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

[2021] SGHC 178

Originating Summons No 1253 of 2020

Between

CIZ

… *Plaintiff*

And

CJA

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Arbitral tribunal] — [Jurisdiction]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

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CIZ
v
CJA

[2021] SGHC 178

General Division of the High Court — Originating Summons No 1253 of 2020
Chua Lee Ming J
26 April 2021

15 July 2021

Chua Lee Ming J:

Introduction

1 The plaintiff and the defendant were the respondent and claimant respectively in Singapore International Arbitration Centre ("SIAC") Case No 085 of 2018 (the "arbitration proceedings"). In the arbitration proceedings, the defendant claimed damages in respect of the plaintiff's refusal to pay for consultancy services provided by the defendant in relation to the following:

(a) the acquisition of shares by the plaintiff in [X Co], an operator of oil fields (the "X Opportunity"); and

(b) a collaboration between the plaintiff and [Y Co], an integrated energy company (the "Y Opportunity").

2 The arbitration tribunal (the "Tribunal") issued its Final Award on 25 September 2020 ("Award").[1] The Tribunal awarded the defendant the sum of US$5,066,106.86 with interest and costs in respect of its claim in relation to the X Opportunity but dismissed the defendant's claim in relation to the Y Opportunity.

3 In these proceedings, the plaintiff applied to set aside the Award relating to the X Opportunity. The defendant did not challenge the Tribunal's dismissal of its claim in relation to the Y Opportunity.

4 I set aside the Award relating to the X Opportunity on the ground that the Tribunal had exceeded its jurisdiction, pursuant to Article 34(2)(*a*)(iii) of the Model Law read with ss 3 and 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The defendant has appealed against my decision.

Facts

The agreements between the parties

5 The plaintiff entered into a Consultancy Agreement dated 7 September 2012 (the "Agreement") with [Z Co].[2] Under the Agreement, [Z Co] was to provide the plaintiff with information and consultation/advisory services relating to opportunities for the plaintiff to "acquire an interest in producing oil and gas fields around the world". In return, the plaintiff agreed to pay [Z Co] a fee ("Success Fee") subject to certain conditions in the Agreement.

6 The Agreement expired on 31 December 2012. On 28 February 2013, [Z Co] requested an extension of the Agreement to 31 December 2013 and assignment of the Agreement to its sister company, the defendant.[3]

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7 On or about 21 October 2013, the plaintiff, [Z Co] and the defendant entered into a Deed of Novation ("Deed of Novation").[4] Under the Deed of Novation:

(a) [Z Co]'s rights, obligations and liabilities under the Agreement were novated to the defendant.

(b) The Agreement was extended to 31 December 2013.

(c) The plaintiff and the defendant agreed that, immediately following the completion of the novation, the Agreement would be amended and restated in the form annexed to the Deed of Novation.

8 On the same day (21 October 2013), the plaintiff and the defendant entered into the Amended and Restated Consultancy Agreement (the "Amended Agreement").[5] Under the Amended Agreement, the defendant replaced [Z Co] and the expiry date was extended to 31 December 2013.

9 The Agreement, Amended Agreement and Deed of Novation contained similar provisions that provided for disputes to be finally resolved by arbitration before the SIAC in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect.

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Relevant provisions in the Amended Agreement

10 The relevant provisions in the Amended Agreement were as follows:

> **ARTICLE 1**
> **SCOPE OF SERVICES**
>
> 1.1 [The defendant] will, at its own cost and expense, provide to [the plaintiff] information with respect to opportunities that are available to [the plaintiff] to acquire an interest in producing oil and gas fields around the world where the API gravity of the oil is in excess of 20 degrees ("**Opportunity**"). ...
>
> …
>
> 1.3 Any Opportunity presented to [the plaintiff] by [the defendant] shall be in writing and signed by a representative of [the defendant] and shall contain the following information:
>
> …
>
> …
>
> **ARTICLE 2**
> **SUCCESS FEE**
>
> 2.1 Subject to the conditions in Article 2.3, if following the presentation of an Opportunity, [the plaintiff] Completes an acquisition for an interest in an oil field that has been identified by [the defendant] pursuant to Article 1.3 ("**Acquired Interest**"), [the plaintiff] shall pay to [the defendant] the fee described in Article 2.2 below ("**Success Fee**").
>
> 2.2 The Success Fee shall be calculated as follows:
>
> …
>
> 2.3 The Success Fee will only be payable to [the defendant] if:
>
> 2.3.1 [The defendant] has presented the Opportunity in the manner described in Article 1.3 ("**Opportunity Notice**");
>
> 2.3.2 [The plaintiff] has not advised [the defendant] in writing within ten (10) business days of receiving notice of the Opportunity that it is already aware of the Opportunity and plans to pursue the Opportunity on its own without the assistance of [the defendant] ("**Rejection Notice**");

