IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 17

Civil Appeal No 31 of 2021

Between

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

… *Appellants*

And

Convexity Ltd

… *Respondent*

In the matter of Originating Summons No 1158 of 2020

In the matter of
Section 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Order 69A Rule 2(1)(*d*) of the Rules of Court (2006 Rev Ed)

And

In the matter of
an award in Arbitration No. 380 of 2019 pursuant to the Sixth Edition (1 August 2016) of the Rules of the Singapore International Arbitration Centre between Convexity Limited as the Claimant therein, and Phoenixfin Pte Ltd, Mek Global Limited and Phoenixfin Limited as the Respondents

Between

Convexity Ltd

… *Applicant*

And

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

… *Respondents*

GROUNDS OF DECISION

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

Phoenixfin Pte Ltd and others
v
Convexity Ltd

[2022] SGCA 17

Court of Appeal — Civil Appeal No 31 of 2021
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
26 October 2021

7 March 2022

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 This matter was an appeal against the High Court Judge's (the "Judge") decision in *Convexity Ltd v Phoenixfin Pte Ltd and others* [2021] SGHC 88 ("Judgment") to set aside part of an arbitral award on the basis that there had been a breach of natural justice which prejudiced the respondent, that the arbitral tribunal had exceeded the scope of submission to arbitration and that it had acted contrary to the arbitral procedure agreed to between the parties. The appeal was dismissed on 26 October 2021. We now give our full grounds of decision.

Background to the Award

2 The respondent, Convexity Ltd, is a company incorporated in Gibraltar. On 18 December 2018, it entered into a Services Agreement ("the Agreement") with the first appellant, Phoenixfin Pte Ltd, a company incorporated in

Singapore, to provide the latter with IT security consulting services. The second and third appellants are companies affiliated with the first appellant and they agreed to guarantee the latter's obligations under the Agreement.

3 The Agreement was for an initial term of 24 months but the first appellant purported to terminate it on 30 September 2019 alleging breach of contract by the respondent. The respondent asserted that the termination was wrongful. It then commenced arbitration proceedings against the appellants on 14 October 2019, pursuant to the arbitration clause in the Agreement, which provided for arbitration in Singapore in accordance with the rules of the Singapore International Arbitration Centre (the "SIAC") – the applicable version of the rules being the 6th Edition dated 1 August 2016 (the "SIAC Rules"). Significantly, however, the Agreement provided for English law to be the governing law of the contract.

4 The respondent's main claim was against the first appellant for alleged breaches of the Service Agreement. The respondent also claimed against the second and third appellants as guarantors/indemnitors. At some point in the arbitration however, these two appellants ceased to participate in it, leaving the first appellant as the active defendant.

5 Clause 10.2 of the Agreement provided that if it was terminated during the initial term, the first appellant would be liable to pay the respondent a "Make-Whole Amount" ("the Make-Whole Clause"). Clause 11 provided that if the first appellant failed to meet its payment obligations, the respondent would be entitled to simple interest of 5% per month on the unpaid amount until the date of actual payment ("the Interest Clause"). The respondent's claim in the arbitration was for payment of US$2.8m allegedly due under the Make-Whole

Clause and interest thereon at 5% per annum in accordance with the Interest Clause.

6 The arbitration was commenced under the expedited procedure provided for in the SIAC Rules which meant that it was intended to be completed within six months. On 2 January 2020, the SIAC appointed Ms Maria Chedid as the sole arbitrator ("the Tribunal"). On 2 October 2020, the Tribunal issued her final Award ("the Award") in which she dismissed the respondent's claim on the sole basis that the Make-Whole Clause was unenforceable in that it imposed an "unconscionable penalty that [was] unenforceable as [being] against public policy under English law." The respondent's claim for recovery under the Make-Whole Clause was thus denied (Award at [124]). The Tribunal further found that the Interest Clause was similarly an unenforceable penalty clause, although the question of whether the interest amount was a penalty had been rendered moot since the Tribunal had already dismissed the respondent's claim under the Make-Whole Clause (Award at [125]).

How the arbitration proceedings were conducted

7 The setting aside proceedings centred on the way in which the Tribunal had conducted the arbitration. We therefore set out in some detail the key events leading up to the application in Originating Summons No 1158 of 2020 ("OS 1158") to set aside part of the Award.

8 On 17 January 2020, after consultation with the parties, the Tribunal issued Procedural Order No 1 ("PO1"), which included a Procedural Timetable for the arbitration. The Tribunal noted in the Award (at [16]) that the Procedural Timetable adopted "agreed procedures and dates jointly proposed by the Parties during the Preliminary Meeting". It provided that the exchange of Witness Lists

and Agreed List of Issues was to take place on 17 April 2020 with hearing dates in mid-May 2020. On 4 May 2020 the evidentiary hearing dates were re-scheduled to late May.

9 On 28 April 2020, the first appellant sent an e-mail to the Tribunal enclosing an amended list of witnesses, annexing the scope of evidence that was intended to be given by two experts from the United Kingdom, Mr Oliver Spence ("Mr Spence") and Dr David McIlroy ("Dr McIlroy"). The evidence that Dr McIlroy was slated to give included whether the Make-Whole and Interest Clauses were penalty clauses under English law ("Penalty Issue").

10 On 6 May 2020, the first appellant made an application for leave to adduce expert evidence from Mr Spence and Dr McIlroy. In the application, the issues that the first appellant wanted Dr McIlroy to give evidence about included the issue of whether the Make-Whole Amount or the Interest Clause amounted to penalties under English law.

11 The Tribunal stated in the Award that she had ruled during a telephonic session held on 13 May 2020 ("13 May Teleconference") that she would "receive submissions on the English law issues proposed to be included in the report of [Dr McIlroy], and that such submissions would be made by way of counsel (rather than expert) submissions" (Award at [12]). The import of the Tribunal's ruling at this teleconference was disputed by the parties.

