IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(I) 1

Originating Summonses Nos 7 and 8 of 2020; No 9 of 2021

Between

(1) CFJ
(2) CFK

… *Plaintiffs*

And

(1) CFL
(2) CFM

… *Defendants*

JUDGMENT

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

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CFJ and another
v
CFL and another and other matters

[2023] SGHC(I) 1

Singapore International Commercial Court — Originating Summonses Nos 7 and 8 of 2020 and Originating Summons No 9 of 2021
Kannan Ramesh JAD, Dominique Hascher IJ, Arjan Kumar Sikri IJ
15, 18, 19 March, 29 June 2021, 18, 19 July 2022

31 January 2023 Judgment reserved.

Kannan Ramesh JAD (delivering the judgment of the court):

Introduction

1 How strictly does an arbitral tribunal have to adhere to the pleadings (or memorials) of the parties? In what circumstances is the fair hearing rule not satisfied? When is there apparent bias as regards an arbitrator? These questions arise in the three applications before us which relate to a long-running arbitration between two substantial energy groups that began over a dispute regarding the sale of shares in a member of one to members of the other. Specifically on the first question, one party alleges that the arbitral tribunal should have strictly followed the case as framed in the pleadings filed by the parties and that its failure to do so was a breach of natural justice or an act in excess of the tribunal's jurisdiction. That party also calls into question the

conduct of the arbitral tribunal and the impartiality of one of its members, specifically its President.

2 These are not uncommon grounds for challenge and a pragmatic approach must be adopted by the court in resolving such challenges when exercising its supervisory jurisdiction over arbitral tribunals and their awards. As recently observed by the Court of Appeal in *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 ("*CAJ*") at [2]: "it is not common in Singapore for awards to be set aside, and the courts have only done so in *exceptional* cases when the grounds are clearly made out" [emphasis in original]. This strikes a balance between the need to respect the autonomy of arbitration proceedings and to give effect to the principle of minimal curial intervention, while ensuring that meritorious challenges are properly ventilated: *CAJ* at [1]. Parties who agree to arbitrate their dispute do not have a right to a "correct" decision, but only a right to a decision that is within the ambit of their agreement to arbitrate, and a decision that is arrived at following a fair process. These are salutary observations. With this in mind, we consider the background to the three applications before us.

Background

3 CFJ and CFK (collectively, "the Seller") and CFL and CFM (collectively, "the Purchaser") are two corporations in the oil and gas industry. They are respectively members of substantial groups in the same industry. On 23 July 2012, the Purchaser acquired a 49% stake in one of the Seller's subsidiaries ("the Subsidiary") by way of a Share Purchase Agreement ("the SPA") to which the Seller and the Purchaser were parties. Thereafter, the Purchaser alleged that the Seller had, *inter alia*, deceived it into investing in the Subsidiary by making several representations. The Purchaser commenced

arbitration proceedings ("the Arbitration") against the Seller for the tort of deceit in relation to misrepresentations concerning five aspects of the operations of the oil and gas fields which were owned and operated by the Subsidiary: Reserves, Projects, Production, Decommissioning and Maintenance ("the Five Topics"). There were two additional claims. First, a claim for breach of contractual warranties. Second, a claim (described as "the PEDI Claim") for an indemnity for losses arising after 1 January 2012 as a result of the conduct of the Seller before that date concerning three of the Five Topics: Reserves, Decommissioning and Maintenance. The various claims are explained in detail later in this judgment at [26]–[27] below.

4 Pursuant to Procedural Order No. 1, the Arbitration proceeded on the basis of the memorials and not the pleadings track. Thus, while the documents filed carried titles commonly used to describe pleadings in a pleadings track, they were not "pleadings" in the sense used in the pleadings track and therefore did not adhere to the strict rules of pleadings in such a track. Instead, consistent with the memorial system, the case was set out in a mix of assertion of facts, and submissions on the facts and the law supported by key documents, witness statements and expert reports annexed thereto.

5 The Arbitration was heard by a three-member tribunal ("the Tribunal"), who are esteemed and experienced members of the international arbitration community. The Arbitration was bifurcated into a liability phase and an assessment of damages phase. Over the course of two years, three partial awards were issued by the Tribunal. The first partial award concerned the claim for breach of contractual warranties ("the First Partial Award"). The second partial award related to the deceit claim concerning Reserves and the PEDI Claim ("the Second Partial Award"). The third partial award related to the deceit claims concerning Production, Projects, Maintenance and Decommissioning ("the

Third Partial Award"). We elaborate on the findings of the Second Partial Award and the Third Partial Award respectively at [29] and [35] below.

6 The Seller was dissatisfied with the Second Partial Award and Third Partial Award. It filed Originating Summons No 7 of 2020 ("OS 7") on 28 April 2020 and Originating Summons No 9 of 2021 ("OS 9") on 19 July 2021 to respectively set aside the Second Partial Award and Third Partial Award. The Seller also filed Originating Summons No 8 of 2020 ("OS 8") on 8 July 2020 to remove the Presiding Arbitrator ("the President") on the grounds of apparent bias. We shall refer to OS 7, OS 8 and OS 9 individually by the cause number and collectively as "the Applications".