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

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

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

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

2.4.1 [the plaintiff] provides a Rejection Notice to [the defendant] …; or

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

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

2.6 [The plaintiff] shall have no obligation to reimburse [the defendant] for any out-of-pocket expenses incurred by [the defendant] in connection with the presentation of an Opportunity or its performance of the Services.

…

ARTICLE 3
EXCLUSIVITY

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

3.2 Upon the expiration or earlier termination of this Agreement, the exclusivity described in Article 3.1 shall terminate immediately, and the Parties shall no longer have any further obligation to each other under this Agreement, provided however, if a SPA has been executed

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> by [the plaintiff] that has not Completed at the time this Agreement expires, then, subject to the termination provisions of Article 5, [the plaintiff] shall be obligated to pay the Success Fee.
>
> **ARTICLE 4**
> **TERMS OF AGREEMENT**
>
> The effective date of this Agreement shall commence on 01 September 2012 and expire on 31 December 2013 unless terminated earlier by either Party in accordance with the terms of Article 5.1[.] This Agreement may be extended upon mutual agreement by the Parties.
>
> **ARTICLE 5**
> **TERMINATION**
>
> 5.1 Either Party may terminate this Agreement if any of the following events occurs:
>
> 5.1.1 if the other Party's representations in Article 7 are untrue;
>
> 5.1.2 if the other Party fails to perform its obligations under this Agreement; or
>
> 5.1.3 if the other Party commences liquidation proceedings …
>
> 5.2 …
>
> 5.3 If [the plaintiff] terminates this Agreement under Articles 5.1.1, 5.1.2, or 5.1.3, no compensation shall be due or payable to [the defendant], even if resulting from [the defendant]'s efforts prior to such termination notwithstanding whether an Opportunity Notice has been presented to [the plaintiff] or a SPA has been executed.
>
> …
>
> **ARTICLE 12**
>
> **LIMITATION OF ACTIONS**
>
> No action or proceeding arising out of this Agreement may be brought by either Party more than three months after the expiry or termination of this Agreement.

The X Opportunity

11 In 2012, [Z Co] presented the X Opportunity to the plaintiff. [X Co]'s chief executive officer, Mr [HF], was also its controlling shareholder. The

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X Opportunity involved the acquisition of [HF]'s shares in [X Co], which were held through [ABC Co].

12 On 14 September 2012, the plaintiff entered into a Confidentiality Agreement with [X Co].[6] On 1 October 2012, the plaintiff wrote to [X Co], expressing its non-binding preliminary indication of interest to acquire all the shares in [X Co] and requesting access to [X Co]'s data room for its due diligence review.[7] Access to the data room was given and due diligence began.

13 [X Co] owned a significant subsidiary with major oil fields in a country in Africa. On 19 February 2013, the plaintiff wrote to [X Co] setting out several issues that needed to be resolved.[8] These issues included two issues involving the government of the said African country – taxation (the "tax issue") and an interest held by [BCD Co] in the production sharing contract between [X Co]'s subsidiary and the government of the said African country (the "BCD issue"). The plaintiff sought an exemption or release from taxation, [BCD Co]'s termination of its interest and a release from any liabilities relating to such termination.

14 Another issue that arose related to a proposed change in the regulations of [Z Co]'s home state, to lower the threshold for mandatory takeover offers from 30% to 25%. On 26 September 2013, the plaintiff informed [Z Co] that it was not in a position to execute a mandatory takeover offer.[9]

15 The Amended Agreement expired on 31 December 2013, without any written agreement for its extension. Further, the plaintiff had not entered into any sale and purchase agreement ("SPA") relating to the X Opportunity by 31 December 2013.