Application to amend Defence & Counterclaim

12 On 18 May 2020, the first appellant applied to amend its Defence & Counterclaim ("D&CC"), in order to (amongst other proposed amendments) "aver that the 'Make-Whole Amount' and interest claimed are 'penalty clause[s]' and unenforceable". It sought to amend [39] of its D&CC as follows

(the underlined portions being the amendments) (the "Amendment Application"):

> Paragraphs 35 to 39 are denied as the 'Make-Whole Amount' is not payable if termination is contemplated pursuant to Clause 16.3, specifically due to Clause 16.3.1 nor any interest thereof as the Services Agreement has been validly terminated. The 1st Respondent [*ie*, the first appellant] asserts that the payment of USD2 million for the services rendered by the Claimant is manifestly excessive and does not commensurate with the services provided, if any, by the Claimant. Further or in the alternative the 'Make-Whole Amount' is a 'penalty clause' and is unenforceable. The claim for interest under the Late Payment of Commercial Debts (Interest) Act 1998 is not applicable in law or is a 'penalty clause', thus unenforceable and they both are not genuine pre-estimates of the damages or loss.

13 On the same day, the respondent notified the Tribunal that it objected to the Amendment Application as an attempt to "put in an entirely new and different cause of action and defences on the doorstep of the evidentiary hearing and after all the [witnesses'] statements [had] been exchanged". On 20 May 2020, the respondent made its full submissions on the point. It submitted that the first appellant's sole pleaded defence to the claim in relation to the Make-Whole Amount was that the Agreement had been properly terminated pursuant to cl 16.3, and that the obligation to make payment therefore did not arise. This, according to the respondent, was a "purely legal defence based on contractual interpretation". The first appellant's new defence on the Penalty Issue would, however, require evidence on factual issues which were not currently before the Tribunal. It was "likely [that] any in-depth cross examination of these issues [would] also take longer than the time allotted between the parties".

14 On 26 May 2020, the Tribunal reserved its decision on whether the Amendment Application should be granted. The Tribunal informed the parties by e-mail ("26 May 2020 e-mail") that:

> **2. [first appellant's] APPLICATION TO AMEND THE [D&CC]**
>
> The Tribunal has received the two written submissions on this Application made by each of the [respondent] and [first appellant] last week, and is further considering these submissions at this time. In 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 [first appellant's] application to submit evidence on English law *by way of an expert report* from Dr. David McIlroy, but permitted such English law evidence to be presented *by way of counsel or co-counsel submissions*; and (ii) granted the [first appellant's] application for leave to call Mr. Oliver Spence as an expert witness.
>
> [emphasis in original]

15 The Tribunal eventually gave her ruling on 29 May 2020 (the third day of the evidentiary hearing), disallowing the Amendment Application. The ruling on the application read as follows:

> … As I said the other day, I see this as an issue of a formal request to amend the pleadings that came very late. I heard you, Mr Chia, on the prejudice caused by a request to amend the pleadings at such a late date. I think those are valid concerns that you raised with respect to many of the issues.
>
> At the same time, as I mentioned the other day, I have ruled that certain documents, that a certain expert report, can be submitted and that you are able, for [the respondent], to object to that evidence. *I also already ruled that what was proposed for the English law expert report could be addressed by way of counsel submissions.*
>
> *Now, there is a certain balancing that needs to go on here because I am not granting the [first appellant] the ability to raise entirely new defences and their claims at this late stage in the arbitration. On the other hand, I am not applying the very technical pleading standard that one would apply in a court. So what I have asked the [respondent] to do in my guidance that I provided on the first day of the evidentiary hearing is to respond to those issues that when reviewing the defence and counterclaim and the submissions that followed it, one needs a reasonable notice for issues that are going to be presented by the [first appellant] and I will give you an example of that.*
>
> *There is a request to amend the pleadings to allow for a claim of duress. While there is no formal claim of duress put in the*

> *pleadings, I do think there are some allegations in the defence and counterclaim that suggests that kind of argument. So that's an example of where I would expect the claimant to address those kinds of allegations.*
>
> Similarly, you mentioned, Mr Chia, that there are issues of industry standards that have been presented and a claim that those industry standards have been breached. That's something that I don't see in the defence or the counterclaim and on that issue, there is no reasonable notice for you and no reasonable amount of time for you to bring in your own expert. However, you do have clients who have expertise in this area and can speak to these issues to some extent.
>
> You also can address the claims of breach of contract and to the extent they relate to industry standards, we heard a bit of testimony yesterday as to customs from Mr Viktor.
>
> I see there are some mixed issues here and I think that a standard of reasonableness that's appropriate for arbitration has to be applied, but *I'm not going to allow an amendment for entirely new claims that are found nowhere in the defence and nowhere in the counterclaim at this late stage.*
>
> *It is difficult to draw a very clear line on all of these issues. That is why I am offering you both guidance and asking you to apply a standard of review of the pleadings and the rulings that followed, and where there is reasonable notice of an argument or an allegation, I would expect the [respondent] to address it.* But, Mr Sathinathan, I am not granting the application to formally amend the defence and counterclaim.
>
> [emphasis added]

Events following the evidentiary hearing

16 The evidentiary hearing took place over four days from 27 May to 2 June 2020. On 12 June 2020, the parties' closing submissions were submitted to the Tribunal.

17 On 17 June 2020, the Tribunal conducted an Oral Reply Hearing ("Oral Reply Hearing"). At this hearing, it became clear that the Tribunal considered the Penalty Issue to be part of the arbitration. The Tribunal appeared to be of the view that her ruling at the 13 May Teleconference had kept the

Penalty Issue within the scope of the arbitration. We set out the exchange between the Tribunal and Mr Daniel Chia, counsel for the respondent, in relation to whether and when the Penalty Issue became part of the arbitration proceedings:

> Tribunal: When we received the expert application from the [first appellant], that was in early May; May 6 I believe. And in that application the issue of penalties is raised as an issue for Dr David to address. And at that time I agreed with you that it would be better to have his 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 him 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, which I made very clear 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. And so I said remember that the issues I've 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.*
>
> *So as of that time, the [respondent] 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, your witnesses, your fact witnesses were there and could offer whatever their own testimony was on this issue.*
>
> So as I said, it's 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's why I emphasised at the end of the hearing I really want the English law issues to be addressed in the closing submission. That's why I'm continuing to ask questions about them now because these are issues that are in this case and that I need to hear both parties on.*

[emphasis added]

