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

[2021] SGHC 88

Originating Summons No 1158 of 2020

Between

Convexity Ltd

… *Applicant*

And

(1) Phoenixfin Pte Ltd
(2) Mek Global Ltd
(3) Phoenixfin Ltd

… *Respondents*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]
[Arbitration] — [Award] — [Recourse against award] — [Tribunal's powers]

TABLE OF CONTENTS

Convexity Ltd
v
Phoenixfin Pte Ltd and others

[2021] SGHC 88

General Division of the High Court — Originating Summons No 1158 of 2020
Andre Maniam JC
18 February 2021

19 April 2021

Andre Maniam JC:

Introduction

1 When a party *objects* to the late introduction of an issue into an arbitration, but the tribunal erroneously thinks that the parties had *agreed* on the introduction of the issue, and then decides the arbitration on that issue, should the award be set aside?

Background

The Services Agreement

2 The applicant was the claimant in the arbitration (and I will refer to it as such). The claimant's main claim was against the first respondent for breach of contract; it also claimed against the second and third respondents – as guarantors/indemnitors. At some point in the arbitration, the second and third

respondents ceased to participate in it, leaving the first respondent as the sole active respondent.

3 The first respondent had engaged the claimant to provide certain services, on the terms of a "Services Agreement" dated 18 December 2018.[1]

4 The governing law of the Services Agreement was English law, and it was agreed that disputes would be resolved in arbitration in Singapore, on the rules of the Singapore International Arbitration Centre ("SIAC") – the applicable version of the rules being the 6th Edition dated 1 August 2016 ("the SIAC Rules").

5 The Services Agreement was for an initial term of 24 months ("the Initial Term"), with a monthly fee of US$200,000.

6 In the course of the Initial Term, on 30 September 2019, the first respondent purported to terminate the contract on the basis that the claimant was in material breach of its contractual obligations. The claimant disputed this – it regarded the Services Agreement as having come to an end because the first respondent's purported wrongful termination was a material breach.

7 Clause 10.2 of the Services Agreement generally provided that if the contract were terminated during the Initial Term, the first respondent would pay a "Make-Whole Amount" to the claimant. If, however, termination had occurred pursuant to one of the grounds specified under clause 16.3 (*eg*, if one party stopped carrying on all or a significant part of its business or indicates in any

[1] Exhibit 2 in Applicant's 1st Affidavit at pp 131–148.

way that it intends to do so, *per* clause 16.3.1) the Make-Whole Amount would not be payable.[2]

8 The Make-Whole Amount was to bring the total amount paid or payable by the first respondent to the claimant, to 24 months' worth of the monthly fee of US$200,000, *ie*, US$4.8m. When the first respondent purported to terminate the contract on 30 September 2019, it had already paid the claimant US$2m in monthly fees. The Make-Whole Amount was thus US$2.8m.

9 Clause 11 of the Services Agreement provided that if the first respondent failed to make payment in accordance with the contract, the claimant was entitled to simple interest of 5% per month on the unpaid amount until the date of actual payment.[3]

The Arbitration

Commencement

10 On 14 October 2019, the claimant commenced arbitration against the respondents ("the Arbitration").[4]

Expedited arbitration

11 It was agreed that the Arbitration would be conducted in accordance with the expedited procedure under Rule 5 of the SIAC Rules, and the SIAC determined accordingly.[5] As such, the Arbitration was to be completed within

---

2 Applicant's 1st Affidavit at p 141.

3 Applicant's 1st Affidavit at pp 141–142.

4 Final Award dated 2 October 2020 ("The Award") at para 12 in Applicant's 1st Affidavit at p 88.

5 The Award at para 2 in Applicant's 1st Affidavit at p 85.

six months of the tribunal being constituted (on 2 January 2020),[6] *ie*, by 2 July 2020, unless – in exceptional circumstances – the SIAC Registrar extended that time (Rule 5.2(d) of the SIAC Rules).

Pleaded claims, defences, and counterclaims

12 In the Arbitration, the claimant claimed the Make-Whole Amount of US$2.8m, and interest on it at 5% per month.[7]

13 In response, the first respondent contended that the contract had been terminated under clause 16.3.1 because the claimant had stopped carrying out its part under the Services Agreement.[8] The Make-Whole Amount would not need to be paid if clause 16.3.1 applied.

14 There was also some suggestion that the first respondent had entered into the Services Agreement under duress.[9]

15 Besides defending against the claimant's claim, the first respondent raised a counterclaim, alleging that the claimant had committed a breach of confidence by hacking into the first respondent's server and misusing the first respondent's confidential information.10 This was denied by the claimant.11

---

6 The Award at para 14 in Applicant's 1st Affidavit at p 88.

7 Claimant's Statement of Claim in the Arbitration ("Arbitration SOC") at pp 13–14 in Applicant's 1st Affidavit at pp 165–166.

8 First respondent's Statement of Defence and Counterclaim in the Arbitration ("Arbitration D&CC") at para 37 in Applicant's 1st Affidavit at p 276.

9 Arbitration D&CC at paras 11–12 in Applicant's 1st Affidavit at p 269.

10 Arbitration D&CC at paras 43–44 in Applicant's 1st Affidavit at pp 277–278.

11 Claimant's Statement of Reply to the Arbitration D&CC ("Arbitration Reply") at paras 49–52 in Applicant's 1st Affidavit at pp 301–302.

The Penalty Issue

16 The first respondent did not plead in its Defence and Counterclaim in the Arbitration ("D&CC") that clause 10.2 (on the Make-Whole Amount) and clause 11 (on interest) in the Services Agreement were unenforceable penalty clauses ("the Penalty Issue"). Instead it pleaded that the Services Agreement had been terminated pursuant to clause 16.3.1, and so the Make-Whole Amount under clause 10.2 was not payable.[12]

17 The Penalty Issue was first mentioned on 28 April 2020, when the first respondent circulated a list of witnesses, listing one "Mr S" as a technical expert and one "Mr M" as a legal expert on English law (the "List of Witnesses").[13] The first respondent stated that it intended for Mr M to give evidence on (among others): "[u]nder what circumstances would the charges in the [Services Agreement] be regarded as unlawful or unenforceable" and "[w]hether the [Make-Whole Amount] or interest provisions in the [Services Agreement] amount to penalties under English law".[14] There was then less than a month to go, to the evidentiary hearing scheduled to begin on 27 May 2020.

18 On 4 May 2020, the claimant's counsel emailed the first respondent's counsel to say that "any issues involving the application of the law of England arising in [the Arbitration] can be addressed by way of submissions instead of adducing opinions via expert witnesses" (the "4 May 2020 Email").[15]

---

12 Arbitration D&CC at para 39 in Applicant's 1st Affidavit at p 277.

13 Exhibit 13 in Applicant's 1st Affidavit at pp 530–532.

14 Applicant's 1st Affidavit at p 532.

15 Exhibit 15 in Applicant's 1st Affidavit at pp 545–546.

19 On 6 May 2020, an Agreed List of Issues was filed, as well as individual lists containing issues that were not agreed upon.[16] Despite what the first respondent had said about what it had intended for Mr M to cover, it did not list the Penalty Issue as an issue; quite rightly so, for the Penalty Issue was not then an issue in the Arbitration.

