the Consultancy Agreement, which



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governed the interim period between the expiry of the Deed of Novation and the execution of a new written contract.

(c) In any event, the respondent was estopped from denying that the Consultancy Agreement was no longer valid by virtue of the fact that the Deed of Novation had expired. This was because:

(i) The respondent was under a duty to disclose or inform it of the non-existence of a subsisting agreement but did not do so (estoppel by representation).

(ii) Further or in the alternative, the parties shared an assumption that the Consultancy Agreement was still valid and continued to work notwithstanding the expiration of the Consultancy Agreement (estoppel by convention).

13 The appellant further mounted an alternative claim. It averred that, in the event the Tribunal did not find that there was such a subsisting agreement beyond the expiry date stated in the Deed of Novation, the appellant was entitled to a reasonable sum based on the law of unjust enrichment. Although the appellant referred only to the Consultancy Agreement and the Deed of Novation in its Notice of Arbitration and its Statement of Claim, no issue arose out of this. In its Response to the Notice of Arbitration, the respondent accepted that the dispute in relation to the Deed of Novation and the Amended Agreement had been referred to arbitration.

14 In its Defence, the respondent denied the existence of any subsisting agreement after the Amended Agreement expired on 31 December 2013. It pleaded that:



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(a) There was no oral agreement as alleged by the appellant, or any such agreement for a renewal or extension of the Amended Agreement, or a fresh agreement to appoint the appellant as its consultant after 31 December 2013. The appellant also could not satisfy the basic requirements to establish a contract.

(b) There was no implied contract.

(c) It was not estopped as claimed by the appellant. It had repeatedly informed the appellant that the Amended Agreement had expired on 31 December 2013, and there was no shared assumption of any agreement between parties after 31 December 2013.

(d) The appellant's claim was time-barred, as Article 12 of the Amended Agreement provided that no action or proceeding arising out of the Amended Agreement could be brought by either party more than three months after the expiry of the same. The appellant was additionally not entitled to any reasonable sum for work done, as such a claim would be precluded by the terms of the Amended Agreement during its pendency, and no unjust enrichment took place after the expiry of the Amended Agreement.

***The Award***

15 The arbitration was heard by the Tribunal over three days in October 2019. By way of the Award dated 25 September 2020, the Tribunal upheld the appellant's claims in part. It should be noted that in the Award, for the avoidance of doubt, the Tribunal specifically stated that any reference to the Consultancy Agreement included the Amended Agreement and vice versa; and any reference



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to the appellant included Z Co and vice versa, unless the context clearly indicated otherwise.

16 In the Award at [238]–[246], the Tribunal rejected the appellant's assertion of an "Agreement" that was partly oral and partly written. It found that nothing on the facts or in the terms of the Amended Agreement obliged the respondent to extend the duration of the Amended Agreement during or after its pendency. Further, there was no extension by mutual agreement after 31 December 2013. Nor was there any implied contract as such would be contrary to the terms of the Amended Agreement. Instead, the Tribunal treated the parties' contract as being entirely contained in the Consultancy Agreement, the Deed of Novation and the Amended Agreement and rendered its decision in favour of the appellant on the basis of its interpretation of those documents and parties' obligations thereunder.

17 The following summary of the findings of the Tribunal make its reasoning clear:

> (a) After setting out parties' respective positions in the Award, the Tribunal stated that it considered that the "real matter at the heart of the proceedings [was] not whether the [Amended Agreement] was extended and/or a new contract came into existence after it expired", but rather whether the appellant could maintain claims in respect of the Opportunities proposed by it (or Z Co) which had been accepted by the respondent before the expiry of the Amended Agreement (Award at [247]). The determination of that issue turned on the interpretation of the material terms of the Amended Agreement (Award at [249]).



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(b) The appellant had performed all the services requested of it by the respondent (Award at [256]–[257]).

(c) As the Opportunities were introduced by Z Co and thereafter accepted and acted upon by the respondent before the Consultancy Agreement was formally entered into, the formal notice requirements did not apply to them (Award at [267]). This was based on a construction of the Consultancy Agreement and the term "Opportunity" in Article 1.1 in a common-sense way, to give business efficacy and meaning to what the parties as reasonable business entities would have contemplated when the Consultancy Agreement was entered into (Award at [264]). After it was entered into, both parties regarded these two transactions as Opportunities that were already embraced by the Consultancy Agreement and consistently acted on that basis (Award at [267]).

(d) A SPA need not be entered into and/or completed before the expiry of either the Consultancy Agreement or the Amended Agreement (Award at [274], [275] and [279]). The Tribunal came to this conclusion because it found that:

(i) There was nothing in Article 2.3 that suggested that the Opportunity m ust be completed before the expiration of the Amended Agreement;

(ii) Article 2.4 read with Article 2.4.2 made it clear that the Success Fee was still payable to the appellant unless (A) a Rejection Notice was served on it within ten days; and (B) the SPA that was the subject of the Opportunity did not complete for any reason;



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(iii) Article 3.2 made it plain that upon the expiry of the Amended Agreement, there was no release for the respondent from its obligation to pay the Success Fee. All that happened on the expiry of the Amended Agreement was that the exclusivity enjoyed by the appellant in referring to the respondent further Opportunities would terminate. However, the obligation to pay the Success Fee continued. Although the article referred to a SPA that was being executed, it was plain this also extended to a SPA that was being negotiated or in relation to an Opportunity that bore fruit later;

(iv) Articles 2.4 and 2.4.2, which specifically addressed when the obligation to pay the Success Fee terminated, did not refer to the necessity of an executed SPA being in existence before the Consultancy Agreement expired; and

(v) Article 5.3 which came under the umbrella of Article 5 (captioned "Termination") further reinforced this construction. It provided that if the Amended Agreement was terminated by the respondent as a result of the appellant's fault, misconduct or liquidation, then no compensation would be payable to the appellant, even if the compensation resulted from its efforts prior to such termination. This would be the case notwithstanding whether an Opportunity Notice had been presented to the respondent or a SPA had been executed. The Success Fee arrangement was thus a long fee tail arrangement, and all that was required was the presentation of an Opportunity by the appellant which had been accepted by the respondent.



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(e) Once it was recognised that a SPA may be entered into or negotiations in relation to an Opportunity could continue even after the expiry of the Amended Agreement, it was plain that Article 12 did not preclude the arbitration proceedings from being brought. However, Article 12 with its short timeframe was not without meaning or effect, and would apply, for example, if either party were to dispute a termination by the other (Award at [275]).

(f) Under the terms of the Consultancy Agreement and the Amended Agreement and due to the very complex nature of the transactions they encompassed, unless expressly circumscribed by explicit clauses, the right to recover Success Fees was not lost as long as a clear link to the successful completion of the Opportunity was shown. The appellant's claims for Success Fees were not time barred by Article 12 (Award at [279]).

(g) The requirements concerning the Success Fee claims stipulated by Articles 2.1, 2.3.1, 2.3.2 and 2.3.5 of the Consultancy Agreement were satisfied (Award at [284]).

(h) The appellant's claim for Success Fees as regards the X Opportunity was allowed, as the subject of an acquisition in 2016, namely, shares in X Co, was exactly the same as in an earlier transaction that Z Co and the appellant had worked on previously and which was later aborted (Award at [301] and [312]). However, the appellant's claim for Success Fees as regards the Y Opportunity failed as the eventual transaction did not fall within the scope of the Amended Agreement (Award at [319]–[321]).



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***The respondent's application to set aside the Award***

18 On 9 December 2020, the respondent applied to the High Court seeking a setting aside of the parts of the Award relating to the US$5,066,106.86 awarded in favour of the appellant, being its Success Fee as regards the X Opportunity. It relied on s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Art 34(2)(*a*)(iii) of the UNICTRAL Model Law of International Commercial Arbitration (the "Model Law") to contend that the following findings of the Tribunal should be set aside:

(a) The Tribunal's finding that the appellant had the right to recover Success Fees even after the Consultancy Agreement or the Amended Agreement had expired;

(b) The Tribunal's finding that the appellant's right to recover Success Fees was not lost as long as a clear link to the successful completion of the Opportunity could be shown, even after the Consultancy Agreement or the Amended Agreement had expired; and

(c) The Tribunal's finding that Article 12 of the Consultancy Agreement or the Amended Agreement did not curtail the appellant's right to claim for Success Fees more than three months after the Consultancy Agreement or the Amended Agreement had expired.