18 At this hearing, the following exchange also took place:

> Tribunal: *So is it [respondent's] position then that in the time from May 6 until the hearing, which started on 27 May, it was not sufficient time to introduce any even testimony on these issues of penalty, including the interest issue? Is that your position?*
>
> Mr Chia: Mdm Arbitrator, the [respondent's] position is that as of 6 May, we did not know what you were going to rule in respect of the application.
>
> Tribunal: *You don't know what I was going to rule but you knew it was an issue being introduced by the [first appellant].*
>
> Mr Chia: *Which you subsequently disallowed on pleading.*
>
> Tribunal *No, I disallowed it on expert submission, I permitted it on counsel's submission and I ruled that I was not going to take a very strict construction of pleadings because this is an arbitration, and I said that my ruling on the formal amendment of the pleadings was subject to my former rulings on what comes in remaining in place, meaning the rulings on the English law issues, the rulings on the documents and the ruling on the (loss of audio).*
>
> [emphasis added]

19 On 16 July 2020, the Tribunal informed the parties that she would require "more complete submissions" on the enforceability of the Make-Whole Clause and the Interest Clause, including the Penalty Issue. The Tribunal noted the respondent's position that it would "require additional time to submit supporting factual evidence in order to fully address the enforceability issues". As such, the Tribunal directed the respondent to file supplemental submissions, "including any supporting evidence it wishe[d] to offer on the issues of enforceability of the contractual 'make-whole' and interest provisions" by 3 August 2020. The Tribunal directed that the appellants could also file

supplemental submissions. The Tribunal also indicated that she intended to "schedule additional hearing time" during the week of 10 August 2020.

20 In response, on 21 July 2020, the respondent repeated its objection about the non-pleading of the Penalty Issue. It stated that the Tribunal had ruled against the first appellant's attempt to amend its pleadings, and that even though the Tribunal expected parties to address issues that had been previously raised in the unamended pleadings, this did not apply to the Penalty Issue. It then asked for a clarification as to whether the Tribunal intended to "reinsert the issue on penalty as a live issue and wishe[d] to give the [p]arties another opportunity to address [it] on the same notwithstanding the manner in which the proceedings [had] already played out".

21 On 23 July 2020, the Tribunal responded, stating that she had ruled at the 13 May Teleconference that the first appellant could make submissions through counsel on English law issues identified in its application dated 6 May 2020, "including on the issue of whether the Make-Whole Amount or the Interest provisions in the Services Agreement amount[ed] to penalties under English law". She then stated that she had determined that the "English law contract enforceability issues" had to be "more fully addressed", and that she had requested additional time from the SIAC Registrar for parties to make further submissions.

22 In accordance with the directions of the Tribunal, the first appellant and the respondent both filed supplemental submissions, and the first appellant also filed supplemental reply submissions. In support of its supplemental submissions, the respondent also submitted an additional witness statement of Alex Grebnev, a director of the respondent. In the statement, Mr Grebnev merely cited the representations that had been made by the respondent's witness

(a director of the respondent) Viktor Mangazeev and Mr Chia at the evidentiary hearing, and affirmed them. In the respondent's supplemental submissions, the respondent reiterated its case that the first appellant did not plead the Penalty Issue and that the burden did not lie on the respondent to establish that the Make-Whole and Interest Clauses were not unenforceable penalty clauses.

23 On 10 August 2020, the Tribunal, having reviewed the submissions and the additional witness statement, noted that the respondent had stated in its supplemental submissions that its witnesses had been "denied the opportunity to explain [the respondent's] position and to answer any questions in respect of the penalty issues". Therefore, the Tribunal ruled that it would "afford the [respondent's] witnesses, Mr Grebnev and Mr Mangazeev, such opportunity at [the] resumed hearing date, and opposing counsel will be afforded opportunity for appropriate cross-examination". The Tribunal further noted that it would also "have questions of the witnesses" and suggested that the further hearing be fixed on 14 August 2020.

24 The respondent replied on 12 August 2020 asking that the Tribunal "reconsider" her position. Its e-mail set out the respondent's concern that the final day of hearing had "evolved from a final day of submission to one which potentially include[d] another round of limited cross-examination of only the [respondent's] witnesses (after the conclusion of the evidentiary hearing) on what [the respondent] maintain[ed] [were] unpleaded issues which the Tribunal had already rejected the amendments of". The Tribunal rejected the respondent's request on 13 August 2020.

25 The Tribunal subsequently issued Procedural Order No 3 dated 19 August 2020 ("PO3") setting out her directions. The Tribunal directed the parties to identify and jointly propose two alternative hearing dates for a full-

day hearing. Further Mr Grebnev and Mr Mangazeev were to be "prepared to respond to questioning by counsel and by the Tribunal on evidence relating to English law enforceability issues". On 28 August 2020, the respondent objected to the directions made in PO3 on the basis that the parties had "already agreed to adopt the procedure wherein the issues would be set out in the pleadings". Although the Tribunal had rejected the Amendment Application, she now "appear[ed] to want to reopen the unpleaded issues of enforceability" of the relevant clauses after the evidentiary hearing and closing submissions. The respondent repeated its concern that the respondent's witnesses "may be subjected to another round of cross-examination" even though the evidentiary hearing had concluded.

26 On 31 August 2020, the Tribunal stated that her rulings "as set forth in detail in [PO3] and in prior related rulings" were "clear". She requested that the respondent clarify whether it would produce its witnesses, Mr Grebnev and Mr Mangazeev, for questioning during the hearing fixed on 4 September 2020, having noted that the respondent's participant list did not include these two witnesses. The respondent replied on 1 September 2020 that the two witnesses would not be attending the hearing. The Tribunal then asked the respondent's counsel to clarify if the witnesses' non-attendance could be remedied by choosing a different hearing date. The respondent replied on 2 September 2020 that it was of the view that there was "no need" for the witnesses to attend "what essentially would be the final day of closing submissions". The respondent stated that this position was "in line with" its position that the Penalty Issue was unpleaded and that the issue was "not part of the submission to arbitration".

27 The Tribunal then stated that she was requesting the presence of the witnesses on her own initiative under the SIAC Rules. The respondent did not make the witnesses available for the final day of hearing. As noted above, the

Tribunal proceeded to find in the Award that the Make-Whole and Interest Clauses were unenforceable penalty provisions.

