IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 21

Originating Summons No 1103 of 2019

Between

(1) CAI

… *Plaintiff*

And

(1) CAJ
(2) CAK

… *Defendants*

JUDGMENT

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

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CAI
v
CAJ and another

[2021] SGHC 21

General Division of the High Court — Originating Summons No 1103 of 2019
S Mohan JC
29, 30 June 2020

29 January 2021 Judgment reserved.

S Mohan JC:

Introduction

1 In the arena of international arbitration, our courts commonly hear applications to set aside arbitral awards on the ground that a breach of natural justice was occasioned by an arbitral tribunal in the making of the award. One of the most common grounds raised by the aggrieved party is that it was denied a reasonable opportunity to be heard.

2 A denial of a reasonable opportunity to be heard can occur in any number of ways, including the manner in which the arbitral tribunal conducted the arbitration proceedings. I term this as "procedural natural justice". In matters pertaining to procedural natural justice in particular, the Court of Appeal very recently in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*"), emphasised the need for an

aggrieved party to give fair intimation to the arbitral tribunal in "real time" if that party felt that a breach of procedural natural justice had occurred during the course of the arbitration proceedings. The Court of Appeal underscored the importance of making clear one's objection as any equivocation may be equated to a party attempting to hedge its position. Any attempt by the aggrieved party to hedge its position would be frowned upon by the courts if that party subsequently sought to challenge the award on the ground of breach of natural justice occasioned by the tribunal (at [168], [170]).

3 The application before me in HC/OS 1103/2019 ("OS 1103") raises a number of interesting issues but at its core, it brings into sharp focus the principles laid down in *China Machine* and the extent of the duty to give fair intimation to the tribunal. As applications of this nature are highly fact sensitive, I begin with a detailed review of the background facts leading up to the making of the award in question. As is common in these applications, the parties agreed to a sealing order being made to preserve the confidentiality of the parties and the arbitral proceedings.[1] Therefore, all references to the parties, their places of business or any other details that might otherwise reveal their identities have been anonymised in this judgment.

Facts

The parties

4 The plaintiff is CAI, a public company incorporated in Narnia. It was the first claimant in the underlying arbitration (the "Arbitration") which gave rise to the present application. B was a subsidiary of CAI in Lalaland and the

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1 HC/ORC 8010/2019.

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owner of a polycrystalline silicon plant (the "Plant") in Lalaland.[2] While B was the party that initiated the Arbitration, it assigned its rights to the claims in the Arbitration to CAI and is hence not a party to the present application.[3] For ease of reference, I refer to CAI and B collectively as the "Arbitration Claimants".

5 The first defendant is CAJ, a public company also incorporated in Narnia. It specialises in the construction and engineering of large industrial facilities and chemical plants around the world.[4] The second defendant is CAK, CAJ's wholly owned subsidiary incorporated in Lalaland.[5] Both defendants were the contractors responsible for constructing the Plant and were the respondents in the Arbitration.

Background to the dispute

6 CAI filed the present application to partially set aside an award dated 11 March 2019 ("Award") rendered by a three-member arbitral Tribunal ("Tribunal"). The Arbitration was seated and conducted in Singapore under the auspices of the International Chamber of Commerce ("ICC").

The underlying agreements and the relevant contractual provisions

7 The substance of the underlying dispute between the parties relates to two connected contracts dated 29 September 2010 pursuant to which the

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2 Plaintiff's Bundle of Court Documents ("PBOCD") I at pp 2–3 [First Affidavit of CAI's Mr [Redacted] at paras 5–10].

3 Plaintiff's Submissions ("PS") at para 19.

4 Defendants' Submissions ("DS") at para 7.

5 DS at para 8.

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defendants agreed to construct the Plant in an industrial park located in Lalaland.

8 The first contract was an Engineering and Procurement Services Agreement for TMP Project outside Lalaland between B as the owner and CAJ as the contractor ("Offshore Agreement"). The second contract was a Field Engineering, Field Procurement and Construction Services Agreement for TMP Project inside Lalaland between B as the owner and CAK as the contractor ("Onshore Agreement"). The two contracts will hereafter be referred to collectively as the "Agreements".

9 An integral part of the Agreements was a set of further contractual provisions termed the "General Conditions".[6] I adopt the same terminology used in the Arbitration and refer to them as "GC X", with "X" being the specific numbering of the general condition in question. The five general conditions germane to the Arbitration and the present application are GC 1, GC 3, GC 5, GC 24 and GC 40.

10 Under the Agreements, the defendants were required to achieve "Mechanical Completion" of the Plant on or before a specified date. Mechanical Completion was defined with reference to two provisions. First, in GC 1 of both Agreements to mean:

> that the Plant or any part thereof has been completed mechanically structurally and put in a tight and clean conditions [*sic*] and that all work in respect of Pre-commissioning of the Plant or the relevant part thereof has been completed.

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6 PBOCD I at pp 252 and 336 [Article 1.1(2) of the Agreements].

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11 Second, under GC 24.1 of the Onshore Agreement which stated that:

> As soon as the Plant or any part thereof has, in the opinion of the Contractor, been satisfied [*sic*] the criteria for the Mechanical Completion of the Plant or the relevant part thereof, as specified in Appendix 4 to the Agreement including but not limited to completion of Pre-commissioning of the Plant or the relevant part thereof, excluding such minor items as finishing of insulation and painting, and other items **not materially affecting the operation or safety of the Plant or the relevant part thereof**, the Contractor shall so notify the Owner in writing.
>
> [emphasis added]

12 The immediately preceding definition is included only in the Onshore Agreement because only the Onshore Agreement defined what amounts to Mechanical Completion. GC 24.3 of the *Offshore* Agreement provided as follows:

> The Plant or that part thereof shall be deemed to have reached Mechanical Completion under this Contract as at the date when the Onshore Contractor achieves Mechanical Completion in accordance with [the] Onshore Contract.

13 The parties agree that the effect of the provisions cited above was to align the definition of Mechanical Completion under both Agreements.[7]

14 Article 5.1 of the Agreements required the defendants to achieve Mechanical Completion of the Plant by 28 February 2013. Article 5.3 of the Agreements provided that liquidated damages would begin to accrue after a 14-day grace period – the grace period would end on 14 March 2013. From 15 March 2013, liquidated damages would begin to accrue at the rate of 0.1% of

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[7] PBOCD I at p 6 [First Affidavit of CAI's Mr [Redacted] at paras 19–20]; PBOCD I at p 107 [Final Award at para 130].

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the contract price for each day of delay, up to a maximum of 10% of the contract price, *ie*, for a maximum period of 100 days.[8]

15 Under the Agreements, Article 5.1 was expressly "subject to such extension of time to which [CAJ or CAK respectively] shall be entitled under GC 40". GC 40 in turn provided for an extension of time for Mechanical Completion and stated that:

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

16 GC 26.1 of the Agreements confirmed that Mechanical Completion need only be achieved within such extended time to which the defendants shall be entitled under GC 40. Article 5.3 read with GC 26.2 further cemented the

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8 PBOCD I at pp 254 and 337 [Article 5.1 of the Agreements].

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position that liquidated damages would only start to accrue if Mechanical Completion was not achieved within this extended time.

17 In essence, GC 40 allowed for the extension of time for Mechanical Completion and hence a reduction in the amount of liquidated damages payable upon any delay. The extension of time for Mechanical Completion was subject to three contractual conditions: (a) that the delay on CAJ's or CAK's part was attributable to B; (b) the submission of a notice of claim justifying the extension as soon as reasonably practicable; and (c) CAJ or CAK was to use its reasonable efforts to minimise any delay in the performance of their obligations. As will be seen later in this judgment, GC 40 is a central feature of CAI's application.

The present application

18 In OS 1103, CAI asks that the Tribunal's decision to grant the defendants a 25-day extension of time in respect of delays that occurred in the mechanical completion of the Plant be set aside. The granting of the extension of time resulted in a corresponding reduction of 25 days' worth of liquidated damages (amounting to 2.5% of the contract price) that were adjudged by the Tribunal to be payable by the defendants to the Arbitration Claimants. The Arbitration Claimants were hence granted only 74 days' worth of liquidated damages by the Tribunal, instead of the 99 days' worth of liquidated damages sought.

19 Although the contract prices were expressed in a number of different foreign currencies,[9] I use the Singapore dollar as a neutral currency (based on current exchange rates) to preserve confidentiality in this judgment. At a rate of

[9] Article 3 of the Agreements.

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0.1% of the respective final contract prices for each day of liquidated damages,[10] the difference between 99 days' worth of liquidated damages and 74 days' worth of liquidated damages was approximately S$20 million. Consequently, CAI also asks that the liquidated damages payable to it be increased correspondingly.[11]

The circumstances leading to the dispute

20 The defendants ran into a gamut of problems during the construction of the Plant. Mechanical Completion was delayed due to: (a) the failure of the hydrogen unit ("H2 unit") of the Plant to produce the required purity of hydrogen necessary for the production of polysilicon; and (b) excessive vibrations in compressors located in the H2 unit. Only the second vibration related problem is relevant to OS 1103, and I will refer to it as the "Vibration Issue".

21 In summary,[12] the Plant included a H2 unit with six compressors. These compressors would sufficiently pressurise hydrogen before forcing it through a multi-stage purification apparatus that would allow the H2 unit to produce purified hydrogen gas for the production of polysilicon. On 25 January 2013, CAK informed the manufacturer of the compressor motors that the compressors were exhibiting abnormal and excessive vibrations ("Abnormal Vibrations"), far exceeding any levels of vibrations that were deemed safe by the International Organisation for Standardisation.

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10 Article 5.3 of the Agreements.

11 HC/OS 1103/2019.

12 PBOCD I at pp 13–23 [First Affidavit of CAI's Mr [Redacted] at paras 32–69]; PS at paras 27–39.

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22 For context, the Abnormal Vibrations were impermissible as they could damage the compressors and any connected systems, as well as render the Plant unsafe and/or inoperable, particularly given the highly combustible and explosive properties of hydrogen.[13] On 27 February 2013, a day before the deadline for Mechanical Completion, CAK apologised to B for the "significant trouble caused by the delay in the hand-over" of the H2 unit and requested that B proceed to issue the Notice of Mechanical Completion by 28 February 2013 despite acknowledging that the Abnormal Vibrations remained.[14]

23 On 1 March 2013, B rejected CAK's request to issue the Notice of Mechanical Completion and suggested that in respect of the Abnormal Vibrations in the H2 unit, parties agree on "permanent measures based on an investigation into the causes and a schedule for the measures, and *make sure that the schedule does not impact [B's] commissioning schedule*" [emphasis added][15] ("1 March 2013 Email").

24 On the same day, the Abnormal Vibrations caused a high-voltage power cable connection to break and melt a steel plate in the terminal box of one of the compressors. On 3 March 2013, the Abnormal Vibrations had still not been rectified. From about 5 March 2013, B and CAK began to discuss the implementation of temporary countermeasures to rectify the issue and began implementing them. However, not only did these temporary countermeasures fail to resolve the Vibration Issue, they instead caused the vibrations to increase.

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13 PBOCD I at p 14 [First Affidavit of CAI's Mr [Redacted] at para 38].

14 PBOCD I at pp 458–459 [Email from CAK's Mr [redacted] to B dated 27 February 2013].

15 Defendants' Bundle of Court Documents ("DBOCD") I at pp 324–325 [Email from B to CAK].

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25 On 11 March 2013, the defendants prepared a schedule for the implementation of proposed permanent countermeasures ("Piecemeal Rectification Schedule"), which contemplated that the countermeasures to reduce the Abnormal Vibrations would be implemented in a piecemeal fashion. It envisaged that the rectification works would be performed on two out of six compressors at a time ("Piecemeal Rectification Works").[16] Each tranche of the Piecemeal Rectification Works was projected to take 23 days.

26 Meanwhile, the Abnormal Vibrations worsened further and even caused an operational shut down of the Plant on 18 March 2013.

27 On 2 April 2013, CAK provided an updated schedule to B on the implementation of permanent countermeasures ("Updated Rectification Schedule")[17]. This schedule too provided for Piecemeal Rectification Works.

28 On or about 12 April 2013, CAK began the process of implementing its proposed permanent countermeasures; this process was completed by 21 June 2013.[18] On 22 July 2013, it was confirmed that the permanent countermeasures had succeeded in reducing the vibration levels of the compressor motors to acceptable levels.[19]

29 The crucial point to note about the 1 March 2013 Email is that it formed the basis on which *B* instructed the defendants to carry out piecemeal rectification of the compressors, *ie*, only two at a time, as opposed to concurrent

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16 PBOCD I at p 21 [First Affidavit of CAI's Mr [Redacted] at para 64].

17 PBOCD I at p 22 [First Affidavit of CAI's Mr [Redacted] at para 65].

18 PBOCD I at p 22 [First Affidavit of CAI's Mr [Redacted] at para 66].

19 PBOCD I at p 23 [First Affidavit of CAI's Mr [Redacted] at para 69].

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rectification which would have required all six compressors to be shut down.[20] This was so that the rectification works would not affect the Plant's commissioning schedule.[21] This was admitted by the Arbitration Claimants in the Arbitration. As will be seen below, the 1 March 2013 Email played a significant role in the Tribunal's eventual decision to allow a 25-day extension of time to the defendants (see below at [53]).[22] The piecemeal nature of the rectification works had the effect of occasioning further delays to the defendants' work schedule and thus contributed to the delay in Mechanical Completion. I refer to B's instruction based on the 1 March 2013 Email as the "Admitted Instruction".

30 It is undisputed that the defendants never requested an extension from B of the deadline for Mechanical Completion, nor complied with the notice provision in GC 40.2. As such, no extension of time was ever granted to the defendants by B.[23]

The Arbitration and its procedural history

31 The crux of CAI's case in OS 1103 is that the Tribunal had wrongly considered and accepted the defendants' "entirely new defence" that they were entitled to an *ex post facto* extension of time under GC 40 to achieve Mechanical Completion of the Plant. The basis of the extension was that the Admitted Instruction had occasioned further delays to the defendants' work schedule and

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20 DBOCD I at pp 25–27 [First Affidavit of CAJ and CAK's Mr [Redacted] at para 33]; DBOCD I at p 324–325 [Email from the Arbitration Claimants' representative].

21 PS at para 32.

22 DBOCD I at p 21–22 [First Affidavit of CAJ and CAK's Mr [Redacted] at para 27.1].

23 PBOCD I at p 11 [First Affidavit of CAI's Mr [Redacted] para 26].

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thus contributed to the delay in Mechanical Completion. To fully appreciate the issues in play and the gravamen of CAI's complaint in OS 1103 as summarised above, it is necessary to lay out the procedural history of the Arbitration in some detail, focussing on the pleadings of the parties, the issues that they had submitted for the Tribunal's decision, and the course the Arbitration took until the Award was rendered by the Tribunal.

32 On 10 June 2016, B commenced the Arbitration by filing its request for arbitration ("Request for Arbitration") with the International Court of Arbitration of the ICC pursuant to the 2012 ICC Rules ("ICC Rules").[24] On 27 July 2016, the defendants provided their answer to the Request for Arbitration ("Answer to the Request for Arbitration").

33 On 8 March 2017, B submitted a request for the joinder of CAI to the Arbitration with the mutual consent of the defendants. This request was allowed by the ICC Court on 10 March 2017.[25]

34 Pursuant to Art 23 of the ICC Rules, the parties submitted an amended terms of reference on 10 March 2017 which included a summary of the parties' claims, defences and a list of issues to be determined by the Tribunal ("Terms of Reference").[26] In respect of the Vibration Issue, the Arbitration Claimants sought liquidated damages amounting to approximately S$80m under both Agreements.[27] They alleged that the defendants had caused a 144-day delay in

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24 DS at para 10; DBOCD I at p 41 [First Affidavit of CAJ and CAK's Mr [Redacted] at para 64].

25 PBOCD I at p 70 [Final Award at para 26].

26 PBOCD I at p 70 [Final Award at para 27]; PBOCD I at pp 425–436 [Terms of Reference].

27 PBOCD I at p 571 [Amended Statement of Claim at para 19].

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Mechanical Completion due to the Abnormal Vibrations in the compressors within the H2 unit.[28]

35 The defendants' response was two-fold. First, no liquidated damages were payable because the defendants had achieved Mechanical Completion prior to the grace period ending on 14 March 2013. They argued that the Abnormal Vibrations did not materially affect the operation or safety of the Plant such that the rectification was not in fact required. The defendants also contended that, in the alternative, any delay to Mechanical Completion was a result of the Admitted Instruction, such that the Arbitration Claimants had waived their right to insist on the completion of the rectification work as a requirement for Mechanical Completion and to seek liquidated damages. Alternatively, they were estopped from doing so.[29] In the Final Award, the Tribunal understood the former to be the main defence put forth by the defendants in respect of the Vibration Issue.[30]

36 In the defendants' amended statement of defence and counterclaim dated 13 April 2017 ("Amended Defence and Counterclaim"), the defendants responded to the Vibration Issue as follows:[31]

> The vibration in the motor units for the H2 Unit compressors did not '*materially affect operation or safety*' so as to require permanent rectification as part of Mechanical Completion. It is simply not tenable for [the Arbitration Claimants] to assert otherwise in circumstances where [B] operated the Plant without significant interruption resulting from vibration levels

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28 PBOCD I at p 429 [Terms of Reference at para 27].

29 PBOCD I at pp 430–431 [Terms of Reference at para 35(b)]; PBOCD I at p 139 [Final Award at para 232].

30 PBOCD I at pp 89, 97 [Final Award at paras 79(b), 96].

31 Amended Defence and Counterclaim at para 2.4(b).

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> and **where [B] instructed [CAK] to carry out permanent rectification work only on a piecemeal basis so that the H2 Unit could be available for continuous rectification**.
>
> [emphasis in original in italics, emphasis added in bold]

37 The defendants elaborated on the portion in bold at paragraph 20.9 of the Amended Statement of Defence and Counterclaim by pleading that "[a]s a result of B's instructions to carry out work on a piecemeal basis, rectification (which could have been completed within 24 days) was instead completed on 21 June 2013". Paragraph 20.9 was accompanied by footnote 116, which referred to the date on which rectification works were completed as follows:

> [the defendants'] Exhibit CHI-44, listing the last day of rectification work on 21 June 2013 (CYD01714), with vibration testing then carried out on 22 June 2013 (CYD01715).

38 The defendants then used the next footnote 117 to introduce a defence of waiver and estoppel, framed as follows:[32]

> Even if permanent rectification work otherwise would be a requirement for Mechanical Completion (which is denied), [B's] instruction to carry out the permanent rectification works only on a piecemeal basis would be a waiver of its right to insist on completion of such work as a requirement for Mechanical Completion and/or its right to receive liquidated damages from 14 March 2013 to the time agreed for completion of the permanent rectification works (as set out in the rectification schedules). In the alternative, [B] would be estopped from insisting on these rights under the doctrine of promissory estoppel.

For clarity, I adopt CAI's terminology in OS 1103 and refer to the waiver and estoppel defence collectively as the "Estoppel Defence". The point worth noting

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[32] PBOCD II at p 662 [Amended Statement of Defence and Counterclaim at footnote 117].

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here is that the defendants remained silent as to, and did not plead, any contractual entitlement to an *extension of time* under GC 40.[33]

39 The Arbitration Claimants' response in their amended reply and defence to counterclaim dated 25 November 2017 ("Amended Reply and Defence to Counterclaim") was that "the reference to 24 days in paragraph 20.9 is not supported by any evidence, and the [defendants] are put to proof of the same".[34] They pointed out that the "simple answer" to the Estoppel Defence was that GC 3.9 required that any "waiver" of a party's rights had to be in writing and that the right and extent of such waiver had to be specified. The Arbitration Claimants added that no such signed written waiver had ever been provided by them, nor would a waiver of such extensive scope have been authorised. They categorically denied the presence of any representations that could ground such an estoppel or waiver.[35]

40 In a similar vein to [39] above, the Arbitration Claimants expressly pleaded at paragraph 217 of their Amended Reply and Defence to Counterclaim in relation to another aspect of the dispute that the defendants *had not* advanced any claim for a contractual extension of time under GC 40 in response to the Arbitration Claimants' claims for liquidated damages against the defendants. The Arbitration Claimants also conceded that B had given CAK specific instructions to carry out the Piecemeal Rectification Works on the compressors

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33 PS at para 57.