**Decision below**

19 The Judge allowed the respondent's application to set aside the Award relating to the X Opportunity on the ground that the Tribunal had exceeded its jurisdiction. In the GD, he observed that:



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(a) The appellant's claim for damages in the arbitration proceedings had been based on, according to its pleadings: (i) an oral agreement between parties to extend the Amended Agreement for a "further period", during which it would continue to provide the services under the Amended Agreement, which would be subsequently reflected in a written contract; (ii) alternatively, an implied contract between parties on the same terms as the Consultancy Agreement, before a new written contract would be entered into; and (iii) that the respondent was estopped from asserting that the Consultancy Agreement was no longer valid (GD at [25]).

(b) The respondent's response was to argue that there was no agreement to renew or extend the Amended Agreement or enter into a fresh agreement to appoint the appellant as its consultant. It had also argued that under Article 3.2 of the Amended Agreement, parties had no further obligation to each other on the expiry of the Amended Agreement. The carve out in Article 3.2 (for where a SPA had been executed but not completed at the time of the expiry of the Amended Agreement) did not apply. Furthermore, the appellant's claims were time-barred by virtue of Article 12 of the Amended Agreement. Finally, the acquisition of the shares in X Co in 2016 was different from the earlier X Opportunity Z Co had presented to the respondent in 2012 (GD at [27]).

(c) However, the appellant's response on Articles 3.2 and 12 was to reiterate its position that there was a subsisting agreement. Article 12 therefore did not come into effect since the implied contract continued to exist. It also denied the respondent's claim that the acquisition of



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shares in X Co in 2016 was different from the earlier X Opportunity (GD at [28]).

(d) Parties' positions did not change in the course of their closing submissions and the appellant's reply submissions (GD at [29]–[31]).

20 The Judge observed that the substance of the Tribunal's decision was that although the Amended Agreement had expired without any SPA having been signed and there was no subsisting agreement thereafter, the appellant could claim its Success Fee because: (a) Article 3.2 did not require a SPA to be entered into before the Amended Agreement expired; it was sufficient if there was a "clear link to the successful completion of the Opportunity"; and (b) since there was no requirement that a SPA be entered into before the Amended Agreement expired, Article 12 did not bar the appellant from claiming its Success Fee (GD at [37]).

21 The Judge was of the view that since the Tribunal found that there was no subsisting agreement after the Amended Agreement expired on 31 December 2013, "the very premise" of the appellant's claim had been rejected and that ought to have been the end of its claim. Yet, the Tribunal went on to find that the appellant could nevertheless claim its Success Fee based on grounds that were nowhere to be found in the appellant's Notice of Arbitration, pleadings, or submissions in the arbitration proceedings (GD at [55]–[56]). The Tribunal's findings on Articles 3.2 and 12 were in fact inconsistent with the positions taken by the appellant on those Articles. These grounds for its decision were thus "entirely different from [the appellant's] case in the arbitration proceedings" and the Tribunal's findings could not be described as ancillary to the matter submitted to arbitration (GD at [57]–[59]). In his view, the case was similar to



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the situation in *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 ("*GD Midea*"), where the arbitrator's decision had been based on a finding that cl 4.2 of the agreement in question was breached. Yet, such a breach was never part of the claimant's case, and the arbitrator's interpretation of cl 4.2 was also inconsistent with the claimant's position (GD at [60]). Furthermore, in the present case, the appellant had decided not to change its framing of its case when asked by the Tribunal about Article 3.2. Rather, in its closing submissions and reply submissions, it had maintained its case as pleaded. The Tribunal therefore should have respected the appellant's decision as to how it chose to frame its case (GD at [61]).

22 In light of the Judge's conclusion on the Tribunal's findings with respect to Articles 3.2 and 12 of the Amended Agreement, it was not necessary for him to deal with the respondent's other submission on a breach of natural justice. Nor was it necessary to deal with its claims on an excess of jurisdiction and a breach of natural justice with respect to the Tribunal's findings that: (a) the acquisition of shares in X Co in 2016 was the same transaction as the X Opportunity presented by Z Co to the respondent; and (b) a certain sum formed part of the quantum of the Success Fee. However, the Judge expressed the view that these were "merely attempts to appeal against the Tribunal's findings and were therefore not sufficient to set aside the Award" on the X Opportunity (GD at [65]).

23 The following orders made in the Award were therefore set aside:

(a) The Tribunal's order that the respondent was to pay to the appellant, as the latter's Success Fee for the X Opportunity, the



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sum of US$5,066,106.86 within 21 days of the date of the Award;

(b) The Tribunal's order that the respondent was to pay the appellant interest on US$5,066,106.86 at 5.33% per annum from 17 April 2017 till the amount was paid in full; and

(c) The Tribunal's order that the respondent was to pay the appellant, in respect of legal fees and arbitration expenses, the net sum of S$228,822.87.

Costs of the application in the sum of S$7,500.00 plus disbursements fixed at S$19,210.60 were ordered to be paid by the appellant to the respondent.

## The parties' cases on appeal

### *The appellant's case*

24 On appeal, the appellant first submits that the Judge erred by taking a "narrow and limited view" of its pleaded case at the arbitration, by confining its case to its entitlement to the Success Fee on the basis of an oral agreement, an implied contract, or estoppel. However, the appellant's claim as set out in its Notice of Arbitration had been for "Success Fees under Article 2 of the … Agreement"; and as stated in its Statement of Claim, for "the Success Fees due and payable to them upon the successful completion of the Opportunities, and/or any remuneration at all".

25 It furthermore disagrees with the Judge's apparent view that findings by a tribunal that differ from a claimant's case would constitute matters falling outside the scope of submission to the tribunal. Rather, the jurisdiction of a tribunal would also encompass the Defence and other submissions made during



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the arbitration, and regard must be had to all the issues that surface during the course of the arbitration. It is submitted that the Judge therefore ought to have at the very least considered both parties' pleadings and their respective Lists of Issues in ascertaining the scope of submission to the Tribunal.

26 Second, the appellant argues that the Tribunal's findings on Articles 3.2 and 12 of the Amended Agreement were based on matters that were pleaded or arose from parties' pleadings. Following clarifications from the Tribunal, both parties' second Lists of Issues had also acknowledged that Articles 3.2 and 5 were in issue before the Tribunal, and Article 12 was also raised by the respondent in its List of Issues. The appellant submits that the present case is distinguishable from *GD Midea* since, in the latter case, the issue of a breach of cl 4.2 had not arisen from the Notice of Arbitration, the pleadings, the Agreed List of Issues, or the submissions in the arbitration. The learned Judge in *GD Midea* had further found that the tribunal's letter on post-hearing submissions also did not suggest that it was considering the question of whether cl 4.2 had been breached, unlike the present case where the Tribunal had specifically raised Articles 3.2 and 5.3 for parties to clarify.

27 Alternatively, the appellant argues that the Tribunal's interpretations of Articles 3.2 and 12 of the Amended Agreement were consistent with or at least flowed reasonably from the appellant's submissions in the arbitration. For example, the appellant had argued that Article 3.2 of the Amended Agreement "does not affect nor detract from [its] entitlement to receive the Success Fee, or such other form of remuneration or compensation, from [the respondent] upon the completion of the opportunity or opportunities subsequently". The Tribunal's interpretation of Article 12 of the Amended Agreement then "reasonably flow[ed]" from its interpretation of Article 3.2 of the Amended



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Agreement, in line with the commercially sensible approach that was submitted by the appellant in its closing submissions. At most, the Tribunal's interpretations of the provisions in the Amended Agreement were errors of fact, which are insufficient to set aside an arbitral award under Article 34(2)(*a*)(iii) of the Model Law.