20 That same day, 6 May 2020, the first respondent filed an application for (among other things) Mr M to be called as an expert witness ("the Expert Witness Application").[17]

21 By an email from its counsel on 7 May 2020 (the "7 May 2020 Email"), the claimant objected to Mr M being an expert witness because English law could be addressed by way of submissions rather than expert evidence; moreover, the first respondent was intending for Mr M to cover issues that were unpleaded, including the Penalty Issue.[18] The 7 May 2020 Email was then cited in the claimant's counsel's further email of 12 May 2020 (the "12 May 2020 Email").[19]

22 On 13 May 2020, over a telephone conference with the parties (the "13 May 2020 Teleconference"), the tribunal agreed with the claimant that Mr M should not give expert evidence; instead, he could be co-counsel and make submissions on English law.[20]

---

16 Applicant's 1st Affidavit at para 56; Applicant's Bundle of Documents ("ABOD") at p 122.

17 Applicant's 1st Affidavit at para 55.

18 Email dated 7 May 2020 at 11:27:19PM SGT provided by the respondents' counsel on 23 March 2021.

19 Applicant's 1st Affidavit at pp 578–579.

20 Applicant's 1st Affidavit at paras 64–65.

23 On 18 May 2020, the first respondent applied to amend its D&CC. It proposed (among other things) to amend paragraph 39 of the D&CC to plead the Penalty Issue as a defence (the "Amendment Application"). The first respondent explained the reason for the amendment as follows: "[t]o aver that the "Make-Whole Amount" and interest claimed are "penalty clause" [*sic*] and unenforceable. *Factual pleading* ***necessitated*** *for legal arguments*" [emphasis added in italics and bold].[21] The first respondent thereby recognised that the Penalty Issue was a question of fact and law (see [33] below), and that it had to amend its pleadings in order to make legal arguments on the point. The claimant, in an email dated 20 May 2020 (the "20 May 2020 Email"), objected to the first respondent's Amendment Application on the ground it was made so late in the day without explanation and that it would cause irreparable prejudice to the claimant if allowed.[22]

24 The four-day evidentiary hearing started on 27 May 2020. At the end of the third day of the hearing, 29 May 2020, the tribunal gave its decision on the Amendment Application: none of the proposed amendments was allowed, including that to plead the Penalty Issue as a defence.[23]

25 After the evidentiary hearing, the parties submitted their written closing submissions on 12 June 2020.[24]

26 At the hearing of oral reply submissions on 17 June 2020 (the "17 June 2020 Oral Reply Hearing"), however, the tribunal asked that the claimant's

---

21 Exhibit 18 in Applicant's 1st Affidavit at pp 581–582.

22 Exhibit 19 in Applicant's 1st Affidavit at pp 603–606.

23 Exhibit 20 in Applicant's 1st Affidavit at p 608.

24 Applicant's 1st Affidavit at para 77.

counsel address the Penalty Issue in a "fulsome manner".[25] The claimant's counsel objected, but the tribunal was insistent on dealing with the Penalty Issue. Correspondence and directions ensued (including Procedural Order 3 dated 21 August 2020 ("PO 3")),[26] in which the claimant maintained its objections to the Penalty Issue, while the tribunal maintained that it was in issue.[27] The hearing of oral reply submissions then resumed on 4 September 2020.[28]

The Award

27 On 2 October 2020, the final award was issued ("the Award").[29] The claimant's claims were dismissed, on the sole basis of the Penalty Issue.

28 The tribunal also dismissed the first respondent's counterclaim for breach of confidence.[30] However, the tribunal ordered (among other things) that the claimant destroy any and all proprietary or confidential data of the first respondent (the "Confidentiality Relief").[31] The tribunal did not accept the claimant's assertion that it had no such proprietary or confidential data.[32]

---

25 Applicant's 1st Affidavit at para 83.

26 Applicant's 1st Affidavit at paras 99–100; Exhibit 33 in Applicant's 1st Affidavit at pp 847–854.

27 Applicant's 1st Affidavit at paras 86–97.

28 Applicant's 1st Affidavit at para 105.

29 The Award in Applicant's 1st Affidavit at p 82.

30 The Award at paras 130–131 in Applicant's 1st Affidavit at pp 116–117.

31 The Award at para 134 in Applicant's 1st Affidavit at pp 117–118.

32 The Award at para 134 in Applicant's 1st Affidavit at pp 117–118.

The setting-aside application

29 The claimant applied to set aside two aspects of the Award:

(a) the tribunal's decision to dismiss the claimant's claims on the basis of the Penalty Issue; and

(b) the tribunal's order that the claimant destroy any and all proprietary or confidential data of the first respondent, *ie*, the Confidentiality Relief.

30 The claimant contended that there had been a breach of natural justice prejudicing its rights, justifying setting-aside under s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). The claimant also relied on the setting-aside grounds in Arts 34(2)(a)(ii), (iii), and (iv) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") (read with s 3(1) of the IAA):

(a) that the claimant was unable to present its case;

(b) that the Award contains decisions on matters beyond the scope of the submission to arbitration; and

(c) that the arbitral procedure was not in accordance with the agreement of the parties.

31 There were various other applications before me, but it was agreed that I should first address the claimant's setting-aside application.

The Penalty Issue

The pleadings

32 The Penalty Issue was never pleaded. It was not in the first respondent's D&CC ([16] above), and the tribunal did not allow the first respondent's Amendment Application to amend its pleadings to plead the Penalty Issue as a defence ([24] above).

33 The burden of proving that a contractual term is a penalty rests on the party asserting this (*Lombard North Central plc v European Skyjets Ltd (in liquidation) and another* [2020] EWHC 679 (QB) ("*Lombard North*") at [54]; *Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd* [1996] 3 SLR(R) 244 ("*Banner Investments*") at [8]–[9]). Here, that burden rested on the first respondent, which contended that the clauses on the Make-Whole Amount and interest were penalty clauses. Since this was a question of fact and law, it must be pleaded (*Lombard North* at [54]; *Banner Investments* at [14]–[16]). In *Banner Investments*, the appellate court set aside the first instance decision that was based on the unpleaded point that the liquidated damages clauses there were penalties (see *Banner Investments* at [6], [7] and [19]).

34 In the present case, the first respondent recognised that it had to plead and prove that the claimant was claiming on clauses that were unenforceable penalties: thus, the first respondent applied to amend its D&CC, but the tribunal did not allow the amendment ([24] above).

Was the Penalty Issue introduced into the Arbitration?

35 Ironically, the tribunal itself then raised the Penalty Issue at the 17 June 2020 Oral Reply Hearing, and ultimately based the Award on it.

36 At that hearing, the tribunal asked the claimant's counsel to address the Penalty Issue. The claimant's counsel objected, pointing out that the Penalty Issue was unpleaded, and that the first respondent's counsel had neither cross-examined the claimant's witnesses on the point, nor put the point to them.

37 The tribunal, however, asserted that the Penalty Issue "was on the table … [and] was in play" by the 13 May 2020 Teleconference, when the tribunal agreed with the claimant that English law issues should be addressed by way of submissions rather than expert evidence (see [22] above).[33] The tribunal explained its position thus:[34]

> [w]hen we received [the Expert Witness Application] from the first respondent … the issue of penalties [was] raised as an issue for [Mr M] to address. … at that time I agreed with you that it would be better to have [Mr M's] submissions made through counsel rather than as expert, and we **agreed** that **the issues, as they were presented**, could be submitted that way.
>
> Now, for [Mr M] to do that as counsel, the way that the schedule was agreed to by both parties, was that you would make your fulsome legal submissions after the evidentiary hearing. This was something that both parties proposed to me and I accepted it.
>
> **So as of that time, the issue of penalty was on the table, it was in play.** And I would expect that, as I said during the evidentiary hearing, things that you could reasonably anticipate from not only the pleadings but from my rulings … stand, notwithstanding the issue of the pleadings; this is an arbitration, an arbitration is not as formal in terms of pleadings as court proceedings are. … the issues [I have] already ruled on come in irrespective of the pleadings, and this was an issue of the English law that we **agreed** on during [the 13 May Teleconference].
>
> So as of that time, the claimant was aware that **this was an argument to be made** and I would expect that it would be addressed and a reasonable showing would be made. As I said,

---

33 Applicant's 1st Affidavit at p 38.

34 Applicant's 1st Affidavit at pp 38–39.

> [the claimant's] witnesses … were there and could offer whatever their own testimony was on this issue.
>
> So as I said, [it is] a balancing. Maybe there's some degree of evidence that there was not time to introduce and you could make a persuasive argument to me about that. But there are also some things in the record, legal arguments and some testimony, that could be introduced. And I would expect, as I said during the hearing, that that would be done.
>
> [That is] why I emphasised at the end of the hearing [that] I really want the English law issues to be addressed in the closing submissions. That's why [I am] continuing to ask questions about them now because **these are issues that are in this case** that I need to hear both parties on.
>
> [emphasis added in underline and bold underline]

38 This is telling: the tribunal was proceeding on the erroneous belief that, as of 13 May 2020, the parties had *agreed* that the Penalty Issue would be in issue in the Arbitration, irrespective of the pleadings. There was however no such agreement.