34 DBOCD I at p 213 [Amended Reply and Defence to Counterclaim at para 131].

35 DBOCD I at pp 216–218 [Amended Reply and Defence to Counterclaim at paras 142–145].

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so as to reduce further disruption to the commissioning of the Plant, *ie,* the Admitted Instruction.[36]

41 Parties exchanged draft lists of issues in early February 2018 but were unable to arrive at a consensus on a consolidated list.[37] Nevertheless, it remains undisputed by the parties that the various lists of issues *did not* include any *express* reference to whether the defendants were entitled to an extension of time in accordance with GC 40. Nor was there any mention, in the draft lists, of how long the rectification works would have taken if they had been carried out *concurrently* on all six compressors ("Concurrent Rectification Works") as opposed to on a piecemeal basis.

42 In or about late February 2018, the parties filed their respective written opening submissions. Both parties reiterated their previously pleaded positions in respect of the Vibration Issue and the Estoppel Defence.[38] In particular, the defendants argued that their estimate of 24 days for Concurrent Rectification Works to be completed (or 30 days allowing for initial detailed design and procurement) was based off the Rectification Work Schedule of 11 March 2013 prepared for the *Piecemeal* Rectification Works.[39] As such, but for the Admitted Instruction to carry out Piecemeal Rectification Works, permanent *concurrent* rectification works could have been completed within 30 days from 11 March

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36 PBOCD II at pp 940, 944 [Defendants' Opening Submissions at paras 15.1–15.4, 15.18].

37 PS at para 78.

38 PBOCD II at pp 733–735 [the CAJ's Opening Submissions at paras 70–79]; PBOCD II at pp 946–948 [Defendants' Opening Submissions at paras 15.22–15.28].

39 PBOCD II at pp 947–948 [Defendants' Opening Submissions at paras 15.27–15.28].

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2013. Again, at this point, there was no mention in the defendants' opening submissions of any reliance on GC 40 to seek a contractual extension of time.

43 The oral hearing in the Arbitration was conducted from 5 to 13 March 2018.[40] Prior to the filing of written closing submissions, both parties presented oral closing arguments before the Tribunal on 13 March 2018. More will be said about the oral closing hearing later in this judgment (see [121] and [206] onwards) as certain parts of the exchanges between the Tribunal members and the parties' counsel are of relevance to the positions taken by the parties in OS 1103. Thereafter, the defendants filed their written closing submissions on 6 April 2018 ("Defendants' Closing Submissions"). The defendants recognised that the Vibration Issue was the "primary basis on which [the Arbitration Claimants] argue that [the defendants] failed to achieve Mechanical Completion on time"[41] and thus maintained their primary defence that the Abnormal Vibrations had not materially affected the operation or safety of the Plant.[42] The defendants also put forth two further alternative defences of note: (a) the doctrine of waiver and/or promissory estoppel prevented the Arbitration Claimants from insisting on any entitlement to be paid liquidated damages (*ie,* the Estoppel Defence);[43] and (b) *for the first time,* the defendants raised GC 40 and sought an extension of time of 71 days ("EOT Defence").

44 The EOT Defence as raised and elucidated in the Defendants' Closing Submissions played a central role in the Award on the Vibration Issue, and in

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40 DBOCD I at p 32 [First Affidavit of CAJ and CAK's Mr [Redacted] at para 51].

41 PBOCD II at p 1009 [Defendants' Closing Submissions at para 6.1].

42 PBOCD II at p 1011–1017 [Defendants' Closing Submissions at paras 8–9].

43 PBOCD II p 1018 [Defendants' Closing Submissions at para 10.4].

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OS 1103. It is thus worth reproducing it in full. The defendants argued that they were entitled to a 71-day extension of time to perform their obligation under the Agreements to achieve Mechanical Completion because:[44]

> (a) The [defendants'] performance of their obligation to permanently rectify the vibrations prior to Mechanical Completion was delayed or impeded by reason of [B's] instructions on 1, 2 and 8 March 2013 to develop a schedule for permanent countermeasures which did not impact [B's] commissioning, and by [B's] confirmation on 12 March 2013 of the schedule prepared in accordance with that instruction. (Significantly, [the Arbitration Claimants] acknowledge that [B's] instructions delayed completion of the repair works);
>
> (b) Because of this instruction, the [defendants] could not immediately commence work to permanently rectify all six compressors simultaneously. It is clear from the Rectification Work Schedule of 11 March 2013 and from the time actually taken to rectify each set of compressors … that rectification work could be carried out in around 30 days allowing for detailed design and procurement. Accordingly, had the [defendants] proceeded with this work as of 12 March 2013, it would have been completed by 11 April 2013;
>
> (c) Instead, because of [B's] instruction, completion of the repairs on all six compressors was delayed until 21 June 2013, a delay of 71 days; and
>
> (d) In all the circumstances it is fair and reasonable that the Time for Completion be extended by the same amount of time – that is, to 10 May 2013 (28 February 2013 plus 71 days).

Leveraging on this, the defendants then submitted that they would, if at all, be liable for only 28 days' worth of liquidated damages from 25 May to 21 June 2013, *ie,* excluding the period starting from 28 February 2013, the 14-day grace period plus 71 days.

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44 PBOCD II pp 1023–1024 [Defendants' Closing Submissions at para 10.28].

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45 It is common ground between the parties that the EOT defence was introduced for the first time in the Defendants' Closing Submissions in the Arbitration.[45]

46 The Arbitration Claimants then filed their written closing submissions 21 days later on 27 April 2018 ("Arbitration Claimants' Closing Submissions"). There, the Arbitration Claimants, *inter alia*, objected to several arguments that had been raised in the Defendants' Closing Submissions which were not pleaded, including the EOT Defence. With regard to the EOT Defence specifically, the Arbitration Claimants objected to the EOT Defence in the following terms:[46]

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

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45 DS at paras 26(b)(ii), 56(a), 92; PRS at para 4; Notes of Argument ("NOA") 30 June 2020 at p 13 lines 5–6.

46 PBOCD II at pp 1085–1086 [Arbitration Claimants' Closing Submissions at paras 94, 97–98].

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> **[Arbitration] Claimants denied the opportunity in this regard, but also the fact that the [defendants] did not subject the [Arbitration] Claimants' witnesses to any cross-examination to give them a chance to explain their positions (on the unpled issues).** This approach runs entirely contrary to the purpose of the detailed Procedural Orders.
>
> 98. In any event, this new GC 40 claim has three insurmountable flaws:
>
> (a) First, the plain wording of GC 40.1 has not been satisfied: even on the [defendants'] case they have not been "*delayed or impeded in the performance of any of its obligations…*" There is no dispute that they failed to complete by the Time for Completion, and the events to which they refer arose both (a) only after the Time for Completion, and (b) as a direct consequence of the [defendants'] admitted breach of contract. GC 40 cannot have been intended to apply in these circumstances: its purpose was to avoid the application of the prevention principle prior to that point in time.
>
> (b) Second, the [defendants] have not complied with the mandatory pre-requisites for such an extension at GC 40.2, which are if anything even more explicit and extensive than those for GC 39, or identified nay mutual agreement by which these have been waived.
>
> (c) Third, as has been addressed above, there is no evidence upon which the Tribunal can properly find there was any delay to which the clause could apply. Even if there were, GC 40.1 only permits an Extension of Time '*by such period as shall be fair and reasonable*'. By the time of the events relied upon by the [defendants], it was already inevitable that they would be liable to pay Liquidated Damages to the [Arbitration] Claimants, and GC 40 could not '*fairly'* or '*reasonably*' operate so as to the defeat the claim.
>
> [emphasis in underline and italics in original; emphasis added in bold]

47 The paragraphs quoted above also feature centrally in OS 1103 and I consider them later in this judgment.

48 Further correspondence was subsequently exchanged between the parties and the Tribunal (see below at [139]) on other matters that did not involve the EOT Defence. The Tribunal declared the proceedings to be closed

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on 10 September 2018. At that point in time, the admissibility of the EOT Defence which the Arbitration Claimants had objected to had *not yet* been ruled on by the Tribunal.

The Award

49 Some six months later, the Tribunal rendered its final award on 11 March 2019 ("Final Award") and an Addendum to the Final Award on 30 May 2019.[47] I shall refer to them collectively as the "Award". Where reference is made in this judgment to paragraphs of the Award, this should be taken as referring to the relevant paragraphs within the Final Award unless otherwise stated.

50 The Tribunal found that the defendants had failed to resolve the Abnormal Vibrations in the H2 unit and therefore failed to achieve Mechanical Completion before the liquidated damages provisions came into play. It therefore found in favour of the Arbitration Claimants in respect of liability on the Vibration Issue.[48]

51 The Tribunal also rejected the Estoppel Defence. The Tribunal found that the Arbitration Claimants had not waived their rights to rely upon the liquidated damages provisions "by way of any express written statement" as required under GC 3.9 (Award at paragraph 235). GC 3.9 required several prerequisites to be fulfilled before any waiver of the Agreements could have contractual effect and it was common ground that none of these prerequisites

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47 First Affidavit of CAJ and CAK's Mr [Redacted] at para 6.

48 PBOCD I at p 139 [Award at para 231].

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had been completed. The Estoppel Defence had also not been sufficiently pleaded or particularised (Award at paragraph 240).

52 The Tribunal then turned to the EOT Defence. With regard to the objections raised by the Arbitration Claimants (see [46] above), this was the Tribunal's response:[49]

> 290. However, the Tribunal regards the [defendants'] 'new' argument as being perfectly capable of consideration by the Tribunal because:
>
> (a) the [Arbitration] Claimants' written closing submissions were prepared and filed in response to the [defendants'] written closing submissions; and
>
> (b) the [Arbitration] Claimants have therefore had an opportunity to make submissions in response to the [defendants'] argument (to which the [defendants] did not have a right of reply). In the premises, the [defendants] are therefore entitled to make use the evidence which had already existed in this arbitration (at the time of their written closing submissions) in their attempt to make good this line of argument.

53 The Tribunal thus went on to consider the substance of the EOT Defence. The Tribunal found that while the defendants had caused Mechanical Completion to be delayed by 99 days (after factoring in the 14-day grace period), it was "fair and reasonable" (using the language of GC 40) to extend time by a period of 25 days. Consequently, the Arbitration Claimants were only entitled to receive liquidated damages for 74 days (Award at paragraph 269), *ie,* 99 days less an extension of time of 25 days. In connection with this, the Tribunal made five key findings and/or observations germane to OS 1103:

(a) it was common ground between the parties that the defendants had not complied with the notice provisions under GC 40.2 and that the

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[49] PBOCD I at p 157 [Award at para 290].

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Arbitration Claimants had never formally granted an EOT to CAK under the Onshore Agreement (Award at paragraph 285);

(b) compliance with the notice provisions in GC 40.2 was not a condition precedent for the *Tribunal* to grant an EOT to the defendants pursuant to GC 40.1 (Award at paragraphs 286, 292, 304–306);

(c) the Tribunal had a "wide discretion in determining the length of any EOT granted under [GC 40.1]" as the provision provides that any EOT must fairly and reasonably "in all the circumstances" reflect the delay or impediment suffered by CAK (Award at paragraph 312);

(d) if there had been no Piecemeal Rectification Works, CAK would have fixed the Vibration Issue more promptly than the actual time taken for the permanent countermeasures to be implemented, *ie,* via concurrent rectification works on all six compressors simultaneously (Award at paragraphs 314–316); and

(e) the defendants had carried out Piecemeal Rectification Works upon the Admitted Instruction. The piecemeal nature of the works was to the "direct advantage" of B who would otherwise have had to wait to commence the commissioning of the Plant. This also compromised the defendants' ability to use their concerted efforts to fix the Abnormal Vibrations (Award at paragraphs 314–324, in particular paragraph 322).

54 The Tribunal acknowledged that detailed evidence concerning how CAK would have gone about rectifying the Abnormal Vibrations but for the Piecemeal Rectification Schedule, was not before it (Award at paragraphs 313, 333 and 335). It accepted that there was no precise expert or factual evidence establishing the difference in time for rectification but found that such evidence

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would have only amounted to circumstantial evidence of CAK's intention in the early months of 2013. The Tribunal did not think that this evidence would have been of much assistance as it would still have to form its own view on the extent to which B's actions increased the time taken for the rectification of the Vibration Issue (Award at paragraph 314).

55 Even though there was "no direct evidence" before it "establishing how long permanent counter-measures would have taken to be implemented, absent B's involvement in the issue", the Tribunal saw itself as being capable of fairly and reasonably determining a time period which reflected the delay or impediment suffered by CAK, as required under GC 40.1 (Award at paragraph 327).

56 The Tribunal then concluded that taking into account "all the evidence *and its experience in these matters*" [emphasis added], a 25-day extension of time would be an appropriate EOT to grant to CAK, to reflect the delay occasioned by B by its insistence that rectification works be carried out on a piecemeal basis (Award at paragraph 334).

57 Finally, in the Tribunal's view, the period of 25 days reflected the Arbitration Claimants' own culpability, which the Tribunal assessed at "around 25%".

58 On 29 August 2019, CAI filed OS 1103.

The parties' cases

59 CAI seeks to set aside the Award on two main grounds.

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60 On the first ground, CAI argues that the Award is tainted by two breaches of natural justice:

(a) first, the Tribunal allowed and ruled on the EOT Defence without giving the Arbitration Claimants a fair and reasonable opportunity to respond, despite recognising that such evidence and submissions would have made a difference to its determination of the matter ("Primary NJ Breach");[50] and

(b) second, the Tribunal relied substantially on its purported experience (as opposed to the available evidence) to ground its decision to grant a 25-day EOT to the defendants without intimating to the parties what its experience or expertise was in that regard ("Secondary NJ Breach").[51]

61 On the second ground, CAI argues that the Tribunal exceeded the scope of its jurisdictional mandate by ruling upon and allowing the EOT defence. The EOT defence had never formed part of the parties' pleaded cases and was not an issue submitted for the Tribunal's determination.[52]

62 The defendants concede that the EOT Defence was raised for the first time in the Defendants' Closing Submissions. However, they argue that CAI's application to set aside the Award is an attempt to challenge the substance or merits of the Tribunal's decision on the EOT Defence – an issue that was, according to the defendants, within the scope of submission to arbitration and

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50 PS at paras 4–11, 233.

51 PS at paras 12–16, 233.

52 PS at paras 17, 234.

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on which CAI had a reasonable opportunity to put its case.[53] The defendants also contend that CAI's objections to the EOT Defence were half-hearted, equivocal and no more than an attempt to hedge its position against an adverse decision by the Tribunal.

63 The defendants add that even if the high threshold for setting aside an award had been met on either ground, CAI is prevented from challenging the Award by virtue of the doctrine of approbation and reprobation.[54] Furthermore, as the court cannot vary an arbitral award under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") or the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), it cannot grant the substantive relief sought by the Plaintiff in the form of higher liquidated damages and further interest.[55]

64 The defendants further submit that if CAI succeeds on the first ground, the matter should be remitted to the Tribunal instead of the Award being set aside. However, the defendants accept that if CAI succeeds on the Excess of Jurisdiction Ground, the matter cannot be remitted and, in that event, the entire portion of the Award dealing with liquidated damages must be set aside.[56]

Issues to be determined

65 With the foregoing background in mind, I consider that there are four broad issues in OS 1103 for my determination:

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53 DS at para 26(a).

54 DS at para 27.

55 DS at para 28.

56 NOA 30 June 2020 at p 40 lines 7–8.

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(a) whether there was any breach of natural justice in the making of the Award such that it ought to be set aside under s 24(*b*) of the IAA or Art 34(2)(*a*)(ii) of the Model Law ("Issue 1");

(b) whether the Tribunal had acted in excess of its jurisdiction or decided a matter that was not within the scope of the parties' submission when it allowed and ruled upon the EOT Defence, such that the Award ought to be set aside under Art 34(2)(*a*)(iii) of the Model Law ("Issue 2");

(c) whether the doctrine of approbation and reprobation is applicable in this case to prevent CAI from challenging the Tribunal's decision to allow the 25-day extension of time in the Award ("Issue 3"); and

(d) if Issue 1 is answered in the affirmative and Issues 2 and 3 in the negative, whether the court should set aside the relevant part of the Award or remit the Award back to the Tribunal for its consideration ("Issue 4").

Issue 1: Breach of natural justice

The general legal principles

66 The principles of natural justice in the context of international arbitration are a well-trodden path in our jurisprudence. As prefaced at [2] above, the Court of Appeal in *China Machine* ([2] *supra*) had occasion to add to the existing jurisprudence by restating and clarifying a number of principles governing s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law:

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(a) An applicant seeking to set aside an arbitral award for breach of natural justice must establish: (i) which rule of natural justice was breached; (ii) how it was breached; (iii) in what way the breach was connected to the making of the award; and (iv) how the breach did or could have prejudiced its rights (at [86]).

(b) The right to be heard, *ie,* a party's right to present its case and to respond to the case against it, is a fundamental rule of natural justice (at [87]).

(c) The threshold for finding a breach of natural justice is a high one and will only be crossed in exceptional cases. Setting aside is permitted on this basis when the procedural protections in Art 18 of the Model Law have not been duly accorded to the award-debtor (at [87], [89], [104(a)]).

(d) Article 18 of the Model Law provides that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting its case". The word "full" was not intended to create a right of unlimited scope, but rather a right that is impliedly limited by considerations of reasonableness and fairness (at [96]–[97], [104(b)]).

(e) What constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair and the court ought to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done (at [98], [104(c)]).

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(f) In undertaking this exercise, the court must put itself in the shoes of the tribunal, particularly when the court is reviewing complaints by the aggrieved party of procedural unfairness on the tribunal's part. This means that: (i) the tribunal's decisions can only be assessed by reference to what was known to the tribunal at the time and it follows from this that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in matters of procedure. The threshold for intervention is a high one and the court will not intervene simply because it might have done things differently (at [99], [101], [103], [104(d)]).

The Primary NJ Breach

67 The thrust of CAI's submissions in respect of the Primary NJ Breach is that the Arbitration Claimants were taken by surprise as the EOT Defence was introduced only in the Defendants' Closing Submissions. This belated introduction deprived the Arbitration Claimants of an opportunity to, *inter alia*, adduce factual and expert evidence and obtain document disclosure that would have allowed them to pursue meaningful submissions and provide a fulsome response to the EOT Defence.[57] Given the manner in which the EOT Defence was first introduced into the arena, their only option was thus to object to the EOT Defence and to point out several threshold issues with it in the Arbitration Claimants' Closing Submissions.[58]

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57 NOA 29 June 2020 at p 3 line 17–p 6 line 14.

58 PRS at para 74–75.

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68 In response, the defendants aver that:[59] (a) the evidence supporting the Tribunal's decision on the EOT Defence had been on the record since the Answer to the Request for Arbitration (*ie,* by virtue of the Estoppel Defence which relied on the exact same facts and evidence as the EOT Defence);[60] (b) the belated introduction of the EOT Defence was in response to the Tribunal's express invitation extended to both parties to do so during the hearing of the oral closing submissions; (c) the Arbitration Claimants had every opportunity to respond to the EOT Defence and had indeed done so; and (d) if the Arbitration Claimants had truly felt the need to adduce further evidence in response to the EOT defence, it was incumbent on them to make the relevant application to Tribunal unequivocally – as opposed to hedging its bets by objecting half-heartedly.

69 I analyse the parties' arguments in respect of the Primary NJ Breach by reframing them into the following sub-issues:

(a) whether the Arbitration Claimants had a fair and reasonable opportunity to respond to the EOT Defence or to present its case in respect of it ("Issue 1(a)");

(b) whether the Arbitration Claimants' conduct in the Arbitration amounted to hedging ("Issue 1(b)"); and

(c) whether the Primary NJ Breach was connected to the making of the Final Award and materially prejudiced CAI's rights ("Issue 1(c)").