28 Third, again in the alternative, the Tribunal's findings were based on matters that were ancillary to the dispute and which were known to all parties, therefore falling within the scope of submission to arbitration. The parties' respective Lists of Issues had provided that any omission therefrom would not be taken as a waiver of any issue. The question of the effect of Article 3.2 would follow as an ancillary issue once the Tribunal agreed with the appellant that a Success Fee under Article 2 of the Consultancy Agreement was payable to it upon the successful completion of an Opportunity introduced within the term of the Consultancy Agreement or the Amended Agreement. The Tribunal's interpretation of Article 12 also flowed reasonably from parties' submissions and its findings.

29 Finally, the appellant argues that even if the Tribunal's findings on Articles 3.2 and 12 of the Amended Agreement are found to have been made in excess of jurisdiction, its claim for Success Fees was not infected by these findings, and the Award should nevertheless not be set aside.

***The respondent's case***

30 First, the respondent submits that since the appellant's case in the arbitration rested wholly on there being a subsisting contract with the respondent and the Tribunal had found against the appellant on its pleaded case, the Tribunal should have found that the appellant had no claim for Success Fees.



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31 Second, it argues that the mere mention of Articles 3.2 and 12 in the pleadings did not give the Tribunal *carte blanche* to adopt a chain of reasoning that had no nexus with the cases advanced by parties. The appellant had doubled-down on its position as to a subsisting agreement when the Tribunal had asked parties about Article 3.2 and to consider "the position of an [O]pportunity [N]otice that has been presented but not executed". Further, it was always the appellant's case that it could bypass Article 12 because there was a continuing agreement and/or Article 12 was rendered unenforceable pursuant to the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA"). The respondent had also objected to the belated inclusion by the appellant of the issue of the interpretation of Article 3.2 in its second List of Issues, which was submitted after the evidential hearing. Furthermore, it argues that merely placing the issues in a List of Issues does not give tribunals the jurisdiction to deal with them without reference to the positions advanced by parties, and the Tribunal was not entitled to disregard the parties' positions in coming to its conclusion. It argues that the Judge was correct to rely on *GD Midea* in coming to his decision given that, as in the present case, the arbitrator's interpretation of the clause in question was inconsistent with the position taken by parties. Further, the fact that the appellant had doubled-down on its case as regards a subsisting agreement when queried by the Tribunal on the effect of Article 3.2 strengthens the submission that the Tribunal ought not depart from parties' submissions.

32 The respondent also submits that the Tribunal's conclusions did not reasonably flow from parties' arguments. It argues that the appellant's allegation that the Tribunal's interpretations of Articles 3.2 and 12 are "at best errors of fact" are bald assertions.



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33 Third, the respondent argues that the Tribunal's findings *vis-à-vis* Articles 3.2 and 12 were not ancillary to the dispute submitted by parties. There was no reasonable connection between parties' submissions during the arbitration and the Award, not least since the position taken by the Tribunal was "diametrically opposed" to that of both parties. On Article 12, the appellant had also never advanced an interpretation that was in any way akin to the Tribunal's conclusion.

34 Finally, the respondent argues that since the Tribunal's findings on Articles 3.2 and 12 were central to its Award in the appellant's favour, the appellant's position that the Award should nevertheless be upheld is unsustainable. It further argues that pursuant to O 57 r 9A(5) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed), the appeal can also be dismissed on the additional ground that there was a breach of natural justice. In support of this, the respondent points to alleged prejudice suffered by it: as the interpretation of Article 3.2 was not squarely put to it before the evidential hearing, the questions that were asked of Mr PM related to the appellant's case on a subsisting agreement. The respondent's argument appears to be that "any finding of prejudice … would also amount to a breach of natural justice".

**Issues before this court**

35 The following main issues arise for this court's consideration:

(a) Whether the Judge had correctly held that the Tribunal's findings, including its interpretations of Articles 3.2 and 12, were not within the scope of submission to the Tribunal and therefore in excess of its jurisdiction; and



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(b) If not, whether there was a breach of natural justice by the Tribunal in the making of the Award, such that the setting aside of the impugned portions of the Award should nevertheless be upheld.

**Our decision**

36 It appears that although the respondent relies on the grounds of an excess of jurisdiction and a breach of natural justice to set aside the impugned portions of the Award, its allegations in respect of both grounds rest substantially on the same factual matrix. While the respondent has not elaborated on its additional ground of a breach of natural justice in the present proceedings, it had in the proceedings before the Judge suggested that the latter largely followed from the former. For example, it was argued that because the Tribunal adopted its own interpretation of Article 12, the respondent was unable to "put its interpretation of Article 12 to the appellant's witnesses or test it under cross-examination. To take reference from the analysis of this court in *CDM v CDP* [2021] 2 SLR 235 ("*CDM*"), if it is found that the Tribunal did not exceed its jurisdiction in taking a certain view of the Success Fee arrangement such that the appellant was entitled to claim the Success Fee, this finding would be fatal to the respondent's argument on a breach of natural justice (*CDM* at [16]). As observed by this court in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"), "in the ordinary run of cases … it is only logical and commonsensical that the answer to one should be the same as to the other" (at [71]).

***Whether the Tribunal acted in excess of jurisdiction***

37 The principles governing a challenge on the basis of Art 34(2)(*a*)(iii) of the Model Law for an excess of jurisdiction were recently restated in



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*Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 ("*Bloomberry*"). Article 34(2)(*a*)(iii) of the Model Law reflects the fundamental principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties (*Bloomberry* at [68]). However, a practical view has to be taken regarding the substance of the dispute which has been referred to arbitration (*Bloomberry* at [68]). It is also well-established that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Art 34(2)(*a*)(iii) of the Model Law, as a distinction has to be drawn between the erroneous exercise by an arbitral tribunal of an available power vested in it and the purported exercise by the arbitral tribunal of a power which it did not possess (*Bloomberry* at [69]).

38 A two-stage inquiry is followed in assessing whether an arbitral award should be set aside for an excess of jurisdiction: (a) first, the court must identify what matters were within the scope of submission to the arbitral tribunal; and (b) second, whether the arbitral award involved such matters, or whether it involved a "*new difference* … outside the scope of the submission to arbitration and accordingly would have been *irrelevant to the issues requiring determination*" [emphasis in original] (*CDM* at [17]; *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [40]). Further, in *CDM*, this court held (at [18]) that the question of what matters were within the scope of the parties' submission to arbitration would be answerable by reference to five sources: the parties' pleadings, the list(s) of issues, opening statements, evidence adduced, and closing submissions at the arbitration. This was an elaboration of the principle that in considering whether the jurisdiction has been exceeded, the court must look at matters in the round to determine whether the issues in question were live issues in the arbitration. In doing so, it does not



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apply an unduly narrow view of what the issues were: rather, it is to have regard to the totality of what was presented to the tribunal whether by way of evidence, submissions, pleadings or otherwise and consider whether, in the light of all that, these points were live.

*Scope of parties' submission to arbitration*

(1) The parties' pleadings

39 As noted above, the appellant in commencing the arbitration claimed damages in the form of Success Fees as provided for in Article 2 of the Consultancy Agreement. The respondent then took the position that as the Consultancy and Amended Agreements had expired, parties no longer owed any obligation to each other. Thus, in its Statement of Claim, the appellant pleaded the existence of an oral agreement to extend the Amended Agreement, or an implied contract between parties, or that the respondent was estopped from asserting that the Agreement was not valid, as noted by the Judge (GD at [25]).

40 Where we think the Judge may have erred, however, was in expressing the view that a tribunal is not entitled to depart from the pleadings to the extent of making its decision based on a ground that has not been pleaded at all or is not ancillary to the pleadings (GD at [50]). That appeared to inform his approach to the case: he found that since it was "never [the appellant's] case in the arbitration proceedings that it had a valid claim if there was no subsisting agreement after the Amended Agreement expired", the Tribunal exceeded its jurisdiction in finding that the appellant had a valid claim despite the expiry of the Amended Agreement (GD at [56]). But that approach is inconsistent with the principle that the court must cast a much wider eye than that, and have regard



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to the totality of what was placed before the Tribunal, as we have observed previously.