Grounds of Decision below

28 In OS 1158, the respondent applied to set aside part of the Award in relation to the Tribunal's decision to dismiss its claims on the basis that the Make-Whole Clause and the Interest Clause were unenforceable penalty clauses, on the ground that there had been a breach of natural justice, relying on s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed). The respondent further relied on Arts 34(2)(*a*)(ii), 34(2)(*a*)(iii) and 34(2)(*a*)(iv) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), arguing that it had been unable to present its case; that the Award contained decisions on matters beyond the scope of submission to arbitration; and that the arbitral procedure was not in accordance with the agreement of the parties.

29 The Judge found that there had been a breach of natural justice, as the respondent was denied the opportunity to address its objections to the introduction of the Penalty Issue. The Judge reached this conclusion on the basis that the Tribunal had erroneously thought that the parties had *agreed* on the introduction of the Penalty Issue into the arbitration, when the respondent had in fact objected to the late introduction of the issue. This caused prejudice to the respondent as the Penalty Issue might not have been introduced into the arbitration if the Tribunal had considered its objections. The Tribunal did not regard the Penalty Issue as one that she had introduced on her own initiative; rather, the Tribunal viewed the issue as one introduced by the parties as of 13 May 2020 when there was in fact no such agreement (Judgment at [86]–[90]).

30 The Penalty Issue was a mixed question of law and fact. The Tribunal had rejected the appellant's Amendment Application, but subsequently and only at the stage of oral reply submissions, asked that the issue be more fully addressed in terms of evidence and submissions. Although the Penalty Issue did involve public policy considerations, the decision would nevertheless be susceptible to being set aside if the issue was not properly before the decision maker. Even though the Tribunal had powers pursuant to Rules 27(c), (f), (h) and (m) of the SIAC Rules, and could take cognisance of public policy as a question of law, these powers did not give the Tribunal licence to act in breach of natural justice. In this case, natural justice had been breached as the Tribunal had misunderstood that the respondent agreed to the Penalty Issue being introduced when it had not (Judgment at [91]–[98]).

31 The parties, including the first appellant itself, did not understand the Tribunal to have ruled at the 13 May Teleconference that the Penalty Issue was an issue in the arbitration. They also did not understand the Tribunal's 26 May 2020 e-mail to have meant that the Penalty Issue had been permitted to be introduced as an issue into the arbitration. Further, the Tribunal's rejection of the Amendment Application was a signal to the parties that it was not in issue (Judgment at [99]–[103]).

32 It only became apparent at the Oral Reply Hearing that the Tribunal had a different understanding from the parties as to what had transpired at the 13 May Teleconference (Judgment at [104]). Prejudice had been caused to the respondent as the Tribunal failed to consider its objections to the late introduction of the Penalty Issue, such that the respondent lost the reasonable opportunity of keeping the issue out of the arbitration. This prejudice could not be negated by the fact that the Tribunal belatedly afforded the respondent the opportunity to submit further evidence on the issue and to have its witnesses

return for questioning on it. The respondent was entitled to take a stand on its objections (Judgment at [106]–[107]).

33 The Judge further found that the Penalty Issue was outside the scope of submission to arbitration, and that the relevant sections of the Award should therefore be set aside. The Penalty Issue was objectively not an issue in the arbitration prior to 17 June 2020; and the issue was never properly introduced into the arbitration but was brought in in a manner that was in breach of natural justice (Judgment at [109]–[111]). Finally, the Judge found that the procedure adopted in the arbitration proceedings was contrary to the parties' agreed procedure (Judgment at [114]). The Judge therefore granted the 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 (the "impugned sections") (Judgment at [121]).

The Appeal

Appellant's submissions

34 First, the appellants submitted that there was no breach of natural justice as the Judge had erred in finding that the Tribunal proceeded in the belief that the parties had agreed to the Penalty Issue being part of the arbitration. This finding was not evidentially substantiated. Instead, the Tribunal's position was that the Penalty Issue was in issue based on (a) her ruling that the first appellant could make submissions on issues pertaining to English law by way of counsel's submissions; and (b) the fact that the respondent had already been put on notice of the English law issues as of 28 April 2020.

35 The appellants further argued that the respondent had been given ample opportunity to be heard on the Penalty Issue. The respondent had been put on

notice as of 28 April 2020 of the first appellant's intention to add Dr McIlroy as an expert witness to provide evidence on the Penalty Issue. It had also been afforded multiple opportunities to make legal and evidentiary submissions on the Penalty Issue, including after the Oral Reply Hearing. However, the respondent insisted on relying on its "technical (and tactical)" objection to the Penalty Issue being introduced on the basis that it was not pleaded.

36 The Tribunal had acted fairly and within the scope of her powers pursuant to case law and the SIAC Rules. The Tribunal had emphasised at various junctures in the proceedings that she required the parties to fully address the Penalty Issue. The appellants argued that the Tribunal was "acting well within her power in ruling during the 13 May [Teleconference] that the Penalty Issue should be addressed in the [a]rbitration by way of counsel or co-counsel submissions". She had similarly acted within the scope of her powers in requesting further legal and factual submissions on the Penalty Issue following the Oral Reply Hearing, "having regard to the fact that that issue also concerned a matter of public policy."

37 In any event, there was also no actual prejudice suffered by the respondent as a result of the Tribunal's conduct of the proceedings. In the first place, the prejudice identified by the Judge was that the respondent did not have the opportunity to address the Tribunal on its objections to the introduction of the Penalty Issue. However, the Judge had erred in his finding that the Tribunal had misunderstood the respondent to have agreed to the introduction of the issue. There was also no prejudice to the respondent as it had adduced "substantial evidence" on the "genesis and object of the Make-Whole [c]lause". The respondent's counsel had also acknowledged that evidence had been led on the Penalty Issue.

38 Second, the appellants submitted that the scope of submission had not been exceeded. The appellants took the view that the Penalty Issue was certainly on the table and in play. Third, the appellants submitted that there had been no breach of arbitral procedure. There was no prejudice caused to the respondent: the respondent had adduced some evidence in respect of the Make-Whole Clause; the Tribunal had provided the parties with multiple opportunities to adduce further evidence on the Penalty Issue; the respondent's counsel had admitted to cross-examining the appellants' witnesses on the proposed amended D&CC; and there was no one-sided treatment in the Tribunal's order to recall the respondent's witnesses for cross-examination – its directions were to allow the respondent to adduce further evidence. Finally, the Tribunal had powers under the SIAC Rules to raise new issues to be addressed by the parties, and to decide new issues raised by the parties, in the course of arbitration proceedings.