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59 DS at para 26.

60 DS at para 56(b).

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Issue 1(a): Whether the Arbitration Claimants had a fair and reasonable opportunity to respond to the EOT Defence or to present its case in respect of it

70 In my judgment, the Arbitration Claimants did *not* have a fair and reasonable opportunity to respond to the EOT Defence or to present their case in response to it based on the evidence that had already been adduced in the arbitral proceedings. I come to this conclusion for two key reasons. First, the EOT Defence was indisputably a completely new defence that was introduced at the tail end of the arbitral proceedings. As such, the Arbitration Claimants did not have the opportunity to adduce the relevant evidence and present submissions necessary to properly deal with it. Second, they could not, in my view, have predicted the appearance of the EOT Defence. Thus, when the Tribunal allowed and ruled on the EOT Defence in the Award, the Arbitration Claimants were, in my view, denied their right to be heard.

(1) The EOT Defence was a completely new defence

71 The EOT Defence was a completely new defence in two senses of the word "new".

72 The first sense of the word "new" is based on the question whether the EOT Defence had featured at any time during the course of the arbitral proceedings prior to the Defendants' Closing Submissions. This must be answered in the negative. As stated above, the defendants concede that the EOT Defence had not been pleaded and appeared for the first time in the Defendants' Closing Submissions. This was approximately a month *after* the evidentiary hearing had concluded, at the very tail end of the arbitral proceedings. Prior to this, there was no hint that the defendants would be relying on GC 40 to positively seek a contractual extension of time – I return to this point later when

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dealing with the alleged invitation by the Tribunal at [120]–[122] below. As mentioned above at [40], the Arbitration Claimants had expressly pointed out in the Amended Reply and Defence to Counterclaim that the defendants were *not* seeking to rely on GC 40.

73 The second sense of the word "new" is based on the question whether the EOT Defence was so similar to the pleaded Estoppel Defence such that the Arbitration Claimants had a reasonable opportunity to present their case on the EOT Defence because it had sufficient notice of, and a reasonable opportunity to deal with the Estoppel Defence. I also answer this question in the negative.

74 The defendants acknowledge that the EOT Defence is separate from the Estoppel Defence. However, their case is that the Arbitration Claimants had every opportunity to engage with the EOT Defence during the arbitration. This is because the facts and evidence relied upon *by the defendants* to support the Estoppel Defence were "the exact same facts and evidence that they then relied on in their written closing submissions to make the separate (but closely related) legal argument that they were entitled to an EOT" [emphasis in original].[61] The Arbitration Claimants had made a tactical decision not to engage with the facts and evidence upon which the Estoppel Defence, and subsequently the EOT Defence, were based. Their gamble did not pay off and they cannot now claim that they had been deprived of a reasonable opportunity to present their case.[62]

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61 DS at paras 56(b)–56(c).

62 DRS at paras 5–6.

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(A) THE PARTIAL AND COMPLETE ESTOPPEL DEFENCES

75 I pause briefly to note that in their reply submissions for OS 1103, the defendants advance a new bifurcated understanding of the Estoppel Defence premised upon the Admitted Instruction. The two alternative estoppel arguments are as follows:[63]

(a) that the Arbitration Claimants had waived or were estopped from enforcing *any* right to liquidated damages as a consequence of the Admitted Instruction ("Complete Estoppel Defence").

(b) that the Arbitration Claimants were estopped from enforcing any right to liquidated damages after the date by which CAK would have otherwise completed the rectification works but for the Admitted Instruction ("Partial Estoppel Defence").

76 The Complete Estoppel Defence had been a part of the defendants' case from the early stages of the arbitral proceedings. It was first alluded to at footnote 117 of the Amended Defence and Counterclaim (see above at [38]) and fleshed out in the defendants' written opening submissions. In essence, the Admitted Instruction and B's conduct (*ie,* insisting during various meetings that rectification works be carried out in a piecemeal fashion so as not to delay the Plant's commissioning and formally approving the defendants' repair methodology and schedule which involved repairing the compressors two at a time),[64] meant that the Arbitration Claimants were barred (or estopped) from claiming any liquidated damages for the delay in Mechanical Completion.[65]

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63 DRS at para 16.

64 DBOCD II at pp 652–653 [Defendants' Written Opening submissions at paras 15.16–15.18]; DRS at para 17.

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77 It is, however, less clear whether the *Partial* Estoppel Defence had ever been advanced by the defendants during the Arbitration.

78 The defendants argue in their reply submissions for OS 1103 that the Partial Estoppel Defence had also been raised early in the Arbitration.[66] They refer, in particular, to their opening submissions in the Arbitration at paragraphs 15.27–15.28,[67] which stated that based on the Rectification Work Schedule submitted on 11 March 2013, concurrent rectification works on all six compressors could have been completed within 24 days (or 30 days including detail design and procurement). As such, but for the Admitted Instruction, permanent rectification works on all six compressors could have been completed by 30 days from 11 March 2013. This meant that the defendants would only be liable for 27 days' worth of liquidated damages.

79 During the oral hearing for OS 1103, the defendants' counsel, Mr Thio Shen Yi SC, also pointed me to paragraph 15.22 of the defendants' opening submissions to show that the Partial Estoppel Defence had been in issue during the Arbitration.[68] Paragraph 15.22 stated that:

> In this case, in reliance on [B's] representation, the [defendants] developed and carried out a repair methodology and schedule that involved taking the compressors out two at a time. This delayed completion of the works to 21 June 2013 … Had the [defendants] proceeded with permanent repairs, these could have been carried out in 30 days (including detail design and procurement) from commencement of work (allowing for detail design and procurement).

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65 DBOCD I at pp 506–507 [Defendants' Written Opening Submissions at pp 22–23].

66 DRS at paras 21–24.

67 DRS at para 22.

68 NOA 30 June 2020 at p 17 lines 2–6.

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The defendants submit that the Partial Estoppel Defence focussed squarely upon the extent of delay that was caused by the Admitted Instruction.[69]

80 I am, however, unable to agree with the defendants' submissions. In my view, the Partial Estoppel Defence was only advanced by the defendants in their *reply submissions for OS 1103*. First, the phrase "Partial Estoppel Defence" appears for the first time in the defendants' reply submissions in OS 1103 dated 15 June 2020.[70]

81 Further, upon closer review, paragraphs 15.27 and 15.28 of the defendants' opening submissions in the Arbitration do not actually demonstrate that the defendants had advanced the Partial Estoppel Defence during the Arbitration. First, paragraph 15.27 referred expressly to "[the Arbitration Claimants'] assertions" which the defendants summarised at paragraph 15.25 and then proceeded to explain why those assertions were incorrect.[71] Paragraph 15.25 of the defendants' opening submissions in turn made reference to what the defendants considered the Arbitration Claimants' implied assertions in their Amended Reply and Defence to Counterclaim (at paragraphs 131–134) that the Admitted Instruction should relieve the defendants from liability for liquidated damages only for the period of time which would not in any event have been incurred for rectification works. Paragraph 15.26 of the defendants' opening submissions then continued as follows:

> *The [defendants] do not accept that the effect of [B's] representation should be so limited.* Since 1 March 2013, [B] had required [CAK] to arrange and perform permanent rectification work in accordance with [B's] requirements, leading the

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69 DRS at para 24.

70 NOA 29 June 2020 at p 14 lines 2–5.

71 PBOCD II at pp 946–948 [Defendants' Written Opening Submissions at pp 171–173].

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> [defendants] reasonably to believe that *[B] would not seek to enforce any alleged right to liquidated damages whatsoever*.
>
> [emphasis added]

The defendants' focus in paragraphs 15.25–15.28 of their opening submissions in the Arbitration was thus quite clearly solely on a *complete* bar to *any alleged right to liquidated damages whatsoever*, *ie,* the *Complete* Estoppel Defence.

82 The same analysis and conclusion apply in respect of paragraph 15.22 of the defendants' opening submissions in the Arbitration because the two following paragraphs make clear that the defendants were only concerned with the *Complete* Estoppel Defence:

> 15.23 The [Arbitration] Claimants acknowledge that this repair method delayed completion of the repair works. Now that the [defendants] have carried out repair works in that way, it would be inequitable for the [Arbitration] Claimants to renege from [B's] representation and claim an entitlement to be paid liquidated damages for the delay [B] insisted upon. To do so would be to allow [the Arbitration Claimants] to benefit from non-performance of which they were the cause.
>
> 15.24 Accordingly, the [defendants] submit that, [the] third and final element of promissory estoppel is satisfied and *that the [Arbitration] Claimants should not be entitled to claim liquidated damages*.
>
> [emphasis added]

83 The defendants did not point me to any further examples where the Partial Estoppel Defence had allegedly featured during the Arbitration. Their silence on the Partial Estoppel Defence (including in their first set of submissions for OS 1103) bolsters my view that the Partial Estoppel Defence is an afterthought that only surfaced belatedly in OS 1103 and did not feature in the Arbitration. As such, while there was mention of the length of delay caused by the Admitted Instruction from the outset of the Arbitration, I am unable to accept the defendants' submission that the Partial Estoppel Defence had been a

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live issue from the inception of the Arbitration. What was in play in the Arbitration was only the Complete Estoppel Defence.

84 For clarity, I will hereafter no longer use the term "Estoppel Defence" as referring to partial and complete estoppel. Preceding and subsequent references in this judgment to the "Estoppel Defence" should thus be read as referring only to the Complete Estoppel Defence.

(B) THE ARBITRATION CLAIMANTS' TACTICAL DECISION

85 The paragraphs cited above from the defendants' opening submissions in the Arbitration do not demonstrate that the Partial Estoppel Defence had been in play during the Arbitration. However, they do demonstrate that the defendants did put forth submissions and *some* evidence as to the extent of delay even though this was not directly in issue during the Arbitration.

86 In addition to the various paragraphs of the defendants' opening submissions in the Arbitration, the defendants point to three main instances where the facts and evidence pertaining to the EOT Defence were already in the arena during the Arbitration prior to the Defendants' Closing Submissions:[72] (a) the Answer to the Request for Arbitration dated 27 July 2016; (b) the Amended Defence and Counterclaim; and (c) the Witness Statements.

87 In a similar vein to the defendants' opening submissions, these three examples show that *in the context of the Estoppel Defence*, the defendants had pleaded the facts pertaining to the Admitted Instruction as well as two *piecemeal* rectification work schedules which provided for the Piecemeal Rectification

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72 DS at para 79(c).

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Work (*ie,* the Piecemeal Rectification Schedule of 11 March 2013 and the Updated Rectification Schedule of 2 April 2013). The defendants had also put forth the argument that as a result of the timelines set out in the two piecemeal work schedules referred to above (as approved by B) and the Admitted Instruction, rectification works which could have been completed within 24 (or 30) days were instead completed on 21 June 2013.[73]

88 As the Tribunal pointed out, "there is no direct evidence before the Tribunal establishing how long permanent countermeasures would have taken to be implemented, absent B's involvement in the issue" (Award at paragraph 327). This question (*ie*, how long *concurrent* permanent rectification works would have taken) was not addressed in any of the Witness Statements or expert reports. Neither party provided any analysis on the length of the delay caused by the piecemeal nature of the rectification works or how long concurrent remedial works would have taken.[74]

89 It should be noted that even when the EOT Defence was first raised in the Defendants' Closing Submissions, the Piecemeal Rectification Schedule, the Updated Rectification Schedule, as well as the time taken to actually rectify each pair of compressors remained the *only* pieces of evidence cited by the defendants in support of their estimate that concurrent rectification works could have been completed within 24 days but for the Admitted Instruction (or 30

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73 First Affidavit of CAJ and CAK's Mr [Redacted] at paras 20, 24, 33.

74 PS at para 63.

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days to allow for the "initial detail design and procurement").[75] In this regard, the defendants' reasoning was as follows (at paragraph 10.28):

> …
>
> (b) Because of this [Admitted] instruction, the [defendants] could not immediately commence work to permanently rectify all six compressors simultaneously. *It is clear from the Rectification Work Schedule of 11 March 2013 and from the time actually taken to rectify each set of compressors* … that rectification work could be carried out in around 30 days allowing for detailed design and procurement. Accordingly, had the [defendants] proceeded with this work as of 12 March 2013, it would have been completed by 11 April 2013;
>
> (c) Instead, because of [B's] instruction, completion of the repairs on all six compressors was delayed until 21 June 2013, a delay of 71 days; and
>
> (d) In all the circumstances, it is fair and reasonable that the Time for Completion be extended by the same amount of time – that is, to 10 May 2013 (28 February 2013 plus 71 days).
>
> [emphasis added]

90 Bearing in mind the foregoing, I agree with the defendants that certain facts, evidence and arguments as to the time that rectification works would have taken but for the Admitted Instruction had indeed been brought up during the Arbitration in the context of the Estoppel Defence. As to whether the "evidence" submitted *by the defendants* was sufficient to afford *the Arbitration Claimants* a fair and reasonable opportunity to respond to and engage the EOT Defence, this is a question which I return to at [115]–[118] below.

91 I also accept that CAI made a tactical decision not to engage with those facts, evidence and arguments pertaining only to the Estoppel Defence, before

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[75] PS at paras 81, 98(b); PRS at para 14; PBOCD II at pp 1023–1024 [Defendants' Closing Submissions at para 10.28]; see also PBOCD II at p 947 [Defendants' Opening Submissions at para 15.27] which is to the same effect.

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the appearance of the EOT Defence in the Defendants' Closing Submissions.[76] CAI acknowledges that the "period of delay caused by the Piecemeal Rectification Works may have been mentioned tangentially at some points during the Arbitration".[77] Further, based on CAI's own summary of the arbitral proceedings, the Arbitration Claimants' response to the argument that rectification works would have taken either 24 or 30 days but for the Admitted Instruction was always to state that the estimate was "not supported by any evidence and [the defendants] are put to proof of the same".[78] In fact, as part of its case that the EOT Defence had never been in issue during the Arbitration prior to the Defendants' Closing Submissions, CAI agrees that it had not sought to adduce any evidence of how long Concurrent Rectification Works would have taken but for the Admitted Instructions.[79] For convenience, I refer to this as the "Tactical Decision".

(C) THE DISTINCTIVENESS OF THE EOT DEFENCE AND THE ARBITRATION CLAIMANTS' LACK OF A REASONABLE OPPORTUNITY TO PRESENT ITS CASE

92 I do not think that the Arbitration Claimants can be faulted for the Tactical Decision as the length of delay caused by the Admitted Instruction and the Piecemeal Rectification Works were not squarely in issue during the arbitration proceedings, at least not until the Defendants' Closing Submissions and the introduction of the EOT Defence. For convenience, I refer to this as the "Piecemeal Rectification Delay Issue".

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76 DRS at paras 25–28.

77 PS at para 168.

78 PS at para 58(b) referring to the Amended Reply and Defence to Counterclaim.

79 PS at paras 63–67.

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93 In my view, while the Piecemeal Rectification Delay Issue was certainly relevant to the Estoppel Defence, the Arbitration Claimants did not have to engage with it in order to rebut the defences based on waiver and estoppel. This is because the defences based on waiver or estoppel were conceptually and factually distinct from the EOT Defence under GC 40.

94 The Estoppel Defence is premised on the equitable doctrine of estoppel which requires proof that: (a) B made a clear and unequivocal representation that it would not insist on its strict legal rights in respect of its entitlement to liquidated damages so as to ensure that the Plant's commissioning would not be affected by the rectification works; (b) the defendants had relied upon such representation to perform the Piecemeal Rectification Works; and (c) the defendants had suffered detriment such that it would be inequitable for B to now insist on being paid liquidated damages.[80]

95 In contrast, the EOT Defence hinged on a *contractual entitlement* that had its roots in GC 40 of the Agreements. Specifically:

> (a) GC 40.1 and GC 40.1(e) required proof that there was an "act", "omission" or "any default or breach by [B]" that caused the defendants to "be delayed or impeded in the performance of any of [their] obligations under the [Agreements].
>
> (b) To receive an extension of time for completion, the defendants must show that the period sought is "fair and reasonable in all the circumstances and … fairly reflect[s] the delay or impediment sustained by [them]" (GC 40.1).

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80 DRS at paras 16–21; PS at para 165.

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(c) GC 40.2 required that the defendants submit a notice of a claim for an extension of the time for completion together with the particulars of the event or circumstances justifying the extension as soon as reasonably practicable after the commencement of such event or circumstance.

(d) GC 40.3 requires that the defendants use their "reasonable efforts to minimize [*sic*] any delay in the performance of [their] obligations under the [Agreements]".

96 The practical *effect* of a successful EOT Defence might be the same as a successful Partial Estoppel Defence (assuming it had been raised) or analogous to a successful Estoppel Defence. However, the different legal *and* factual bases of the Estoppel Defence and EOT Defence meant that they could very well be dealt with differently on the facts of the present case. In particular, the Arbitration Claimants had the option of choosing whether they wished to fully engage with the Piecemeal Rectification Delay Issue in order to respond to the Estoppel Defence. As submitted by CAI, the Arbitration Claimants had a potential "silver bullet" in the form of GC 3.9 to counter the Estoppel Defence.[81]

97 GC 3.9 provided as follows:

> 3.9 Non-Waiver
>
> 3.9.1 Subject to GC 3.9.2 below, no relaxation, forbearance, delay or indulgence by either Party in enforcing any of the terms and conditions of the Contract or the granting of time by either Party to the other shall prejudice, affect or restrict the rights of that Party under the Contract, nor shall any waiver by either Party of any breach of the Contract operate as a waiver of any subsequent or continuing breach of the Contract.

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81 NOA 29 June 2020 at p 12 lines 17–19.

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> 3.9.2 Any waiver of a Party's rights, powers or remedies under the Contract must be in writing, dated and signed by an authorized [*sic*] person of the Party granting such waiver, and must specify the right and extent to which it is being waived.

98 It was common ground between the parties during the Arbitration that no such waiver in respect of the Arbitration Claimants' right to claim liquidated damages from the defendants had ever been written, signed and authorised by B (Award at paragraph 240). As such, armed with GC 3.9, it is understandable that the Arbitration Claimants engaged with the Piecemeal Rectification Delay Issue and the Estoppel Defence by simply putting the defendants to strict proof and relying on GC 3.9.

99 As it turned out, the Tactical Decision paid off. At paragraphs 235 and 240 of the Award, the Tribunal agreed with the Arbitration Claimants that "GC 3.9.1 clearly prevents a party from relying upon estoppel unless it is clearly set out. The Tribunal does not consider [the Arbitration Claimants] to have given up their contractual rights by way of any express written statement" such that GC 3.9 of the Agreements prevents estoppel.[82]

100 To summarise this section, while I agree that the Arbitration Claimants had made the Tactical Decision not to adduce evidence of their own to rebut the defendants' evidence and submissions on the Piecemeal Rectification Delay Issue, they did not have to do so in the context of the Estoppel Defence. This being the case, it cannot be said that the Piecemeal Rectification Delay Issue was in issue in any meaningful way during the Arbitration or that all the relevant facts and evidence impinging on the EOT Defence were already in the arena

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[82] PBOCD I at p 140 [Final Award at para 235].

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before the Defendants' Closing Submissions were filed. I reiterate that the Estoppel Defence and the EOT Defence are conceptually distinct with different legal and factual elements. As such, CAI did not have every opportunity to engage with the EOT Defence on the basis of the evidence and submissions adduced in respect of the Estoppel Defence, as the defendants suggested. Put simply, no opportunity could have arisen because the Arbitration Claimants did not have reasonable notice that it was necessary to engage with the Piecemeal Rectification Delay Issue until the EOT Defence belatedly appeared.

(D) THE CONSEQUENCE OF THE BELATED RAISING OF THE EOT DEFENCE

101 In my judgment, the belated introduction of the EOT Defence meant that the Arbitration Claimants were deprived of a reasonable opportunity to respond to it.