7 Having considered the evidence and the parties' submissions, we dismiss the Applications in their entirety. Given that the Applications share the same factual substratum and raise similar legal principles, we have sought to streamline our analysis by setting out the relevant facts and applicable legal principles collectively before addressing the submissions for each of the Applications in turn.

Commercial context of the dispute

8 We begin with the commercial context of the dispute before the Tribunal. One of the key factual inquiries before the Tribunal was whether the Subsidiary's oil and gas reserves were properly evaluated and recognised by the Seller in accordance with the applicable standards. The main set of standards that was referred to was the US Securities and Exchange Commission ("SEC") oil and gas reserve standards ("the SEC Standards").

9 To understand the SEC Standards, the Tribunal relied on a joint report that was prepared by the experts of both parties dated 4 October 2017 and

updated on 1 June 2018 ("the Joint Reserves Report") which was tendered in the Arbitration. While the experts disagreed on how the SEC Standards should be interpreted and applied, they reached a high level of agreement on the applicable standards and most of the definitions therein.

10 The Joint Reserves Report set out the structure of the SEC Standards. The SEC Standards comprised Regulation S-X Part 210 Rule 4-10 of the United States Code of Federal Regulations ("Rule 4-10"), which provides definitions and requirements for booking reserves, and the further guidance provided by the SEC in formal documents known as the "Compliance and Disclosure Interpretations" ("C&DI Questions"). We reproduce definitions of the relevant terms in Rule 4-10 and salient extracts from the C&DI Questions:

(a) The term "reserves" is defined in Rule 4-10(a)(26) as follows:

> Reserves are estimated remaining quantities of oil and gas and related substances anticipated to be *economically producible*, as of a given date, by application of development projects to known accumulations. In addition, there must exist, or there must be a reasonable expectation that there will exist, the legal right to produce or a revenue interest in the production, installed means of delivering oil and gas or related substances to market, and all permits and financing required to implement the project…
>
> [emphasis added]

(b) The term "economically producible" is defined in Rule 4-10(a)(10) as follows:

> [t]he term economically producible, as it relates to a resource, means a resource which generates revenue that exceeds, or is reasonably expected to exceed, the costs of the operation.

(c) The term "proved reserves", which we shall refer to as "1P Reserves", is defined in Rule 4-10(a)(22) as follows:

> Proved oil and gas reserves are those quantities of oil and gas, which, by analysis of geoscience and engineering data, can be estimated with *reasonable certainty to be economically producible* – from a given date forward, from known reservoirs, and under existing economic conditions, operating methods, and government regulations – prior to the time at which contracts providing the right to operate expire, unless evidence indicates that renewal is reasonably certain, regardless of whether deterministic or probabilistic methods are used for the estimation. The project to extract the hydrocarbons must have commenced or the operator must be reasonably certain that it will commence the project within a reasonable time…
>
> [emphasis added]

(d) The term "reasonable certainty" is defined in Rule 4-10(a)(24) as follows:

> If deterministic methods are used, reasonable certainty means a high degree of confidence that the quantities will be recovered. If probabilistic methods are used, there should be at least a 90% probability that the quantities actually recovered will equal or exceed the estimate. A high degree of confidence exists if the quantity is much more likely to be achieved than not, and, as changes due to increased availability of geoscience (geological, geophysical, and geochemical), engineering, and economic data are made to estimated ultimate recovery (EUR) with time, reasonably certain EUR is much more likely to increase or remain constant than to decrease.

(e) The term "probable reserves" is defined in Rule 4-10(a)(18) as follows:

> Probable reserves are those additional reserves that are *less certain to be recovered than proved reserves* but which, together with proved reserves, are *as likely as not to be recovered.*
>
> > (i) When deterministic methods are used, it is *as likely as not* that actual remaining quantities recovered will exceed the sum of estimated proved plus probable reserves. When probabilistic methods are used, there should be *at least a 50%* probability that the actual

> quantities recovered will equal or exceed the proved plus probable reserves estimates.
>
> [emphasis added]

(f) The term "possible reserves" is defined in Rule 4-10(a)(17) as follows:

> [p]ossible reserves are those *additional reserves that are less certain to be recovered than probable reserves*.
>
> > (i) When deterministic methods are used, the total quantities ultimately recovered from a project have a *low probability* of exceeding proved plus probable plus possible reserves. When probabilistic methods are used, there should be *at least a 10% probability* that the total quantities ultimately recovered will equal or exceed the proved plus probable plus possible reserves estimates.
> >
> > [emphasis added]

(g) We refer to the sum of 1P Reserves and probable reserves as "2P Reserves" and the sum of 2P Reserves and possible reserves as "3P Reserves".