What happened at the 13 May 2020 Teleconference?

39 The respondents, in their written submissions, seek to defend the "agreement" mentioned by the tribunal, as follows:[35]

> [o]n 13 May 2020, orally through a telephonic session, the Tribunal ruled that the English [l]aw issues would be received by a report and [c]ounsel submissions [citing paragraph 12 of PO 3]. This was proposed and agreed by [the claimant] [citing the 4 May 2020 Email by the claimant's counsel (see [18] above)].

40 However, PO 3 was issued more than three months after the 13 May 2020 Teleconference – it was issued on 21 August 2020 (see [26] above). As for the 4 May 2020 Email by claimant's counsel, that was an email between

---

[35] Respondent's Written Submissions ("RWS") at para 115.

counsel; it does not appear to have been copied to the tribunal. It does not appear that the tribunal had sight of the 4 May 2020 Email at the time of the 13 May 2020 Teleconference. When the tribunal cited the 4 May 2020 Email at paragraph 34 of the Award,[36] it referred to it as "Annex P" to the claimant's written closing submissions in the Arbitration, which the tribunal only received on 12 June 2020. If the tribunal did not have the 4 May 2020 Email at the time of the 13 May 2020 Teleconference, that email could not have influenced the tribunal's thinking then.

41 In any event, the 4 May 2020 Email shows that the claimant *did not agree* to the introduction of unpleaded issues (including the Penalty Issue) into the Arbitration. The email stated:[37]

> [s]eparately, we note that [the first respondent] intends to give evidence on the law of England through the adducing of an expert opinion. We are of the view that this is unnecessary. [The claimant] is of the view that **any issues** involving the application of the law of England **arising in this arbitration** can be addressed by way of submissions instead of adducing opinions via expert witnesses, which would involve additional costs (including the preparation of expert reports and cross-examination) to achieve the same purposes. [The claimant] does not have any issue with [Mr M] acting as co-counsel in the arbitration. We further confirm that [the claimant] will not take a technical objection to the fact that [the first respondent] wishes to make submissions on the law of England.
>
> [emphasis added in underline and bold underline]

42 The claimant's position was that any English law issue "arising in this arbitration" could be addressed by way of submissions rather than expert evidence. The claimant did not say that the English law issues which the first

---

36 Applicant's 1st Affidavit at pp 91–92.

37 Exhibit 15 in Applicant's 1st Affidavit at pp 545–546.

respondent had listed for Mr M to cover ([17] above) *were* issues arising in the Arbitration.

43 The first respondent evidently did not read the 4 May 2020 Email to be any agreement on the introduction of unpleaded issues, including the Penalty Issue. When lists of issues were submitted on 6 May 2020, the Penalty Issue was not listed ([19] above).

44 On 6 May 2020, the first respondent made the Expert Witness Application for Mr M to give expert evidence on English law. By the 7 May 2020 Email, the claimant objected to the Expert Witness Application.[38] In that email, which was sent to the tribunal, the claimant made it plain that it objected to the introduction of issues that were unpleaded, irrelevant and not at issue in the Arbitration (including the Penalty Issue) and stated the following:

(a) "… the issues proposed for [Mr M] to opine on *do not appear relevant* to these proceedings" [emphasis added];

(b) "… any position in English law, *where relevant to the issues in these proceedings*, can simply be dealt with in counsel's submissions and the submission of case authority as support" [emphasis added];

(c) "… the issues that the [first respondent] wishes [Mr M] to address are *not even pleaded or at issue* in this arbitration" [emphasis added];

(d) " … the [claimant] respectfully asks that this Tribunal dismiss the application as it is unnecessary and will result in the wastage of costs

[38] Email dated 7 May 2020 at 11:27:19PM SGT provided by the respondents' counsel on 23 March 2021.

> and time, and appears to be *a backdoor attempt to introduce new and unpleaded issues* at and prejudice to and the expense of the [claimant]" [emphasis added].

45 In suggesting that English law issues be addressed by submissions rather than expert evidence, the claimant *was not agreeing* to the introduction of issues which were unpleaded, irrelevant, and not at issue in the Arbitration. To the contrary, the claimant was *objecting* to such issues being introduced. The 7 May 2020 Email was also cited in claimant's counsel's subsequent 12 May 2020 Email.[39]

46 The claimant's counsel's 7 May 2020 Email was however conspicuously not mentioned by the tribunal in its correspondence after the 17 June 2020 Oral Reply Hearing,[40] or in PO 3,[41] or in the Award.[42]

47 Then came the 13 May 2020 Teleconference, at which the tribunal agreed with the claimant that English law issues should be addressed by way of submissions rather than expert evidence. There is no transcript or other contemporaneous record of the 13 May 2020 Teleconference. However, given the objections taken by the claimant in its counsel's preceding correspondence (*viz*, the 7 May 2020 Email and 12 May 2020 Email), it would not have agreed, on 13 May 2020, to the introduction of issues which were unpleaded, irrelevant, and not at issue in the Arbitration. The respondents do not say that this happened either.

---

39 Applicant's 1st Affidavit at pp 578–579.

40 Applicant's 1st Affidavit at paras 86–97.

41 Applicant's 1st Affidavit at paras 99–100; Exhibit 33 in Applicant's 1st Affidavit at pp 847–854.

42 Applicant's 1st Affidavit at pp 83–129.

48 The 13 May 2020 Teleconference is described as follows in the claimant's affidavit for the setting-aside application:[43]

> 64. On 13 May 2020, the Tribunal held a teleconference to hear parties on the Expert Witness Application. I am advised and verily believe that [the claimant's counsel] objected to the Application and raised objections *inter alia*, that [Mr M's] witness statement raised issues, including but not limited to the Penalty Issue, that were not in parties' pleadings. However, in the interest of time (the deadline for witness statements had passed, the deadline for written opening submissions was on 20 May 2020 and the evidentiary hearing was to begin on 27 May 2020), [the claimant's counsel] stated that [the claimant] was prepared to allow [Mr M] to be [the first respondent's] co-counsel and to make submissions on English law via written submissions. I am advised and verily believe that [the claimant] did not accept that the unpleaded issues, in particular the Penalty Issue, would thereafter become live issues in the Arbitration.
>
> 65. Accordingly, during the teleconference, the Tribunal directed it was unnecessary to have [Mr M] as an expert witness as he could simply give his opinions on English law in closing submissions.
>
> [emphasis added]

49 In their affidavit, the respondents provided only a muted response to the above:[44]

> [referring to paragraph 64 of the extract from the claimant's affidavit cited at [48] above] … [the claimant] admits that they allowed [Mr M] to be [the first respondent's] co-counsel and to make submission on English Law via written submissions. [The claimant was] already aware that [the Penalty Issue] … would be submitted by our expert.

50 That goes no further than saying that the claimant knew what issues the first respondent wanted Mr M to cover. But the claimant had, in the 7 May 2020 Email and 12 May 2020 Email, objected to the late introduction of those issues.

---

43 Applicant's 1st Affidavit at paras 64–65.

44 Respondents' 1st Affidavit at para 53.

51 Significantly, the respondents do not dispute the claimant's account of the 13 May 2020 Teleconference (see [48] above) – that the claimant's counsel had objected that the English law issues which the first respondent had proposed to be covered by Mr M (including the Penalty Issue) were unpleaded issues; and that the claimant did not accept that the unpleaded issues (in particular, the Penalty Issue) would thereafter become live issues in the Arbitration.