Issues to be decided

39 We had to consider the following issues:

(a) Whether there had been a breach of natural justice;

(b) Whether the Penalty Issue was outside the scope of submission to arbitration; and

(c) Whether there had been a breach of arbitral procedure.

We address each issue in turn.

Whether there had been a breach of natural justice

40 We agreed with the Judge that a breach of natural justice had been occasioned, as the respondent did not have a full opportunity to address the Penalty Issue.

41 First, it was reasonable for the respondent to consider that the Penalty Issue was not in play in the arbitration, as the issue was not a "live" one in the arbitration until it was unilaterally re-introduced by the Tribunal at the Oral Reply Hearing.

42 The pleadings, Agreed List of Issues and the first appellant's List of Issues made no mention of the Penalty Issue. By seeking to introduce the Penalty Issue through the Amendment Application, the first appellant recognised that up to that stage the Penalty Issue was not part of the dispute. The Amendment Application was itself barely sufficient to introduce the Penalty Issue, as the proposed amendment contained only an assertion that the clause was a penalty provision. The underlying facts were not pleaded in the proposed amendment. Nevertheless, had the application been allowed, it would have opened the doorway for the Penalty Issue to be brought into the arbitration, and the appellants would have had to particularise their case as to why the clauses in question were penalty clauses. In the event, the Amendment Application was dismissed, and the Penalty Issue never arrived at the table.

43 The appellants argued that the respondent had *notice* as early as 28 April 2020 that the Penalty Issue would be introduced into the arbitration. However, this argument missed the point entirely. The respondent certainly had notice of the fact that the Penalty Issue would be introduced into the proceedings should the Amendment Application be allowed; but such "notice" did not mean that

the respondent had any burden to lead evidence on the issue when it was not yet in play.

44 The Tribunal appeared to take the view at the Oral Reply Hearing that her ruling given at the 13 May Teleconference had kept the Penalty Issue in play. There was no record of what had transpired at the 13 May Teleconference, but it was stated in the 26 May 2020 e-mail that the Tribunal's ruling on 13 May "denied the [first appellant's] application to submit evidence on English law by way of an expert report from [Dr McIlroy], but permitted such English law evidence to be presented by way of counsel or co-counsel submissions" [emphasis in original omitted]. The Tribunal presumably considered that the "English law evidence" which she had permitted to be presented included the Penalty Issue.

45 On appeal, the appellants submitted that the Tribunal had "gone the extra mile and more" to ensure that the respondent had "ample opportunity" to make its case on the Penalty Issue, including by reminding the parties of her ruling at the 13 May Teleconference in the 26 May 2020 e-mail, as well as prior to the start of the evidential hearing on 27 May 2020. However, we agreed with the Judge that it was far from clear that the Penalty Issue had been admitted into the scope of the arbitration by way of the Tribunal's ruling at the 13 May Teleconference.

46 At the outset, it was incorrect to speak of adducing expert evidence on English law when the dispute was subject to English law in the first place. We were in any event unable to agree that the Penalty Issue was in play following the Tribunal's ruling at the 13 May Teleconference. First, legal submissions by an expert of English law on the law of penalty cannot adequately address the point of whether a particular provision is or is not a proscribed penalty, which

is an issue of mixed law and fact. Second, as the Judge rightly pointed out, even the first appellant itself did not get the impression that the Tribunal had ruled that the Penalty Issue was in play from the 13 May Teleconference. The Judge noted in his Judgment that, before him, the first appellant's counsel had acknowledged as much. Further, the first appellant filed the Amendment Application thereafter, and did not submit at that juncture that it was relying on the Tribunal's earlier ruling (see Judgment at [52], [99] and [100]). As we noted above, the very filing showed that the first appellant was of the view that the issue needed to be pleaded and was aware that the issue would involve factual as well as legal issues which had to be fleshed out in pleadings before they could be explored at the hearing.

47 Third and most importantly, the Tribunal's dismissal of the Amendment Application could not be reconciled with her view that her ruling at the 13 May Teleconference kept the Penalty Issue alive. It was the Tribunal who unilaterally reintroduced the Penalty Issue at the Oral Reply Hearing, in effect reversing her earlier decision to disallow it. But the Tribunal reintroduced it without calling for the amendments to the pleadings on both sides which were needed to flesh out the issue.

48 It was entirely reasonable for the respondent to have interpreted the Tribunal's dismissal of the Amendment Application to mean that the Penalty Issue was not within the scope of the arbitration proceedings. As the Judge rightly noted, the Tribunal in her rejection of the Amendment Application stated that she was "not going to allow an amendment for entirely new claims that [were] found nowhere in the defence and nowhere in the counterclaim at this late stage" (see Judgment at [103]). The Penalty Issue was one such "entirely new claim". We were accordingly of the view that the respondent could not be faulted for not having led evidence on this point during the evidentiary hearing.

49 Second, the Tribunal's purported ruling given during the 13 May Teleconference and her written guidance issued via the 26 May 2020 e-mail could not override the fact that she had dismissed the Amendment Application and the Penalty Issue was, as a result, not brought into the arbitration. As against this point, the appellants submitted that the Tribunal had given the respondent the opportunity to present its case on the Penalty Issue; but the respondent chose to rely on "technical (and tactical) but certainly arid pleading objections". The appellants further submitted that strict rules of pleadings did not apply "in the same formalistic or rigid way" in the context of an arbitration.

50 It is correct that in arbitration proceedings generally, pleadings are not determinative in the same way they might be in court litigation. This is because arbitration is consensual and the parties are always at liberty to agree to an unpleaded issue being dealt with in an arbitration. In the case of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972, the High Court observed at [52] 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". This observation applies particularly to legal or policy issues which do not require evidential ballast.