41 In its Notice of Arbitration, the appellant stated that pursuant to the Amended Agreement, it had presented two key Opportunities to the respondent. Yet, "[d]espite the successful completion of the Opportunities, and repeated requests … [the respondent] ha[d] failed, refused, and/or neglected to pay [it] the corresponding Success Fees under Article 2" of the Consultancy Agreement. It therefore sought, *inter alia*, an award that the respondent "pay [it] damages". The respondent responded by arguing that the appellant was not entitled to Success Fees, since a holistic interpretation of the Amended Agreement would indicate that parties intended and bargained that any claim for a Success Fee had to crystallise (*ie*, a SPA had to be completed) before the expiry of the Amended Agreement. It then also raised the issue of Article 12 of the Amended Agreement, claiming that thereunder the appellant was contractually time barred from commencing any claim arising out of the Amended Agreement.

42 In its Statement of Claim, the appellant pleaded that it was entitled to the payment of a Success Fee pursuant to Article 2 of the Consultancy Agreement:

> [66] The [appellant's] dispute with the [r]espondent arose for two primary reasons:
>
> (1) The [r]espondent's refusal to execute a written contract to formally extend the Consultancy Agreement so as to enable to[*sic*] [appellant] to rely on such written contract to claim for the Success Fees as provided for in Article 2 of the [Consultancy Agreement]; and
>
> (2) The [r]espondent's refusal to pay the [appellant] the Success Fees due and payable to them upon the successful completion of the Opportunities, and/or any remuneration at all.



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> …
>
> [86] It is the [appellant's] case that the [r]espondent has breached Article 2.5 of the [Consultancy Agreement] read with Articles 2.2 and 2.3 of the [Deed of Novation] by neglecting, failing and/or refusing to pay the [appellant] the corresponding Success Fees under Article 2 of the [Consultancy Agreement] upon the successful completion of the Opportunities, despite the [appellant's] numerous requests and reminders.

43 It was on this basis that the appellant mounted arguments to support an oral extension of the agreement (pursuant to which it continued to provide its services to the respondent), an implied contract on the same terms as the Amended Agreement, and estoppel. Although, before us, counsel for the appellant argued that it had claimed an "expectation loss arising from the [r]espondent's breach of the [Agreement]" which in turn referenced alleged breaches of Article 2.5 read with Articles 2.2 and 2.3 of the Deed of Novation, it is not so clear in our view that the appellant had pleaded in its Statement of Claim a case which asserted that those rights continued to subsist in the event that there was no oral agreement, implied contract or operation of the doctrine of estoppel as claimed. Indeed, it was these three grounds which were referenced in the said claim for expectation loss. Certainly, there was no indication therein of the manner in which the Tribunal eventually interpreted Article 2 of the Amended Agreement.

44 On the other hand, the respondent in its Defence raised the issue of whether parties owed obligations to each other following the expiry of the Amended Agreement. It pleaded that "pursuant to Articles 3.2, 4 and 5.2 of the [Amended Agreement] … the [Amended Agreement] expired on 31 December 2013 and thereafter, the [appellant] and [r]espondent did not owe any further obligations to each other". In this regard, it averred that under Article 3.2, the



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only exception would be if a SPA was executed but not completed before the expiration of the Amended Agreement. In such a case, the respondent would still be liable to pay Success Fees to the appellant. However, the exception did not apply given that no SPA was executed before the expiry of the Amended Agreement on 31 December 2013. It reiterated that Article 12 had the effect that no action or proceeding could be brought by either party after 31 March 2014, and that the appellant's action in the arbitral proceedings were time-barred as a result, having been commenced more than four years after the time bar was effective. The appellant's Reply denied that this was the effect of Articles 3.2, 4 and 5.2 or Article 12. It reiterated the plea that this was because the Amended Agreement continued to subsist between parties on the basis of an oral agreement or implied contract, or that the respondent was estopped from asserting that it was no longer valid.

45 In sum, while the issues of the effects of Articles 3.2 and 12 indeed arose in the course of the parties' pleadings, it is not clear in our view that the appellant had, at least at this point, raised the possibility of a valid claim under Article 2 of the Amended Agreement arising in respect of a SPA executed after the expiry of the Amended Agreement. This only clearly appeared in the appellant's closing submissions, following questions from the Tribunal.

(2) The parties' opening statements

46 The parties' opening statements did not significantly differ from their pleadings. The appellant again maintained that there was a subsisting agreement beyond the expiry date in the Deed of Novation or that the respondent was estopped from denying the same. In the event the Tribunal was of the view that there was no subsisting agreement, it claimed a reasonable sum on the basis of unjust enrichment. The respondent asserted that parties ceased to have any



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further obligation to each other following the expiry of the Amended Agreement, in view of Articles 3.2 and 5.2 of the Amended Agreement; and that the appellant's claim was time-barred pursuant to Article 12 of the same.

(3) The parties' Lists of Issues

47 The parties were unable to agree on a List of Issues. The appellant's first List of Issues, which was submitted before the evidentiary hearing, reflected the matters raised in its opening statement, namely, *inter alia*, whether there was a subsisting agreement between parties that extended beyond the expiry date in the Deed of Novation and whether there was a breach of agreement between them. Similarly, the respondent's first List of Issues included whether the appellant had complied with the requirements for a Success Fee to be paid to it under the written agreement(s); whether parties' agreement was limited to the terms of the Deed of Novation and the Amended Agreement; and whether parties owed each other any obligations following the expiry of the Amended Agreement, including whether there was any obligation to extend the Amended Agreement after it had expired.

48 However, the appellant's second List of Issues, which was submitted following the close of the evidential hearing, tracked far more closely the eventual reasoning of the Tribunal, *ie*, that on an interpretation of Article 2 of the Amended Agreement, the respondent would be obliged to pay a Success Fee in relation to an Opportunity that was embraced by the Consultancy Agreement or Amended Agreement, even if the Opportunity only bore fruit subsequently. This was not surprising given that the Tribunal had prompted parties to consider such a possibility. On the first day of the hearing, the Tribunal queried the respondent on whether there could be liability after the pendency of the Amended Agreement:



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CHAIRMAN: Can I understand your case? The facts are different, but the legal construction of the agreement, the consultancy agreement. So if there is an opportunity and the SPA is signed during the pendency of the consultancy agreement, then there is liability. If there is an opportunity and the SPA is executed but not completed -- … during the pendency of the consultancy agreement, then there is no liability?

MR SINGH: Executed but not completed during the term of the agreement, there is liability.

CHAIRMAN: There is liability. So, so long as it is executed during the pendency of the consultancy agreement, there is liability. You acknowledge?

MR SINGH: Yes.

CHAIRMAN: *Third scenario; if an opportunity is presented, it continues to be negotiated through no fault of any party, it is not executed during the pendency of the consultancy agreement, but thereafter, and completed, you say there is no liability?*

MR SINGH: No liability save for in the original 2.4.2 had a compensation for costs and expenses.

…

CHAIRMAN: … The final agreement that is executed says [in 2.4.2] that if the SPA is not completed for any reason. So assuming it is the fault of one of the parties, I'm just looking at the permutations, is there liability? Supposing for some reason, which is not the case here, [the respondent] delays it, is there liability?

… Let's say there's a change of personnel, it forgets about the contract and then comes back to the contract six months later and renews it, is there liability?

MR SINGH: Maybe sir, but this never happened in six months.

CHAIRMAN: I'm asking you a hypothetical question. *I need to understand how we are going to construe this.*

MR SINGH: To be fair, sir, I haven't thought about that scenario.