(h) Reserves were either "developed" or "underdeveloped". The term "developed reserves" is defined in Rule 4-10(a)(6) as follows:

> Developed oil and gas reserves are reserves of any category that can be expected to be recovered:
>
> > (i) Through *existing wells* with existing equipment and operating methods or in which the cost of the required equipment is relatively minor compared to the cost of a new well…
> >
> > [emphasis added]

(i) The term "undeveloped reserves" is defined at Rule 4-10(a)(41) as:

> Undeveloped oil and gas reserves. Undeveloped oil and gas reserves are reserves of any category that are expected to be recovered from *new wells on undrilled acreage, or from existing wells where a relatively major expenditure is required for recompletion.*
>
> …
>
> ii. *Undrilled locations can be classified as having undeveloped reserves only if a development plan has been adopted* indicating that they are scheduled to be drilled within five years, unless the specific circumstances, justify a longer time.
>
> iii. Under no circumstances shall estimate for undeveloped reserves be attributable to any acreage for which an application of fluid injection or other improved recovery technique is contemplated, unless such techniques have been proved effective by actual projects in the same reservoir or an analogous reservoir, as defined in paragraph (a)(2) of this section, or by other evidence using liable technology establishing reasonable certainty.

[emphasis added]

(j) What constitutes adoption of a "development plan" in relation to the definition of "undeveloped oil and gas reserves" (see [10(g)] above) is clarified in the answer to Question 131.04 of the C&DI Questions:

> Question: The definition of "undeveloped oil and gas reserves" requires that the company have adopted a development plan with respect to the reserves. *What constitutes adoption of a development plan?*
>
> Answer: The mere intent to develop, without more, does not constitute "adoption" of a development plan and therefore would not, in and of itself, justify recognition of reserves. *Rather, adoption requires a final investment decision.*

[emphasis added]

(k) The C&DI Questions also clarify that it is *not possible* for proved, probable and possible reserves to be aggregated into one total reserve estimate. The answer to Question 105.01 of the C&DI Questions sets out the SEC's position in full:

> Question: In a deterministic reserve evaluation, when you have determined specific, individual estimates for proved, probable and possible reserves, is it acceptable to sum up these separate reserve categories into one total reserve estimate?
>
> Answer: No. Because the categories of proved, probable and possible reserves have difference levels of certainty, it is not appropriate to sum up the individual deterministic estimates for these reserves into one total reserve estimate. The individual estimates for each category should be disclosed as separate estimates, with difference in certainty for each estimate fully explained

(l) Further, the C&DI Questions makes clear that probable and possible reserves should only be disclosed in isolation (without proved reserves) in exceptional cases. The response to Question 117.02 of the C&DI Questions sets out the SEC's position in full:

> Question: Can an issuer assign probable or possible reserves in an area in which it does not, or cannot, assign proved reserves?
>
> Answer: Yes. *However, disclosure of unproved reserves without associated proved reserves should be done only in exceptional cases*, such as for (1) development projects where engineering, geological, marketing, financing and technical tasks have been completed, but final regulatory approval is lacking or (2) improved recovery projects, at or near primary depletion, that await production response. Reserves would not be assigned without well penetration of the

> subject reservoir (rock volume) in the contiguous area that yields technical information sufficient to support the attributed reserve category. *Volumes that are not economically producible are not reserves of any classification and should not be disclosed.*
>
> [emphasis added]

11 In summary therefore, reserves are estimated remaining quantities of oil and gas and related substances that are anticipated to be economically producible. Reserves would be regarded as economically producible if the resources needed to extract them exceed or are reasonably expected to exceed the costs of production. Reserves are classified into three categories, "proved", "probable" and "possible", depending on the probability recovery – at least 90% for "proved", at least 50% for "probable" and at least 10% for "possible". Reserves may also take two forms – "developed" and "undeveloped". If recovered from existing wells with existing equipment or new equipment with relatively minor costs compared to a new well, they would be classified as developed reserves. If recovered from new wells in undrilled locations or existing wells with major expenditure, they will be classified as undeveloped reserves subject to a qualification – as regards reserves in new wells in undrilled locations, a development plan must have been adopted.

12 The Arbitration, *inter alia*, related to whether 2P Reserves, in particular "probable" reserves in undeveloped oil and gas reserves, were properly recognised. This in turn revolved around whether a development plan was adopted, which was the central issue in the Arbitration. This brought into sharp focus the proper interpretation of terms, such as "development plan" and "final investment decision" ("FID"), and whether the Seller had a proper basis for recognising and disclosing the reserves of the Subsidiary. This was heavily

contested in the Arbitration and we address the arguments in our analysis beginning at [117] below.

13 Beyond the SEC Standards that were used to measure the reserves of the Subsidiary, two other terms require explanation to provide context to the Production Representation (defined at [18] below). These are pertinent to the Third Partial Award. In this judgment, "Production" is defined as the amount of hydrocarbons which are forecasted to be extracted in any given year, while "Production Efficiency" ("PE") is a metric measuring the ratio of actual production to potential production.

14 Having set out the salient terms, we turn now to provide a timeline of the significant events leading up to the Applications.

The parties enter negotiations for the purchase of the Subsidiary

15 On 23 July 2012, the parties entered into the SPA. At the material time, the Subsidiary held equity interests in 46 oil and gas fields ("the Fields") and operated 35 of those Fields. The Fields held oil and gas reserves ("the Reserves") that were potentially extractable through oil and gas projects.