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16 By early 2014, the tax issue and the BCD issue remained unresolved.[10] On 14 April 2014, the plaintiff informed [X Co] (among others) that it had decided not to proceed with the proposed investment in [X Co].[11]

17 On 11 July 2014, the plaintiff informed the defendant that its "view on [the defendant] contract remains the same, i.e a new contract is needed".[12]

18 According to the plaintiff, sometime in December 2015, it decided to acquire a company as part of its expansion plans and it considered [X Co] as one of its potential targets.[13] This time, the plaintiff, together with [HF], managed to resolve the tax issue and the BCD issue.[14] On 31 July 2016, the plaintiff signed an agreement with [ABC Co] to acquire [ABC Co]'s shares in [X Co] (which corresponded to 24.53% of [X Co]'s share capital).[15] The plaintiff eventually acquired the shares using its wholly owned subsidiary (the "Subco"). The agreement envisaged that the purchaser would launch a voluntary tender offer ("VTO") over the outstanding securities in [X Co].

19 On 25 August 2016, the completion of the Subco's acquisition of [ABC Co]'s shareholding in [X Co] was announced by the plaintiff and the Subco.[16] The Subco launched the VTO and by 16 February 2017, it held 72.65% of [X Co]'s share capital.[17]

20 The plaintiff did not involve [Z Co] or the defendant in its acquisition of [ABC Co]'s shares in [X Co] in 2016. The plaintiff also disputed the defendant's entitlement to a Success Fee in respect of the acquisition.

21 A "without prejudice" joint discussion on 13 July 2017 and a mediation at the Singapore Mediation Centre on 6 December 2017 failed to resolve the dispute.

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Commencement of arbitration

22 On 17 April 2018, the defendant commenced the arbitration proceedings by serving a Notice of Arbitration.[18] The parties agreed that the SIAC Arbitration Rules (6th Ed, 2016) would apply to the arbitration proceedings.

23 The Notice of Arbitration referred to the arbitration agreement in the Deed of Novation.[19] It was not clear why it did not refer to the Amended Agreement which had been signed. However, no issue arose out of this. In its Response to the Notice of Arbitration,[20] the plaintiff accepted that the "dispute in relation to the Deed of Novation and the [Amended Agreement] has been referred to arbitration …".[21]

24 In its Statement of Claim in the arbitration proceedings ("Statement of Claim"), the defendant referred only to the Agreement and the Deed of Novation; there was no reference to the Amended Agreement. Again, no issue arose out of this. The plaintiff's Statement of Defence ("Defence") properly referred to the Amended Agreement and the defendant's Statement of Reply ("Reply") too referred to the Amended Agreement. As the Tribunal noted in its Award, there were "no material differences between the [Agreement] and the [Amended Agreement]".[22]

Parties' cases in the arbitration proceedings

25 The defendant acknowledged that the term of the Agreement (as extended by the Deed of Novation) expired on 31 December 2013. However, the defendant pleaded as follows:

(a) There was an oral agreement between the plaintiff and the defendant to extend the Agreement for "a further period" during which

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the defendant would continue to provide the services under the Agreement, and this would be reflected in a written contract to be executed in due course (the "Oral Agreement").[23]

(b) In the alternative, there was an "implied contract between [the defendant] and [the plaintiff] on the same terms as the [Agreement] governing the interim period between the expiry of the [Deed of Novation] and the execution of a new written contract" ("Implied Contract").[24]

(c) The plaintiff was "estopped from denying that the Agreement [was] no longer valid by virtue of the fact that the [Deed of Novation had] expired".[25] Presumably, what the defendant meant to say was that the plaintiff was estopped from asserting that the Agreement was no longer valid.

26 The defendant claimed damages in the form of the Success Fee, arising from the plaintiff's breach of the Agreement and/or the Oral Agreement and/or the Implied Contract.[26] In the alternative, the defendant claimed a reasonable sum for work done in respect of the X Opportunity.[27]

27 In its Defence, the plaintiff denied the alleged Oral Agreement, Implied Contract and estoppel.[28] The plaintiff pleaded, among other things, that:

(a) There was no agreement between the defendant and the plaintiff for the renewal or extension of the Amended Agreement or a fresh agreement for the defendant's appointment as the plaintiff's consultant.[29]

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(b) Under Article 3.2 of the Amended Agreement, upon the expiration of the Amended Agreement, the defendant and the plaintiff had no further obligation to each other unless an SPA had been executed but not completed at the time the Amended Agreement expired.[30] No SPA had been executed by the time the Amended Agreement expired on 31 December 2013.

(c) Under Article 12 of the Amended Agreement, no action or proceeding arising out of the Amended Agreement may be brought more than three months after the expiry of the Amended Agreement.[31] The Notice of Arbitration was filed on 17 April 2018, more than four years out of time.