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> CHAIRMAN: *I want both parties to think about it, because it seems to me it's not as obvious as either of the parties would like us to believe.*
>
> [emphasis added in italics]

49 Later that day, the Tribunal requested that parties "think about" the position of an Opportunity Notice that had been presented but not executed. The relevant exchange between the tribunal and counsel for the respondent is as follows:

> CHAIRMAN: …Also, perhaps I could draw your attention to 3.2. 3.2 suggests that on the expiration or earlier termination, if as far as not being executed – as far as not completed, you drew our attention to 3.2 earlier, then subject to the termination provisions of article 5, [the respondent] should be obligated to pay the success fee. It says, "subject to the termination provisions of article 5". So if you look at article 5 and it includes 5.3, if I draw your attention to 5.3, it states that:
>
> "If [the respondent] terminates this agreement …"
>
> And it spells out the relevant clauses:
>
> "… no compensation shall be …"
>
> Paid even if resulting from [the appellant's] efforts prior to such termination and look at these words:
>
> "… notwithstanding whether an opportunity notice has been presented to [the respondent] or a SPA has been executed."
>
> So if a termination notice has been provided, these two are out?
>
> MR SINGH: Yes.
>
> CHAIRMAN: But if a termination notice has not been provided, *what is the position of an opportunity notice that has been presented but not executed?* Think about it. You don't need to respond now.
>
> MR SINGH: Understand.



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> CHAIRMAN: Same goes to you, Ms Tan.
>
> Because your opening statements, neither of you have dealt with this. It may be relevant, or it may not be relevant. As I said, we think it is useful to let counsel know at an early stage what may be relevant and it could well be because you know the case at this stage better than us, but this may not be issues for consideration.
>
> [emphasis added]

50 The appellant's second List of Issues therefore raised the issue of whether it was entitled to claim remuneration from the respondent "on the construction of Article 3.2 and Article 5 of [the Agreement and/or the Amended Agreement] … in respect of an Opportunity that [was] presented in accordance with Article 1.3 of [the Agreement/Amended Agreement], which was subsequently executed and completed after the expiry date stated in the [Deed of Novation]"; as well as whether Article 2.4.2 of the Amended Agreement precluded such a payment. It had also included the issue of:

> Q: Where the [r]espondent has not terminated the [Agreement] or the [Amended Agreement] under Article 5 thereof, whether the [r]espondent is liable to compensate the [appellant] for an Opportunity Notice that has been presented to the [r]espondent but has not been completed.

In the respondent's second List of Issues, it stated that an issue was its liability to pay the appellant any sum in respect of its acquisition of shares in [X Co] in 2016. The issue of whether parties owed each other any obligation following the expiry of the Amended Agreement as well as that of a time bar was also listed by the respondent.



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(4) The evidence adduced by the parties

51 The evidence adduced by the parties at the arbitration dealt in some detail with the issue of whether the respondent could continue to be liable under the Amended Agreement following the expiry date in the Deed of Novation. Mr DT, who was Vice-President and subsequently senior Vice-President of the Upstream Business Growth of the respondent at the material time, stated in his witness statement that:

> Article 3 of the [Agreement] limits the obligations that [the respondent] and [Z Co] owe to one another … Article 3.2 of the [Agreement] provides that on the expiration of the [Agreement], [the respondent] and [Z Co] shall stop owing any obligations to one another under the [Agreement] … .

52 In his reply statement, Mr DT reiterated that after the Amended Agreement expired on 31 December 2013, the appellant was not the respondent's consultant, nor was the respondent obliged to pay it any sum. He also stated that he had told Mr PM on many occasions that he did not have a consultancy agreement and that the Amended Agreement, which had expired, had to be renewed in order for Mr PM to be appointed the respondent's consultant. On his part, Mr PM stated in his witness statement that he had "no basis to doubt the subsistence of the Agreement" after receiving confirmation to proceed with the Y Opportunity. He stated that after the expiry of the Deed of Novation after 31 December 2013, he had made repeated requests to the respondent to formally extend the term of the Amended Agreement to reflect the subsisting agreement, as well as attempted numerous times to obtain the Success Fees payable thereunder.

53 Significantly, an expert appointed by the respondent, Mr AH, had also addressed the appellant's entitlement to Success Fees in the event that an



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Opportunity the appellant introduced was concluded after the expiry of the Amended Agreement. He expressed the view that if a fee tail mechanism, which is often used to manage the situation where an opportunity concludes after the pendency of such consultancy agreements, was absent from an agreement (as in the case of the Amended Agreement), it would not have been the intention of parties to include the same. He also opined that, in agreeing to the Amended Agreement with "excessively high" Success Fees, the appellant had accepted the obligation to deliver a completed transaction, and no fee was payable as no transaction was delivered within the terms of the Amended Agreement. The respondent subsequently submitted that Article 3.2 was a fee tail clause: it provided that payment should be made to the appellant in the event a SPA completed after the expiry of the Amended Agreement, but only if the SPA was executed before the expiry of the Amended Agreement. The Tribunal however took the view that the Success Fee arrangement was a long fee tail arrangement, where the respondent's liability to the appellant depended on the presentation of an Opportunity by the appellant that had been accepted by the respondent, without the requirement of a SPA being in existence before the expiry of the Amended Agreement.

54 Additionally, the issue of the respondent's obligation to pay the Success Fee provided a SPA had been signed (*ie,* the subject of Articles 2 and 3.2 of the Amended Agreement) arose in the course of the cross-examination of Mr DT:

> Q: So would you disagree with the suggestion that regardless of whether the [appellant's Mr PM] is involved in the negotiation process for the commercial terms of the opportunity, success fees would still be payable if the respondent acquires an interest as a result of the opportunity presented?
>
> A: Let me answer carefully. *The agreement stipulates clearly the fee is payable to the consultant if SPA has been signed before the agreement expires.*



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> Q: It doesn't matter if the [appellant's Mr PM] is involved in the negotiation of the commercial terms. Correct?
>
> A: His role is a consultant. It's kind of overall.
>
> ….
>
> Q: So even if he's not involved in the commercial negotiation, as long as the respondent completes the opportunity and acquires the interest, success fees will still be payable to the [appellant]. Correct?
>
> A: *So long the SPA is signed before the contract expires.* I mean, whatever the roles and let's say the activities, responsibilities of the consultant is clearly defined, some he cannot fulfil, others he cannot fulfil, that's fine, we see it as a whole. Basically he continues to accompany us. *But the condition for paying the fee is very clear. Only if we achieve this milestone of signing the sale purchase agreement, SPA.*
>
> [emphasis added]

Accordingly, the question of whether it was necessary for a SPA to be executed during the lifetime of the Amended Agreement in order for liability to attach was in issue in the course of the arbitration.

(5) The parties' closing submissions

55 Taking reference from the clarifications raised by the Tribunal during the hearing, the appellant contended in its closing submissions that the Success Fee was payable upon the completion of the Opportunity regardless of when such a completion took place. This, it argued, was consistent with Articles 2.5 and 2.4.2 as well as Article 5.2 of the Amended Agreement. On Article 3.2, it submitted that this meant that the parties' exclusivity obligations towards each other (in Article 3.1) would cease, unless a SPA had been executed that had not been completed at the time of the expiration of the Amended Agreement. As against this, the respondent disagreed with the appellant's position that "it ought to be paid Success Fees as long as an Opportunity is presented" to it. It



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characterised this interpretation as one that "blatant[ly] disregard[ed]" Articles 3.2, 4 and 5.2.

56 On Article 12, the appellant contended that the provision did not apply in light of a subsisting agreement between the parties. It also argued that it had consistently requested payment of the requisite Success Fees from as early as March 2014. On the other hand, the respondent emphasised that there could be "only one meaning ascribed to Article 12, that is, that the parties intended for a three-month time bar to apply after the expiry of the [Amended Agreement]", and that the appellant's claims had been made out of time.

*Whether the Award involved a "new difference"*

57 It is apparent from the summary above that the fundamental point upon which the Tribunal eventually found for the appellant – namely, that various provisions of the Amended Agreement pointed to the Success Fee being payable upon completion of the Opportunity regardless of when that took place – was present in the appellant's submissions in the arbitration. In other words, the respondent's obligation to pay the Success Fee was not, according to the appellant's submissions in the arbitration, constrained by the term limits of the Agreement or Amended Agreement.