16 During the course of the negotiations in 2012 and as part of its sales case to the Purchaser, which we shall term as "Project Alpha", the Seller made several representations to the Purchaser. Two are of significance to the present action: one pertained to the Reserves, and the other pertained to the production capabilities of the Subsidiary.

The Reserves and the Reserves Representation

17 First, the Seller represented to the Purchaser that the Subsidiary had significant levels of Reserves, measured and booked in accordance with the

SEC Standards as of 2011. Specifically, the Purchaser alleged that the following representation, which we shall refer to as the "Reserves Representation", was falsely made by the Seller:

> That [the Subsidiary] had 1P reserves of 249.4 Mmboe and 2P reserves of 455.9 Mmboe as at year end 2011, evaluated and disclosed in accordance with the standards of the US Securities and Exchange Commission that were in place at the time ("SEC Standards") together with Business Plan 2P reserves of 489 Mmboe.

The Subsidiary's production capabilities and the Production Representation

18 Second, the Seller made representations to the Purchaser about the forecasted production and PE levels that the Subsidiary was capable of achieving. These were also alleged to be false. Specifically, a number of financial models and sales cases were provided by the Seller to the Purchaser, though, unbeknownst to the Purchaser, the Seller had also prepared radically different versions of these documents for internal consumption only. These versions, which contained technical and financial data such as the Subsidiary's projected levels of production, the PE, capital expenditure ("Capex"), operating expenditure ("Opex"), and net present value ("NPV"), were deliberately withheld from the Purchaser. For convenience, we refer to these financial models and sales cases collectively as the "Production Representation", although we point out that the exact scope of the Production Representation is the principal issue in OS 9. We discuss this more fully at [228]–[287] below.

The Seller's executives

19 The Reserves Representation and Production Representation were primarily made by three executives of the Seller who were involved in both the Subsidiary's end of 2011 evaluation process of the Reserves and Project Alpha. We refer to them as "Mr X", "Mr Y" and "Mr Z".

20 Mr X was the Subsidiary's Senior Vice-President from February 2011 to May 2014. Prior to this, he was the Subsidiary's Wells Vice-President the Vice-President for the Northern Business Area, and Deputy Managing Director of the Subsidiary's Norwegian business.

21 Mr Y was the Subsidiary's Vice-President, Northern Business Area, from March 2010 to August 2011 and its Vice-President, Resource Renewal, from August 2011 to November 2014. Mr Y subsequently left the Subsidiary.

22 Mr Z was the Seller's Independent Qualified Reserves Evaluator ("IQRE") from January 2004 to May 2012 and Vice-President, Global Business Development from January 2004 to April 2013. It is pertinent that Mr Z's role as the IQRE required him to perform an audit function on the integrity of the Subsidiary's estimate of Reserves. However, his role as the Vice-President, Global Business Development also required him to maximise the Subsidiary's Reserves in order to improve the business case for Project Alpha – in other words, to make the Subsidiary a more attractive target for acquisition. As is readily apparent, Mr Z's position created a conflict of interest. Mr Z's conflict was an important consideration in the Tribunal's assessment of the credibility and honesty of the representations.

The Purchaser brings arbitration proceedings against the Seller

23 Completion of the SPA took place on 17 December 2012 with the Purchaser acquiring a 49% interest in the Subsidiary. The SPA was governed by English law and contained an arbitration agreement ("the Arbitration Agreement") that stipulated Singapore as the seat of the arbitration.

24 Following completion, the Purchaser discovered that various representations made by the Seller including the Reserves Representation and

Production Representation were false and were made in order to present the Subsidiary as a more attractive target for acquisition. In particular, the Purchaser realised that the Seller had not recognised the Subsidiary's year-end 2011 Reserves in accordance with the SEC Standards. The Subsidiary's year-end 2011 Reserves were inflated, as a result of which the Reserves were recognised in relation to "projects" that were highly speculative.

25 Consequently, on 13 July 2015, the Purchaser commenced the Arbitration against the Seller for various claims pursuant to the Arbitration Agreement. Each party nominated their respective arbitrators, and the two party-nominated arbitrators then nominated the President.

26 Three principal claims were advanced by the Purchaser in the Arbitration:

(a) a claim for breach of contractual warranties under the SPA ("the Warranty Claim");

(b) a claim in the tort of deceit ("the Deceit Claim"), relating to the Five Topics; and

(c) "the PEDI Claim", a contractual claim for indemnification under a Pre-Effective Date Indemnity ("PEDI") clause in the SPA ("the PEDI Clause"), that date being 1 January 2012, which concerned three of the Five Topics – Reserves, Decommissioning and Maintenance.

27 The thrust of the Purchaser's claims was that it had overpaid for its stake in the Subsidiary as a result of the fraudulent misrepresentations of the Seller. This led to the Purchaser valuing the Subsidiary at a higher price than its actual

value, and consequently overpaying for its stake in the Subsidiary. The Purchaser sought damages to be assessed, claiming some US$5 billion.

28 Unsurprisingly, the proceedings were involved given the stakes. The Arbitration was heard over 35 days and the Tribunal heard oral evidence from 34 factual witnesses and 11 expert witnesses. The record of the Arbitration comprised more than 427,000 pages. This explains in part the length of the arbitral awards. The following timelines of the Arbitration are salient:

(a) On 13 July 2015, the Purchaser filed its Notice of Arbitration ("the NoA") against the Seller. The Seller filed its Response to the Notice of Arbitration ("the RNoA") on 1 October 2015.