(d) The acquisition of shares in [X Co] in 2016 was different from the X Opportunity that [Z Co] presented to the plaintiff in 2012; one key difference was in the amount of [X Co] shares acquired.[32]

28 In Reply, the defendant's response to Article 3.2 was to reiterate its position as pleaded in its Statement of Claim, *ie*, that there was a subsisting agreement.[33] As for Article 12, the defendant pleaded that Article 12 did not come into effect since the Implied Contract continued to subsist.[34] The defendant also denied the plaintiff's claim that the acquisition of shares in [X Co] in 2016 was different from the X Opportunity that [Z Co] presented to the plaintiff in 2012.[35]

29 In its Closing Submissions, the defendant maintained its pleaded case.[36] The defendant summed up its case by submitting that the crux of its case remained that "there [was] a subsisting agreement between the parties after the expiry date stated on the [Deed of Novation] such that there [was] *no issue of*

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expiration" [emphasis added].[37] The defendant did not dispute that Article 3.2 required an SPA to be executed before the Agreement expired.[38] The defendant's submission was that the purport of Article 3.2 was that upon the expiry or earlier termination of the agreement, the parties' exclusivity obligations cease, unless an SPA has been executed that has not been completed.[39] As for Article 12, the defendant repeated its position in its Reply and further submitted that Article 12 was unreasonable and unenforceable under the Unfair Contracts Terms Act (Cap 396, 1994 Rev Ed) ("UCTA").[40]

30 The plaintiff too maintained its pleaded case in its Closing Submissions. The plaintiff reiterated that the Amended Agreement expired on 31 December 2013,[41] and submitted, among other things, that (a) it had no obligation to pay the Success Fee to the defendant because no SPA had been executed before 31 December 2013,[42] and (b) the claim was time-barred under Article 12.[43]

31 In its Reply Submissions, the defendant reiterated the broad issues, which included whether there was a subsisting agreement, and if not, whether it was entitled to a reasonable sum for work done.[44]

32 On the question of the quantum of the Success Fee, Article 2.2 read with Articles 2.7.1 of the Amended Agreement provided for the Success Fee to be calculated based on the "Consideration" paid by the plaintiff for the acquisition of the "interest in the Opportunity identified by [the defendant] that is the subject of a SPA".[45] Article 2.7.2 defined "Consideration" to exclude, among other things, "any future or contingent payment not paid or payable at the time of Completion".[46]

33 The plaintiff argued that the "Consideration" should exclude what it paid for the securities acquired pursuant to the VTO, which took place after the

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completion of the SPA.[47] Not surprisingly, the defendant took the opposite view.[48]

34 There was no agreed list of issues before the Tribunal.

The Award relating to the X Opportunity

35 The Tribunal found that:

(a) there was "plainly no express contract in existence" between the parties after the expiry of the [Amended Agreement] and that there was "simply no extension by mutual agreement after 31 December 2013";[49]

(b) "no such implied contract(s) as pleaded by [the defendant] exist(s)";[50] and

(c) the UCTA had no relevance to the Amended Agreement.[51]

The Award did not deal with the defendant's case on estoppel. It would appear that the Tribunal did not find any merit in the estoppel argument that was worth discussing.

36 However, despite having rejected the defendant's pleaded case, the Tribunal found that the plaintiff was liable to pay the defendant the Success Fee for the X Opportunity. The Tribunal based its decision on the following grounds:

(a) All the requirements of Articles 2.1 and 2.3 were satisfied.[52]

(b) While Article 3.2 "refers to a SPA that has been executed [*sic*] it is plain that this also extends to a SPA that is being negotiated or in relation to an Opportunity that bears fruit subsequently".[53]

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(c) Articles 2.4 and 2.4.2 do not refer to the necessity of an executed SPA being in existence before the Agreement expires; a specific clause should take precedence over a more general one.[54]

(d) The right to recover the Success Fee was not lost "as long as a clear link to the successful completion of the Opportunity" was shown.[55]

(e) An SPA need not be entered into and/or completed before the expiry of the Agreement and/or the Amended Agreement.[56]

(f) "Once it is recognized that a SPA may be entered into and/or negotiations in relation to an Opportunity continue even after the expiry of the [Agreement], then it is plain that Article 12 does not preclude these proceedings from being brought".[57]

(g) The acquisition of the shares in [X Co] in 2016 was the same transaction as the X Opportunity.[58]

37 It can be seen from the above that with respect to Articles 3.2 and 12 of the Amended Agreement, the substance of the Tribunal's decision was that although the Amended Agreement had expired without any SPA having been signed and there was no subsisting agreement thereafter, the defendant could claim its Success Fee because:

(a) Article 3.2 did not require an SPA to be entered into before the Amended Agreement expired; it was sufficient if there was "a clear link to the successful completion of the Opportunity"; and

(b) since there was no requirement that an SPA be entered into before the Amended Agreement expired, Article 12 did not bar the defendant from claiming its Success Fee.