58 In arriving at this conclusion, the Tribunal interpreted various provisions in Article 2 of the Amended Agreement (namely, Articles 2.3, 2.4 and 2.4.2) and accepted the appellant's interpretation of Article 3.2 as applying to the parties' exclusivity obligations towards each other. That is, it was of the view that, pursuant to the article, all that would happen on the expiry of the Amended Agreement would be that the exclusivity that the appellant enjoyed in referring to the respondent further Opportunities would cease. The Tribunal then went



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further than the appellant, to consider that Article 3.2 did not just provide for a situation where a SPA had been executed but had not been completed at the time the Amended Agreement expired. It also applied where a SPA was being negotiated at that time or the Opportunity bore fruit subsequently. It additionally considered that Article 12 did not apply, *because of the view it took of the Amended Agreement as a whole*.

59 These findings did not, however, involve a new difference outside the scope of parties' submission to arbitration. They were premised on the fundamental point raised by the appellant in its submissions that the respondent's obligation to pay the Success Fee was not constrained by the term limits of the Consultancy Agreement or Amended Agreement. In this regard, we accept the appellant's submission before us that the Judge may have misunderstood the appellant's position in the arbitration as one where the appellant "accepted that Article 3.2 required [a] SPA to be signed before the Amended Agreement expired, and that the limitation period under Article 12 would have applied if there were no subsisting agreement after the Amended Agreement expired" (GD at [57]). Rather, it had argued that Article 3.2 merely applied in a specific setting, *ie*, where a SPA had been executed that had not been completed at the time of the expiration of the Agreement. But this did not overshadow the general obligation for the respondent to pay it under Article 2.5 of the Agreement, and there was no indication that the Success Fee would only be payable if the SPA was completed within the term of the Consultancy Agreement. Furthermore, the appellant's position on Article 12 was that the provision did not effectively bar its claim, of which the submission of a subsisting agreement was only one facet – the others being unreasonableness and that it had requested the Success Fee as early as March 2014. It was therefore a mischaracterisation for the Judge to have found that Article 12 was



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a concession on the appellant's part that the provision would have barred its claim if it was unable to establish the existence of a subsisting agreement.

60 It is significant as well that in its closing submissions, the respondent had argued against the fundamental point raised by the appellant, *ie*, that the respondent's obligation to pay the Success Fee was not constrained by the duration of the Amended Agreement. The respondent argued that there was no basis for the appellant's assertion that if no termination notice was given by the respondent, the Amended Agreement continued to subsist. Among other things, it submitted that this was a "twisted reading" of Article 5.3, contrary to Article 3.2, and that in the absence of an early termination, the Amended Agreement would naturally expire on the contractual expiry date pursuant to Article 4. Thus, even though the eventual reasoning of the Tribunal on the effects of Articles 2, 3.2 and 12 was not explicitly in the terms argued by the appellant, the questions of the interaction between the payment obligations and the expiry date of the Amended Agreement were clearly canvassed before the Tribunal.

61 The present case is thus different from, for example, *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 ("*CAJ*"), where a defence that the appellants were entitled to an extension of time ("EOT Defence") had been accepted by the tribunal although it was raised for the first time in their closing submissions, and had not been expressly raised in the pleadings, the List of Issues or the Terms of Reference (at [8] and [43]). This court considered that the EOT Defence was a "creature of a contractual provision" and "necessarily fact-sensitive", as the appellants who sought to rely on it would have to satisfy conditions including, *inter alia*, an act of breach of contract caused by the respondent's subsidiary, and explain how the appellants had been delayed by it (at [28]–[31]). Evidence would have to be led in this regard and if the appellants



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had intended to rely on it, they were contractually required to provide express notice of their claim to the respondent at the relevant time (*ie*, as soon as reasonably practicable after the alleged breach), as opposed to at the arbitration. This court held that the EOT Defence would only have fallen within the scope of the parties' submissions to arbitration upon its introduction by way of an amendment to the pleadings (if so permitted by the tribunal, with other consequential orders) (at [40] and [52]). As there had been no such process, this court held that the court below had been correct to find that the tribunal's decision to grant an extension of time was made in excess of jurisdiction.

62 Nor is this a case where the Tribunal proceeded on the basis of a new claim (see also by way of contrast, *CBX and another v CBZ and others* [2022] 1 SLR 47 at [41]–[47], where this court held that the tribunal exceeded jurisdiction in allowing a claim for the repayment of certain amounts independently of an acceleration event, which was the basis of the claim in the arbitration, and without resolving clear and repeated jurisdictional objections). Here, from the commencement of the arbitration, the appellant had sought damages in the form of Success Fees as provided for in Article 2 of the Amended Agreement. There was therefore no question of the appellant needing to demonstrate that it satisfied certain additional conditions that it had not pleaded (*CAJ* at [32]).

63 The decision in *GD Midea*, which was relied on by the Judge, is distinguishable for similar reasons. In *GD Midea*, the claimant had claimed that the termination of a distribution agreement by the respondent was invalid, in part because the respondent had breached certain payment terms which were allegedly agreed at a meeting. These were therefore matters extrinsic to the distribution agreement. The respondent denied the alleged agreed payment



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terms and asserted that it was entitled to terminate the distribution agreement due to cl 2.2 of the same, concerning targets to be met thereunder and a provision in PRC contract law. In its opening submissions, the claimant claimed that the parties reached consensus on the alleged agreed payment terms and that the payment term imposed by the respondent was "contrary to the parties' prior agreement and practice". The claimant subsequently abandoned its claim based on the alleged agreed payment terms, and its case in the closing submissions was that the imposed payment term was in breach of parties' prior practice.

64 There was, accordingly, no allegation of a breach of cl 4.2 of the distribution agreement in the Notice of Arbitration and pleadings and submissions in the arbitration, nor was there any reference to a breach of cl 4.2 in the parties' Agreed List of Issues which was submitted to the tribunal, or in parties' closing submissions. Rather, the relevant issue submitted by the parties to the tribunal was whether the respondent had breached prior practice in imposing the payment terms. A post-hearing letter sent by the tribunal did not suggest it was considering the question of a breach of cl 4.2, and the interpretation of cl 4.2 adopted by the tribunal was also inconsistent with the position taken by parties. Chua J consequently held that the tribunal had exceeded jurisdiction by finding largely in favour of the claimant on the ground that the respondent had breached cl 4.2 of the distribution agreement. In contrast, there is in the present case no issue of the respondent's liability being established on a basis that was not part of the appellant's case.

65 As we have held that the impugned findings of the Tribunal were within the scope of the dispute submitted to arbitration, it is unnecessary at this juncture to consider the appellant's alternative arguments that the Tribunal's findings



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flowed reasonably from the parties' arguments, or were based on matters that were ancillary to the dispute and known to all parties.

66 We note as well that the respondent's arguments as to whether the Tribunal had acted in excess of jurisdiction by relying on, *inter alia*, *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL*") and *Soh Beng Tee*, were in substance arguments as to a breach of natural justice. The present case is therefore somewhat analogous to *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488, where this court held that a tribunal did not exceed its jurisdiction by recharacterizing a claim for loss of profits to one for loss of an opportunity to earn profits, the Notice of Arbitration having prayed for, among other things, "damages". Rather, the contentions that the tribunal had throughout the proceedings understood the claim as one for loss of profits, and nevertheless took it upon itself to re-characterise the claim, went towards issues of "fair process, notice and natural justice" (at [70] and [74]). Accordingly, we address these arguments by the respondent under the following discussion on breach of natural justice.

***Whether the Tribunal acted in breach of natural justice***

67 Article 34(2)(*a*)(ii) of the Model Law gives teeth to the procedural guarantee in Article 18 of the same, which provides that parties shall be treated equally and that each shall be given a full opportunity of presenting its case (*China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [89]–[90] and [104(a)]). These requirements embody "basic notions of fairness and fair process which underpin the legitimacy of all forms of binding dispute resolution" (*China Machine* at [90]). On the other hand, a party's right to an opportunity to present its case in



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an arbitration is not unlimited in scope, but "impliedly limited by considerations of reasonableness and fairness" (*China Machine* at [97] and [104(b)]).