(b) On 25 May 2016, the Purchaser filed its Statement of Claim ("the SOC") with submissions, witness statements and relevant appendices that contained the documents and authorities that were relied upon.

(c) Six months later on 25 November 2016, the Seller filed its Statement of Defence ("the SOD"). This filing was also accompanied by submissions and witness statements that were relied upon.

(d) On 1 December 2016, the Seller submitted an application for determination of the Warranty Claim as a preliminary issue. The principal argument was that the claim was barred by limitation.

(e) At a procedural conference on 31 January 2017, the Tribunal ordered the Arbitration to be bifurcated, with liability being decided first ("the Liability Phase"), and damages to follow if liability was established ("the Quantum Phase").

(f) On 31 May 2017, the Purchaser filed its Statement of Reply ("the SOR"), which was accompanied by witness statements and expert reports.

(g) On 19 and 20 June 2017, the Tribunal heard submissions on the application for determination of the preliminary issue.

(h) On 2 August 2017, the Seller filed a Statement of Rejoinder ("the Rejoinder"), annexing the witness statements and expert reports that were relied upon. At the same time, the Purchaser also submitted expert reports.

(i) On 15 August 2017, the Tribunal issued the First Partial Award upholding the argument on limitation and dismissing the Warranty Claim.

(j) The parties filed Pre-Hearing Written Submissions ("the PHS") in December 2017 *on all of the remaining claims*. This was followed by a hearing in Singapore between 29 January 2018 and 22 February 2018, where parties made oral opening submissions and the Tribunal heard evidence from almost all of the factual witnesses from both sides. The Arbitration then moved to London for a further hearing between 18 to 29 June 2018. At this hearing, the Tribunal heard evidence from a further factual witness and all the expert witnesses. Subsequently, between 9 to 11 July 2018, parties made oral closing submissions.

(k) On 28 September 2018, the parties filed Post-Hearing Briefs ("the PHB"). The Purchaser subsequently requested leave to rely on additional authorities and leave was granted for the parties to file replies to the PHB. These were filed on 12 October 2018.

The Tribunal issues the Second Partial Award

29 On 13 October 2019, the Tribunal wrote to parties stating that it "envisage[d] that a Partial Award dealing with the Reserves claims" would be completed. Several months later, on 29 January 2020, the Tribunal delivered the Second Partial Award which dealt only with the Deceit Claim on Reserves and the PEDI Claim on Reserves. In the Second Partial Award, the Tribunal ruled in the Purchaser's favour on the Deceit Claim on Reserves and the PEDI Claim on Reserves and found, *inter alia*, that:

(a) the Reserves Representation was false and the individuals who made it were recklessly indifferent as to its falsity such that the Seller was liable to the Purchaser for fraudulent misrepresentation; and

(b) the Seller was liable to indemnify the Purchaser under the PEDI Clause for losses resulting from the Seller's mis-booking of the Reserves at the end of 2011.

The Seller challenges the President's appointment

30 After the release of the Second Partial Award, the Seller filed a Notice of Challenge to the Singapore International Arbitration Centre ("SIAC") Registrar on 14 February 2020, asking that the President withdraw from the Arbitration, or that he be removed by the SIAC because there were justifiable doubts over his independence or impartiality. The basis for this assertion was the President's appointment on 26 August 2018 to a panel of experts ("the Panel") constituted by the highest court in Ruritania ("the Ruritanian Court").

31 From the sequence of events above at [28], the appointment of the President was an event that occurred after the oral closing submissions by the parties from 9 to 11 July 2018 and the filing of replies to the PHB on 12 October

2018. The Seller asserted that its lawyers only discovered the appointment after the Second Partial Award was issued. It is undisputed that (a) the President was appointed to the Panel by the Ruritanian Court, and (b) this fact was not disclosed to the parties by the President until 18 February 2020, after the challenge was filed and when the President provided his comments to explain that there was no basis for any doubt over his impartiality – a period of around 18 months (*ie* 28 August 2018 to 18 February 2020). His co-arbitrators also provided comments, likewise stating that there was no bias or lack of impartiality on the part of the President during the Tribunal's deliberations.

32 Between February and March 2020, the parties filed their papers for the challenge, and on 8 June 2020, the SIAC released its decision, dismissing the challenge.

The Seller files OS 7 and OS 8

33 Before the SIAC could come to a decision on the challenge, the Seller filed OS 7 on 28 April 2020 to set aside the Second Partial Award pursuant to s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") and/or Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law").

34 After the SIAC dismissed the Seller's challenge on 8 June 2020, the Seller filed OS 8 on 8 July 2020 to remove the President as the Presiding Arbitrator on the grounds that there was a reasonable suspicion that he lacked independence and/or impartiality, pursuant to Arts 12(2) and 13(3) of the Model Law read with ss 3 and 8 of the IAA.