52 At the hearing before me, the respondents' counsel accepted that the tribunal, by its ruling during the 13 May 2020 Teleconference that Mr M should make submissions on English law issues rather than give expert evidence on the same, did not thereby rule that the Penalty Issue would be an issue in the Arbitration.[45]

53 Indeed, the first respondent did not thereafter act as if the Penalty Issue were in issue in the Arbitration regardless of the state of the pleadings. On 18 May 2020, the first respondent filed the Amendment Application to amend its D&CC to introduce the Penalty Issue into the Arbitration, explaining the need for the amendment as follows: "[f]actual pleading necessitated for legal arguments" (see [23] above).[46]

54 In the course of the four-day evidentiary hearing (with the Amendment Application pending till the end of the third day), the parties did not conduct themselves as if the Penalty Issue were in issue in the Arbitration. The claimant did not seek to comprehensively lead evidence on the Penalty Issue; counsel for the first respondent did not cross-examine the claimant's witnesses or even put to them that clauses 10.2 and 11 of the Services Agreement were unenforceable

---

45 Notes of Argument, 18 February 2021, p 7 lines 4–7.

46 Exhibit 18 in Applicant's 1st Affidavit at pp 581–582.

penalties. In so far as there was *some* evidence from the claimant's witnesses relevant to the Penalty Issue, they were not challenged on it.

55 Until the end of the evidentiary hearing, the first respondent never asserted that there was any agreement or ruling that the Penalty Issue was already in issue in the Arbitration. As far as the parties were concerned, there was *no such agreement*, and *no such ruling*.

56 When the tribunal said, at the 17 June 2020 Oral Reply Hearing, that the Penalty Issue was already in issue in the Arbitration as of 13 May 2020, that was premised on a *non-existent agreement* between the parties.

57 As a result of its erroneous belief that the claimant had *agreed* to the introduction of the Penalty Issue into the Arbitration, the tribunal failed to consider the claimant's earlier *objections* to the introduction of Penalty Issue – that the Penalty Issue was unpleaded, irrelevant, and not at issue in the Arbitration (as stated in the 7 May 2020 Email, and reiterated during the 13 May 2020 Teleconference (see [44]–[45] and [48] above)); and that the Amendment Application seeking to introduce the Penalty Issue into the Arbitration should be disallowed because it was sought late in the day and would prejudice the claimant (as stated in the 20 May 2020 Email (see [23] above)).

58 Although the tribunal did deal with the Amendment Application (ultimately dismissing it on 29 May 2020), it appears that the tribunal considered that to be of no consequence to whether the Penalty Issue was an issue in the Arbitration – to the tribunal, it already was an issue, as of 13 May 2020, because this had been agreed to by the parties (see [37]–[38] above). Thus, while the claimant was fighting to keep the Penalty Issue out of the Arbitration by resisting the Amendment Application, to the tribunal, the Penalty Issue was

already "on the table … [and] in play" (as the tribunal would say, during the 17 June 2020 Oral Reply Hearing). The claimant did not know at the time that its victory in the Amendment Application was a pyrrhic one in the eyes of the tribunal.

Subsequent developments

59 Following the 17 June 2020 Oral Reply Hearing, the claimant continued to object to the Penalty Issue being a live issue; but the tribunal continued to insist that it was. Throughout this process, the tribunal characterised the claimant's objections as a mere complaint that it had not had sufficient time to put forward evidence on the Penalty Issue – so the tribunal first allowed, and then required, the claimant's witnesses to return for questioning on the point.[47] The claimant objections, however, were to the Penalty Issue being an issue in the Arbitration at all. The tribunal persisted in not engaging with those objections. Instead, it continued to labour under the misapprehension that there was an agreement between parties on the introduction of the Penalty Issue into the Arbitration as of 13 May 2020.

60 The hearing of oral reply submissions was not completed on 17 June 2020 – it was adjourned to a date to be fixed.

61 On 16 July 2020, almost a month later, the tribunal directed the claimant to make "a Supplemental Submission, including any supporting evidence it wishes to offer on the issues of enforceability of the contractual [Make-Whole Amount] and interest provisions" (the "Direction of 16 July 2020").[48] This was

---

47 Applicant's 1st Affidavit at paras 124–125.

48 Applicant's 1st Affidavit at para 86; Exhibit 27 in the Applicant's 1st Affidavit at p 834.

to be done by 3 August 2020, *ie*, in around two and a half weeks. The respondents were also allowed to do likewise. However, the parties had made no provision for such a development in their agreed procedural timeline as set out in Procedural Order 1 dated 17 January 2020 ("PO 1")[49] and Procedural Order 2 dated 18 May 2020 ("PO 2").[50]

62 In its Direction of 16 July 2020, the tribunal said it had noted "the [claimant's] position stated during the evidentiary hearing that it would require additional time to submit supporting factual evidence in order to fully address the enforceability issues".[51] However, during the evidentiary hearing, the claimant's counsel had *not* asked for additional time to put in supporting factual evidence on the Penalty Issue. Instead, the claimant's position was that allowing the Amendment Application to introduce the Penalty Issue into the Arbitration at such a late stage would prejudice the claimant because that issue would require new factual evidence which the claimant could not reasonably put forward in time for the evidentiary hearing.[52] The claimant certainly was not asking for a further evidentiary hearing so that it could submit supporting evidence on the Penalty Issue. Instead, it had asked that the tribunal not allow the Penalty Issue to be introduced by an amendment to the first respondent's D&CC.

63 However, it would appear that throughout the evidentiary hearing, the tribunal regarded the Penalty Issue to already be an issue in the Arbitration, and

---

49 The Award at para 16 in Applicant's 1st Affidavit at p 88; Exhibit 7 in Applicant's 1st Affidavit at pp 284–291.

50 The Award at para 31 in Applicant's 1st Affidavit at p 91; Exhibit 14 in Applicant's 1st Affidavit at pp 542–543.

51 Exhibit 27 in the Applicant's 1st Affidavit at p 834.

52 Applicant's 1st Affidavit at pp 24–28.

so it viewed the claimant simply to be seeking additional time to put in further evidence. The tribunal did not engage with the claimant's objections to the introduction of the Penalty Issue.

64 On 21 July 2020, the claimant responded by email to the tribunal's Direction of 16 July 2020,[53] expressing concern at a situation where further factual evidence and issues that are not grounded in any of the pleaded issues may arise from the claimant's submission of further supporting evidence on the enforceability of the Make-Whole Amount and interest provisions in the Services Agreement. In that email, the claimant also highlighted that the tribunal's direction was a *significant departure from the Procedural Orders agreed between the parties* (*viz*, PO 1 and PO 2) where there was only one round of evidence taking, which had since concluded. The claimant pointedly sought clarification as to whether the tribunal "intends to reinsert the [Penalty Issue] as a live issue [in the Arbitration] and wishes to give [parties] another opportunity to address [the tribunal] on the same notwithstanding the manner in which the proceedings have already played out [emphasis added]".[54] The claimant thus maintained that the Penalty Issue *was not an issue* into the Arbitration, but queried if the tribunal intended to *make it an issue*.

65 The tribunal did not squarely address this query. Instead, it responded on 23 July 2020 to say:[55]

> [t]he Tribunal, exercising its discretion under the governing rules and terms of its procedural orders, has determined that the circumstances require that the fundamental English law contract enforceability **issues in this arbitration** should be

---

53 Applicant's 1st Affidavit at para 88; Exhibit 28 in Applicant's 1st Affidavit at pp 836–837.

54 Applicant's 1st Affidavit at p 837.

55 Applicant's 1st Affidavit at para 90; Exhibit 29 in Applicant's 1st Affidavit at p 839.

> more fully addressed. The Tribunal accordingly secured from the SIAC Registrar additional time for the Parties to make supplemental submissions … Accordingly, on 16 July 2020, the Tribunal instructed the Parties to make Supplemental Submissions and Supplemental Reply Submissions (both legal and evidentiary) regarding English law contract enforceability issues … Further details regarding our additional hearing time will be determined in due course and in view of the evidence included in the Parties' Supplemental Submissions.
>
> [emphasis added in underline and bold underline]

66 The tribunal continued to regard the Penalty Issue as an issue that was already in the Arbitration since 13 May 2020, as it had stated at the 17 June 2020 Oral Reply Hearing.