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38 Finally, the Tribunal decided that the price paid by the plaintiff for the securities acquired pursuant to the VTO formed part of the "Consideration" for the purposes of computing the Success Fee.[59]

The plaintiff's case in the present proceedings

39 The plaintiff's case was that the Tribunal's findings, set out at [37] and [38] above, breached s 24(*b*) of the IAA and Article 34(2)(*a*)(iii) of the Model Law.

40 Section 24(*b*) of the IAA provides for the setting aside of an award on the ground of breach of natural justice; it states as follows:

> **Court may set aside award**
>
> **24.** Notwithstanding Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> (a) …
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

41 Pursuant to s 3(1) of the IAA, the Model Law, with the exception of Chapter VIII thereof, has the force of law in Singapore. Chapter VIII of the Model Law is not relevant for present purposes. Article 34(2)(*a*)(iii) of the Model Law provides for the setting aside of an award on the ground that the tribunal exceeded its jurisdiction; it states as follows:

> Article 34. Application for setting aside as exclusive recourse against arbitral award
>
> …
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:

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

Whether the Tribunal's findings with respect to Articles 3.2 and 12 of the Amended Agreement exceeded its jurisdiction

42 I deal with this issue first as it was the plaintiff's main argument.

The law relating to Article 34(2)(a)(ii) of the Model Law

43 While the court should not, without good reason, interfere with the arbitral process by setting aside arbitral awards, it would not hesitate to do so if a statutorily prescribed ground is clearly established: *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [25]–[27].

44 Article 34(2)(*a*)(iii) of the Model Law applies "where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it": *CRW* at [31]. An arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination: *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [37].

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45 It is clear that in determining the scope of the matters submitted to the tribunal, the pleadings play an important role. As the Court of Appeal observed in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*") at [33]:

> The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication. …

46 However, the court should not construe the pleadings too narrowly. The Court of Appeal held in *Kempinski* (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 parties to the arbitration is part of that dispute and need not be specifically pleaded. It may be raised in the arbitration, …

47 Further, a practical view has to be taken regarding the substance of the dispute being referred to arbitration: *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 ("*Prometheus*") (at [58]).

48 In *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") (at [52]), the court referred to *Kempinski* and concluded that "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". However, this statement must be looked at in its proper context. As the court pointed out in *CAI v CAJ and another* [2021] SGHC 21 ("*CAI*") (at [202]), the judge in *TMM* 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 not known to the parties. In addition, it must be noted that

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even in the scenario painted in *Kempinski*, what may be raised in the arbitration, although not pleaded, are only matters that are *ancillary* to the dispute submitted for arbitration.

49 I agreed with the view expressed in *CAI* (at [203]) that:

> … *TMM*, read in its proper context, does not … 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. … 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 …
>
> [emphasis in original]

50 In my view, an arbitral tribunal is not entitled to depart from the pleadings to the extent of making its decision based on a ground that has not been pleaded at all and which cannot be said to be ancillary to what has been pleaded. Or as the court put it in *CAI* (at [203]), "there must be some reference in the pleadings to the claim, defence or issue that the tribunal eventually decided upon".

51 Indeed, the decision in *TMM* demonstrates this. That case involved contracts for the sale of two vessels. Clause 11 of the contracts required the respondent/seller to ensure that repairs were completed before issuing the Notice of Readiness. The dispute that was submitted to arbitration concerned the validity of a Notice of Readiness issued by the respondent, which in turn depended on whether the respondent had complied with its obligation under cl 11. The arbitrator held that the repairs had been completed, and that in any event, cl 11 was not a condition precedent but a warranty, the breach of which did not entitle the claimant to terminate the contracts. The claimant sought to set aside the award. One of the grounds relied on was that the arbitrator had exceeded his jurisdiction in deciding that cl 11 was a warranty. The claimant

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argued that the only issue which it had put before the arbitrator was whether cl 11 was a condition or innominate term. The court held (at [70]) that "the finding that cl 11 was a collateral warranty was not only reasonably connected to the arguments raised by both parties; it was a reasonable follow-through from his finding that cl 11 was not a condition". In other words, the issue as to whether cl 11 was a warranty was ancillary to the dispute that had been submitted to arbitration.