51 In *CBX and another v CBZ and others* [2022] 1 SLR 47 ("*CBX*"), the Court of Appeal referenced *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*"), where it was stated that "any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded" (*Kempinski* at [47]), and observed that (*CBX* at [48]):

> … the Court of Appeal was not, at [47] of [*Kempinski*], giving an unrestrained licence to introduce new claims. It was addressing new and unpleaded facts or changes of an 'ancillary' nature (in that case, new facts or changes potentially affecting an existing claim), which were furthermore 'known to all the parties' in that case (being facts or changes which were in fact addressed expressly and without any jurisdictional objection by both parties with the tribunal). *Pleadings generally serve the valuable function of defining the parameters of the issues which the parties have to address and, in so doing, precluding unexpected surprises which a party does not have a fair opportunity to address.* The challenge to the award in [*Kempinski*] was not based on any complaint of that nature. It was, in contrast and as will appear, of the most formal and unmeritorious nature. The conduct of parties to litigation before an arbitrator or judge may and does on occasion widen the scope of the issues falling for determination in a way which deprives a pleading objection of any force. [*Kempinski*] was such a case, the present is not.
>
> [emphasis added]

52 When, however, the court has to consider whether a party has been afforded natural justice during arbitration proceedings, the pivotal question is always whether that party has been given a fair opportunity to deal with an issue that has been raised in the arbitration either by the other party or by the tribunal itself. The extent of the opportunity needed to be given depends on the nature of the issue. If the issue is a legal one, then sufficient time to make legal submissions is all that is required. But if the issue is a factual one or a mixed fact and law question then, apart from submitting on the law, a party needs to be able to question the evidence produced in support of the issue as well as have the chance to itself introduce relevant rebuttal evidence. And in order to do all this, there has to be clarity and precision regarding what issue is being raised and what evidence will be relied on to support it. It is in situations like this that the pleadings will assume a more significant role in indicating the kind of opportunity that natural justice requires to be given and in preventing "unexpected surprises", to use the words of *CBX*.

53 Returning to the facts in the present case, in our judgment, following the dismissal of the Amendment Application, the Penalty Issue was not in play. The Tribunal was not entitled to bring it up when the inclusion of the Penalty Issue as an issue to be decided in the arbitration had been specifically rejected. Thus, the Penalty Issue was not an issue that was known to all the parties in the dispute and the Tribunal's reintroduction of the same came as an unexpected surprise (and an unpleasant one at that) to the respondent who did not have a fair opportunity to address it.

54 This was particularly so as the Penalty Issue was a mixed question of law and fact. The appellants had recognised this by filing the Amendment Application and did not dispute this point on appeal. To determine the Penalty Issue, it would have been necessary for the Tribunal to have regard to not only whether the legal point was flagged, but also whether the evidentiary material relevant to that legal point had been engaged with. However, no evidence was led by the appellants on the question of whether the factual foundation of the Penalty Issue could be made out, whether before the Amendment Application was dismissed on day three of the evidentiary hearing or thereafter. The appellants failed to establish the factual underpinnings of their case that the Make-Whole and Interest Clauses were penalty clauses. Further, they did not cross-examine the respondent's witnesses on the same. Given that no evidence was led on the Penalty Issue by the appellants, the respondent did not have a case to respond to or rebut. The respondent was also not given an opportunity to respond to the appellants' case at the evidentiary hearing since its witnesses were not cross-examined on the issue. Despite this, the Penalty Issue was resurrected during the Oral Reply Hearing, when the Tribunal asserted that she considered the Penalty Issue to be part of the arbitration.

55 The respondent's counsel had made clear its objection to the re-introduction of the Penalty Issue to the Tribunal at many points during the proceedings. In the oral opening statement, the respondent's counsel submitted that:

> In respect of the interest amounts, Mdm Arbitrator, we will also argue it is not a penalty. *I can't show you because we don't have the opportunity to show, to gather all of the information to show you what both industry standards are, what the legitimate interest that we have to protect is in respect of our relationship with security consultants, but the fact is it is there*. It has been there from the first draft. It wasn't something that was snuck in. It was there and reviewed by the [first appellant] who had their own in-house legal counsel, and are not unsophisticated[d], and they accepted this as a legitimate risk allocation.
>
> [emphasis added]

56 This point was picked up at the Oral Reply Hearing, when the respondent's counsel made the case that:

> Mr Chia: … So that's the law on penalties post Cavendish. What I wanted you, Mdm Arbitrator, to take away from that is that *in addition to the very simplistic formulation of whether it is a genuine pre-estimate of loss and it's so out of proportion, one also has to understand factual context about why the clause was implemented, whether there are commercial interests that need to be protected on the part of the party relying on that particular clause, and in a lot of instances there is also a looking at the finances of that particular party*.
>
> …
>
> How is that applicable to our situation, Mdm Arbitrator? *You know that the penalty issue was not pleaded, and from that you have also heard our complaints that we didn't address any of these issues in the witness statements about what is the commercial justification et cetera. In fact, I flagged it out on the first day of the hearing, to say that if you allow this to happen, in a way there will be some prejudice to us because we couldn't explain this, we didn't show what the subcontractor's rates are et cetera.*
>
> Notwithstanding I said all of these things, it is important then to see what happens at the evidentiary hearing, which is that

> *counsel for the [first appellant] did not cross-examine or put the case to the [respondent's] representatives that the clause is a penalty. And given that it is the burden of, number one, the [first appellant] to plead a penalty to put it into issue, and number two, for the [first appellant] to show that it's a penalty, whether expressly or implicitly, that omission is important.*
>
> *And that omission is why, Mdm Arbitrator, there is no evidence right now before you of what is the commercial back-end relationship that Convexity has with its subcontractors, what are the payment terms with those subcontractors, whether there are certain interest rates for late payment with those subcontractors which are governed by different laws, not necessarily English law, and therefore may have varied interest rates. That is all not before you. It was not put in issue at pleading, it was not tested during the evidentiary hearing. That, therefore, comes to my submission on this point.*
>
> You can see that I think it is undisputed; for a ruling on penalty one must look also at the factual circumstances of the case. The burden of pleading and putting those in issue, as we have shown you in our submissions, are under Singapore law which is the lex [s]itus, is on the [first appellant] alleging penalty. In fact, I also understand it's under English law. The reason is because you must give notice of it.
>
> When the [first appellant] does not raise the penalty point, does not cross-examine the [respondent's] witnesses on the penalty point, even though I had expressly said it in the first day of the hearing what it should be asked in a way. It is not right, nor fair, to allow the [first appellant] then to allege that there is no proof and no evidence led at all about any of the circumstances and the commercial circumstances to justify the imposition of either the make-whole amount or the interest when it comes to late payment.
>
> [emphasis added]

57 It can be seen from the exchange above that Mr Chia had sought to impress upon the Tribunal that the *factual* context and circumstances of the case were relevant in determining the Penalty Issue. However, as the issue had not been pleaded, the respondent did not address it in its witness statements. In the evidentiary hearing, the first appellant did not put its case on this issue to the respondent's witnesses or cross-examine the latter on the point. As a result of how the proceedings had panned out, there was no evidence on the Penalty Issue

before the Tribunal, but this could not be held against the respondent. It would therefore prejudice the respondent if the Penalty Issue was to be re-introduced. The Tribunal did not accept the point. Instead, she asserted that the issue had been in play since her ruling at the 13 May Teleconference.