67 The claimant put forward a Supplemental Submission on 3 August 2020.[56] In it, it reiterated that the Penalty Issue was unpleaded, and moreover, that the first respondent's case that the claimant was claiming on unenforceable penalty clauses had not been put to the claimant's witnesses – as such, the claimant's witnesses were denied the opportunity to explain the claimant's position and to answer any questions in respect of the Penalty Issue. The claimant contended that the first respondent should not be allowed to advance submissions on the point.

68 The claimant also submitted a second witness statement from one of its witnesses, but that only *repeated* what had already been said in the record of the Arbitration that was relevant to the Penalty Issue.[57]

---

56 Applicant's 1st Affidavit at para 92.

57 Applicant's 1st Affidavit at para 93.

69 On 10 August 2020, the tribunal directed that the hearing of the oral reply submissions would resume on 14 August 2020, just four days later. The tribunal stated:[58]

> [the] Claimant also states in its Supplemental Submission … that, due to the manner in which 1st Respondent has addressed these issues, 'the Claimant's witnesses were denied the opportunity to explain the Claimant's position and to answer any questions in respect of the [Penalty Issue].' The Tribunal shall afford the Claimant's witnesses … such opportunity at our resumed hearing date, and opposing counsel will be afforded opportunity for appropriate cross-examination. The Tribunal also will have questions of the witnesses.

70 The tribunal continued not to engage with the claimant's objections to the Penalty Issue being introduced into the Arbitration. Instead, it kept asking for further evidence to be adduced on the issue.

71 On 12 August 2020, the claimant's counsel protested, maintaining that the Penalty Issue was not an issue in the Arbitration (the "12 August 2020 Email"):[59]

> [w]e also would set out [the claimant's] concerns on how this final day of hearing has evolved from a final day of submission to one which potentially includes another round of limited cross-examination of only the Claimant's witnesses (after the conclusion of the evidentiary hearing) on what [the claimant] maintains is unpleaded issues which the Tribunal had already rejected the amendments of.
>
> Accordingly, we ask that [the tribunal] [reconsider] this issue.

72 In the event, the tribunal postponed the intended hearing on 14 August 2020 as the first respondent's co-counsel Mr M was unavailable then.

---

58 Applicant's 1st Affidavit at para 94; Exhibit 30 in Applicant's 1st Affidavit at p 841.

59 Applicant's 1st Affidavit at para 96; Exhibit 32 in Applicant's 1st Affidavit at p 843.

73 On 21 August 2020, the tribunal issued PO 3 in response to the claimant's counsel's 12 August 2020 Email.[60] The tribunal continued not to engage with the claimant's objections to the Penalty Issue being introduced into the Arbitration. Instead, it persisted in saying that the Penalty Issue had been introduced by agreement of the parties:[61]

> 11. … On 28 April 2020, the 1st Respondent gave notice that it would be seeking to introduce [Mr M] as an expert on English law, and identified the issues of contract unenforceability and penalties under English law that 1st Respondent [*sic*] would advance in the Arbitration. On the following day, 29 April 2020, Claimant notified the Tribunal that it had added to its counsel team in the Arbitration, [Mr E], an English-qualified solicitor currently practicing with Claimant's firm.
>
> 12. On 6 May 2020, the 1st Respondent filed an application for leave to adduce expert evidence on the English law issues raised. Claimant's Counsel opposed the application and, *inter alia*, took the position that the English law issues would be more appropriately admitted by counsel submissions instead of by way of expert report and expert testimony during the evidentiary hearing. After considering the positions of both of these Parties as set forth in their written submissions and further presented orally during a telephonic session with the Tribunal on the 13 May 2020, the Tribunal ruled during that session that it would receive submissions on the English law issues proposed to be included in the report of [Mr M], and that such submissions would be made by way of counsel (rather than expert) submissions.
>
> [emphasis added]

74 The tribunal went on to direct an additional full-day hearing, at which the claimant's two witnesses "shall be prepared to respond to questioning by counsel and by the Tribunal on evidence relating to English law enforceability

---

60 Applicant's 1st Affidavit at para 99; Exhibit 33 in Applicant's 1st Affidavit at pp 847–854.

61 Exhibit 33 at paras 11 and 12 in Applicant's 1st Affidavit at p 849.

issues".[62] The tribunal also allowed any party wishing to further supplement its legal or factual submissions on the Penalty Issue, to do so by 28 August 2020.[63]

75 At paragraph 33 of PO 3, the tribunal stated:[64]

> 33. In respect of Claimant's arguments as to whether certain English law issues were adequately pleaded or subjected to cross-examination in the Arbitration, the Tribunal has considered and remained mindful of them throughout these proceedings, but they do not prevent the Tribunal from requesting that the contract enforceability issues be fully addressed, both legally and factually, under the present circumstances. In this regard, the Tribunal recalls its earlier guidance provided to the Parties that *the pleadings alone and arguments regarding the same would not necessarily be determinative of whether a party had been provided fair notice of an issue required to be addressed in the arbitration.*
>
> …
>
> [emphasis added in underline and italics]

76 The tribunal did not engage with the claimant's objections to the Penalty Issue being introduced into the Arbitration. Instead, it viewed the claimant as simply arguing whether it should be required to address the issue any further, given the state of the pleadings and the lack of cross-examination on the issue. Thus, the tribunal characterised its determination as being "that further submissions are necessary".[65]

---

62 Exhibit 33 at para 31 in Applicant's 1st Affidavit at p 853.

63 Exhibit 33 at para 34 in Applicant's 1st Affidavit at p 854.

64 Applicant's 1st Affidavit at para 100; Exhibit 33 at para 33 in Applicant's 1st Affidavit at pp 853–854.

65 Exhibit 33 at p 4 in Applicant's 1st Affidavit at p 851.

77 On 28 August 2020, the claimant's counsel expressed the claimant's concerns about PO 3, maintaining that the Penalty Issue was not an issue in the Arbitration:[66]

> [the claimant] appreciates that the Tribunal is master of its own procedure and has discretionary powers to conduct this arbitration proceedings in the way it deems fit, as long as it is not manifestly unfair or contrary to natural justice and as long as it is not against Parties' agreement on the procedure.
>
> Respectfully, [the claimant's] confusion arises because the Parties have already agreed to adopt the procedure wherein the issues would be set out in the pleadings. By the Tribunal's ruling against allowing the 1st Respondent's expanded amendment on the penalty point in its proposed amended Defence and Counterclaim, the Tribunal has therefore agreed with us and ruled to limit the issues in dispute.
>
> Yet after such ruling, the Tribunal appears to want to **reopen** the unpleaded issues of enforceability of the Make-Whole amount and Interest provisions (the 'Unpleaded Issues'), when the evidentiary hearing has already concluded and closing submissions have been exchanged months ago. It is also concerning that the Tribunal appears to, of its own volition thereafter and despite the conclusion of the evidentiary hearing, suggest that our client's witnesses may be subjected to another round of cross-examination.
>
> We will seek to assist the Tribunal in any queries it may have at the upcoming hearing on 4 September 2020. However, [the claimant's] concerns on these remain. Accordingly, we seek the Tribunal's understanding if we are unable to fully address the Unpleaded Issues in the same manner as if they were properly pleaded by the 1st Respondent at first instance.
>
> [emphasis added in underline and bold underline]