102 I take the defendants' case at its highest and assume that it was open to the Tribunal to make a finding that an extension of time was warranted under GC 40 even though it is common ground that: (a) the defendants did not comply with the notice provisions under GC 40.2; and (b) that B had never formally granted an extension of time to CAK under the Agreement (Award at paragraphs 285–288). Even so, it would still be necessary for the defendants to show that the period of extension is "fair and reasonable in the circumstances" under GC 40.1 and that they had used their "reasonable efforts to minimize [*sic*] any delay in the performance of [their] obligations under the [Agreements]" under GC 40.3.

103 GC 3.9 would *not* have afforded the Arbitration Claimants an answer to the EOT Defence on the facts of the present case. The EOT Defence was rooted in a contractual entitlement under the Agreement rather than the equitable

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doctrine of estoppel. Therefore, it is logical and I accept CAI's submission that to rebut the defendants' evidence and submissions on the Piecemeal Rectification Delay Issue *in the context of the EOT Defence*, the Arbitration Claimants would have needed to seek disclosure, adduce evidence and advance submissions on the following issues:[83]

(a) how long the Concurrent Rectification Works would have taken;

(b) whether the defendants had their own independent reasons for embarking on the Piecemeal Rectification Works. In other words, whether the Admitted Instruction was the direct and proximate reason for piecemeal (as opposed to concurrent) rectification of the compressors; and

(c) whether the defendants had at all times used their reasonable efforts to minimise any delay in the performance of their obligations under the Agreements as required under GC 40.3, and if not, how this would have impacted the application of GC 40.

104 Focussing on [103(a)], it is likely that expert evidence would have been important and would feature on two further issues: (a) whether the Concurrent Rectification Works were even feasible in the first place; and (b) how long the Concurrent Rectification Works would have taken and the difference in the amount of time needed for Concurrent as opposed to Piecemeal Rectification Works. The answers to these two questions would assist in determining what would be a "fair and reasonable" amount of extension of time, if any, to be granted to the defendants.

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83 PS at para 139.

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105 I also accept CAI's submission that evidence as to whether there were any other factual circumstances to take into account when estimating the time required for the repairs (*eg*, any factors specific to the H2 units in question which might make the concurrent repair of all six compressors more difficult) would likely also have featured in CAI's rebuttal.[84]

106 The defendants submit that CAI's list of possible evidence and arguments that could have been deployed at the hearing in respect of the EOT Defence are: (a) not evidence at all but rather legal submissions that CAI had the opportunity to make; (b) evidence of subjective intention that is irrelevant or inadmissible as a matter of English law; or (c) otherwise irrelevant to determining the issues in respect of the EOT Defence. It was also argued that the further evidence would not have made any meaningful difference to the Tribunal's decision on the EOT Defence.[85]

107 I agree with CAI that these arguments are plainly wrong and should be rejected.[86] The areas canvassed at [103] above relate to whether GC 40 was even applicable on the facts of the dispute and if so, the appropriate length of an extension of time, if any, to be allowed under GC 40. To understand why these areas could have made a meaningful impact on the Tribunal's decision on the EOT Defence, one need look no further than the Award itself.

108 There, the Tribunal *itself* recognised at various junctures that there was a lack of *critical evidence* on which to base its decision on the EOT Defence. I

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84 PS at para 139(a)(ii).

85 DS at paras 56(d) and 79.

86 PRS at paras 18, 20–24.

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list three key examples of this which relate precisely to the further areas raised by CAI.

(a) First, the Tribunal stated that there was a dearth of detailed evidence as to how Concurrent Rectification Works would have been carried out (Award at paragraph 313):

> There is nothing in GC 40.1 which precludes the Tribunal from granting [CAK] an EOT, once it has considered all the circumstances, if the Tribunal finds that GC 40.1(e) is engaged. *One* ***critical circumstance*** *is that detailed evidence concerning precisely how [CAK] would have gone about rectifying the motor vibrations, if it were not for the piece-meal schedule, is not before the Tribunal.* The [Arbitration] Claimants submit that there is no evidence on which the Tribunal can find that there was any delay attributed to the [Arbitration] Claimants.
>
> [emphasis added in italics and bold italics]

(b) Second, the Tribunal acknowledged that there were potential issues surrounding the state of CAK's resources and hence its ability to carry out the Concurrent Rectification Works (Award at paragraph 333):

> The Tribunal ***does not have sufficient evidence*** *before it as to determine whether [CAK],* ***with the allocation of resources available to it at the time****, could have achieved the rectification of all six (6) compressors in a similar time as it took to rectify only a pair of compressors.* Thus, the Tribunal does not wholly accept the [defendants'] submissions, in so far as they [are] relevant to estimating a time period in which [CAK] could have introduced the permanent counter-measures into each of the six (6) compressors.
>
> [emphasis added in italics and bold italics]

(c) Third, the Tribunal granted the defendants a 25-day extension of time while simultaneously recognising that expert evidence would have been useful to assist CAK in its claims for a 71-day extension of time (Award at paragraph 334):

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> *… Had the [defendants] procured further evidence, or even obtained expert evidence*, then perhaps an extension of time of 71 days could have been granted to them. But this was not done.
>
> [emphasis added]

It is clear that the Tribunal recognised that there was a lack of evidence, including expert evidence, on material aspects of the EOT Defence.

109 It has not escaped my attention that at paragraph 314 of the Award, the Tribunal stated that while there was no precise expert or factual evidence establishing the difference in time for rectification, "any such evidence (factual or expert in nature) would only amount to circumstantial evidence which speaks to [CAK's] intention during the early months of 2013" and therefore "would not have been of much assistance were it adduced in any case".[87]

110 I find it difficult to reconcile the Tribunal's comments at paragraph 314 with its candid acceptance at other parts of the Award that the evidence before it as to the precise length of the delay attributable to the Admitted Instruction was unsatisfactory and that such evidence was potentially important. Even if the grant of an extension of time under GC 40 was well within the Tribunal's discretion, the precise length of the extension to be granted had to be determined with reference to the factual matrix of the case. In this regard, I agree with CAI that it was precisely the Tribunal's role to reach its conclusions based on the evidence presented by the parties. While the evidence may not be determinative, it does not follow that it is unnecessary or unhelpful.

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87 DS at para 79(d); PBOCD I at pp 162–163 [Final Award at para 314].

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111 Returning to [103(c)] above, it is noteworthy that the Tribunal does not appear to have put its mind to GC 40.3 in the Award, despite this being one of the conditions for the grant of an extension of time under GC 40. Relatedly, no submissions or evidence were tendered by the defendants specifically in respect of GC 40.3.[88]

112 I would stress that the issue under consideration is *not* whether the additional expert or factual evidence, or document discovery would have been useful to the Arbitration Claimants in successfully rebutting the EOT Defence. Rather, the question is whether the Tribunal had deprived them of the opportunity to obtain, lead and/or rely on such evidence in the first place such that it could be said that the Arbitration Claimants had not been given a *reasonable opportunity* to present its case on the defendants' EOT Defence.

113 In my view, this question must be answered in the affirmative. I accept CAI's submission that if the EOT Defence had been raised earlier during the Arbitration, the Arbitration Claimants would have run their case differently.[89] As mentioned previously, the Admitted Instruction and the Piecemeal Rectification Delay Issue were not squarely in issue during the Arbitration until the Defendants' Closing Submissions were filed (see above at [92]–[100]). The Arbitration Claimants were only required to meet the defendants' defences against its claims for liquidated damages. However, they could not be expected to *guess* what the defendants' case might have been or to pursue and respond to all possible defences that the defendants had not explicitly raised in the Arbitration, such as the EOT Defence.

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88 PS at para 139(e).

89 PS at para 139.

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114 I turn next to deal with the defendants' submission that the facts and evidence that they had used to advance the EOT Defence in the Defendants' Closing Submissions were exactly the same as those relied upon in respect of the Estoppel Defence.[90] In my judgment, this submission misses the point. In this regard, Vinodh Coomaraswamy J's analysis of the two aspects of a reasonable opportunity to present one's case in *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro Industries*") is instructive:

> 146 There are two aspects to a party's reasonable opportunity to present its case: a positive aspect and a responsive aspect. The positive aspect encompasses the opportunity to present the evidence and advance the propositions of law on which it positively relies to establish its claim or defence, as the case may be. The responsive aspect encompasses the opportunity to present the evidence and advance the propositions of law necessary to respond to the case made against it. It is the responsive aspect of the opportunity to present its case which JVL alleges the tribunal denied it.
>
> 147 The responsive aspect of presenting a party's case has itself two subsidiary aspects to it. The first is having notice of the case to which one is expected to respond. The other is being permitted actually to present the evidence and advance the propositions of law necessary to respond to it. A tribunal will therefore deny a party a reasonable opportunity to respond to the case against it if it either: (a) requires the party to respond to an element of the opposing party's case which has been advanced without reasonable prior notice; or (b) curtails unreasonably a party's attempt to present the evidence and advance the propositions of law which are reasonably necessary to respond to an element of the opposing party's case. But there is a third situation in which a tribunal will deny a party a reasonable opportunity to present its responsive case: when the tribunal adopts a chain of reasoning in its award which it has not given the complaining party a reasonable opportunity to address.

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90 DS at para 26(b) and 26(c).

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115 CAI's case in OS 1103 in respect of the Primary NJ Breach is focussed on the *responsive aspect* of having a reasonable opportunity to respond to the *case made against it*. The defendants' submission thus misses the mark: a reasonable opportunity to present one's case under Art 18 of the Model Law requires that *the Arbitration Claimants* (not the defendants) had a reasonable opportunity to present its case, and more importantly, to respond to the defendants' belatedly raised EOT Defence with evidence and legal arguments.

116 With the greatest respect to the Tribunal members, they too seemed to have missed the point. At paragraph 290 of the Award, the Tribunal reasoned as follows in allowing *and* ruling on the EOT Defence:

> (a) it felt that the "new argument" was perfectly capable of being considered by the Tribunal;
>
> (b) the Arbitration Claimants' Submissions were prepared and filed in response to the Defendants' Closing Submissions.
>
> (c) the Arbitration Claimants therefore had an opportunity to respond to the Defendants' Closing *Submissions* on the EOT Defence; and
>
> (d) *the defendants* were entitled to make use of the evidence which already existed to make good *their* arguments on the EOT Defence.

Even on a generous reading of this paragraph of the Award, it is clear to me that the Tribunal did not consider the Arbitration Claimants' objection that *they* had not been given any opportunity to lead evidence or cross-examine the defendants' witnesses, or seek document disclosure to respond to the EOT Defence. The Tribunal appears to have focused on the *defendants'* right to use

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the existing evidence to advance the EOT Defence. In my view, the Tribunal failed to adequately consider whether the *Arbitration Claimants* had sufficient opportunity to, for example, marshal their own evidence to meet the EOT Defence. That was where the process failed and procedural unfairness was occasioned. A chance to respond to the counterparty's legal submissions on a newly raised defence cannot constitute a reasonable opportunity to present one's case if the evidence that might support one's arguments had not been adduced during the arbitral proceedings. Whilst paragraph 98 of the Arbitration Claimants' Closing Submissions (reproduced at [46] above) did attempt to make some substantive arguments on the EOT Defence, I disagree that it was demonstrative of the Arbitration Claimants having had a reasonable opportunity to present its responsive case to the EOT Defence. The Arbitration Claimants were entitled to be given a reasonable opportunity to respond, not perfunctorily, but in a fulsome manner to the EOT Defence. Paragraph 98 must also be viewed in the context of paragraphs 94 and 97 of the Arbitration Claimants' Closing Submissions where they had objected to the EOT Defence even being raised at that stage of the Arbitration and had asked the Tribunal to disregard it.

117 Although CAI may have strategically made the Tactical Decision while dealing with the evidence led by the defendants in respect of the Estoppel Defence, the landscape pertaining to the Vibration Issue was, in my judgment, materially altered when the conceptually distinct EOT Defence was sought to be put into play in the Defendants' Closing Submissions. I reiterate that at that point of the arbitral proceedings, document disclosure, witness evidence, cross-examination and oral closing submissions had all been completed.

118 The defendants' submission at [114] above fails for another reason: the evidence and facts adduced by the defendants concerning the two rectification schedules and the time taken to rectify each set of compressors (see above at

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[89]) were wholly insufficient. It hardly needs to be said that the actual time taken to complete the Piecemeal Rectification Works and the two rectification schedules pertained specifically to *Piecemeal Rectification Works* – they did not demonstrate how long it would have taken for *Concurrent Rectification Works* to be completed. This very point is reflected in the Tribunal's own reasoning when it rejected the evidence adduced by the defendants. As has been mentioned at [108(b)] above, after having regard to "all the evidence before it",[91] the Tribunal stated that it did not have sufficient evidence as to whether CAK could have carried out Concurrent Rectification Works in the same time it would have taken as the Piecemeal Rectification Works. As such, "the Tribunal [did] not wholly accept the [defendants'] submissions, in so far as they [are] relevant to estimating a time period in which [CAK] could have introduced the permanent counter-measures into each of the six (6) compressors". Thus, the evidence that the defendants claim allowed them to present their case on the EOT Defence could not have afforded the Arbitration Claimants a reasonable opportunity to respond to the EOT Defence simply because the "evidence" in play then was not directly relevant to the EOT Defence. Instead, one would have to rely on "inductive logic" to extrapolate from the length of time taken to rectify two compressors to determine the time to rectify all six compressors concurrently.[92] As such, it is fallacious for the defendants to contend that the "exact same facts and evidence" adduced by the defendants in respect of the Estoppel Defence afforded the Arbitration Claimants a reasonable opportunity to present its responsive case in respect of the EOT Defence.

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91 PBOCD I at p 166 [Final Award at para 328].

92 NOA 29 June 2020 at p 11 lines 20–24.

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119 To conclude this section, in my judgment, CAI did not have a fair and reasonable opportunity to present its case in respect of the EOT Defence. The EOT Defence was a completely new defence that was introduced at an extremely late stage in the arbitral proceedings which, up to that point, had only really focussed on the Estoppel Defence. The EOT Defence was conceptually and factually distinct to the Estoppel Defence and needed to be dealt with and addressed in a different fashion. Furthermore, even if it was possible for the defendants to advance the EOT Defence based on the exact same evidence relied upon in respect of the Estoppel Defence, this does not aid the defendants' case for two reasons. First, the crux of Art 18 of the Model Law is not whether the defendants could advance their EOT Defence, but rather whether the Arbitration Claimants could respond to it. Second, the evidence relied upon by the defendants was, in any event, insufficient to ground their own EOT Defence, much less a rebuttal of it from the Arbitration Claimants.

(2) The alleged invitation by the Tribunal

120 In my view, the Arbitration Claimants could not have predicted or foreseen the raising of the EOT Defence. They were accordingly deprived of a reasonable opportunity to present their case on the EOT Defence because they did not have "***notice*** of the case to which [they are] expected to respond" [emphasis added] (*JVL Agro Industries* ([114] *supra*) at [146]).

121 As stated previously, there was no hint of the EOT Defence until it appeared in the Defendants' Closing Submissions. In response to this, the defendants refer to the comments of one of the Tribunal members made on the last day of the oral hearing to argue that they had introduced the EOT Defence upon *the invitation* of the Tribunal to both parties to deal with alternative bases of relief from liquidated damages. This being the case, the Arbitration Claimants

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had notice of the EOT Defence (*ie,* as an alternate basis of relief from liquidated damages) and had subsequently taken the opportunity to respond substantively to the argument in the Arbitration Claimants' Closing Submissions.[93]

122 I disagree with the defendants. In my view, the Tribunal did not specifically invite submissions on the EOT Defence or "alternate bases of relief from liquidated damages" or authorise the raising of new defences. As to whether the EOT Defence had been introduced upon the invitation of the Tribunal is a question that features more significantly in respect of Issue 2, I will only address it here briefly (see below at [206]–[214] for further elaboration).

(a) First, it is clear that even if one of the Tribunal members' views could be taken as being representative of the Tribunal's views, the Tribunal was thinking only of existing defences and arguments that had already been made, as opposed to authorising or inviting the parties to raise new and hitherto unpleaded defences.

(b) Second, even taken at its highest, the discussion cannot be interpreted as a license for parties to introduce new defences without seeking leave from the Tribunal to do so. In fact, the Tribunal member concerned stated that if a tribunal wishes to deal with "principles that the parties have not fully argued" (*ie,* principles that had been raised at some point but not fully considered), such an approach "must be taken with full notice to the parties with full opportunity for argument".[94]

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93 DS at paras 26(b)(ii) and 56(a).

94 DBOCD IV at p 1775–1776 [Transcript on 13 March 2018 at page 22 lines 21–page 23 line 3].

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As such, there was, in my view, no advance notice or invitation to *both* parties that they ought to be raising any new arguments or defences in relation to alternative bases of relief from liquidated damages in their closing submissions.

123 The defendants also aver that an extension of time "is the usual response (along with arguments of estoppel and the like) to situations in which the Owner/Employer prevents or delays the Contractor's completion of the works".[95] On this basis, the defendants appear to suggest that the Arbitration Claimants ought to have foreseen the raising of the EOT Defence.

124 This argument is, with respect, somewhat disingenuous.[96] The Arbitration Claimants had expressly pointed out in their pleadings that the defendants were *not* seeking an extension of time under GC 40 in response to the claims for liquidated damages (see [40] above). The defendants did not deny this and the parties dealt with the Vibration Issue on the basis that GC 40 was not in issue in the dispute. The Arbitration Claimants could not, therefore, be expected to predict a 180 degree about turn in the Defendants' Closing Submissions right at the tail end of the Arbitration.

Issue 1(b): Whether the Arbitration Claimants' conduct in the Arbitration amounted to hedging

125 The defendants argue that if the Arbitration Claimants had truly felt that it had no opportunity to properly deal with the factual or legal bases of the EOT Defence, it was incumbent on them to make the relevant objections to the Tribunal forcefully and unequivocally rather than to hedge their bets by

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95 DS at para 69(d).

96 PRS at paras 46–48.

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objecting half-heartedly, then proceeding to respond and thereafter waiting for the Award. Mr Thio SC described this as the Arbitration Claimants' "heads, I win; tails, I win" hedging strategy. The defendants add that the Arbitration Claimants never sought leave from the Tribunal to: (a) put forth further factual and expert evidence that it now claims was material to the outcome of the EOT Defence and the Arbitration; (b) cross-examine the defendants' witnesses; and (c) make further legal submissions on the EOT Defence.[97]

126 In my judgment, the Arbitration Claimants' conduct during the Arbitration and the objections they raised in their closing submissions did not amount to hedging. They had objected sufficiently clearly and unequivocally to the EOT Defence in the Arbitration Claimants' Closing Submissions. Their silence in the period leading up to 10 September 2018 when the Tribunal declared the arbitral proceedings to be closed does not undermine their clear and unequivocal position.

127 The pertinent principles in relation to hedging were explained by the Court of Appeal in *China Machine* ([2] *supra*) as follows:

> 168 … An assertion that the tribunal has acted in material breach of natural justice is a very serious charge, not just for the imputation that such an allegation makes as to the bona fides and professionalism of the tribunal, but also for the grave consequence it might have for the validity of the award. For this reason, *there can be no room for equivocality in such matters*. ***An aggrieved party cannot complain after the fact that its hopes for a fair trial had been irretrievably dashed by the acts of the tribunal, and yet conduct itself before that tribunal "in real time" on the footing that it remains content to proceed with the arbitration and obtain an award, only to then challenge it after realising that the award has been made against it***. In our judgment, such tactics simply cannot be countenanced.

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97 DS at para 59.

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

(1) The objection in the Arbitration Claimant's Closing Submissions

128 In my judgment, the objection raised by the Arbitration Claimants to the EOT Defence in their Closing Submissions was not half-hearted, perfunctory or an attempt to hedge their bets.