52 *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 ("*GD Midea*") provides a contrast. There, the dispute that was submitted to arbitration concerned the validity of a notice of termination of a distribution agreement issued by the respondent. The claimant's case was that the notice of termination was invalid because, among other things, the respondent had breached certain payment terms that were agreed during a particular meeting. The arbitrator found largely in favour of the claimant but on the ground that the respondent had breached payment terms *under cl 4.2* of the agreement. The Notice of Arbitration, pleadings and submissions in the arbitration did not allege any breach of cl 4.2, and there was no reference to any breach of cl 4.2 in the parties' "Agreed List of Issues". The arbitrator's interpretation of cl 4.2 was also inconsistent with the position taken by the parties on cl 4.2. The High Court set aside the arbitrator's finding on cl 4.2 on the ground that the arbitrator had exceeded its jurisdiction (at [62]). The claimant's appeal against the High Court's decision was dismissed by the Court of Appeal with no written grounds of decision rendered.

53 Finally, where a Tribunal has exceeded its jurisdiction by addressing matters beyond the scope of the submission to arbitration, there is no further requirement to show that the applicant had suffered "real or actual prejudice": *GD Midea* at [60].

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Applying the law to the facts in this case

54 The defendant's case throughout the arbitration proceedings was that it was entitled to the Success Fee on the basis of the Oral Agreement, or the Implied Contract, or the claim that the plaintiff was estopped from asserting that the Amended Agreement was no longer valid. This was plain from the pleadings and submissions made to the Tribunal. As the defendant itself said in its Closing Submissions before the Tribunal, the crux of its case remained that "there [was] a *subsisting agreement* after the expiry date on the [Deed of Novation] such that there [was] *no issue of expiration*" [emphasis added].[60]

55 The Tribunal found that there was no subsisting agreement after the Amended Agreement expired on 31 December 2013. That should have been the end of the defendant's claim since the very premise of the defendant's claim had been rejected. Instead, the Tribunal proceeded to find that although the Amended Agreement had expired without any SPA having been signed and there was no subsisting agreement thereafter, the defendant could claim its Success Fee because:

(a) Article 3.2 did not require an SPA to be entered into before the Amended Agreement expired; it was sufficient if there was "a clear link to the successful completion of the Opportunity"; and

(b) since there was no requirement that an SPA be entered into before the Amended Agreement expired, Article 12 did not bar the defendant from claiming its Success Fee.

56 Nowhere in the defendant's Notice of Arbitration, pleadings or submissions in the arbitration proceedings did the defendant claim it was entitled to the Success Fee on the above grounds. This was not surprising. After

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all, the defendant's entire case was based on there being a subsisting agreement (on the same terms as the Amended Agreement) after 31 December 2013. This meant that neither Article 3.2 nor Article 12 presented any issues. the defendant's Statement of Claim did not even refer to Article 3.2. It was never the defendant's case in the arbitration proceedings that it had a valid claim if there was no subsisting agreement after the Amended Agreement expired.

57 In fact, the Tribunal's findings on Articles 3.2 and 12 were inconsistent with the positions taken by the defendant on those Articles. With respect to Article 3.2, the defendant had submitted that upon the expiration of the Amended Agreement, the plaintiff had an obligation under Article 3.2 to pay the Success Fee if an SPA has been executed *before* the Amended Agreement expired.[61] As for Article 12, the defendant's case was that it had not come into effect given that the Implied Contract continued to subsist between the plaintiff and the defendant.[62] In other words, the defendant accepted that Article 3.2 required an SPA to be signed before the Amended Agreement expired, and that the limitation period under Article 12 would have applied if there were no subsisting agreement after the Amended Agreement expired.

58 In its Closing Submissions, the defendant also argued that Article 12 was unenforceable because it was unreasonable under the UCTA; however, as stated earlier, this was rejected by the Tribunal (see [29] and [35(c)] above).

59 It was clear that the Tribunal's finding that the defendant was entitled to payment of the Success Fee was based on grounds that were entirely different from the defendant's case in the arbitration proceedings. It was not possible to describe the Tribunal's findings as being ancillary to the matter submitted to arbitration. The Tribunal's interpretations of Articles 3.2 and 12 were also inconsistent with the defendant's positions on these provisions.