78 Further correspondence ensued from 31 August 2020 to 2 September 2020 on whether the claimant would recall its witnesses as directed by the tribunal. That culminated in the claimant's counsel's second email of 2 September 2020 which stated that the claimant's witnesses would not return for questioning because "the defence that the Make Whole Amount and interest are

---

66 ABOD at p 585.

a 'penalty' is unpleaded; the amendment to include them as proposed issues in this arbitration dismissed; and therefore the question is not part of the submission to arbitration".[67]

79 The hearing of oral reply submissions resumed on 4 September 2020, with the claimant's witnesses absent.[68] In response to a query from the tribunal about the extent of evidence relating to an aspect of the Penalty Issue, the claimant's counsel said that the claimant had not put more into the record because "this was not actually a contentious issue at the time".[69]

Treatment of the Penalty Issue in the Award

80 On 2 October 2020, the Award was issued. The claimant's claims were dismissed on the sole ground that clause 10.2 of the Services Agreement providing for the Make-Whole Amount was an unenforceable penalty clause.[70] The claimant's claim for the Make-Whole Amount thus failed, and consequently so did the claimant's claim for interest on the Make-Whole Amount (pursuant to clause 11 of the Services Agreement), and its claims against the second and third respondents.[71]

81 The tribunal briefly mentioned the first respondent's defence of duress, but said:[72]

---

67 Applicant's 1st Affidavit at para 103; Exhibit 34 in Applicant's 1st Affidavit at p 856.

68 Applicant's 1st Affidavit at para 105.

69 Annex A to Applicant's Written Submissions at p 137.

70 The Award at paras 110–111 and 124 in Applicant's 1st Affidavit at pp 109 and 114–115.

71 The Award at paras 125–128 in Applicant's 1st Affidavit at p 115.

72 The Award at para 129 in Applicant's 1st Affidavit at p 116.

> [t]he Tribunal need not make a finding on this defence as no liability claim against the Respondents remains in view of the Tribunal's denial, based on the penalty rule, of Claimant's request for recovery under the Make-Whole Obligation and interest thereon.

82 In the Award, the tribunal also set out its perspective as to how the Penalty Issue came to be introduced into the Arbitration:[73]

> 33. During a 13 May 2020 telephonic session with the Participating Parties, the Tribunal issued an oral ruling: (i) denying the 1st Respondent's application to submit evidence on various English law issues — including the penalty rule — by way of an expert report from [Mr M], but ordered that all **such** English law evidence could instead be presented by way of counsel or co-counsel submissions; and (ii) granting the 1st Respondent's application for leave to call [Mr S] as an expert witness.
>
> 34. The Tribunal notes that, while the Claimant had objected to the request for leave to present the English law issues by way of expert testimony, the Claimant on its own initiative proposed that **such** issues would be better admitted in the proceedings through counsel submissions and stated that it would not oppose any such ruling by the Tribunal. The Claimant was on notice of the English law issues, including the 1st Respondent's challenge based on the penalty rule, as of 28 April 2020, when the 1st Respondent circulated by email its List of Witnesses [Amended]. In response, the Claimant's Counsel wrote to the 1st Respondent's Counsel on 4 May 2020 as follows:
>
> > Separately, we note that [the first respondent] intends to give evidence on the law of England through the adducing of an expert opinion. We are of the view that this is unnecessary. [The claimant] is of the view that **any issue** involving the application of the law of England **arising in this arbitration** can be addressed by way of submissions instead of adducing opinions via expert witnesses, which would involve additional costs (including the preparation of expert reports and cross-examination) to achieve the same purposes. [The claimant] does not have any issue with [Mr M] acting as co-counsel in the arbitration. We further confirm that [the claimant] will not take a technical objection to the

[73] The Award at paras 33–34 in Applicant's 1st Affidavit at pp 91–92.

> fact that [the first respondent] wishes to make submissions on the law of England. [citing Annex P of the claimant's closing submissions]
>
> [emphasis added in underline and bold underline]

83 As discussed above, the claimant had *never agreed* to the introduction of the English law issues identified by the first respondent (including the Penalty Issue). It only proposed and agreed that "any [English law] issue … arising in this arbitration" be addressed by way of submissions instead of expert evidence. It *objected* to the introduction of issues that were unpleaded, irrelevant, and not in issue in the Arbitration, including the Penalty Issue.

84 Although the tribunal referred to the claimant's counsel's 4 May 2020 Email to justify the tribunal's ruling during the 13 May 2020 Teleconference, it does not appear that the tribunal had that email at the time; in any event, the 4 May 2020 Email shows that the claimant did not agree to the introduction of the Penalty Issue (see [41]–[42] above). Conspicuously, the tribunal did not refer to the claimant's counsel's 7 May 2020 Email objecting to the English law issues identified by the first respondent (including the Penalty Issue) as being irrelevant, unpleaded, and not at issue in the Arbitration.

85 It thus appears from the Award that the tribunal persisted in its thinking, as stated at the 17 June 2020 Oral Reply Hearing, that the claimant had *agreed* to the introduction of the Penalty Issue as an issue in the Arbitration. The tribunal failed to consider the claimant's *objections* to the same.

Should the tribunal's decision on the Penalty Issue be set aside?

Breach of natural justice / inability to put one's case

86 In *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"), the tribunal disregarded certain contentions of the respondent ("Front Row") on the stated basis that Front Row had ceased to rely on them; in fact, Front Row had *not* ceased to rely on those points. The court concluded that there was a breach of natural justice and set aside the affected part of the award: *Front Row* at [14] and [45]–[46] and *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [40]–[47].

87 Here, the tribunal erroneously thought that the claimant had *agreed* to the late introduction of the Penalty Issue into the Arbitration, and failed to consider the claimant's *objections* to the same – although those had been articulated clearly in the claimant's counsel's 7 May 2020 Email to the tribunal, which the tribunal never mentioned in the Award.

88 This was a breach of natural justice. The claimant was denied the opportunity to address its objections to the mind of the tribunal (*Front Row* at [35]); the tribunal did not bring its mind to bear on an important aspect of the dispute before it (*AKN v ALC* at [46]).

89 The breach of natural justice caused the claimant actual, real prejudice. Had the tribunal considered the claimant's objections, it might have decided not to allow the late introduction of the Penalty Issue into the Arbitration. The Penalty Issue would then not have been a basis on which to dismiss the claimant's claims. Thus, it could reasonably have made a difference to the outcome had the tribunal considered what it had failed to consider: *Soh Beng*

Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 at [86]; *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54] and [91]–[92].

90 The respondents seek to defend the Award by arguing that the tribunal had the power to introduce the Penalty Issue of its own initiative as of the 17 June 2020 Oral Reply Hearing, an argument premised on it *not being an issue in the Arbitration* up to that point.[74] This, however, is not what the tribunal did: it never regarded the Penalty Issue to have been introduced of its own initiative; instead, it regarded it as having been introduced by the agreement of the parties as of 13 May 2020, but there was no such agreement (see [55]–[56] above).

91 The respondents cite *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 (*"Kempinski"*) at [72] and [73] for the proposition that a tribunal can take cognisance of public policy as a question of law if it becomes aware of the issue in the course of hearing the evidence presented during the arbitral proceedings.[75] In *Kempinski*, certain decisions of an Indonesian Ministry had made the performance of a "Management Contract" by the claimant ("Kempinski") illegal save in certain ways (see *Kempinski* at [8], [14] and [72]). The respondent ("Prima") argued that that it would be offensive to Indonesian public policy to award damages to Kempinski for the "Intervening Period" (between the date of purported termination of the Management Contract and the date of a new Management Contract); but Kempinski chose not to, and did not, address the tribunal on this (see *Kempinski* at [72]). The Court of Appeal held that the tribunal was entitled to decide that an award of damages for the Intervening Period would have been

---

74 RWS at paras 31–34; Notes of Argument, 18 February 2021, p 7, lines 9–13.

75 RWS at paras 32–33.

contrary to Indonesian public policy, although this had not been formally pleaded (see *Kempinski* at [72]–[75]).