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129 To fully appreciate the nature of the Arbitration Claimants' written objections it would be useful to again lay out the relevant paragraphs in full (see [46] above):[98]

> 94. The [defendants] assert several new arguments for the first time in their Written Closing. **On the basis of procedural fairness alone, when each of these points would turn on detailed issues of fact that were not addressed at the hearing, and in particular where the [defendants] have made no application to amend, each of these new arguments should be dismissed by the Tribunal.** Each is dealt with briefly below.
>
> …
>
> 97. The [defendants'] third new argument advances a claim for a retrospective order for an extension of time pursuant to GC 40 to complete these works. **This argument was never pleaded, nor raised at any point during the 8-day hearing, until it appeared in the Written Closing. For that reason alone, it should not be considered by the Tribunal. The procedural unfairness point is particularly acute with this final new claim, as the [defendants] attempt to put more and more emphasis on discussions or alleged agreements which have not been the subject of pleadings, focused document production, witness evidence or cross-examination**. **This includes the fact that not only were the [Arbitration] Claimants denied the opportunity in this regard, but also the fact that the [defendants] did not subject the [Arbitration] Claimants' witnesses to any cross-examination to give them a chance to explain their positions (on the unpled issues).** This approach runs entirely contrary to the purpose of the detailed Procedural Orders.
>
> 98. In any event, this new GC 40 claim has three insurmountable flaws:
>
> (a) First, the plain wording of GC 40.1 has not been satisfied: even on the [defendants'] case they have not been "*delayed or impeded in the performance of any of its obligations…*" There is no dispute that they failed to complete by the Time for Completion, and the events to which they refer arose both (a) only after the Time for Completion, and (b) as a direct consequence of the [defendants'] admitted breach of contract. GC 40 cannot have been intended to apply in these

[98] PBOCD II at pp 1085–1087 [CAI's Closing Submissions at paras 94, 97–98].

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> circumstances: its purpose was to avoid the application of the prevention principle prior to that point in time.
>
> (b) Second, the [defendants] have not complied with the mandatory pre-requisites for such an extension at GC 40.2, which are if anything even more explicit and extensive than those for GC 39, or identified nay mutual agreement by which these have been waived.
>
> (c) Third, as has been addressed above, there is no evidence upon which the Tribunal can properly find there was any delay to which the clause could apply. Even if there were, GC 40.1 only permits an Extension of Time '*by such period as shall be fair and reasonable*'. By the time of the events relied upon by the [defendants], it was already inevitable that they would be liable to pay Liquidated Damages to the [Arbitration] Claimants, and GC 40 could not '*fairly'* or '*reasonably*' operate so as to the defeat the claim.
>
> [emphasis in original in underline and italics; emphasis added in bold]

130 At paragraph 94, the Arbitration Claimants expressly asked that, *inter alia*, the EOT Defence be disregarded and made specific reference to the procedural unfairness. In paragraph 97, the Arbitration Claimants not only laid out their objection again to the introduction of the EOT Defence, but also explained the basis for their objection again. This encompassed several areas of procedural unfairness, *ie,* the unfairness due to its belated introduction, the lack of any opportunity to: (a) test the evidence relied upon by the defendants; and (b) adduce their own evidence to rebut the EOT Defence. I note also that paragraph 97 of the Arbitration Claimants' Closing Submissions broadly mirrors CAI's case in OS 1103. The Tribunal had thus been given some prior warning as to the substance of the case that the Arbitration Claimants might take up in setting aside or enforcement proceedings against the Award if it had proceeded to rule on the EOT Defence. Therefore, in the *China Machine* sense (at [170]), and in the specific context of this case, the objections raised in paragraphs 94 and 97 were, in my view, already a form of "fair intimation" to the Tribunal, even though *strictly speaking* at that point in time, there was as yet

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no breach of procedural natural justice by the Tribunal; nonetheless, the objection was raised by the Arbitration Claimants.

131 The defendants have made much about the relevance of the eminence and experience of the Tribunal who are all experienced legal practitioners and arbitrators.[99] In my view, this argument is a double-edged sword and works against the defendants. The Tribunal's undoubted legal and arbitration experience meant that its members would have appreciated the nature of the objections being raised, particularly the repeated emphasis by the Arbitration Claimants on procedural unfairness. I disagree that the Arbitration Claimants' objections in their closing submissions were half-hearted, perfunctory objections that merely made generic motherhood statements without due elaboration. In my judgment, there was no equivocality in the Arbitration Claimants' response and objections to the EOT Defence or to the manner in which it was raised by the defendants.

132 I am conscious of the fact that the Arbitration Claimants then went on, at paragraph 98, to point out "three insurmountable flaws" with the EOT Defence. The defendants leverage on this and argue that: (a) the Arbitration Claimants were hedging their bets because they had already objected to the EOT Defence at paragraph 97 but nonetheless went on to substantively engage with the EOT Defence on its merits; and (b) paragraph 98 was evidence that the Arbitration Claimants had the opportunity to respond to the EOT Defence and had taken it.[100]

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99 DS at paras 18–20, 57 and 136; DRS 178.

100 DS at para 59.

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133 I disagree with the defendants' contentions for two reasons. First, the brief observations in paragraph 98 do not constitute a "fair and reasonable opportunity" to respond to the EOT defence. I agree with the submissions of counsel for CAI, Mr Cavinder Bull SC, that the Arbitration Claimants were only able to point out "threshold issues" in a cursory manner as opposed to engaging with the merits of the EOT Defence in a fulsome way. This was because they did not possess sufficient evidence in respect of it (nor had they been given the opportunity to test the defendants' evidence in respect of it).[101] Second, I agree with CAI that there is nothing inherently inconsistent with briefly pointing out obvious flaws with the EOT Defence while simultaneously objecting in principle to its late introduction. The Arbitration Claimants had already pointed out their objections to the EOT Defence even being considered, *twice* in the earlier paragraphs.

134 Finally, the defendants submit that that the Arbitration Claimants ought to have proactively sought leave to adduce further evidence, test the evidence adduced by the defendants or tender further legal submissions. They aver that the Arbitration Claimants' failure to do so was emblematic of hedging. The defendants also argue that if indeed the Arbitration Claimants had a "silver bullet" in GC 3.9 to deal with the Estoppel Defence, then their objections to the EOT Defence (which did not engage GC 3.9) would have been much stronger.

135 For the reasons given above, I disagree that the Arbitration Claimants' objections were half-hearted or insufficiently emphatic. Further, the defendants' argument places the cart before the horse. The defendants did not plead or otherwise raise the EOT Defence at any point prior to the Defendants' Closing

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101 PRS at para 74.

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Submissions. It was a new defence introduced at an extremely late stage in the proceedings. I agree that the initial burden of seeking leave to introduce this new defence thus laid on the defendants, be it by way of amendment to their pleadings and/or to adduce the necessary evidence to support their wholly new argument or defence (see *Econ Piling Pte Ltd and another (both formerly trading at Econ-NCC Joint Venture v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246 at [85] and [86], *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*") at [33] and [48]).[102] Only if that was done would the Arbitration Claimants then have the burden of objecting to the EOT Defence and/or to seek further directions from the Tribunal in respect of it. Be that as it may, whilst the defendants did not first seek leave to introduce the EOT Defence, the Arbitration Claimants nonetheless objected to it at the earliest opportunity afforded to them.

136 To summarise, the Arbitration Claimants' objection to the EOT Defence in their closing submissions was clear and unequivocal. There was thus no hedging by the Arbitration Claimants in the sense cautioned against by the Court of Appeal in *China Machine* ([2] *supra*).

(2) The Arbitration Claimants' post-objection conduct

137 The present case is somewhat unusual in its factual contours. Unlike other cases involving challenges to arbitral awards on the basis that one party was unable to present its case due to a breach of procedural natural justice by an arbitral tribunal (see *eg, ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm) ("*ASM Shipping*") and *China Machine*), not only was the complaining party's objection raised at the earliest opportunity, this

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102 NOA 29 June 2020 at p 8 line 12–p 9 line 11; PRS at paras 53–54.

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opportunity also happened to be the last substantive written submission to the Tribunal. By that time, the "meat" of the proceedings had already come to an end, including the entire evidentiary hearing and oral closing submissions.

138 The defendants argue that the Arbitration Claimants could have raised *further objections* after the Arbitration Claimants' Closing Submissions were tendered to the Tribunal, there being "ample time" for them to do so.[103] In a similar vein to their argument reproduced at [134] above, the defendants argue that the Arbitration Claimants' silence meant that their objection was equivocal and emblematic of hedging because they did not "at the very least, seek to suspend the proceedings until the breach [had] been satisfactorily remedied (if indeed the breach is capable of remedy) so that the tribunal and the non-complaining party [had] the opportunity to consider the position" (*China Machine* at [170]). This showed that the Arbitration Claimants were "clearly content to proceed to the Final Award" in reliance on their earlier submissions and the earlier Tactical Decision. According to the defendants, this silence was also part of the Arbitration Claimants' overall "heads, I win; tails, I win" hedging strategy with regard to the EOT Defence.[104]

139 To appreciate the defendants' arguments, it is necessary for me to briefly provide some further context as to the events *after* the Arbitration Claimants' Closing Submissions were tendered on 27 April 2018. The general timeline of events is as follows:[105]

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103 NOA 30 June 2020 at p 23 lines 2–10.

104 DRS at paras 115–116.

105 PBOCD I at pp 74–75 [Final Award at paras 54–61].

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(a) On 18 May 2018, the Arbitration Claimants wrote to the Tribunal advising that one of the English authorities cited in their Closing Submissions had since been overturned on appeal. This letter did not touch on the EOT Defence.

(b) On 24 May 2018, the defendants wrote to the Tribunal alleging that the Arbitration Claimants had raised new arguments in their closing submissions and their letter of 18 May 2018, and then proceeded to respond to various points. This letter also did not touch on the EOT Defence. I refer to it as the "24 May 2018 Defendants' letter".

(c) On 26 May 2018, the Arbitration Claimants provided a further response to the Tribunal complaining that the defendants were making further submissions and stating that the onus was on the defendants to make the proper application to the Tribunal if they wished to adduce a further round of written submissions. They asked that the 24 May 2018 Defendants' Letter be disregarded almost entirely and expressly reserved their rights in respect of the same. I refer to this letter as the "26 May 2018 Arbitration Claimants' Letter". This letter similarly did not contain anything pertaining to the EOT Defence.

(d) On 28 May 2018, the Tribunal wrote to the parties advising that it took the view that the 24 May 2018 Defendants' Letter would not be ignored. The Tribunal requested the Arbitration Claimants to "respond to whatever part of the [24 May 2018 Defendants' Letter] that it objects against". The Arbitration Claimants were not to "raise any new submissions beyond what has been raised by the [24 May 2018 Defendants' Letter]". I refer to this letter as the "28 May 2018 Tribunal Letter".

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(e) On 30 May 2018, the Arbitration Claimants provided their response. Again, nothing was said in relation to the EOT Defence.

(f) On 1 June 2018, costs submissions were filed by the parties.

(g) On 22 June 2018, reply costs submissions were filed by the parties.

(h) On 19 July 2018, supplemental costs submissions were filed by the parties.

(i) On 10 September 2018, the Tribunal declared the proceedings closed. The Award was released to the parties on 11 March 2019, some six months after the close of proceedings.

140 Three points emerge from the above timeline of events after the Arbitration Claimants' Closing Submissions: (a) the Arbitration Claimants had time and opportunity to follow up on their objections to the EOT Defence; (b) they took the opportunity to alert the Tribunal that one of the authorities relied on by them had since been overruled; and (c) the Arbitration Claimants did not follow-up on their objection or make any further application in respect of the EOT Defence up to the point where the Tribunal declared proceedings to be closed. The key question to consider is whether the Arbitration Claimants were required to do so.

141 I answer this question in the negative.

142 In my judgment, the Arbitration Claimants' silence in respect of the EOT Defence after their closing submissions were tendered neither undermines their position that the Tribunal ought not to have allowed and ruled on the EOT

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Defence, nor illustrates that they were trying to hedge their position. This is because the Arbitration Claimants' duty to give fair intimation to the Tribunal and/or to seek to suspend the arbitral proceedings *had not yet arisen*.

143 When the Tribunal declared the close of the arbitration proceedings, this signalled to the parties that the arbitral process would be coming to an end, after which no more money or effort was to be expended and the award would be rendered (Gary Born, *International Commercial Arbitration*, (Wolters Kluwer 2014, 2nd Ed) at pp 2296–2297). The significance of this in the case before me is that it potentially meant that one of three scenarios could play out:

(a) the Tribunal would not allow the EOT Defence and would disregard it ("Scenario 1");

(b) the Tribunal would allow the EOT Defence to be raised and rule on it based on the evidence and submissions presented to it prior to the close of the hearing ("Scenario 2"); or

(c) the Tribunal would allow the EOT Defence, and if allowed, would permit further evidence and/or submissions to be introduced, and also permit the re-opening of the hearing, if necessary ("Scenario 3").

144 The Arbitration Claimants were, in my view, entitled to assume, and reasonably so, that by declaring the proceedings closed without any further indication in relation to the new EOT Defence, the Tribunal would either not allow it to be raised, or would allow it to be raised but only after re-opening the proceedings and permitting further pleadings, discovery, and/or evidence in respect of the same in order to afford the Arbitration Claimants a reasonable opportunity to challenge the EOT Defence. This being the case, two of the three

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scenarios (*ie,* Scenarios 1 and 3) at [143] above would have been permissible to the Arbitration Claimants.

145 In *China Machine* ([2] *supra*)*,* the Court of Appeal held that a court analysing whether a party has been denied his right to a fair hearing by a tribunal's conduct of the proceedings must ask itself what a reasonable and fair-minded tribunal might have done bearing in mind the precise factual matrix confronting the tribunal then (at [98]). The arbitral process is dynamic; the fairness of the procedure used can only be judged against what the parties may be taken as having agreed to and expected *by what they contemporaneously communicated to the tribunal, and which is conducting the proceedings in real time* (at [101]). In the context of a challenge directed at the exercise of the tribunal's procedural discretion, there cannot be any non-compliance with natural justice if the complaining party has not informed the tribunal of what, in its view, such compliance required (at [102]). Reading these three paragraphs in *China Machine* together, the duty of the complaining party to inform the tribunal of an alleged breach is necessarily contingent on the complaining party *first knowing* that the tribunal *has* taken a step in the conduct of the proceedings that the complaining party considers to be a breach of procedural fairness. Only then can the complaining party's duty to give fair intimation to the tribunal arise, and for that party to state what, in its view, compliance with procedural fairness would require. If, *at that point*, the complaining party does not object, objects equivocally or simply reserves its rights while indicating that it is prepared to continue with the arbitral proceedings, that is when hedging and equivocation may be said to have arisen.

146 This, however, is not the case here. Here, the Arbitration Claimants had objected, in their Closing Submissions, to the introduction of the EOT Defence and specifically mentioned the ground of procedural unfairness. As such, the

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factual context indicates that the ball was in the Tribunal's court to rule upon the Arbitration Claimants' objection to the EOT Defence. As I have already highlighted earlier, after the Arbitration Claimants' Closing Submissions were filed, the proceedings for all intents and purposes had come to an end, unlike for example, in *ASM Shipping* ([137] *supra*) or *China Machine*. Thus, it was only if and when the Tribunal had made a ruling on the EOT Defence that *either* party would be aware of any breach of natural justice or procedural unfairness *on the Tribunal's part* – that is when the duty to provide fair intimation to the Tribunal would have arisen.

147 View through that lens, the breach of natural justice only occurred *when the Final Award had been delivered*. It did not, in my view, occur when the proceedings were declared closed or at any point prior to it simply because at any point along that spectrum, no one knew if the EOT Defence had been allowed or not. I do not think, even on the authority of *China Machine,* that the burden was on the Arbitration Claimants to follow-up on its objection and demand a ruling from the Tribunal prior to the close of proceedings. They were entitled to reasonably assume that the EOT Defence would either be disallowed by the Tribunal or, in the alternative, that if it was allowed, they would be permitted to respond to it properly so as to remedy any prejudice to the Arbitration Claimants occasioned by allowing the EOT Defence to be introduced at that late stage.

148 CAI thus had no opportunity to give any unequivocal intimation to the Tribunal to object to the manner in which the Tribunal proceeded, simply because it was too late to do anything once the Award had been published. The somewhat unusual and unique factual circumstances of the present case mean that the principle as distilled at [170] in *China Machine,* does not quite apply in the context of this case.

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149 As a counter-argument, it might be said that when the Tribunal declared the proceedings closed and in light of the objection to the EOT Defence that had already been raised by the Arbitration Claimants, there was at that point a *potential* breach of procedural natural justice because the Tribunal had not yet ruled on the said objection. Flowing from this, one might then argue that it was incumbent on the Arbitration Claimants to object to the closing of proceedings until they had received a ruling because if they failed to do so, they might run the risk of the occurrence of Scenario 2 (see [143(b)] above).

150 However, I do not consider that the bar has been pushed that high by the Court of Appeal in *China Machine* ([2] *supra*). In my view, the flip side of the complaining party being obliged to raise its objection with the tribunal unequivocally is that it must be reasonably clear to the complaining party that a breach by the tribunal *has* occurred and not just that a possibility exists or that there is a potential prospect of a breach of the rules of natural justice by the tribunal. This must logically follow since the party is complaining that it *was* or *had been* deprived of the reasonable opportunity to be heard by reason of the actions of the tribunal and then intimates to the tribunal that unless the breach is remedied by the tribunal, the aggrieved party will suspend the arbitral proceedings and seek recourse from the court. In most, if not all cases, that deprivation resulting in a breach of natural justice will be known to the complaining party only when the decision or ruling by the tribunal *has in fact been made.* In a case such as the present where an objection had been raised and the tribunal's decision was awaited, to require the objecting party to anticipate or second-guess the tribunal's next step or to anticipate that a potential breach might occur at some later stage in the proceedings would, in my view, place too high a burden on the complaining party and effectively, set the bar beyond reach.

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151 I deal finally with the defendants' argument that the Court of Appeal's decision in *BBA and others v BAZ and another appeal* [2020] 2 SLR 453 ("*BBA*") at [90] (citing *China Machine* at [168] and [170]) shows that an actual decision by a tribunal is not necessary before a breach of natural justice can arise and that the Court of Appeal's comments in *China Machine* stand as authority for a wider principle "of fairness, one of anti-hedging and anti-gaming the system".[106]

152 This argument, even if accepted, does not further the defendants' case. *BBA* must be understood in the context of its facts. In *BBA,* the sellers of shares sought to argue that the majority of the arbitral tribunal had acted in breach of natural justice because they found the sellers to be jointly and severally liable to the buyer, BAZ, without inviting submissions on this particular point or giving any indication that joint and several liability would be the eventual result (*BBA* at [86]). The Court of Appeal roundly rejected this argument as it took the view that if a point was *not* taken before the tribunal at all in "real time", the majority of the tribunal "cannot be faulted for not foreseeing any complications and not dealing with this issue in depth in the Award, *when nothing was put forward* to suggest that this was going to be anything other than a straightforward issue" (*BBA* at [90]) [emphasis added]. Thus, taking the point before the Tribunal was a facet of giving "fair intimation" to the tribunal in the sense advocated for in *China Machine*. Indeed, in *BBA*, the Court of Appeal was reiterating what it had already made clear in *China Machine* at [167], namely, that "a tribunal cannot be criticised for failing to consider points *not put to it*" [emphasis added]. The situation in the case before me is, however, quite different. Unlike in *BBA* where counsel for the sellers did not take any point on

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106 NOA 30 June 2020 at p 22 lines 9–26.

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joint and several liability or forewarn the tribunal that it might be an issue *particularly in the light of the terms of reference and the pleadings in that case* (*BBA* at [90]–[91]), the Arbitration Claimants *did* raise their objections before the Tribunal on the EOT Defence and expressly flagged them out in the Arbitration Claimants' Closing Submissions. The objections included that the EOT Defence had, *inter alia*, not been pleaded and should be disregarded. As such, even on the defendants' broader reading of *China Machine* in the light of *BBA,* the Arbitration Claimants did give "fair intimation" to the Tribunal.

153 To summarise this section, that the Arbitration Claimants did not follow-up on their objections to the EOT Defence after the Arbitration Claimants' Closing Submissions were tendered does not undermine their position. There was no hedging or equivocality on their part. Having objected to the EOT Defence, the duty to provide any further intimation to the Tribunal or to seek to suspend proceedings did not arise on the facts of this case, at least not until the release of the Award by which time it was too late.