The Tribunal issues the Third Partial Award

35 On 20 April 2021, the Tribunal issued the Third Partial Award. The award dealt with the Deceit Claim on Production, Projects, Maintenance and Decommissioning, and the PEDI Claim on Decommissioning and Maintenance. In the Third Partial Award, the Tribunal ruled in favour of the Purchaser on the Deceit Claim on Production and against the Purchaser on the Deceit Claim on Projects, Maintenance and Decommissioning. The Tribunal also ruled against the Purchaser on the remaining PEDI Claim on Decommissioning and Maintenance.

The Seller files OS 9

36 On 19 July 2021, the Seller filed OS 9 to set aside the Third Partial Award pursuant to s 24(*b*) of the IAA and/or Art 34(2) of the Model Law.

The Applications

37 We turn now to outline the Applications.

OS 8 – removal of the President

38 In OS 8, the Seller seeks the removal of the President on the grounds of apparent bias as there are justifiable doubts over the President's impartiality, *ie*, there was an appearance of bias. There is no allegation of actual bias. The foundation of the Seller's assertion is the President's appointment to the Panel on 26 August 2018. The Seller also relies on this ground as further basis for setting aside both the Second Partial Award and Third Partial Award in OS 7 and OS 9 respectively.

39 The Purchaser characterises the Seller's efforts as an opportunistic challenge and argues that there are no reasons to doubt the President's impartiality, *ie*, there is no appearance of bias. The thrust of its argument is that there is no connection or link between the prospect of bias and the President's appointment to the Panel, and thus there can be no reason to think that the President would not act impartially as a result of accepting the appointment.

OS 7 – application to set aside the Second Partial Award

40 In OS 7, the Seller seeks to set aside the Second Partial Award on the following bases:

(a) First, by dealing only with the Deceit Claim on Reserves in the Second Partial Award, the Tribunal breached the parties' agreed arbitral procedure and failed to act in accordance with the agreement of the parties. The Seller submits that this prejudiced its case as the Deceit Claim on the Five Topics were interconnected and the evidence and conclusion on one would affect the conclusions and outcomes of the others.

(b) Second, that the Tribunal had exceeded the scope of its jurisdiction as the Second Partial Award dealt with issues that did not fall within the submission to arbitration and/or contained decisions on matters beyond the scope of the submission.

(c) Third, that the Tribunal breached the rules of natural justice as the Seller was unable to present its case on several issues and that the Tribunal's decision on these issues could not have been reasonably expected given the parties' cases.

(d) Fourth, that the Second Partial Award be set aside in whole, on the ground that there is a reasonable suspicion that the President lacked independence and/or impartiality. The Seller submits that this is a breach of the rules of natural justice in connection with the making of the Second Partial Award, which has in turn prejudiced the rights of the Seller. In this regard, the Seller relies on the same arguments made in OS 8 (see [38] above).

41 In response, the Purchaser submits that there was no agreed arbitral procedure that there would only be a single award dealing with all the Deceit Claims, and thus there could be no breach as alleged. As regards the argument on excess of jurisdiction, the Purchaser submits that the Seller is in fact complaining about alleged breaches of natural justice and not excess of jurisdiction. On the point on alleged breach of natural justice, the Purchaser submits that there was no breach of natural justice as the Tribunal properly considered the parties' arguments and made a decision that was referrable to those arguments. With regard to the final ground of challenge – that there was a reason to believe that the President lacked independence and/or impartiality – the Purchaser relies on the same arguments it raises in OS 8 (see [39] above), and submits that the challenge should be dismissed.

OS 9 – application to set aside the Third Partial Award

42 In OS 9, the Seller seeks to set aside the Third Partial Award on similar bases to OS 7:

(a) First, that the Third Partial Award dealt with a dispute not falling within the submission to arbitration and/or contained decisions on matters beyond the scope of the submission.

(b) Second, that the Tribunal breached the rules of natural justice as the Seller was unable to present its case on several issues thereby prejudicing its rights.

(c) Third, that the Third Partial Award be set aside in whole in the event that the Second Partial Award is set aside in OS 7 on the ground that there is a reasonable suspicion that the President lacked independence and/or impartiality. The Seller submits that this is a breach of the rules of natural justice in connection with the making of the Third Partial Award, which has in turn prejudiced the rights of the Seller.

43 In response, the Purchaser refutes the allegations made by the Seller. Regarding the excess of jurisdiction point, the Purchaser submits that it is clearly evident from the memorials of the parties that the issues which parties had submitted to arbitration were much broader than suggested by the Seller. On the breach of natural justice point, the Purchaser submits that a fair opportunity was given to the Seller to deal with the issues raised and thus, no prejudice was suffered. Lastly, regarding the issue of the lack of independence and/or impartiality of the President, the Purchaser repeats its arguments in OS 7 and OS 8 and submits that the challenge should be dismissed.

Issues to be determined

44 Viewing the Applications in totality, four main issues arise for consideration:

(a) did the President's appointment to the Panel raise an appearance of bias (see [38], [40(d)] and [42(c)] above) ("Issue 1");

(b) was there a breach of an agreed arbitral procedure as a result of the Second Partial Award addressing only the Deceit Claim on Reserves (see [40(a)] above) ("Issue 2");

(c) did the Tribunal make any findings in the Second and Third Partial Awards that were in excess of jurisdiction (see [40(b)] and [42(a)] above) ("Issue 3"); and

(d) did the Tribunal make any findings in the Second and Third Partial Awards that were in breach of natural justice (see [40(c)] and [42(b)] above) ("Issue 4")?