92 It is noteworthy that the Court of Appeal in *Kempinski* said that a tribunal can take cognisance of public policy as a "question of law" (at [72]). In that case, the tribunal had all the evidence it needed to decide whether an award of damages for the Intervening Period would be contrary to Indonesian public policy. In the present case, however, whether a contractual clause is a penalty is not a pure question of law, it is a mixed question of law and fact (see [33] above). The tribunal denied the first respondent's application to plead the Penalty Issue as a defence (and thereby supply the "factual pleading" for its intended legal arguments), only to find itself asking – at the stage of oral reply submissions – that the Penalty Issue be more fully addressed both in terms of evidence and submissions. Although the issue of whether a clause is a penalty does involve public policy considerations (*Cavendish Square Holding BV v El Makdessi and another appeal* [2016] 2 All ER 519 at [7] and [9]; *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2020] SGCA 119 at [175]), *Banner Investments* ([33] *supra*) shows that where such an issue is not properly before the decision maker, a decision on the issue is susceptible to being set aside.

93 The SIAC Rules – in particular Rule 27(c), (f), (h) and (m) – give a tribunal powers to conduct enquiries, order production of documents, direct the giving of evidence, and to decide issues that have clearly been brought to the notice of the affected party with that party having been given adequate opportunity to respond. However, the tribunal must act fairly in exercising these powers. As Art 18 of the Model Law states: "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". An award made in proceedings where Art 18 has been breached is susceptible

to being set aside: *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [104(a)]. Furthermore, Rule 19.1 of the SIAC Rules, which states that "[t]he Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute", reinforces the tribunal's obligation to act fairly (see also *CAI v CAJ and another* [2021] SGHC 21 at [218] on fairness in relation to a tribunal's exercise of powers under Art 23(4) of the 2012 Rules of the International Court of Arbitration of the International Chamber of Commerce).

94 The fact that a tribunal can take cognisance of public policy as a question of law (as recognised in *Kempinski*), does not give it licence to act unfairly or in breach of natural justice. As the court in *Anwar Siraj and another v Ting Kang Chung and another* [2003] 2 SLR(R) 287 stated at [41]:

> [t]he arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, *so long as what he is doing is not manifestly unfair or contrary to natural justice* [referring to Ronald Bernstein, Arthur Marriott and John Tackaberry, *Handbook of Arbitration Practice* (Sweet & Maxwell, 3rd Ed, 1998)]
>
> [emphasis added]

95 In similar vein, the Court of Appeal in *China Machine* stated at [2]:

> [i]n arbitration, the tribunal is ordinarily the master of its own procedure, but the *requirement of due process* is an essential limitation on the wide autonomy that the parties and the tribunal otherwise have with respect to procedure.
>
> [emphasis added]

96 In *Kempinski* ([91] *supra*), Kempinski's argument to set aside the "Fourth Award" (in which the tribunal decided that an award of damages in

favour of Kempinski for the Intervening Period was contrary to Indonesian public policy) was simply that the tribunal had exceeded the scope of its authority by deciding an issue that had not been formally pleaded (see *Kempinski* at [23(c)]). Kempinski did not otherwise contend that there was a breach of natural justice in the making of the Fourth Award.

97 In the present case, there was a breach of natural justice in the way the tribunal concluded that the Penalty Issue had become an issue in the Arbitration: it misapprehended that the claimant had *agreed* to what it was, in fact, *objecting* to. That misapprehension continued through to the making of the Award, with the tribunal persistently failing to engage with the claimant's objections.

98 Had the tribunal considered the claimant's objections to the late introduction of the Penalty Issue, the tribunal might have decided not to allow the first respondent to introduce the issue; the tribunal might then have decided against taking the initiative to introduce the issue itself. The claimant's arguments as to lateness and prejudice would apply with equal force to the late introduction of the issue, whether by the first respondent or by the tribunal.

99 The respondents also argue that there were certain indications by the tribunal that it might regard the Penalty Issue to be in issue in the Arbitration regardless of the state of the first respondent's pleadings.[76] However, the first respondent itself did not leave the 13 May 2020 Teleconference with that impression: its counsel acknowledged that he did not understand the tribunal to have ruled that the Penalty Issue was an issue in the Arbitration (see [52] above).[77]

---

[76] RWS at paras 8–10.

[77] Notes of Argument, 18 February 2021, p 8 lines 4–7.

100 Five days later, on 18 May 2020 the first respondent made the Amendment Application to amend its D&DC to plead, among other things, the Penalty Issue as a defence. Moreover, it did not seek to support the Amendment Application by contending that the tribunal had already ruled that the Penalty Issue was in issue. The first respondent did not act as if the Penalty Issue was already an issue in the Arbitration.

101 On 26 May 2020, the tribunal wrote to say that it was considering the parties' submissions on the Amendment Application (the "26 May 2020 Email"). The tribunal also said:[78]

> [i]n the meantime, separate and apart from the specific question of amendment of the language of the pleadings, I remind the Parties of the Tribunal's prior ruling, issued … orally at the 13 May 2020 telephonic session, which (i) denied the 1st Respondent's application to submit evidence on English law by way of an expert report from [Mr M], but permitted such English law evidence to be presented by way of counsel or co-counsel submissions …

102 The Penalty Issue was one of mixed fact and law (see [33] above), and the first respondent itself had acknowledged that the Amendment Application was "necessitated" by the need for a factual pleading to support its intended legal arguments (see [23] above). Neither the claimant nor the first respondent understood the tribunal's 26 May 2020 Email to mean that the tribunal had already permitted the introduction of the Penalty Issue as an issue into the Arbitration, when that had been objected to by the claimant (in its 7 May 2020 Email) while the Amendment Application was still pending.

---

78 Applicant's 1st Affidavit at para 69; Exhibit 20 in Applicant's 1st Affidavit at p 608.

103 The tribunal similarly alluded to the making of submissions on English law issues on the first day of the evidentiary hearing,[79] and in giving its decision on the Amendment Application at the end of the third day of that hearing, 29 May 2020. However, the tribunal concluded that it was "not going to allow an amendment for entirely new claims that are found nowhere in the [D&CC] at this late stage".[80] It appeared from that that the tribunal had ruled against the introduction of the Penalty Issue (which was entirely new, found nowhere in the first respondent's D&CC at that late stage). Whether or not the tribunal was amenable to receiving submissions on English law, the tribunal's rejection of the first respondent's Amendment Application to plead the Penalty Issue as a defence signalled to the parties that this was not an issue in the Arbitration. In the course of arguments before me, counsel for the respondents also accepted that this was the position.[81]

104 It only became evident at the 17 June 2020 Oral Reply Hearing that the tribunal had a fundamentally different perspective of the 13 May 2020 Teleconference, and of the parties' discussions on the manner by which the English law issues (including the Penalty Issue) should be addressed.

105 It does not help the respondents to say that there were earlier hints that the tribunal regarded the Penalty Issue to be in issue in the Arbitration, when neither of the parties understood (or ought reasonably to have understood) those hints. In particular, there was no hint whatsoever that the tribunal thought the

---

79 Transcript of Arbitral Proceedings, 27 May 2020, p 29 lines 2–25; pp 30–59; p 60 lines 1–17.

80 Applicant's 1st Affidavit at pp 30–31.

81 Notes of Argument, 18 February 2021, p 7, lines 1–13.

claimant had *agreed* to something which it was *objecting* to, namely, the late introduction of the Penalty Issue.

106 The respondents also argue that the claimant was not prejudiced, in that the tribunal belatedly afforded the claimant an opportunity to put forward further evidence on the Penalty Issue, and to have its witnesses return for questioning on it.[82] This is cold comfort: the relevant prejudice from the tribunal's failure to consider the claimant's objections to the late introduction of the Penalty Issue, is that the claimant lost the reasonable opportunity of keeping that issue out of the Arbitration. Had the tribunal considered and accepted the claimant's objections, there would be no question of the claimant then needing to put in further evidence, or its witnesses being recalled, or its claims ultimately being dismissed based on the Penalty Issue.