Issue 1(c): Whether the Primary NJ Breach was connected to the making of the Final Award and materially prejudiced CAI's rights

154 As I have found above, there was a Primary NJ Breach on the facts of this case. In sum, in allowing the EOT Defence without affording the Arbitration Claimants a chance to: (a) obtain amended pleadings from the defendants; (b) require further discovery from the defendants; (c) adduce further evidence including expert evidence; and/or (d) test the defendants' "evidence" in cross-examination, the Tribunal deprived the Arbitration Claimants of a reasonable opportunity to respond to the EOT Defence.

155 I have reminded myself that the overarching inquiry is whether the Arbitration was conducted in a manner which was fair (see [66(e)] above). I am

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also conscious that the burden on CAI is a high one. Having considered the facts of this case carefully, I am of the view that what the Tribunal did in this case fell *outside* the range of what a reasonable and fair-minded tribunal might have done in those circumstances. I am thus satisfied that the first two requirements of the test summarised at [66] above have been met.

156 The requirements to be satisfied for setting aside an award based on breach of natural justice are clear. A party who seeks to set aside an award on this ground must not only establish a breach of natural justice but also cross two remaining hurdles, namely, to show that there was a causal nexus between the breach and the making of the arbitral award, and that the breach prejudiced the aggrieved party's rights (see *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [48]).

157 In this case, the breach of natural justice that accompanied the making of the Award did, in my view, occasion material prejudice to the Arbitration Claimants' rights. As a result of the breach, the Tribunal was denied the benefit of evidence (including in particular expert evidence) and arguments that had a real (as opposed to a fanciful) chance of making a difference to its decision (see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [54]). The relevance (and absence) of both factual and expert evidence being expressly pointed out by the Tribunal itself at various sections in the Award (see, for example paragraphs 313 and 314 as reproduced in [108(a)] and [108(c)] above).

158 In my judgment, the breach of natural justice was causally connected to the making of the Award and did occasion prejudice to the Arbitration Claimants. If the Arbitration Claimants had been given the opportunity to lead further evidence, test the defendants' evidence and tender further legal

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submissions, this could in my view have reasonably made a difference to the Tribunal's determination (*L W Infrastructure* at [54]). As I elaborate below, the Tribunal appears to have based its grant of a 25-day extension of time on little more than its professed experience. It is thus a likely and reasonable assumption that with the benefit of fuller evidence (both factual and expert) upon which to inform its decision on GC 40, the extension of time (if any) allowed by the Tribunal could have been different. It would not be fanciful to contend that the Tribunal could be persuaded, with the benefit of full evidence and argument, to allow an extension of *less* than 25 days or *no* extension at all.

The Secondary NJ Breach

159 Having dealt with the Primary NJ Breach above, I turn now to the Secondary NJ Breach. CAI submits that there was a further breach of natural justice by the Tribunal. This was because the Tribunal arrived at a specific figure of 25 days' extension of time without giving the Arbitration Claimants an adequate opportunity to present their case on the EOT defence, without any evidence upon which to base that decision, and by relying *on its experience* without informing the parties that it would be doing so.[107]

160 The defendants aver that the Tribunal's decision on the EOT Defence was based on a consideration of the parties' submissions, the evidence before it, and the Tribunal's wide discretion under GC 40.1. The defendants further contend that CAI was nit-picking at the Award by seizing upon the Tribunal's single reference to "experience" in the paragraph concerned. [108]

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107 PRS at para 64.

108 NOA 30 June at p 25 line 26–p 26 line 26.

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161 Unlike the Primary NJ Breach which is largely concerned with a failure in the procedural process of the Arbitration, the Secondary NJ Breach is concerned with a situation where the Tribunal adopted a chain of reasoning in the Award which it did not give the Arbitration Claimants an opportunity to address (see *JVL Agro Industries* ([114] *supra*) at [146]). The Secondary NJ Breach thus does not touch on procedural fairness in the sense of the conduct of the arbitral proceedings. This complaint was grounded on the argument that the Tribunal reached a conclusion based on an idea that it invented by itself. By doing so, it took the parties by surprise and did not afford one or both parties a reasonable opportunity to be heard.

162 Before delving into the parties' detailed arguments, it is apposite to first examine how the Tribunal arrived at its decision to allow a 25-day extension of time, before examining its reasoning to determine if the Tribunal had indeed relied primarily on its unarticulated experience.

The Tribunal's reasoning

163 The Tribunal began by recognising that the Admitted Instruction had caused delay to CAK such that an extension of time would be necessary (Award at paragraph 326). Its line of reasoning was as follows:

(a) At paragraph 312, the Tribunal found that the wording of GC 40.1 conferred on it a "wide discretion" to determine the length of any extension of time to be granted under GC 40.

(b) At paragraph 327, the Tribunal recognised that there was "no direct evidence before the Tribunal establishing how long permanent counter-measures would have taken to be implemented, absent B's involvement in the issue". However, it found that it was "capable of

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fairly and reasonably '*in all the circumstances*' of calculating a time period which reflects the delay or impediment suffered by CAK as required by GC 40.1" [emphasis in original].

(c) At paragraph 328, the Tribunal stated that it had "considered all of the evidence before it in order to determine that *it is capable* of finding a length of time in respect of which an EOT should be granted". In a similar vein, the Tribunal at paragraph 333 stated that:

> The Tribunal does not have sufficient evidence before it as to determine whether [CAK], with the allocation of resources available to it at the time could have achieved the rectification of all six (6) compressors in a similar time as it took to rectify only a pair of compressors. *Thus the Tribunal does not wholly accept the [defendants'] submissions in so far as they [sic] relevant to estimating a time period in which [CAK] could have introduced the permanent counter-measures into each of the six (6) compressors.*
>
> [emphasis added]

(d) At paragraph 334, the Tribunal rejected the defendants' "ultimate submission" that a 71-day extension of time ought to be granted. It stated that:

> The [defendants'] ultimate submission is that the rectification work could have been completed in its entirety by 11 April 2013, yet [CAK] was delayed until 21 June 2013, representing a delay of 71 days, in respect of which the [defendants] contend an EOT should be granted. However, the Tribunal is not minded to give an EOT of that length on the basis of the above reasons. *In the Tribunal's view taking into account all the evidence and its experience in these matters*, the Tribunal considers and determines that 25 days extension of time would be an appropriate EOT to grant to [CAK], in all the circumstances which reflects the delay which was caused by [B] which would not otherwise have occurred if there was no requirement that the vibration issue be fixed on a piece-meal basis. Had the [defendants] procured further evidence, or even obtained expert evidence, then perhaps an extension of

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> time of 71 days could have been granted to them. But this was not done.
>
> [emphasis added]

(e) At paragraph 335, the Tribunal noted and disposed of the Arbitration Claimants' submissions that there was "no evidence upon which the Tribunal can determine that the [defendants] are entitled to an extension of time". The Tribunal stated that even though *"there is no expert evidence presented which precisely points to a 25 day extension"* [emphasis added], it would not be fair and reasonable to conclude that there is no entitlement to any extension of time at all. It found that a 25-day extension of time represented the culpability of the Arbitration Claimants of around 25% in circumstances where the length of delay to Mechanical Completion was approximately 100 days. The Tribunal stressed that its use of the term "fair and reasonable" was a reference to the express language of GC 40.1 and not in its capacity as *amiable compositeur*. The Tribunal thus concluded that a 25-day extension of time would reasonably reflect the impediment which was suffered by the defendants in carrying out Piecemeal Rectification Works when this was commercially advantageous to, and encouraged by the Arbitration Claimants.

The Tribunal's purported reliance on the evidence and its experience

164 The above summary of the Tribunal's reasoning showed that the Tribunal claimed to have relied on (a) "all the evidence" on the facts of the case, and (b) "its experience in these matters" to derive the specific figure of 25 days for the extension of time. I deal with each in turn.

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(1) The Tribunal's reliance on "all the evidence"

165 It will be apparent from the above cited portions of the Award (see in particular paragraphs 327, 328 and 335) and my findings earlier in respect of the insufficiency of the evidence adduced by the defendants in support of the EOT Defence (at [107] and [118] above) that the Tribunal did not have any evidence which *directly addressed* the issue of the specific length of an extension of time under GC 40.[109] There was no evidence to speak of, whether factual or expert, on how long concurrent repairs would take. The only evidence available was how long *piecemeal* works took. The Tribunal acknowledged this at various paragraphs of the Award.

166 In this regard, I accept Mr Thio SC's submission that there is a difference between a situation where there is a complete absence of evidence and one in which there is some evidence which was of insufficient probative value. It is true that on the facts, there was *some* evidence before the Tribunal in the form of the two rectification work schedules and the evidence on the actual time taken to complete the Piecemeal Rectification Works.[110] However, the critical point here is that the Tribunal had *expressly rejected* these pieces of evidence when arriving at its decision to award a 25-day extension of time under GC 40.

167 After summarising the defendants' submission that Concurrent Rectification Works could have been completed within 30 days and the evidence in support of this submission at paragraphs 328–331 of the Award, the

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109 PS at para 151.

110 DS at para 73.

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Tribunal went on to state that it did not accept the defendants' submission for three reasons (Award at paragraph 332):

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>
> (a) the submission does not precisely point to how the calculation of this theoretical time period of thirty (30) days has been calculated;
>
> (b) further, the [defendants'] submission cannot precisely detail the start and end of the relevant periods of work on which they rely; and
>
> (c) no pair of compressors took the same amount of time to rectify as can be seen from the work dates (at [330] above).

This being the case (and despite its indications otherwise), the Tribunal did not, in my view, actually rely on *any* of the evidence adduced by the defendants when it granted the 25-day extension of time. The question then is: what did the Tribunal rely on?

(2) The Tribunal's reliance on its "experience in these matters"

168 The Tribunal stated that it had relied on "all the evidence and its experience in these matters" in arriving at the figure of a 25-day extension of time. As such, a process of elimination would lead to the conclusion that if the Tribunal did not have sufficient "evidence" or, in reality, did not rely on the evidence that it had before it, then a substantial part of the Tribunal's decision making process must have been based on its professed experience.

169 This is, in my view, problematic for two reasons. First, the Tribunal's decision on a highly fact specific issue, *ie,* the length of delay attributable to the Admitted Instruction, was not backed by any evidence. Second, the Tribunal arrived at the figure of 25 days without explaining how and on what evidential basis it came to that landing. The somewhat vague reference to the 25 days

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reflecting the defendants' own culpability of about 25% was also not explained.[111] Further, the Tribunal did not, in the Award, elucidate or explain what its professed experience was "in these matters" generally or on this issue specifically.

170 An analogy can, in my view, be drawn between the present case and the Court of Appeal's decision in *AKN* ([156] *supra*). There, the arbitral tribunal reformulated the appellants' claim for damages from a "loss of profits" claim to a "loss of a chance to earn profits". This new claim was only raised on the final day of the arbitral proceedings by the tribunal. During the oral exchange with the parties, the tribunal suggested that were it to proceed on a "loss of chance" analysis, it would need help to determine the quantum of the chance lost. The issue, however, was that the parties were never given the opportunity to address the tribunal on this particular new point. Nonetheless, the tribunal proceeded to rule on the new "loss of chance" formula and eventually arrived at a loss of 55% chance which translated into a monetary award of US$80m "without *any* apparent analysis or consideration over and above its…approximation, and without any submissions having been sought or made on the quantum of the chance lost" (at [76]). The Court of Appeal held that there was a breach of natural justice as the tribunal was uncertain of, and ill-equipped to deal with the quantum of the opportunity lost and had also failed to request further arguments on this point despite being aware of the need for it.

171 I agree with CAI's submission that if the Tribunal wished to rely on its past experience, whether wholly or substantially, in arriving at a conclusion on an issue where direct and relevant evidence was *admittedly* sorely lacking, the

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111 PRS at para 56.

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parties ought to have been given a chance to comment and provide submissions on the Tribunal's thinking or proposed line of reasoning. As the English Court held in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14:[112]

> Nevertheless, the rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. *If he is to any extent relying on his own personal experience in a specific way then that again is something he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him.*
>
> [emphasis added]

172 Unfortunately, the Tribunal did not do this. There was no elucidation in the Award of what its experience entailed or what it encompassed, and the parties were not given any opportunity to address the Tribunal, in light of its disclosed experience, on the possible direction they were heading in *vis-à-vis* the extension of time. In my view, this too occasioned procedural unfairness to the Arbitration Claimants. The defendants argue that the mere fact that the Tribunal reached a decision between the two diametrically opposed options of zero days' extension of time and 71 days' extension of time is not a justifiable basis for setting aside the Award. Citing the Court of Appeal's decision in *Soh Beng Tee* (at [63], [65(d)] and [65(e)]), the defendants submit that the

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112 PRS at para 57.

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requirement that a tribunal does not adopt a chain of reasoning in its award which the parties have not been given a reasonable opportunity to address, does not mean that the Tribunal is confined only to the binary options in the parties' arguments.[113]

173 This is, however, not a fair characterisation of CAI's position (see above at [159]). CAI was not taking issue with the fact that the Tribunal had taken a path between the parties' diametrically opposed positions but rather the fact that the Tribunal had arrived at a specific figure of 25 days, in substance, by relying on its own experience without first telling the parties that it would be doing so and without first explaining what this experience entailed.[114] This objection was also tied to the Primary NJ Breach where the Arbitration Claimants expected to be given the opportunity to be heard on the introduction of the EOT Defence, which squarely involved GC 40.

174 In any event, I agree with Mr Bull SC that *Soh Beng Tee* may be distinguished on its facts.[115] That case involved a contractor who had sought and obtained a five-day extension of time to complete certain construction works. The arbitrator felt that five days was not fair and reasonable and hence set time at large. The finding that time was at large had not been argued during the arbitral proceedings. There are three main differences between the present case and *Soh Beng Tee*:

(a) First, the pleadings in *Soh Beng Tee* contained the "constantly reiterated refrain that time had been set at large (albeit in different

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113 DS at para 65.

114 PRS at para 64.

115 PRS at paras 59–62.

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contexts)" and this must have alerted the respondent to the appellant's submission that time was at large (at [34]). Here, there was no mention of the EOT Defence until the Defendants' Closing Submissions.

(b) Second, the tribunal in *Soh Beng Tee* had specifically called for further submissions on the disputed issue of whether time should be set at large (at [40]).

(c) Third, the Court of Appeal found that the issue of whether time had been set at large was based on the same facts as the existing issue of whether the appellant was entitled to an extension of time, so much so that they could be described as being two sides of the same coin (at [94]). However, as I have found above, the EOT Defence and the Estoppel Defence are conceptually *and factually* distinct.

175 Without the necessary evidence to assist it, it could be said that, just as in *AKN* ([156] *supra*), the Tribunal was "ill-equipped" to come to a decision on the length of the extension of time for Mechanical Completion that it considered fair and reasonable in all the circumstances, irrespective of its experience or eminence in this area. Whilst the test under GC 40 may be imprecise, any decision on the length of an extension of time would necessarily have to be grounded on some evidence before the Tribunal from which it could make its assessment. Otherwise, if the Tribunal was relying substantially on its experience, it should have given the parties notice of its thinking and invited submissions on it. One option would have been for the Tribunal to invite the parties to make submissions on the basis of a possible line of reasoning articulated by the Tribunal, without the Tribunal having yet come to any concluded view on the issue.

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176 I thus agree with CAI that there was also a Secondary NJ Breach in the making of the Award. This affected the Award and occasioned prejudice to the Arbitration Claimants as they were unable to present any evidence or submissions targeted at the Tribunal's experience which the Tribunal later relied upon to grant the 25-day extension of time to the defendants.

177 Ultimately, I come back again to the key question that has to be asked: whether what was done (or not done) by the Tribunal was within the range of what a fair-minded and reasonable tribunal would have in the given circumstances (*China Machine* ([2] *supra*) at [98]). In my judgment, CAI has discharged the high burden on it to show that the above question must also be answered in the negative in relation to the Secondary NJ Breach.

178 To end off this section, the defendants take the position that if any of the breaches of natural justice complained of by CAI are made out, the setting aside proceedings ought to be suspended for the Award to be remitted to the Tribunal pursuant to Art 34(4) of the Model Law. I address this issue below when I consider the Excess of Jurisdiction Ground. To conclude, I answer Issue 1 (see [65]) in the affirmative.

Issue 2: Excess of jurisdiction

179 CAI also submits that the Award ought to be set aside under Art 34(2)(*a*)(iii) of the Model Law as the Tribunal had exceeded the parties' scope of submission to arbitration when it allowed and decided on the EOT Defence.[116]

116 PRS at para 81.

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180 In response, the defendants aver that the EOT Defence was well within the parties' scope of submission to arbitration as: (a) it fell within the substance of the dispute as expressed in the Terms of Reference, the defendants' list of issues and pleadings; (b) the EOT argument had been specifically brought to the Arbitration Claimants' attention via an express invitation from the Tribunal to deal with alternate bases of relief from liquidated damages; (c) the introduction and consideration of the EOT defence by the Tribunal was expressly permitted by the procedure set down by the Tribunal in the Terms of Reference; and (d) CAI had failed to raise the scope of submission objection before the Tribunal and should not be allowed to take this point in OS 1103.[117]

181 I analyse the parties' arguments on the Excess of Jurisdiction Ground by first reframing it into the following sub-issues:

(a) whether the EOT Defence fell within the parties' pleadings, the Terms of Reference or the defendants' draft lists of issues ("Issue 2(a)");

(b) whether the Tribunal had specifically invited submissions on the EOT Defence or "alternate bases of relief from liquidated damages" ("Issue 2(b)");

(c) whether the Tribunal was permitted to consider new issues raised by the parties after the signing of the Terms of Reference ("Issue 2(c)");

(d) whether the Arbitration Claimants had raised a jurisdictional challenge in respect of the EOT Defence before the Tribunal ("Issue 2(d)"); and

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117 DS at para 26(c), 94; DRS at paras 154–157.

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(e) whether the Tribunal's consideration of the EOT Defence materially prejudiced CAI's rights ("Issue 2(e)").

182 By way of an executive summary, I answer Issues 2(a)–2(c) in the negative and Issues 2(d) and 2(e) in the affirmative. The EOT Defence was *not* within the scope of the parties' submission to the Arbitration. The Tribunal thus fell afoul of Art 34(2)(*a*)(iii) of the Model Law when it allowed the EOT Defence and decided on it. In the circumstances, I also answer Issue 2 (see [65]) in the affirmative.

The general legal principles

183 Article 34(2)(*a*)(iii) of the Model Law provides that an arbitral award may be set aside if the party making the application furnishes proof that:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; …

It applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters which had been submitted to it (see *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 ("*GD Midea*") at [38] citing the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [27] and [31]).

184 A court faced with a setting aside application under Art 34(2)(*a*)(iii) of the Model Law undertakes the following two-stage inquiry (*GD Midea* at [39]–

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[40]; see also *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [34]):

> …
>
> (a) first, what matters were within the scope of the 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 … irrelevant to the issues requiring determination'.
>
> 40 Thus, the determination of an issue which has not been submitted to arbitration will render that part of the award liable to be set aside. The arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination. …

185 In determining the scope of the parties' submission to arbitration, the pleadings filed in the arbitration provide a convenient way to define the jurisdiction of the tribunal (*Kempinski* ([135] *supra*) at [33]). The pleadings must also be read in the context of the issues raised in the notice of arbitration or in the response to that notice. In general, the court will not take a narrow interpretation of the issues that have been submitted to the Tribunal for determination.

Issue 2(a): Whether the EOT Defence fell within the parties' pleadings, the Terms of Reference or the defendants' draft lists of issues

186 As has been reiterated numerous times in this judgment, the EOT Defence did not fall within the pleadings exchanged in the course of the Arbitration. The defendants concede that the EOT Defence was not mentioned, and did not *explicitly* feature anywhere in: (a) the Request for Arbitration; (b) the Defendants' Answer to the Request for Arbitration; (c) the Terms of Reference; (d) the pleadings; (e) the draft lists of issues that were exchanged by

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the parties prior to the hearing (f) the witness statements; (g) the opening submissions; and (h) the oral hearing before the Tribunal.