58 After the Oral Reply Hearing, the respondent's counsel continued to object to the re-introduction of the Penalty Issue and persistently objected to it, including in its supplemental submissions in response to the Tribunal's e-mail stating that she intended the respondent's witnesses to give further evidence and be cross-examined at a further hearing date, in further response to the Tribunal's formal issue of directions in PO3 and, finally, in its decision not to make its witnesses available at the further hearing date.

59 On the hearing of this appeal, the appellants pointed the court to various excerpts of the transcript which they claimed showed that evidence had been led and submissions made on the Penalty Issue. This approach did not, however, assist them, as we explain below.

60 First, the appellants referred us to three excerpts where the first appellant's counsel had allegedly cross-examined the respondents' witness, Mr Mangazeev, on the Penalty Issue. However, as we had also pointed out to the appellants' counsel during the hearing, these portions of the cross-examination only cursorily canvassed the issue of whether Mr Mangazeev appreciated the legal significance of the Make-Whole Clause. They did not relate to the *underlying facts* that were necessary to establish the appellants' case that the clauses in question were penalty clauses, such as the relevant interest that was being protected by the Make-Whole Amount.

61 The appellants' counsel also referred to an e-mail sent by the respondent to the Tribunal on 21 July 2020, in response to the Tribunal's indication that she would require "more complete submissions under English law" of the Penalty Issue (see [19] and [20] above). In that e-mail, the respondent referred to evidence which Mr Mangazeev had given in relation to whether the Make Whole Clause was a penalty clause, and noted that such evidence had not been challenged. However, in the same e-mail, the respondent made clear its case that (a) the Penalty Issue was unpleaded; (b) the burden was on the party seeking to rely on the point to plead and adduce evidence of the same; and (c) that the Tribunal had dismissed the Amendment Application and that the Tribunal would, in effect, be "reinsert[ing] the issue on penalty as a live issue".

62 In any event, the relevant inquiry was not whether there was any evidence on record to deal with the Penalty Issue. As the respondent rightly pointed out on many occasions, since the respondent was not amenable to the inclusion of this issue the burden was on the appellants to properly bring it into the arbitration and to adduce evidence to establish their case. We return to this point on burden of proof. If the issue had been properly pleaded, it would then be the respondent's prerogative to adduce whatever evidence it deemed relevant to meet the pleaded case. The respondent did not have the opportunity to do so. It was pointless for the appellants to make reference to snippets of evidence which touched on or were tangentially relevant to the Penalty Issue. This is because what the appellants had to show was that the respondent would have adduced exactly the same evidence and nothing more had the issue been pleaded. They could not do so because, obviously, if the respondent had realised the Penalty Issue had to be addressed it would have put forward additional evidence to try and establish that it had a legitimate interest that was reflected

by the terms of the Make-Whole and Interest Clauses and that the same were not penalties.

63 Second, the appellants submitted that the respondent had made submissions on the Penalty Issue in its oral opening statement as well as closing submissions. In relation to the opening statement, the way in which the proceedings were conducted left the respondent in a difficult position, not knowing how the Tribunal would decide on the Amendment Application. The Tribunal had chosen to reserve her decision and only gave her decision on the third day of the evidentiary hearing. It was therefore unsurprising that the respondent did make some submissions on the issue. This, however, did not detract from the fact that the underlying factual basis of the Penalty Issue had not been established by the appellants. As for the closing submissions, the respondent had set out the relevant law, but it had done so to make the point that the legal test to establish whether a relevant clause is a penalty clause entails a legal and factual analysis. Therefore, it "necessarily follow[ed] that, as a minimum, the issue of penalty must be pleaded upfront so that the other party is not deprived of the opportunity to adduce relevant evidence for the court's consideration of the issue". The respondent had therefore never deviated from its position that the Penalty Issue had to be pleaded.

64 As such, the Tribunal could not make a finding on the Penalty Issue which was a question of mixed fact and law, when the issue was unpleaded and no evidence had been led by the appellants on it. The respondent did not have an opportunity to adequately respond to the appellants' case, since the case had never been established.

65 Third, the Tribunal had reversed the burden of proof in her attempt to *re-introduce* the Penalty Issue after the Oral Reply Hearing. The appellants

sought to rely on the Tribunal's directions following the hearing for parties to provide further written submissions on the Penalty Issue, as well as for the respondent's witnesses to give further evidence, to show that the respondent had been given the opportunity to be heard. However, the Tribunal was not entitled to conduct the proceedings in this way.

66 It is uncontroversial that the burden is on the party challenging contractual clauses to show why they are proscribed penalty clauses as a matter of fact in the light of the applicable legal principles. The burden of proof was therefore on the appellants to have led evidence and to make good the factual foundation for arguing that the clauses were invalid as proscribed penalty provisions. The first appellant may have flagged the fact that it wanted to run the penalty argument, but the rejection of the Amendment Application meant that its intention had no further relevance to the issues in the arbitration. The appellants' failure to lead any evidence to establish their case that the clauses in question had nothing to do with the legitimate interest which the respondent was trying to protect, is understandable in this context. However, the consequence of the lack of evidence was that there was no factual basis for any subsequent revival of the Penalty Issue.

67 When it became evident during the Oral Reply Hearing that the respondent had not appreciated that the issue remained in play, the Tribunal thought that she needed only to give the respondent the opportunity to adduce evidence to address the Penalty Issue. She had failed to appreciate that the appellants had the burden to *first* adduce evidence to show that the clauses were penalty provisions, before the respondent would have the burden of adducing rebuttal and explanatory evidence. The Tribunal instead apparently assumed that the clauses were presumptively proscribed penalty provisions and, reversing the burden of proof, required the respondent to show why they were

not proscribed penalty provisions as a matter of fact and law. Given that no relevant factual evidence had been put forward by the appellants and there was not even a *prima facie* case established, there was no need for the respondent to respond. The Tribunal's approach further suggested that she already had a preconceived view on how she intended to decide the issue, since she had presumed that the clauses in question were penalty provisions, and was in effect asking the respondent to rebut that conclusion.