68 Furthermore, a party seeking to set aside an arbitral award on the breach of natural justice ground must identify: (a) the relevant rule of natural justice that was breached; (b) how the rule was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights (*BRS v BRQ and another and another appeal* [2021] 1 SLR 390 at [89]; *Soh Beng Tee* at [29]). As with the principles of law governing an assessment of whether a tribunal has acted in excess of jurisdiction, it is axiomatic that an error of law or fact in the award does not amount to a breach of natural justice (*CDX and another v CDZ and another* [2021] 5 SLR 405 ("*CDX*") at [34(i)]; citing *BLC and others v BLB and another* [2014] 4 SLR 79).

69 The thrust of the respondent's present challenge on this ground appears founded on the fair hearing rule: that is, according to the respondent, the Tribunal had based its decision on matters not submitted or argued before it (*Soh Beng Tee* at [65(a)]). It is alleged that, by adopting a chain of reasoning in its award which it did not give the respondent a reasonable opportunity to address, the Tribunal denied it a reasonable opportunity to present its responsive case (*JVL* at [147]). As noted by Coomaraswamy J in *JVL*, a chain of reasoning will be open to a tribunal where: (a) it arises from the party's express pleadings; (b) it is raised by reasonable implication by a party's pleadings; (c) it does not feature in a party's pleadings but is in some other way brought to the opposing party's actual notice; or (d) the links in the chain flow reasonably from the arguments actually advanced by either party or are related to those arguments (at [159]).



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70 The respondent argues that since parties took the position that Articles 3.2 and 12 acted as bars to a claim for Success Fees, the Tribunal incorrectly determined that Success Fees were payable based on a case that the appellant did not advance. It argues as well that the Tribunal's findings on Articles 3.2 and 12 did not reasonably follow from the disputed issue, particularly since the position taken by the Tribunal was "diametrically opposed to that taken by both parties". In its view, the present case is similar to *JVL*, where the claimant had declined to advance an argument which the tribunal eventually relied on, and it was found that there was a breach of natural justice in the making of the award.

71 We do not agree with the respondent's view of *JVL*. That case concerned a price-averaging arrangement which was extrinsic to the contracts which were in dispute. The tribunal therefore directed parties to deal with the parol evidence rule and its exceptions. However, neither party dealt with the collateral contract exception to the parol evidence rule, which the tribunal eventually held was applicable. Coomaraswamy J observed in *JVL* that the defendant did not advance the applicability of this exception despite having the burden of doing so, being aware of its existence and having the opportunity to do so (at [71]–[72] and [164]–[166]). He held that this precluded the tribunal from adopting that as part of its chain of reasoning, "unless it directed [the plaintiff] specifically to deal with it" (at [168]). As this was not done, there was a breach of natural justice in the making of the award as, *inter alia*, the plaintiff did not have a reasonable opportunity to present its case on that issue. In contrast, in the present case, the Tribunal specifically raised for parties' consideration the situation in which an Opportunity was presented but, through no fault of either party, the SPA relating thereto was only executed after the expiry of the Amended Agreement. The appellant subsequently argued in its closing submissions that, in such a situation, the respondent remained liable under the



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Amended Agreement; and the respondent objected to such a construction of the Amended Agreement. This is therefore not a case where the reasoning of the Tribunal simply did not feature in the course of the arbitration, or where the Tribunal "select[ed] an issue to decide on [its own]" and in so doing, deprived parties of the opportunity to adduce evidence or make arguments on that issue (*JVL* at [173]). Indeed, the Tribunal observed in its Award, referencing the above exchange, that the respondent "did not satisfactorily address" in its closing submissions the Tribunal's "important concern" that the respondent's construction of the Success Fee arrangement meant that it would not be liable for Success Fees even if the respondent was responsible for a delay in executing a SPA (Award at [274]).

72 The more fundamental point is an arbitral tribunal is entitled to arrive at conclusions that are different from the views adopted by parties (regarding contractual interpretation, or otherwise as the case may be). This is provided that these conclusions are based on evidence that was before the tribunal and that it consults the parties where the conclusions may involve a "dramatic departure" from what has been presented to it (*Soh Beng Tee* at [65(e)]; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [59(c)]). We do not think that the respondent is correct to submit otherwise, and to read *Soh Beng Tee* as merely contemplating that an arbitrator may adopt a "middle path" as between two positions taken by adverse parties. The relevant paragraph from *Soh Beng Tee* reads (at [65(e)]):

> It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him.



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> Similarly, an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.

73 It seems to us that an arbitral tribunal cannot be constrained in the manner suggested by the respondent. As noted by this court in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*"), the emphasis of this aspect of natural justice is on the opportunities given to the parties to address the determinative issue(s) in a matter (at [32]). The focus must be on whether the tribunal has adopted "reasonable inferences, findings of fact or lines of argument", these being "entirely acceptable" even if they have not been specifically addressed by parties (*Pacific Recreation* at [32]). It is furthermore often a "matter of degree as to how unexpected the impugned decision is" such that it may be said that the parties were deprived of an opportunity to argue it (*Soh Beng Tee* at [41]). There may well be cases where it is reasonable for the arbitral tribunal to arrive at conclusions or draw inferences that are opposed to the views of both parties, even without further consultation with them.

74 Such a view is also consistent with the summary of authorities by Fisher J in the New Zealand High Court decision of *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 ("*Rotoaira*"), which this court endorsed in *Soh Beng Tee* at [55]:

> …
>
> (g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility,



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> pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.
>
> (h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental process before he finally commits himself.
>
> (i) It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.
>
> (j) Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

75 It is similarly the case in England that as regards s 33(1) of the Arbitration Act 1996 (UK), which imposes obligations on the tribunal to, *inter alia*, provide the parties a reasonable opportunity to deal with any issue that will be relied upon by the tribunal in writing its award, a tribunal "does not have to refer back to the parties its analysis or findings based on the evidence or argument before it, so long as the parties have had an opportunity to address all the 'essential building blocks' in the tribunal's conclusion" (*Grindrod Shipping Pte Ltd v Hyundai Merchant Marine Co Ltd* [2018] EWHC 1284 (Comm) ("*Grindrod*") at [38], citing *Russell on Arbitration* (24th edition, 2015) at para 5-050). The tribunal is therefore entitled to "derive an alternative case from the parties' submissions as the basis for its award", as long as parties have an opportunity to address the essential issues which led the tribunal to those conclusions. Furthermore, there is a difference between, on the one hand, a party having no opportunity to address a point or his opponent's case, and a party



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failing to recognise or take the opportunity which exists; the latter does not involve a breach of s 33 (*Grindrod* at [40] and [68]).

76 The nature of the issue is also relevant in determining the extent of opportunity that a party ought to be granted to address the determinative issues, as this court recently held in *Phoenixfin Pte Ltd and ors v Convexity Ltd* [2022] SGCA 17 ("*Phoenixfin*"). There, we considered that there was a breach of natural justice where the tribunal had found that certain contractual clauses were unenforceable penalty clauses. The tribunal had denied an application by the respondent in the arbitration to amend its Defence and Counterclaim to plead that these clauses were unenforceable on that basis. Despite such rejection, the tribunal appeared to take the view that the issue was still within the scope of the arbitration. The tribunal then went on to dismiss the claim on that basis. We agreed with the High Court that the claimant in the arbitration thus did not have a full opportunity to address this issue of an unenforceable penalty: among other things, the underlying facts supporting the assertions in this regard were not pleaded. This was although the issue of whether a particular provision is or is not a proscribed penalty is a question of mixed law and fact. We observed (at [52]):

> When … the court has to consider whether a party has been afforded natural justice during arbitration proceedings, the pivotal question is always whether that party has been given a fair opportunity to deal with an issue that has been raised in the arbitration either by the other party or by the tribunal itself. The extent of the opportunity needed to be given depends on the nature of the issue. If the issue is a legal one, then sufficient time to make legal submissions is all that is required. But if the issue is a factual one or a mixed fact and law question then, apart from submitting on the law, a party needs to be able to question the evidence produced in support of the issue as well as have the chance to itself introduce relevant rebuttal evidence. And in order to do all this, there has to be clarity and precision regarding what issue is being raised and what evidence will be relied on to support it.