187 The defendants' response to this is that an expansive view ought to be taken of the issues that were submitted for the Tribunal's determination. Mr Thio, SC highlighted to me the Terms of Reference and the defendants' list of issues and submitted that the EOT Defence "fell squarely within the *substance* of the dispute expressed in those documents, being [the Arbitration Claimants'] entitlement to liquidated damages and the impact of B's instruction for piecemeal rectification on their liquidated damages claim" [emphasis in original].[118]

188 I agree with the defendants that the court should not construe the pleadings, lists of issues or the Terms of Reference narrowly. It is also necessary to consider the substance of the dispute during the arbitration.

189 Even so, it is evident that the EOT Defence was *not* an issue that had been submitted for the Tribunal's determination. This is clearly the case even if the defendants had relied on the same facts to advance the Estoppel Defence and EOT Defence. I have already considered the defendants' Answer to the Request for Arbitration and the pleadings (see [32]–[40] above). I now move on to review the shape of the Arbitration beginning from the Terms of Reference through to the parties' closing submissions. I focus particular attention on the actual wording employed in the Terms of Reference and the draft lists of issues.

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118 NOA 30 June at p 16 lines 16–25.

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The Terms of Reference

190 The defendants claim that as the EOT Defence was premised on the Admitted Instruction for Piecemeal Rectification Works and was also aimed at reducing the liquidated damages payable to the Arbitration Claimants, the EOT Defence clearly fell within the following issues in the Terms of Reference (at paragraph 43):[119]

> …
>
> (d) Was permanent rectification of vibration[s] in the motors of the H2 Unit compressor postponed on the instruction of [B]?
>
> (e) On what date was Mechanical Completion achieved?
>
> (f) What, if any, liquidated damages are payable in respect of Mechanical Completion?

It can be seen that there is no mention of the words "extension of time", "EOT" or "GC 40" in any of the issues listed above, or in any of the other paragraphs of the Terms of Reference.

191 I agree with CAI that read holistically, issues (d)–(f) as pointed out by the defendants really only encompassed two defences as far as the Vibration Issue was concerned: (a) that the Abnormal Vibrations did not affect the operation or safety of the Plant, and (b) the *Estoppel Defence* which arose in part from the Admitted Instruction.[120]

192 In my view, to construe the EOT Defence as falling within the abovementioned issues, in particular issue (f), would effectively denude the

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119 DS at para 92(a); DRS at paras 145–147; PBOCD I at p 432 [Terms of Reference at para 43].

120 PS at para 214.

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purpose of having the Terms of Reference in the Arbitration in the first place. If accepted, the defendants' contention would mean that the Terms of Reference would potentially encompass any unpleaded issue so long as it had some tangential impact on the amount, if any, of liquidated damages payable. The Terms of Reference encompassed the issues that had been raised by the parties *in their pleadings*. It is not disputed by the defendants that the EOT Defence was *not* pleaded. For the defendant to then argue that it nevertheless fell within the substance of issues (d)–(f) in the Terms of Reference was, to me, a clear attempt by the defendants to try and shoehorn the EOT Defence into the Terms of Reference after the fact and with the benefit of hindsight.

193 The defendants candidly accept that they had not pleaded or contemplated the EOT Defence until the Defendants' Closing Submissions. The reasonable inference that arises from this acceptance is that not just the defendants but *all* the parties to the Arbitration proceeded in the knowledge that GC 40 and the EOT Defence were *not* among the issues submitted to the Tribunal for its consideration and consequently, were not in play. The defendants' attempt to read the EOT Defence as falling within the Terms of Reference is essentially an unabashed attempt, *ex post facto*, to force a square peg into a round hole in order to force fit the EOT Defence into the Terms of Reference. The facts and circumstances of this case however clearly demonstrate that *none* of the parties contemplated the EOT Defence at any time prior to the Defendants' Closing Submissions.

194 Further, Mr Thio SC's invitation that I look at the substance of issue (f) in the Terms of Reference seeks to persuade me to ignore other relevant context and all the other steps taken by the parties during the arbitral process and instead, to simply focus on one broadly drafted issue in the Terms of Reference in a vacuum. I disagree that that is the correct approach. I should consider the

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pleadings, the Terms of Reference and all other steps taken in the arbitral process to *then* determine if, in substance, the EOT Defence had been submitted to arbitration by the parties. In determining this question, a practical and commonsensical view should be taken. With this in mind, I turn next to the list of issues.

The list of issues

195 In the alternative, the defendants argue that their draft list of issues clearly encompassed the EOT Defence as it was refined to refer specifically to the "legal effect" of the Admitted Instruction to postpone the permanent rectification of the Abnormal Vibrations. They point to the following issues in support of this:[121]

> 4. Was permanent rectification of vibration in the motors of the H2 Unit compressor postponed on the instruction of [B] and if so, what is the legal effect of that instruction?
>
> …
>
> 10. What, if any, payments, damages, costs and interest are payable by any party to any other?

196 My findings and conclusions in respect of the Terms of Reference (at [190]–[193] above) apply equally to the defendants' draft list of issues as they are worded almost identically.

197 As a brief aside, I note that in *AKN,* the Court of Appeal found at [74] that a "generic claim for damages is nothing more than a particular manner of asserting a right to damages" and thus disagreed with the High Court's finding that a generic claim for damages was not broad enough to encompass a claim

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121 DBOCD I pp 473–474.

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that might be characterised as one for a loss of chance. In my view, *AKN* can be distinguished because the issue in question there was the *measure* of damages applicable. In the specific context of the case, the fact that the appellants had prayed for, *inter alia,* "damages" in the notice of arbitration and its pleadings was sufficient to put the issue of damages into the arena and therefore, within the scope of submission.

198 The present case is, to my mind, quite different because the EOT Defence is dependent on the contractual wording of GC 40 and the elements contained therein. It is one thing to say that the *effect* of an extension under GC 40, if granted, would be to reduce the amount of liquidated damages payable. It is however altogether another matter to contend that, therefore, the *whole* EOT Defence and *all* the issues connected with it "in substance" fell within the Terms of Reference or the defendants' draft list of issues. This would, in my view, be pushing the envelope too far in terms of construing the list of issues broadly.

A side note on the role of pleadings in determining the scope of submission to arbitration

199 For completeness, I now turn to deal with an argument raised by the defendants that a number of recent decisions of our courts are explicit in the view that the parties' pleadings and any lists of issues derived from them are not determinative of the "scope of submission".[122] The defendants provide two examples of this.

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122 DRS at para 139–140.

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200 The first is the decision of Chan Seng Onn J in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") which states that (at [52]):

> In some cases, whether a particular matter or issue in dispute has been submitted to the arbitral tribunal is contentious. Sometimes, as in the present case, the parties will submit a memorandum of issues. However, that may not be exhaustive proof of the matters that are within the arbitral tribunal's jurisdiction. In the first place, memoranda of issues may contain catch-all provisions which give arbitral tribunals the discretion to decide on matters which are not expressly listed. Indeed, in the present case, the MOI conferred on the Arbitrator the discretion to rely on additional facts or law which are necessary to decide the dispute. Furthermore, as stated in *Kempinski* at [33], pleadings and their contents are also relevant as they illuminate the matters that have been submitted to the arbitral tribunal. In fact, *Kempinski* recognised (at [47]) that "any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded". *Hence, an issue which surfaces in the course of the arbitration and is known to all the parties would be considered to have been submitted to the arbitral tribunal even if it is not part of any memorandum of issues or pleadings.*
>
> (emphasis added)

201 The second example is the decision of the Court of Appeal in *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 ("*Prometheus*") where Chief Justice Sundaresh Menon, delivering the judgment of the Court, stated that (at [58]):

> … while pleadings in arbitral proceedings can provide a convenient reference point to determine the scope of an arbitrator's jurisdiction, that jurisdiction is by no means limited by the pleadings because a practical view has to be taken regarding the substance of the dispute being referred to arbitration. …

202 Having regard to both cases, I am of the view that *TMM* must be read and understood in its proper context. It is clear from the decisions handed down

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by the Court of Appeal after *Kempinski* ([135] *supra*) (*ie, AKN* ([156] *supra*) at [46] and *Prometheus* at [58]) that pleadings are still an important reference point to determine what are the issues that have been placed before a tribunal for determination. While it may not be the *only* reference point, its importance has not been diluted by *TMM* as the defendants appear to suggest. In *TMM* at [52], Chan J was referring to the scenario painted in *Kempinski, ie*, where the law had changed or a new fact arose after the arbitration reference had started and such change was known to the parties, these need not be specifically pleaded. It does not, however, mean that a new defence or issue that is raised does not need to be pleaded or properly brought into the arena in good time.

203 As such, *TMM,* read in its proper context, does not in my view open the door for an arbitrant to raise a new claim, defence or issue at any stage of the arbitration and in any manner it pleases. The pleadings, Terms of Reference and lists of issues are still important and relevant anchor points delineating the four corners of the dispute and equally, if not more importantly, the scope of the jurisdiction of the arbitral tribunal. In this regard, one has to always bear in mind that in an arbitration, the tribunal's jurisdiction is demarcated by what the *parties agree* to submit to the tribunal for determination (*Kempinski* at [32]). Therefore, even adopting a practical approach to pleadings (see *Prometheus* [63]), in both *AKN* and *Prometheus*, it was clear that there was *some* reference in the pleadings to the claim, defence or issue that the tribunal eventually decided upon, and which was therefore enough to clothe it with jurisdiction. The case at hand stands on an entirely different footing.

204 I would make a final point. In the EOT Defence, the defendants sought an extension of time of 71 days. In monetary terms, that represented 7.1% of the contract price. To put matters in perspective, the Tribunal's award of 75 days' worth of liquidated damages (or 7.5% of the contract price) amounted to

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approximately S$60 million and was almost equivalent to the extension of time sought by the defendants (*ie,* 71 days vs 75 days). Thus, the EOT Defence, if allowed, would have potentially reduced the defendants' liability by approximately S$60 million. By any definition, this would have been a material and significant defence to raise. Yet, the EOT Defence was only raised by the defendants at the eleventh hour. Given its substantial impact on the defendants' liability were the EOT Defence to prevail in full, one would have expected the EOT Defence to have figured prominently in the arbitration and in particular in the defendants' pleadings, the Terms of Reference and/or the defendants' list of issues. The fact that it did not and the defendants are now seeking to persuade the court that in substance, it fell within the Terms of Reference and/or the defendants' list of issues fortifies my view that the parties never agreed to and did not submit the EOT Defence for determination by the Tribunal.

205 To conclude, I agree with the defendants that the EOT Defence was not among the issues that the parties had referred to the Tribunal for determination. In my judgment, the Tribunal did not have the jurisdiction to decide an issue that: (a) had never been pleaded; (b) was not contemplated by the parties at any stage of the Arbitration until the Defendants' Closing Submissions were filed at the very tail end of the Arbitration; and/or (c) was never ventilated by the parties in the course of the Arbitration, including during the oral hearing.

Issue 2(b): Whether the Tribunal had specifically invited submissions on the EOT Defence or "alternate bases of relief from liquidated damages"

206 The defendants submit that even if the EOT Defence did not initially fall within the substance of the dispute submitted for the Tribunal's determination, it *subsequently* fell within the terms and scope of submission to arbitration. This is because it was an argument that was specifically brought to the attention of

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the Arbitration Claimants who were then given (and did in fact take) the opportunity to respond to it when the Tribunal extended an invitation to parties on the last day of the oral hearing to consider alternate bases of relief from liquidated damages in their closing submissions.[123]

207 In this regard, the defendants refer specifically[124] to the comments made by one member of the Tribunal ("Arbitrator A") to the effect that "it may be possible … to analyse the situation as one where 'but for' the agreement or acquiescence of the Arbitration Claimants, the achievement of the trigger where liquidated damages would cease would have occurred much earlier".[125] Arbitrator A had also floated the idea that it "may be an area of potential interest" that "the liquidated damages may be recoverable not for the whole period sought but for a lesser period which is represented by the time which ought reasonably to have been taken, absent an agreement for piecemeal rectification, to fix the vibration issue".[126]

208 I have, at [120]–[122] above explained briefly why I concluded that the Tribunal could not be said to have specifically invited submissions on the EOT Defence or on alternate bases of relief from liquidated damages in the context of the Primary NJ Breach. In this section, I expand upon these points with a focus on the Excess of Jurisdiction Ground.

209 First, having regard to the transcript of the exchanges between Arbitrator A (who was the only member of the Tribunal who could be said to have

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123 DS at para 94; NOA 30 June at p 17 lines 11–27 to p 18 line 4.

124 DRS at para 81.

125 DBOCD IV at p 1772–1773 [Transcript 13 March 2018 at p 19 line 22–p 20 line 1].

126 DBOCD IV at p 1773 [Transcript 13 March 2018 at p 20 lines 15–23].

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"extended the invitation"), I agree with the submissions of Mr Bull SC that Arbitrator A was thinking only of *existing* defences and arguments that had already been made, as opposed to authorising or inviting the parties to raise new and hitherto unpleaded defences.[127]

210 This is apparent from Arbitrator A's comments. Arbitrator A kickstarted the oral exchange by asking parties "whether it would be of assistance to the parties if, during these oral closings, there was to be indications by members of the tribunal of issues which they would find helpful to be *expanded upon* and dealt with in the written closing."[128] He subsequently stated that tribunals:[129]

> sometimes need to consider arguments that on the facts, appear to be an appropriate application of principles that the parties have not *fully argued*, but any such approach by a tribunal must be taken *with full notice to the parties with full opportunity for argument* and, there, I'm just raising this without expression of any formed views on it in that context.
>
> [emphasis added]

211 The words in italics indicate that while there was some discussion at a very general level regarding arguments which Arbitrator A would like for the parties to "expand" upon or on which the parties had not "fully argued", Arbitrator A was thinking of existing arguments that had already been raised.

212 Further, I agree with CAI that Arbitrator A's comments were made in the context of the Estoppel Defence.[130] Firstly, counsel instructed on behalf of

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127 PS at para 174.

128 DBOCD IV at p 1769 [Transcript 13 March 2018 page 16 lines 20–25].

129 DBOCD IV at pp 1775 - 1776 [Transcript 13 March 2018 at page 22 lines 21–page 23 line 3].

130 PS at para 174.

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the Arbitration Claimants was submitting on the Estoppel Defence immediately before Arbitrator A's comments above were made. Secondly, after listening to Arbitrator A (see above at [207]), counsel submitted that the precursors of *estoppel* would have to be satisfied in order for the analysis by Arbitrator A to apply. He stated that:[131]

> We have the liquidated damages provision, and in order for even the *principle of equity* to intervene in the way that [Arbitrator A] had indicated, the *precursors for equitable forbearance would have to be satisfied* …
>
> [emphasis added]

The point to note here is that Arbitrator A did not correct counsel for the Arbitration Claimants. Neither did Arbitrator A suggest that he was in fact referring to a claim or defence premised on a contractual extension of time being sought under GC 40 or any other new defences that had not previously been pleaded or raised. In fact, Arbitrator A's comments (quoted above at [207]) suggest that counsel for the Arbitration Claimants was not wrong to assume that Arbitrator A was referring to the Estoppel Defence. The same comment also indicates that Arbitrator A was clearly aware that if a tribunal wished to consider arguments that *had been* raised *but not fully* ventilated, there would be a need for parties to be afforded a "full opportunity for argument". This awareness is at odds with the defendants' suggestion that Arbitrator A had extended an invitation to or had authorised the parties to tender submissions on *completely new and unpleaded* defences dealing with the issue of liquidated damages on the Vibration Issue. It is also, in my view, noteworthy that Arbitrator A did not mention GC 40 at all during the exchange with the parties' counsel.

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131 DBOCD IV at p 1774 [Transcript 13 March 2018 page 21 lines 19–23].

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213 In my view, the exchanges with Arbitrator A were, at best, equivocal. I disagree that they amounted to an invitation or authorisation by the Tribunal to introduce new defences not pleaded. Finally, I also note that in the Defendants' Closing Submissions, the defendants were silent as to whether the EOT Defence was raised as an alternative defence pursuant to the Tribunal's invitation or authorisation.

214 In sum, it is clear to me that on the facts, neither Arbitrator A nor the Tribunal as a whole invited or authorised the parties to raise alternate bases of relief from liquidated damages in their closing submissions that extended to new and unpleaded defences such as the EOT Defence.

Issue 2(c): Whether the Tribunal was permitted to consider new issues raised by the parties after the signing of the Terms of Reference

215 Assuming that the Tribunal had, on the last day of the oral hearing, invited submissions on the EOT Defence, the defendants argued that the EOT Defence was "in substance submitted to the Tribunal" as permitted by the procedure set down by the Tribunal and agreed to by the parties in the Terms of Reference. In my view, this argument fails for the reasons that follow.[132]

216 The defendants argue that the Tribunal was allowed to rule on the EOT Defence because it had, at paragraph 24 of the Terms of Reference, "reserved its discretion to decide on issues subsequently raised by the parties and/or itself".[133] The relevant portions of paragraph 24 state as follows:

> … In particular, *subject to Article* 19 and *23(4) of the ICC Rules*, the Arbitral Tribunal shall remain entitled to take into

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132 DS at paras 95–96.

133 DS at para 96.

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> consideration any further allegations, arguments and contentions to be advanced by the Parties …
>
> [emphasis added]

The Tribunal's reservation in paragraph 24 of the Terms of Reference is expressly subject to Art 23(4) of the ICC Rules, which in turn provides as follows:

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

Reading paragraph 24 of the Terms of Reference and Art 23(4) of the ICC Rules together, it is clear that if a "new claim" (or by extension, a "new defence") falling outside the limits of the Terms of Reference is to be advanced after the signing of the Terms of Reference, the Tribunal must *first* authorise it.

217 Taking the defendants' case at its highest and assuming that the Tribunal had invited the parties to deal with alternative bases of relief from liquidated damages,[134] a mere oral exchange between a Tribunal member and the parties cannot be interpreted as a license for parties to introduce a new unpleaded defence without first seeking leave, or authorisation, from the Tribunal to do so under Art 23(4) of the ICC Rules. The Tribunal did not state that it was authorising the EOT Defence at any point during the oral hearing or in the correspondence it exchanged with the parties afterwards. Nevertheless, it must have taken this position since it considered and ruled on the EOT Defence by

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134 DS at para 97(c).

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allowing it in part. Therefore, in one sense, this meant that the Tribunal had failed to inform the parties that it was authorising the raising of a new defence until it became apparent to the parties when the Award was published.

218 I agree with CAI that this is not what is contemplated by Art 23(4) of the ICC Rules. It cannot be the case that the Tribunal may expand the scope of its jurisdiction by simply deciding upon new claims or defences in the Award, on the purported authority of Art 23(4) of the ICC Rules. While an arbitral tribunal is ordinarily the master of its own procedure in an arbitration, the requirement of due process is an essential limitation on the wide autonomy that the parties and the tribunal have with respect to procedure (*China Machine* ([2] *supra*) at [2]). If the Tribunal was seeking to rely on Article 23(4) of the ICC Rules, procedural fairness would, at the very least, require that the Tribunal clearly intimate to the parties that it was intending to authorise a new claim or defence *having considered* the nature of the new claim (or defence), the stage of the arbitration and other relevant circumstances. Its decision would need to be conveyed to the parties *before* the Award was published in order for the parties to be given an opportunity to take steps as they might consider necessary to respond to the new claim or defence authorised by the Tribunal. I would add that such steps might *include* those envisaged by the Court of Appeal in *China Machine* at [170].

Issue 2(d): Whether the Arbitration Claimants had raised a jurisdictional challenge in respect of the EOT Defence before the Tribunal.

219 In *BBA* ([151] *supra*), the Court of Appeal at [90] referred to its comments in *China Machine* at [168] and [170] and made clear that a party in a setting aside application may not raise a challenge based on an excess of jurisdiction objection in circumstances when it did not do so expeditiously

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before the tribunal itself (or at all). In this connection, the court at [49] referred to Art 16(2) of the Model Law which provides that:

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later that the submission of the statement of defence. … A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may in either case, admit a later plea if it considers the delay justified.