Preliminary issue – admitting the Third Partial Award

45 Before we turn to address the above issues, we briefly address the question of the admissibility of the Third Partial Award. The Third Partial Award was issued on 20 April 2021 (see [35] above). This was after the oral hearing of OS 7 and OS 8. The Purchaser took the view that the Third Partial Award was relevant to the determination of OS 7 and OS 8, specifically on the issue of the President's apparent bias and the implications if that were the case. It thus wrote to the court to state that it would seek the Seller's agreement to introduce the Third Partial Award into the record for OS 7 and OS 8, and that the parties make submissions on how it would impact the issues in OS 7 and OS 8. The Seller did not agree, taking the position that the Third Partial Award was not relevant to the issues in OS 7 and OS 8.

46 As a result, the parties were directed to file submissions on the matter. The Purchaser wrote to court on 20 May 2021 enclosing brief written submissions. The Seller tendered its written submissions on 7 June 2021. An oral hearing was convened on 29 June 2021.

47 The Purchaser submitted that there were two questions before the Court: (a) whether the Third Partial Award was admissible for the purpose of OS 7 and OS 8, and (b) whether, as a matter of case management, there was any reason for the Court not to admit it. The Seller did not disagree with the framing of issues, and argued that it was "difficult to see how the Third Partial Award is at all relevant to the issues for determination in OS 7 and 8, having been issued over one year after the Second Partial Award and nearly two months after submissions had concluded" [emphasis in original].

48 Thus, the dispute between the parties was on the *relevance* of the Third Partial Award to OS 7 and OS 8. The Purchaser's main argument was that the Third Partial Award was relevant as it "directly undercuts many of the points made by [the Seller] in OS 7 and OS 8." The Purchaser contends that the Third Partial Award was relevant to Issues 1 and 2. Accordingly, we deal with the admissibility and relevance of the Third Partial Award when dealing with the merits of these issues (see [77]–[86], [94]–[99] below).

Issue 1: Apparent bias of the President

49 As noted above at [30], the Seller had originally brought a challenge against the President before the SIAC, seeking his withdrawal from the Arbitration, or an order that he be removed by the SIAC. The challenge was dismissed, and the Seller then brought OS 8 seeking an order for the President's removal on the basis of apparent bias. In addition, the Seller relies on the allegation made in OS 8 as grounds for setting aside the Second Partial Award and Third Partial Award respectively in OS 7 and OS 9.

50 It is helpful to begin by outlining the applicable legal principles on apparent bias. The law on apparent bias in Singapore was definitively restated in the case of *BOI v BOJ* [2018] 2 SLR 1156 ("*BOI*"). The general inquiry is an

objective one: are there circumstances that would give rise to a *reasonable suspicion or apprehension* of bias in the *fair-minded and informed observer*? In this regard, it is important to note that the fair-minded and informed observer would take the trouble to inform himself *on all relevant facts* that are capable of being known by members of the public generally, and that he would also be able to *consider what has been seen or read together with its proper context*: *BOI* at [99]. He would also reserve judgment on every point until he fully understands both sides of the argument: *BOI* at [101].

51 The test is not whether bias has affected the decision. That would be a case of actual bias. Instead, the test is whether there exist facts and circumstances that give rise to a reasonable suspicion or apprehension of bias in the fair-minded and informed observer. This is a fact-specific and objective inquiry, involving: (a) objectively identifying the facts and circumstances that are salient to the question of bias, and (b) understanding whether the fair-minded and informed observer would reasonably entertain an apprehension of bias from those facts and circumstances. The fair-minded and informed observer does not have an interest in the outcome of the matter other than the general interest shared by the public in the fair and proper administration of justice – namely, that justice is not only seen to be done but is manifestly and undoubtedly seen to be done. This is a question of natural justice and due process, of which the perceived independence and impartiality of the adjudicator is a facet. Such considerations transcend both the common law and civil law traditions, and apply equally to arbitral tribunals as much as they do to courts and other forums that exercise quasi-judicial powers: see *Sim Yong Teng and another v Singapore Swimming Club* [2016] 2 SLR 489 in the context of a management committee of a social club; and *Wong Kok Chin v Singapore Society of Accountants* [1989] 2 SLR(R) 633 in the context of a disciplinary tribunal. As noted in the decision of the Swiss Federal Tribunal in *X S.p.A v. Y B.V*, 4A 386/2015, the assurance

of the independence and impartiality of a tribunal is "one of the pillars of any State ruled by law".