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We therefore took the view that in a situation involving questions of fact, pleadings assume greater significance in indicating the kind of opportunity that natural justice requires to be given.

77 On the other hand, in the present case involving a legal issue of the contractual interpretation of various provisions of the Consultancy Agreement/Amended Agreement (in particular Articles 2, 3.2 and 12), we are satisfied that parties indeed submitted on this issue and that the respondent had sufficient opportunity to canvass evidence on, amongst other things, the contextual dimension and commercial purpose of the Agreement (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131]). While the reasoning eventually adopted by the Tribunal was not pleaded by the appellant in those precise terms, it is clear that the more general question of the interaction between the payment obligations and the expiry date under these provisions in the Amended Agreement was canvassed before the Tribunal. Indeed, by the time of parties' closing submissions, they had made their arguments in light of indications from the Tribunal on the first day of the evidentiary hearing that it was considering: (a) the position of an Opportunity Notice that had been presented but no SPA had been executed; and (b) the possibility of the respondent's obligation to pay a Success Fee where a SPA was concluded after the pendency of the Amended Agreement. Even if these submissions may not have precisely engaged the considerations raised by the Tribunal, that would only have been tantamount to the parties failing to recognise or take the opportunities available to address these points. No breach of the fair hearing rule would occur in these circumstances (*Grindrod* at [40]; see also *CDX* at [34(h)(iv)]).



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78 It also seems to us that the chain of reasoning adopted by the Tribunal in arriving at its findings – that Article 3.2 permitted a claim in respect of a SPA that is "being negotiated or in relation to an Opportunity that bears fruit subsequently" (Award at [274(d)]), and that Article 12 did not preclude such a claim from being brought (Award at [275]) – also bore sufficient nexus to parties' cases, bearing in mind the guidance in *JVL*. That is, it appears it would have: (a) arisen by reasonable implication on parties' pleadings, or (b) at the very least, been brought to the notice of the respondent.

79 The Tribunal's interpretation of Article 2 was consistent with the appellant's case that it had met the conditions under Article 2.3 of the Agreement, and that Articles 2.4 and 2.5 did not indicate that the Success Fee would only be payable if a SPA was completed with the stated term of the Agreement. Its interpretation of Article 3.2 was also partly consistent with the appellant's case that it referred to the cessation of the parties' exclusivity obligations on the termination of the Agreement. As for its interpretation of Article 12, the Tribunal relied on the evidence of Mr DT and Mr AH in arriving at its view that it "would be commercially unreasonable to expect the Opportunities to be completed" within the relatively short terms of the Amended Agreement (Award at [276]–[278]). These were reasonable "inferences from the primary facts" which the Tribunal was entitled to make (*Soh Beng Tee* at [65(e)]): in contrast with the situation in *Phoenixfin*, where evidence was not led on the penalty clause issue by the respondents in the arbitration and the claimants did not have a case to respond to or rebut, and the issue was only unilaterally re-introduced during the oral reply hearing by the tribunal (*Phoenixfin* at [41]–[44] and [54]). There, we took the view that snippets of evidence which we were referred to and which touched on or were tangentially relevant to the penalty issue scarcely ameliorated the failure of the respondents



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in the arbitration to properly bring the issue into the arbitration and adduce evidence to establish their case, which the claimant could then meet (*Phoenixfin* at [62]).

80 On appeal, the respondent also argues that it suffered prejudice as: (a) the Tribunal took Mr PM's evidence out of context in reasoning that negotiations of a SPA could not be concluded within a short period of time and that accordingly, the Amended Agreement was interpreted such that claims for Success Fees could be made after its expiry; and (b) if the respondent had been apprised that the Tribunal was considering using Mr PM's position to support this point, it would have put different questions to him. Such questions would have related to his experience with negotiations of SPAs and how long such negotiations took; and the respondent would potentially have included its own evidence to show that acquisitions do not always take a long time.

81 The impugned portion of the Tribunal's reasoning is as follows (Award at [270]):

> It is apparent from the [Amended Agreement] that as a matter of interpretation and business sense the Parties never contemplated that an Opportunity must be completed during the life of the [Consultancy Agreement]. This is because the process of completing such substantial transactions is usually complex and requires intense and drawn out negotiations, much consultation, substantial due diligence, raises difficult legal and tax issues and involves layers of approval as well as, often, regulatory hurdles to overcome. [Mr PM] testified:
>
> > … I've been working in the oil business for long. I know we cannot do anything in a year time. *Acquisition is very long, as you could see from [X Co] and [Y Co].*
> >
> > …
> >
> > I signed the original agreement and for me it was just automatic renewal, *but I need the signature to get payment because I know the system in Indonesia. Once*



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> *you want to invoice, you need to have a valid signed agreement.*
>
> [emphasis by Tribunal retained]

82 This argument by the respondent again appears to be focused on the right to be heard, namely the right of a party to have reasonable and fair notice from the tribunal of any other issue which it adopts as an essential link in the chain of reasoning leading to its decision on the matters before it (*CDX* at [34(d)(i)(B)]). No such breach is however made out in our view. First, by including Mr PM's evidence on why he wanted a signed agreement, the Tribunal did in fact acknowledge the context of his testimony. As noted by the respondent, Mr PM was responding to questions on why he had asked for an extension of the Amended Agreement. Second, the Tribunal's reliance on Mr PM's evidence that "acquisition is very long" to support its point that parties did not contemplate that an Opportunity must be completed during the pendency of the Amended Agreement is not inconsistent with Mr PM's testimony that parties understood that he would keep working, with the Amended Agreement automatically renewed on a yearly basis. Third, and in any event, such use of Mr PM's evidence would at most have amounted to a "reshuffl[ing of the] way in which different concepts have been combined", which an arbitral tribunal is reasonably entitled to do (as noted in *Rotoaira* and *Soh Beng Tee*).

83 Furthermore, it is difficult to see how the respondent suffered prejudice from any alleged breach of the right to be heard, in the sense of such breach having "actually altered the final outcome of the arbitral proceedings in some meaningful way" (*Soh Beng Tee* at [91]). The Tribunal had also considered the testimony of Mr AH as affirming its reasoning and interpretation of the relevant terms of the Amended Agreement, as pointed out by the appellant (Award at [271]). The Tribunal was entitled to rely on Mr AH's evidence in such a manner.



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It was also not a misconstruction of his evidence. He had indeed testified that a fee tail mechanism was customary in the oil and gas industry as a way of managing the possibility of an opportunity concluding after the duration of an agreement, even if his evidence was that the absence of such a mechanism precluded the appellant's claim. In any case, if the tribunal had misconstrued his evidence, that would only have been a mistake of fact for which no relief is available, not a breach of natural justice.

84 The respondent's case that there was a breach of natural justice in the making of the Award which justifies its partial setting aside is therefore unsustainable.

**Conclusion**

85 For all the foregoing reasons, we allow the appeal. We accept that the appellant's case in the arbitration was broader than what was found by the Judge, and indeed included the key finding made by the Tribunal: namely, that the appellant could maintain claims in respect of the Opportunities proposed by it, which had been accepted by the respondent before the expiry of the Amended Agreement. The Tribunal had also made a similar point to parties for their consideration. The respondent's challenge to the Tribunal's interpretations of various provisions in the Amended Agreement are furthermore essentially an allegation of errors of law on the part of the Tribunal. It follows that neither an excess of jurisdiction nor a breach of natural justice has been made out.



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86 We set aside the costs order made by the Judge below and order the respondent to refund the amount (if paid) to the appellant.

87 Having regard to the parties' respective costs' submissions, we award the appellant as legal costs the total sum of $60,000.00 in respect of the appeal and the hearing before the Judge, together with reasonable disbursements as agreed. In default of agreement, parties may write into the court to fix the disbursements. The usual consequential orders shall apply.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

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