68 We were, accordingly, of the view that the Tribunal had reversed the burden of proof in her attempt to have the Penalty Issue addressed after re-introducing it following the Oral Reply Hearing. In the circumstances, we agreed with the Judge that the respondent was entitled to stand its ground and not call its witnesses to adduce evidence on the Penalty Issue at that stage. The Tribunal had, in effect, closed the door to the evidence being dealt with during the hearing itself by virtue of her dismissal of the Amendment Application. The Tribunal's attempt at salvaging the situation, however, overlooked the fundamental point that the Penalty Issue was a mixed question of fact and law and that the factual basis of the case therefore had to be first established by the appellants who were asserting a positive defence on this basis. To be clear, we did not impugn the Award because the Tribunal got the law on burden of proof wrong. We did so because her decision meant that the respondent did not have a proper opportunity to present its case on the Penalty Issue as it did not know what the evidentiary basis for the appellants' contention was. That was the breach of natural justice.

69 Finally, we noted the appellants' argument on appeal that the Judge had erred in finding that the Tribunal regarded the Penalty Issue as having been introduced by the *agreement* of the parties. The Judge had based his finding primarily on the Tribunal's remarks made during the Oral Reply Hearing. The

Tribunal appears to have incorrectly believed that the parties had understood, following the 13 May Teleconference, that they were meant to address all the issues pertaining to English law that the first appellant sought to adduce on 6 May 2020 via expert evidence. Her oral remarks were unclear and suggested that there was an agreement between the parties to that effect reached during the 13 May Teleconference (see [17] above).

70 However, it did seem to us that the Tribunal was cognisant of the fact that the respondent had objected to the introduction of the Penalty Issue, and that she considered the Penalty Issue to have been introduced into the arbitration proceedings by virtue of her ruling rather than by parties' agreement. Nevertheless, the Judge's other reasons were more than sufficient to support his finding that there was a breach of natural justice. We therefore held that the impugned sections of the Award had been rightly set aside.

Whether the Penalty Issue was outside the scope of submission to arbitration

71 Given our conclusion on the issue of whether there had been a breach of natural justice, it followed that the Tribunal was not entitled to consider the Penalty Issue and that it was outside the scope of submission.

Whether there had been a breach of arbitral procedure

72 Finally, we considered the issue of whether there had been a breach of arbitral procedure. As stated in *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 at [63], a party seeking to set aside an arbitral award on the ground of breach of agreed procedure under Art 34(2)(*a*)(iv) of the Model Law must show that (a) there was an agreement between the parties on a particular arbitral procedure; (b) the tribunal failed to adhere to that agreed procedure; (c) the failure was causally

related to the tribunal's decision in the sense that the decision could reasonably have been different if the tribunal had adhered to the parties' agreement on procedure; and (d) the party mounting the challenge is not barred from relying on this ground by virtue of its failure to raise an objection during the proceedings before the tribunal, citing *AMZ v AXX* [2016] 1 SLR 549 at [102].

73 The question before the court was therefore whether the Tribunal conducted the proceedings in a manner that was so unreasonable that the Award should be set aside. The respondent submitted that the first two procedural orders were prepared in consultation with the parties and had set out their agreed procedure. PO1 dated 17 January 2020 set out a timeline where, following the evidentiary hearing, parties would file written closing submissions, followed by oral reply submissions, and an "opportunity for Tribunal questioning of Counsel". Procedural Order No 2 ("PO2") retained the same directions but on revised timelines. By unilaterally issuing PO3 and setting out directions for the Penalty Issue to be addressed, the Tribunal had acted in breach of the agreed procedure. In reply, the appellants submitted that para 48 of PO1 stated that "[a]ny order of the Arbitral Tribunal may, at the request of a party *or at the Arbitral Tribunal's own initiative*, be varied if the circumstances so require" [emphasis added]. This was reiterated at para 3 of PO2.

74 The procedure which the Tribunal set out in PO3, in particular, for only the respondent's witnesses to be called to give evidence and to be cross-examined at a further hearing, was procedurally improper. As we had already explained, the Tribunal's directions reversed the burden of proof, and thus certainly had an impact on the Award. It was also undoubtedly a departure from the parties' agreement in PO1 and PO2: whilst parties had agreed that the Tribunal could vary her orders on her own initiative, they could not have agreed that this could be done in breach of natural justice and where it would cause

significant prejudice to the respondent. As this court held in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695, whilst a tribunal is "ordinarily the master of its own procedure", the requirement of due process was an "essential limitation" on this "wide autonomy". Due process, in turn, "requires that each party be given, amongst other things, appropriate notice of the proceedings and of the case it has to meet, as well as a fair opportunity to prepare and present its case before a neutral and unbiased decision-maker" (at [1]–[2]). In this case, the directions given by the Tribunal in relation to the arbitral procedure breached this essential requirement.

75 The appellants' reliance on the powers afforded to the Tribunal under the SIAC rules did not assist them. The SIAC Rules provide that the Tribunal has the power to: (a) conduct such enquiries as may appear to the Tribunal to be necessary or expedient (Rule 27(c)); and (b) decide, where appropriate, any issue not expressly or impliedly raised in the submissions of a party provided such issue has been clearly brought to the notice of the other party and that other party has been given adequate opportunity to respond (Rule 27(m)). However, these powers also had to be exercised in line with the rules of natural justice and did not give the Tribunal *carte blanche* to introduce or decide issues which the parties did not have an opportunity to address her on. In fact, it was specifically stated in Rule 27(m) that parties had to have an "adequate opportunity" to respond to the issue in question, but the directions in PO3 did not even require the appellants to establish the factual basis of their case. It therefore denied the respondent any opportunity to adequately respond to the Penalty Issue. As such, we agreed with the Judge that the Tribunal had acted in breach of the arbitral procedure.

Conclusion

76 For the reasons set out above, we dismissed the appeal.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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