107 The claimant was entitled to decide to take a stand on its objections. Accordingly: it only repeated evidence already given, that was relevant to the Penalty Issue; and it declined to recall its witnesses for questioning. Had the claimant put in further evidence, or recalled its witnesses, it may have waived its rights in relation to the tribunal's breach of natural justice (see *China Machine* ([93] *supra*) at [102] and [168]–[172]). Instead, the claimant quite properly reiterated its objections to the Penalty Issue being in issue in the Arbitration, but the tribunal persistently failed to engage with those objections – what the tribunal did *does not* fall within the range of what a reasonable and fair-minded tribunal in those circumstances might have done (*China Machine* at [98]–[104]).

---

82 RWS at paras 12–13.

108 In the circumstances, the parts of the Award affected by the Penalty Issue ought properly to be set aside.

Exceeding the scope of the arbitration

109 The claimant also contended that the Penalty Issue was outside the scope of submission to arbitration, and that this afforded a further ground to set aside the affected parts of the Award.

110 In the present case, the tribunal had at the 17 June 2020 Oral Reply Hearing and thereafter indicated that it considered the Penalty Issue to be an issue in the Arbitration. Objectively, the Penalty Issue was not an issue in the Arbitration prior to 17 June 2020, and neither party thought it was. The tribunal's remarks at the 17 June 2020 Oral Reply Hearing would have come as a revelation (and indeed, a shock – particularly to the claimant).

111 In the preceding section, I have concluded that the Penalty Issue was never properly introduced into the Arbitration – instead, the tribunal acted in breach of natural justice. In the circumstances, the tribunal's dismissal of the claimant's claims on the basis of the Penalty Issue was outside the scope of the Arbitration. This is a further ground justifying the setting-aside of the affected parts of the Award.

Proceeding contrary to the parties' agreed procedure

112 The parties had agreed on an expedited arbitration, and on that basis, the Arbitration was expected to be completed by 2 July 2020 (in the event, the Award was issued some three months after that – on 2 October 2020) (see [11] above). The parties also agreed on a procedural timetable that was embodied in PO 1. This contemplated that there would be pleadings, document production,

witness statements, oral testimony, and then closing submissions. Certain timelines were adjusted as agreed between the parties, as reflected in PO 2, but it was still contemplated that the matter would proceed towards an evidentiary hearing, written closing submissions, oral reply submissions on 17 June 2020, and the final award being issued by 1 July 2020.

113 What happened instead was that on 17 June 2020, the tribunal indicated that it regarded the Penalty Issue to be an issue in the Arbitration (and that it was in issue since the 13 May 2020 Teleconference). This led to the tribunal asking that the Penalty Issue be addressed more fully, including allowing and then requiring the claimant to recall its witnesses for questioning on the issue.

114 The Penalty Issue was never pleaded as a defence by the first respondent – its Amendment Application to plead this in its D&CC was dismissed by the tribunal. There was thus no responsive pleading by the claimant. Nor did the tribunal provide for document production on the issue. The tribunal also did not provide for the *first respondent*'s witnesses to return to be cross-examined on the Penalty Issue but only ordered that the *claimant's* witnesses do so. Had the Penalty Issue been pleaded in the original D&CC, it would have been dealt with quite differently from the way things actually transpired – with the tribunal expecting the claimant to respond to the Penalty Issue only at the stage of oral reply submissions – in short order, and in a limited fashion.

115 The 17 June 2020 Oral Reply Hearing (at which the tribunal raised the Penalty Issue) was intended by the parties to be the last stage of the proceedings, before the issuance of the award. It was meant to be a hearing of oral ***reply*** *submissions*: the parties were not expecting any further pleadings, document production, witness statements, or oral testimony by that stage.

116 The departures from the procedure agreed by the parties in PO 1 and PO 2, and the manner in which those happened, reinforce my conclusion that the parts of the Award affected by the Penalty Issue ought to be set aside.

The Confidentiality Relief

117 The first respondent sought, and the tribunal granted, the Confidentiality Relief requiring the plaintiff to destroy any and all proprietary or confidential data or materials of the first respondent, and so on.[83] At the hearing on 4 September 2020, the first respondent had characterised this as being an *ancillary* order if the tribunal found in favour of the first respondent on its counterclaim for breach of confidentiality.[84]

118 In the Award, the tribunal granted the Confidentiality Relief[85] although it dismissed the first respondent's counterclaim for breach of confidence.[86] The tribunal noted that the first respondent had in its D&CC included a prayer for "[s]uch further or other relief as the Tribunal deems just",[87] and granted the Confidentiality Relief "as further relief that the Tribunal deems just".[88] In reaching this decision, the tribunal noted the claimant's position "that such an order is unnecessary as the Claimant already has represented that it has no such data".[89] However, the tribunal did not accept this and said: "[t]he Tribunal

---

83 The Award at para 134 in Applicant's 1st Affidavit at pp 117–118.

84 Applicant's 1st Affidavit at paras 146–147; Exhibit 35 in Applicant's 1st Affidavit at p 860.

85 The Award at para 134 in Applicant's 1st Affidavit at pp 117–118.

86 The Award at paras 130–131 in Applicant's 1st Affidavit at pp 116–117.

87 The Award at para 108 in Applicant's 1st Affidavit at p 108.

88 The Award at para 134 in Applicant's 1st Affidavit at pp 117–118.

89 The Award at para 134 in Applicant's 1st Affidavit at pp 117–118.

observes that some such information or documents necessarily exist, at least insofar as produced or relied upon in the arbitration proceedings."[90]

119 Although the Confidentiality Relief had been sought "ancillary" to the failed counterclaim for breach of confidence, it was within the scope of the Arbitration for the tribunal to grant it as "further or other relief" even if the counterclaim for breach of confidence were dismissed (as it was). In relation to the granting of the Confidentiality Relief in and of itself, there are no grounds for setting it aside.

120 I should however like to hear from the parties on whether the Confidentiality Relief is affected by my decision to set aside the tribunal's decision on the Penalty Issue. As the tribunal noted, the claimant had in the Arbitration produced or relied upon information or documents which the Confidentiality Relief would apply to. The Confidentiality Relief (requiring destruction of data or materials within 30 days) is part of an award that had dealt with all the disputes between the parties, but I have decided that the decision on the Penalty Issue should be set aside. In the present circumstances, should the claimant be required to implement the Confidentiality Relief when the claimant's claims may yet be determined in a new arbitration?

121 For the present, I grant the claimant's application to set aside: (a) paragraphs 110–128 and 141(a) of the Award, on the Penalty Issue; and (b) paragraphs 139–140 and 141(f) of the Award, on the tribunal's costs decision. I will hear further from the parties before finally deciding what (if anything) should be done with paragraphs 134 and 141(e) of the Award on the Confidentiality Relief.

---

90 The Award at para 134 in Applicant's 1st Affidavit at pp 117–118.

Conclusion

122 In the present case, the claimant's claims were dismissed on the basis of the Penalty Issue, with the tribunal thinking that the claimant had *agreed* to the late introduction of that issue, when in fact the claimant had *objected* to this (and kept objecting). There was a breach of natural justice prejudicing the claimant, the tribunal had exceeded the scope of submission to arbitration, and the tribunal had acted contrary to the arbitral procedure agreed between the parties. Accordingly, I set aside the tribunal's decision on the Penalty Issue, and the parts of the Award affected by it.

123 I will hear the parties further on the Confidentiality Relief, costs, and consequential matters.

Andre Maniam
Judicial Commissioner

Daniel Chia, Ker Yanguang, Jeanette Wong
(Morgan Lewis Stamford LLC) for the applicant;
K Sathinathan, J Jayanthi (Lincoln's Law LLC) for the respondents