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60 In my view, this present case was similar to the situation in *GD Midea*. There, the arbitrator's decision was based on a finding that cl 4.2 of the agreement in question had been breached but such breach was never part of the claimant's case, and the arbitrator's interpretation of cl 4.2 was also inconsistent with the claimant's position (see [52] above).

61 During the course of the arbitration proceedings, the Tribunal drew the parties' attention to Article 3.2 and asked the parties to consider "the position of an opportunity notice that has been presented but not executed".[63] However, the defendant decided not to change how it framed its case. In its Closing Submissions and Reply Submissions, the defendant maintained its case as pleaded. The Tribunal should have respected the defendant's decision as to how it chose to frame its case.

62 As Dyson LJ observed in *Al-Medenni v Mars UK Limited* [2005] EWCA Civ 1041 at [21]:

> … It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. *The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. Bu[t] if they refuse to do so, the judge must respect that decision. …*
>
> [emphasis in original]

The above passage was cited with approval in *Kempinski* (at [36]), in which the Court of Appeal said that "the basic principles applicable to determine the jurisdiction of the arbitrator or the court to decide a dispute raised by the parties are generally the same".

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63 In the circumstances, I agreed with the plaintiff that in relying on its interpretation of Articles 3.2 and 12 to find that the defendant was still entitled to claim the Success Fee, the Tribunal had exceeded its jurisdiction. This was sufficient for me to set aside the Award relating to the X Opportunity.

The plaintiff's other grounds

64 The plaintiff had also submitted that the Tribunal's findings with respect to Articles 3.2 and 12 of the Amended Agreement were in breach of the rules of natural justice. In addition, the plaintiff submitted that the Tribunal breached the rules of natural justice and exceeded its jurisdiction with respect to its findings that (a) the acquisition of the shares in [X Co] in 2016 was the same transaction as the X Opportunity presented by [Z Co] to the plaintiff, and (b) the price paid by the plaintiff for the securities acquired pursuant to the VTO formed part of the "Consideration" for the purposes of computing the Success Fee.

65 In the light of the conclusions that I had reached regarding the Tribunal's findings with respect to Articles 3.2 and 12, it was unnecessary for me to deal in detail with the remaining grounds that the plaintiff relied upon in these proceedings. Suffice it to say that, in my view, the remaining grounds were merely attempts to appeal against the Tribunal's findings and were therefore not sufficient to set aside the Award relating to the X Opportunity.

Conclusion

66 For the above reasons, I set aside the Award relating to the X Opportunity under Article 24(2)(*a*)(iii) of the Model Law on the ground that the Tribunal had exceeded its jurisdiction. I ordered the defendant to pay the

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costs of this application fixed at $7,500 plus disbursements to be fixed by me if not agreed.

Chua Lee Ming
Judge of the High Court

Ajinderpal Singh, Chioh Wen Qiang Adriel (Shi Wenqiang) and Koh Kuan Hong John Paul (Dentons Rodyk & Davidson LLP) for the plaintiff;
Tan Wei Ser Venetia and Ong Rui Qi Edwyna (CNPLaw LLP) for the defendant.

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1 1st Affidavit of [T], a Private Case Litigation Manager of the plaintiff, affirmed on 4 December 2020 ("[T]'s 1st Affidavit"), at pp 6000–6196.
2 [T]'s 1st Affidavit, at pp 109–122.
3 [T]'s 1st Affidavit, at p 4150.
4 [T]'s 1st Affidavit, at pp 124–157 and 174–179.
5 [T]'s 1st Affidavit, at pp 146–157.
6 [T]'s 1st Affidavit, at pp 3681–3689.
7 [T]'s 1st Affidavit, at pp 1988–1989.
8 [T]'s 1st Affidavit, at pp 4219–4221.
9 [T]'s 1st Affidavit, at p 2036.
10 [T]'s 1st Affidavit, at para 37.
11 [T]'s 1st Affidavit, at para 38 and p 2457.
12 [T]'s 1st Affidavit, at p 2092.
13 [T]'s 1st Affidavit, at para 39.
14 [T]'s 1st Affidavit, at paras 40–41.
15 [T]'s 1st Affidavit, at pp 4257–4528.
16 [T]'s 1st Affidavit, at pp 4529–4531.
17 [T]'s 1st Affidavit, at p 777 (Statement of [Chief Executive Officer of the plaintiff's wholly owned subsidiary], at para 68).
18 [T]'s 1st Affidavit, at pp 160–198.
19 [T]'s 1st Affidavit, at pp 164–165 (paras 8–10).