220 The defendants submit that CAI's submissions on the Excess of Jurisdiction Ground ought not be countenanced by this court as it had failed to raise the objections before the Tribunal. This is because the Arbitration Claimants' brief objections to the EOT Defence were *only* on the grounds of "procedural fairness" rather than an excess of jurisdiction.[135]

221 I disagree with the defendants' contentions. As I have found at [136], the Arbitration Claimants had unequivocally objected to the introduction of the EOT Defence. While they may not have specifically used the phrases "outside the scope of submission to arbitration" or "excess of jurisdiction", there is no requirement in law for a jurisdictional objection to follow any formulaic incantation. As explained by the Court of Appeal in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 (at [57]), "the 'plea' or objection to jurisdiction which Art 16(3) refers to does not need to be in any specific form or worded in any specific manner". The focus is on the *substance* of the objection.

222 In my view, the Tribunal would have seen and treated the objection raised as *including* an objection to jurisdiction. The Award itself contains

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135 DRS at paras 155–156; NOA 30 June 2020 at p 28 lines 11–18.

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indications that this was how the Tribunal dealt with the objection raised by the Arbitration Claimants at paragraphs 94 and 97 of the Arbitration Claimants' Closing Submissions. The Tribunal stated that:

> 289. On the contrary, the [Arbitration] Claimants contend that the [defendants'] claim for an extension of time *was only raised in their written closing submissions and, accordingly, should not be considered* by the Tribunal. In this regard, the [Arbitration] Claimants ***also*** raise a procedural unfairness point …
>
> [emphasis added in italics and bold italics]

The italicised words were, in my view, a recognition by the Tribunal that the argument that the EOT Defence, only having been raised in the defendants' closing submissions, was not an issue or dispute that had been introduced into the arena, and therefore, "should not be considered" by the Tribunal. The word "also" in bold italics clearly suggests that the Tribunal saw the Arbitration Claimants' objection as going *beyond* excess of jurisdiction to also *include* procedural unfairness and natural justice. In my judgment, this was a sufficiently clear indication that the Tribunal understood the objection as, in substance, also encompassing a jurisdiction point and dealt with it on that basis. As such, there is no merit in the defendants' contention that a jurisdictional objection was not taken by the Arbitration Claimants before the Tribunal. In my view, it was.

223 The defendants also submit that CAI "cannot belatedly cry foul" when it had "responded at length to the submissions [on the EOT Defence] without raising any doubts about the Tribunal's jurisdiction to consider them".[136] This argument is unpersuasive.

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136 DRS at para 157.

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224 In *BBA* ([151] *supra*), the Court of Appeal observed at [49] that the appellant's counsel's submissions before the tribunal on the Weighted Average Cost of Capital formula used to calculate the average rate of return that the respondent would make on its return ("WACC") was done *without informing the tribunal* that adopting the WACC could lead to an excess of jurisdiction. In contrast, in this case, the Arbitration Claimants had raised their jurisdictional and procedural unfairness objection to the Tribunal's consideration of the EOT Defence at the first available opportunity, *ie,* in the Arbitration Claimants' Closing Submissions (at paragraphs 94 and 97). Paragraph 98 of the Arbitration Claimants' Closing Submissions must be read in that context and not in isolation. The arguments raised in that paragraph as to the "three insurmountable flaws" in the EOT Defence must be seen as subsidiary to the Arbitration Claimants' primary objection that the Tribunal ought not to consider the EOT Defence at all.

225 To summarise this sub-issue, the Tribunal, in ruling on the EOT Defence and granting a 25-day extension of time to the defendants in reliance on GC 40, dealt with a dispute that did not fall within the terms of the submission to arbitration. The Award thus contained decisions on matters beyond the scope of the parties' submission to arbitration. The EOT Defence did not fall within the parties' pleaded cases, the Terms of Reference or the list of issues submitted for the Tribunal's determination. Further, the Tribunal did not specifically invite submissions on new and unpleaded alternate bases for relief from liquidated damages. Nor did it authorise the bringing of the EOT Defence. Finally, I am satisfied that Arbitration Claimants did raise the jurisdiction objection before the Tribunal and were accordingly not precluded from raising it in OS 1103.

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Issue 2(e): Whether the Tribunal's consideration of the EOT Defence materially prejudiced CAI's rights

226 Issue 2(e) can be dealt with briefly. To set aside an arbitral award on the grounds of excess of jurisdiction, as with the breach of natural justice ground, the court must also be satisfied that the aggrieved party has suffered actual or real prejudice (see *AKN* at [72] ([156] *supra*), *CRW* ([183] *supra*) at [37], *Prometheus* ([201] *supra*) at [63]). The test of "actual prejudice" under Arts 34(2)(*a*)(iii) and 34(2)(*a*)(ii) are the same (see *AMZ v AXX* [2016] 1 SLR 549 at [104]). The aggrieved party must show that the tribunal could reasonably have arrived at a different result but for the breach.

227 For the same reasons set out above at [154]–[158] in relation to Issue 1, there was, in my view, prejudice to CAI by reason of the Tribunal exceeding its jurisdiction. Having rejected the defendants' primary case that the Abnormal Vibrations did not cause any delay to Mechanical Completion and their secondary case on the Estoppel Defence, the Tribunal granted a 25-day extension of time to the defendants on the sole basis of the EOT Defence. As such, there was a clear causal nexus between the breach (*ie,* considering and deciding on the EOT Defence) and the Award.

228 To conclude, I answer Issue 2 (see [65]) in the affirmative. As for the consequences on the Award of my decision on this issue, I discuss this when I address Issue 4.

Issue 3: Approbation and reprobation

229 The defendants argue that CAI has accepted payment of the liquidated damages under the Award and has thus taken the benefit of that part of the

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Award that it likes. As such, it is prevented from challenging the Award by the doctrine of approbation and reprobation.[137]

230 The foundation of the doctrine of approbation and reprobation is that the person against whom it is applied has accepted a benefit from the matter that he now reprobates. It precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right that he has exercised (*BWG v BWF* [2020] 1 SLR 1296 ("*BWG*") at [102]).

231 One illustration of this doctrine can be found in *First National Bank Plc v Walker* [2001] FLR 505. There, a wife had sought ancillary relief in matrimonial proceedings against her husband and had taken the position that the bank's charge over a property was valid, even swearing affidavits to this effect. The court found that it was inequitable for the wife to then subsequently rely on the defence of undue influence against the bank's claim for possession. The wife had obtained an actual benefit in the form of an order of conveyance in the matrimonial proceedings – this was based at least in part on her position that the bank's charge over the property was valid. Further, she had the option of informing the matrimonial court of the change in circumstances before the property conveyance order was finalised. Her inconsistent conduct was also in relation to the exact same charge on the same property (*BWG* at [107]–[109]).

232 I have no difficulty accepting CAI's submission that the doctrine of approbation and reprobation does not apply on the facts of this case. There is nothing inconsistent about CAI accepting payment in relation to the parts of the Award that it does not dispute, while seeking to challenge a part of the Award

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137 DS at paras 107–108.

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that it does dispute. CAI seeks only to set aside a discrete portion of the award – namely the grant by the Tribunal of a 25-day extension of time.[138] In addition to the Award granting the Arbitration Claimants 75 days' worth of liquidated damages, there are other parts of the Award dealing with other claims advanced by the Arbitration Claimants that were dismissed by the Tribunal. CAI does not seek to impugn those parts of the Award. There were also counterclaims made by the defendants against the Arbitration Claimants that were allowed by the Tribunal, and those parts of the Award are also not being challenged by CAI.

233 The defendants rely on the English case of *European Grain and Shipping Ltd v Johnston* [1983] 1 QB 520 ("*European Grain*") for the proposition that the doctrine of approbation and reprobation applies to prevent parties from having defective awards set aside in circumstances where those parties have taken the benefit of the award. *European Grain* is, however, distinguishable on its facts and the *ratio decidendi* of the case must be understood in the context of its facts.[139] There, the sellers had accepted the buyer's payment pursuant to one part of the award that was in its favour but subsequently sought to set aside the award on the basis that one of the three arbitrators had failed to append his signature to the award. This irregularity infected the *entire* award and not just certain discrete sections of it. Accordingly, the English Court of Appeal held that as the sellers had accepted payment under the first part of the award, they were precluded from disputing the award and contending that they did not like the second part which had gone against them. That was a clear example of the sellers wishing to have their cake and eat it. In the present case, however, CAI is not disputing the entirety of the Award while

138 PRS at para 127.

139 PRS at para 130.

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accepting payment under it and it (unsurprisingly) accepts that the defendants ought to pay liquidated damages to it on account of their delay in achieving Mechanical Completion. As such, in challenging the 25-day extension of time granted to the defendants, CAI is not taking inconsistent positions or approbating and reprobating. I accordingly reject the defendants' arguments on this issue and answer Issue 3 (see [65]) in the negative.

Issue 4: CAI's Recourse against the Award

234 It is common ground between the parties that if the Tribunal had exceeded the scope of submission under Art 34(2)(*a*)(iii) of the Model Law in deciding on the EOT Defence and granting the 25-day extension of time, it would not be appropriate to suspend the setting aside proceedings and remit the Award back to the Tribunal for its determination. That must be the case since the Tribunal would have decided an issue that had never been referred to it by the parties in the first place (see also *GD Midea* ([183] *supra*) at [77]).[140] As such, the only option open to the court would be, as far as possible, to set aside so much of the Award that is infected.

235 In OS 1103, CAI asks that the court does two things:

(a) set aside the Tribunal's decision to grant the defendants 25 days' worth of extension of time for the delay in Mechanical Completion; and

(b) increase the liquidated damages payable by the defendants to CAI by 0.1% of the contract price under the Agreements for each day of delay.

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140 PS at para 157; NOA 30 June 2020 at p 40 lines 7–8.

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236 The defendants object to this. They argue that what CAI seeks in OS 1103 is a substantive order which requires the court to substitute the Tribunal's order that the defendants are only liable for 74 days' worth of liquidated damages (plus interest) with a finding of zero days extension of time and liability for 99 days' worth of liquidated damages (plus interest). This, the defendants contend, is impermissible and would amount to the court granting substantive relief in the form of a variation of the Award, a power it does not possess under the IAA.[141] In this regard, they also argue that the Tribunal never found that the defendants were liable for 99 days' worth of liquidated damages but rather that whilst the period of *delay* was 99 days, it would be fair and reasonable to extend the time for completion by 25 days. As such, the EOT Defence (and the Tribunal's decision on it) cannot be easily untangled from the Award.[142]

237 With regard to the defendants' submission that under the IAA and the Model Law, the court does not have the power to vary an arbitral award, I agree.[143] The court's powers in a setting aside application are circumscribed by Art 5 of the Model Law which provides that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law".

238 In *AKN and another v ALC and others and other appeals* [2016] 1 SLR 966, the Court of Appeal construed Art 5 of the Model law and held that (at [21]):

> The effect of Art 5… is to "confine the power of the court to intervene in an arbitration to those instances which are

141 DS at para 116; DRS at para 168.

142 DS at paras 114–115; NOA 30 June at p 28 line 26–p 29 lines 1–29.

143 DS at paras 116–118.

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> provided for in the Model Law and to 'exclude any general or residual powers' arising from sources other than the Model Law". … Article 5 has also been explained as guaranteeing the "reader and user that he will find all instances of possible court intervention in [the Model Law], except for matters not regulated by it" …

239 There is no mention of the *court's* power to vary or amend an arbitral award in the Model Law or any other section of the IAA. This is in contradistinction to s 48(8)(*b*) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") which expressly provides the court with the power to "vary the award" on an appeal on a question of law. Furthermore, s 19B(2) of the IAA makes it clear that it is only the *arbitral tribunal* which has the power to "vary, amend, correct, review, add to or revoke the award" under Arts 33 and 34(4) of the Model Law. As such, it is clear that under the IAA, the court does not have the power to vary or amend an arbitral award in a setting aside application.

240 The court's powers are limited to either setting aside the award or, where appropriate, to suspend the setting aside proceedings and remit the award for the tribunal's decision under Art 34(4) of the Model Law.

241 Focussing on the former, it is uncontroversial that a court can set aside an arbitral award in whole or in part. Partial setting aside of an award is expressly contemplated in Art 34(2)(*a*)(iii) of the Model Law as it states that "provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, *only that part of the award which contains decisions on matters not submitted to arbitration may be set aside*" [emphasis added]. In *AKN* ([156] *supra*), the Court of Appeal stated that if any of the statutory grounds for setting aside an award under the IAA are fulfilled, the proper approach is to set aside only the part of the award that is tainted, and not the whole award (see *eg,* [80], [105] and [116]). It should also be noted that

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under Art 34(2)(*a*)(iii) of the Model Law, it is only the "decisions" on matters submitted to arbitration that can be set aside, and not the factual findings of the tribunal.

242 Having regard to the Award and the facts of the present case, I do not agree with the defendants that by removing the reference to the 25-day extension of time in the Award, the court would thereby interfere with the factual finding of the Tribunal (*ie,* a 99-day delay) as opposed to its decision on the EOT Defence (*ie,* 74 days' worth of liquidated damages).

243 I also disagree with the defendants that only the dispositive *sections* of an arbitral award can be set aside.[144] As mentioned above, Art 34(2)(*a*)(iii) of the Model Law refers to "*decisions* on matters" beyond the scope of submission and the court's powers to excise those "*decisions*" [emphasis added]. The court, in setting aside an award or the part(s) containing the impugned decision(s) does not thereby set aside a particular section of the award or specific paragraphs. All parts of the award where the "decision" is contained are set aside and the parties are to then act accordingly. The Tribunal's decision is not contained only in the "dispositive section" of the Award, as the defendants sought to argue.

244 While the court has no powers to vary an arbitration award, I agree with CAI that it is empowered to make ancillary or consequential orders to give effect to its setting aside orders.[145] To be more specific, I am of the view that when a court exercises its power to set aside an offending part of an arbitral award, already built into that power is the ancillary power to also set aside or remove

144 DRS at para 170.

145 PRS at para 146.

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dispositive parts of the award which are infected by the decision concerned. I disagree that in doing so, the court is varying the award. This is not a novel concept, nor is it unprincipled. I draw support from two decisions of our courts.

245 First, in *GD Midea* ([183] *supra*), Chua Lee Ming J found that there was a breach of natural justice when the arbitral tribunal made a finding on the breach of cl 4.2 of the relevant contract since: (a) the issue of a breach of cl 4.2 did not arise in the arbitration; and (b) the tribunal had made its finding on cl 4.2 without giving notice to the parties. Chua J analysed the tribunal's findings in the award and found that it was possible to sever *other findings* of the tribunal if they "were linked to and flowed from its finding [which was made in breach of one of the grounds in Art 34]" or, in other words, "inextricably linked" to the impugned finding (see [72]–[76]).[146] Chua J then went on to set aside a number of the tribunal's findings, including one on the plaintiff's lack of good faith.

246 More recently, Anselmo Reyes IJ (sitting in the Singapore International Commercial Court) agreed, in *obiter*, with *GD Midea* and concluded that "[w]here part of an award has been set aside, other parts may consequentially be set aside where they are 'inextricably linked' to or 'flow from' the tribunal's findings which have been set aside" (*CBX and another v CBZ and others* [2020] SGHC(I) 17 at [71]).

247 Returning to the facts of the present case, I am of the view that the court must be and is empowered to make consequential or ancillary orders to give effect to the setting aside of the Tribunal's decision to grant a 25-day extension of time. In so doing, the court is not drawing on any "general or residual powers"

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146 Appeal dismissed by the CA on 1 March 2018 without any written grounds of decision.

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in contravention of Art 5 Model Law. Rather, it is a power that flows from its *express jurisdiction* under Art 34(2)(*a*)(iii) Model Law to set aside an award, or part of it. It cannot be the case that that the court is only empowered to set aside the dispositive *section* of the Award granting 74 days' worth of liquidated damages and nothing else. If the defendant's contention is correct, then the Award would be completely hamstrung – the Award cannot be remitted because I have found that the EOT Defence was not within the scope of submission, yet the dispositive section awarding the Arbitration Claimants 74 days' worth of liquidated damages would have been set aside. The result is that the Award would then be left in a limbo. This would mean that whatever was awarded to the Arbitration Claimants is set aside and would have to be returned to the defendants. CAI would then be left with the wholly unattractive and uncommercial proposition of having to re-commence fresh arbitration proceedings, assuming that is even possible given the effluxion of time. That, in my view, simply cannot be right or a just outcome. The answer to the scenario painted above cannot be that the court is powerless to do anything else and since parties have chosen arbitration as their dispute resolution mechanism, that is the consequence of the parties' autonomous choice.

248 In any case, reading the Award closely and as a whole, I do not agree that the Tribunal only found 99 days' worth of delay and not 99 days' worth of liquidated damages. At paragraph 282 of the Award, the Tribunal found that:

> The consequence of determining that Mechanical Completion was reached on 21 June 2013 is that there are **99 days of delay** between 14 March 2013 (*being the starting point of the damages calculation*) and that date …
>
> [emphasis added]

The words in italics indicate that when the Tribunal referred to 99 days of delay, it was really focusing on 99 days of "culpable" delay for which *damages are*

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payable prior to taking into account any extension of time under GC 40. In essence, the Tribunal used the expressions "days of delay" and "days of liquidated damages" interchangeably. This reading of paragraph 282 is consistent with paragraphs 338 and 339 of the Award which concerned the calculation of the amount of liquidated damages:

> 338. Given that the Tribunal has found that Mechanical Completion was reached on 21 June 2013, the [Arbitration Claimants] are entitled to 74 days of liquidated damages (being the 99 days of delay minus the 25 day extension of time)
>
> 339. On this basis outlined above, the parameters of the [Arbitration Claimants'] liquidated damages Claim, in respect of the Motor Vibration Issue can be summarized [*sic*] as follows …

Liquidated Damages Calculation (Onshore Agreement)	
First Day that Liquidated Damages started to accrue	15 March 2013
Last Day on which Liquidated Damages accrued	21 June 2013
EOT granted to the [defendants]	25 Days
Liquidated Damages per Day	0.1% of the Contract Price
Total Amount of Liquidated Damages	7.4% of the Contract Price

…

I do not reproduce the table which the Tribunal used to calculate the liquidated damages payable by the defendants under the Offshore Agreement as they are almost identical in layout.

249 This being the case, the effect of setting aside the part of the Award granting the 25-day extension of time does not therefore interfere with any findings of fact made by the Tribunal. In my view, it merely acknowledges or

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gives effect to the consequence of the EOT Defence being unfairly permitted, and not falling within the scope of submission. Thus, when the Award is read *with the judgment of this court*, it becomes clear that there is no encroachment into the evidential arena, of any factual findings of the Tribunal or the merits of the case.

Conclusion

250 To conclude, for all of the foregoing reasons, I allow CAI's application in OS 1103 to set aside the Award insofar as it allowed the defendants an extension of time of 25 days. I thus grant an order in terms of CAI's first prayer in OS 1103 and set aside the Tribunal's decision to grant the defendants an extension of time of 25 days for the delay in Mechanical Completion, as set out in the Award.

251 In respect of CAI's second prayer in OS 1103, I do not think that the court can order an *increase* in the liquidated damages payable. I thus reformulate CAI's second prayer and order that "Consequently, the number of days of delay set out in the Award for which liquidated damages are payable is to read as 99 days."

252 Finally, I record my appreciation to both Mr Bull SC and Mr Thio SC for their helpful and lucid submissions, which afforded this court considerable assistance in navigating through the numerous points and issues that arose in OS 1103.

253 I will hear the parties separately on costs.

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S Mohan
Judicial Commissioner

Cavinder Bull SC, Lin Shumin and Amadeus Huang Zhen (Drew & Napier LLC) (instructed), Nicholas Jeyaraj s/o Narayanan and Chik Hui Rong Crystal (Nicholas & Tan Partnership LLP) for the plaintiff; Thio Shen Yi SC, Md Noor E Adnaan and Neo Zhi Wei, Eugene (TSMP Law Corporation) for the defendants.

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