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[20] [T]'s 1st Affidavit, at pp 200–255.
[21] [T]'s 1st Affidavit, at p 210 (para 21).
[22] [T]'s 1st Affidavit, at p 6120 (Award, at para 250).
[23] [T]'s 1st Affidavit, at pp 315–316 (Statement of Claim, at paras 90–92).
[24] [T]'s 1st Affidavit, at p 316 (Statement of Claim, at para 95).
[25] [T]'s 1st Affidavit, at p 328 (Statement of Claim, at para 115).
[26] [T]'s 1st Affidavit, at p 338 (Statement of Claim, at paras 132–133).
[27] [T]'s 1st Affidavit, at p 339 (Statement of Claim, at para 134).
[28] [T]'s 1st Affidavit, at pp 514, 518 and 534 (Defence, at paras 159, 168 and 203).
[29] [T]'s 1st Affidavit, at p 510 (Defence, at para 152).
[30] [T]'s 1st Affidavit, at p 508 (Defence, at para 147).
[31] [T]'s 1st Affidavit, at pp 533–534 (Defence, at para 200).
[32] [T]'s 1st Affidavit, at pp 439–440 (Defence, at paras 53–54).
[33] [T]'s 1st Affidavit, at p 642 (Reply, at para 194).
[34] [T]'s 1st Affidavit, at p 660 (Reply, at para 244).
[35] [T]'s 1st Affidavit, at p 600 (Reply, at para 66).
[36] [T]'s 1st Affidavit, at pp 5604–5605, 5609 and 5612 (the defendant's Closing Submissions, at paras 26, 27, 37 and 45).
[37] [T]'s 1st Affidavit, at p 5646 (the defendant's Closing Submissions, at para 138).
[38] [T]'s 1st Affidavit, at p 5645 (the defendant's Closing Submissions, at paras 133–135).
[39] [T]'s 1st Affidavit, at p 5646 (the defendant's Closing Submissions, at para 135).
[40] [T]'s 1st Affidavit, at pp 5619–5621 (the defendant's Closing Submissions, at paras 64–69).
[41] [T]'s 1st Affidavit, at p 5681 (the plaintiff's Closing Submissions, at paras 36–39).
[42] [T]'s 1st Affidavit, at pp 5693–5695 (the plaintiff's Closing Submissions, at paras 81–90).
[43] [T]'s 1st Affidavit, at p 5750 (the plaintiff's Closing Submissions, at para 301).
[44] [T]'s 1st Affidavit, at p 5827 (the defendant's Reply Submissions, at para 24).
[45] [T]'s 1st Affidavit, at pp 147–148.
[46] [T]'s 1st Affidavit, at pp 148–14.
[47] [T]'s 1st Affidavit, at p 6164 (at para 306).
[48] [T]'s 1st Affidavit, at p 5657 (at para 167).
[49] [T]'s 1st Affidavit, at pp 6117 and 6179 (Award, at paras 243–244 and 341(a)–(b)).
[50] [T]'s 1st Affidavit, at pp 6117–6118 and 6179 (Award, at paras 245 and 341(c)).
[51] [T]'s 1st Affidavit, at p 6137 (Award, at para 268).
[52] [T]'s 1st Affidavit, at pp 6167 and 6181 (Award, at paras 312 and 341(l)).
[53] [T]'s 1st Affidavit, at p 6142 (Award, at paras 274(c) and (d)).
[54] [T]'s 1st Affidavit, at p 6143 (Award, at para 274(e)).
[55] [T]'s 1st Affidavit, at p 6147 (Award, at para 279).
[56] [T]'s 1st Affidavit, at p 6149 (Award, at paras 283(c) and 284).
[57] [T]'s 1st Affidavit, at p 6144 (Award, at para 275).
[58] [T]'s 1st Affidavit, at p 6164 (Award, at para 305).
[59] [T]'s 1st Affidavit, at pp 6164–6167 (Award, at paras 306–311).
[60] [T]'s 1st Affidavit, at p 5646 (the defendant's Closing Submissions, at para 138).
[61] [T]'s 1st Affidavit, at p 5645 (the defendant's Closing Submissions, at paras 133–135).
[62] [T]'s 1st Affidavit, at p 660 (Reply, at para 244), p 5619 (the defendant's Closing Submissions, at para 63).
[63] [T]'s 1st Affidavit, at p 5170 (Transcript, 7 October 2019, at 126:13–25).

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