52 As noted earlier at [30], the Seller's challenge on the President's impartiality is based on his appointment to the Panel on 26 August 2018. This appointment took place after the parties' oral closing submissions from 9 to 11 July 2018 and before the filing of the PHB on 12 October 2018 (see [31] above). Thus, the allegation of apparent bias really concerns the deliberations of the President in relation to the Second and Third Partial Awards. In this regard, the substance of the Seller's submission is that the President ought to have recused himself after all of the evidence and much of the closing arguments in the Arbitration had been presented and heard. But if the President had done so, it would have had the effect of derailing an arbitration that was concluding on the Liability Phase. This paints in stark terms the consequence of accepting the argument that the Seller makes. In view of this, it seems to us that there must be a compelling case of apparent bias before it may be said that the President ought to have taken this course.

53 It is for the Seller to show that the fair-minded and informed observer would harbour justifiable doubts on the impartiality of the President by reason of his appointment to the Panel. The Seller seeks to do this by drawing a link between the Purchaser and the Panel and by extension the President's appointment thereto.

54 We expand on the Seller's arguments and the various links it attempts to draw in the analysis below at [55]–[56]. However, to state our conclusion upfront, in our view, it is clear that no doubts over the President's impartiality as a result of his appointment to the Panel would have arisen in the mind of the fair-minded and informed observer. We therefore decline to remove the

President and set aside the Second and Third Partial Awards on the basis of apparent bias.

The Panel has no link to the Purchaser

55 We first consider the Seller's factual basis for asserting that there is apparent bias, *ie*, that there is a direct link between the Purchaser and the Panel. In our view, the premise is flawed as the evidence does not support a link, let alone a direct link, between the Panel and the Purchaser. A belief to the contrary would be "fanciful" and not something that a fair-minded and informed observer would have entertained. In coming to this conclusion, we keep in mind that such an observer must first and foremost be fair-minded, and cannot be unduly complacent, sensitive or most importantly, suspicious: *BOI* at [103].

56 The Seller draws three connections. The details of its arguments are as follows:

(a) First, the Seller draws a connection between the Purchaser and the Ruritanian Government. In particular, it emphasises the latter's interest in the outcome of the Arbitration. The Seller contends that the Purchaser is "closely connected" to Ruritania as the two entities are state-owned and part of a group that comprises the largest and most valuable state-owned entities in Ruritania. Senior executives in the Purchaser are political appointment holders in Ruritania. Thus, there is a close and undeniable connection between the Ruritanian Government and the Purchaser, and the latter is therefore under the control of the former. Accordingly, Ruritania has a direct interest in the outcome of the Arbitration as it stands to benefit if the Purchaser succeeds.

(b) Second, the Seller draws a connection between the Ruritanian Government and the Ruritanian Court, and by extension the Panel. It argues that Ruritania's legal system does not emphasise true separation of powers between the judiciary (the Ruritanian Court) and the executive (the Ruritanian Government), and thus, there is "no relevant distinction" between the Ruritanian Government and the Ruritanian Court. This means that in substance, the Ruritanian Court is part of the Ruritanian Government. As the Panel was constituted by the Ruritanian Court, it too is part of the Ruritanian Government.

(c) Third, the Seller draws a connection between the President and the Ruritanian Government. The President is in a position where he is able to impact the Purchaser's, and thus the Ruritanian Government's, interests in the Arbitration. By accepting the invitation to the Panel, the President was in direct engagement with the ultimate owner of the Purchaser, the Ruritanian Government in view of the first two connections identified above. This, the Seller argues, raises a reasonable suspicion of bias in the fair-minded and informed observer that the President may be aligned with the interests of the Purchaser.

57 In our view, the connections that the Seller draws are tenuous. In particular, the link that is drawn between the President to the Ruritanian Government is contrived. The Seller draws this connection on the basis of circumstances which would not raise doubts over the President's impartiality in the fair-minded and informed observer. It is somewhat unfortunate that such an attempt has been made; an assertion of bias, whether apparent or actual, has to be carefully considered and made only where there is a compelling factual basis. Such a basis does not exist here. We explain.

58 We are prepared to assume for the moment that the Ruritanian Government *does own* the Purchaser. Hence, the crux of the issue turns on the second connection that the Seller makes – that there is no real distinction between the Ruritanian Government and the Ruritanian Court. The Seller must establish this connection for the third connection – that the President was engaged by the Ruritanian Government – to be relevant and for the challenge of apparent bias to carry. In essence, the second connection is made on the basis of the contention that Ruritania's constitutional structure does not ensure separation of powers between the Ruritanian Government and the Ruritanian Court. As the Panel is constituted by and therefore part of the Ruritanian Court, it and the appointees thereto are indistinguishable from and do not act independently of the Ruritanian Government.

59 We state at the outset that it is not the function of this court to declare or conclude whether as a matter of law and fact the Ruritanian Court is independent from the Ruritanian Government. That is not the issue nor inquiry before us. Instead, the inquiry is whether the fair-minded and informed observer would have drawn the second connection and consequently the third connection. For that assessment to be made, regard must be had to the facts and circumstances that would have been known to the fair-minded and informed observer. Such facts and circumstances would be based on the evidence that the parties have placed before the court and assert to be relevant to this question. This is where the Seller's case on the second connection flounders as the evidence does not support the connection it seeks to draw.

60 The Purchaser adduced expert evidence from an expert on Ruritanian law who expressed the opinion that Ruritania's judiciary exercised its power independently of the Ruritanian Government, and its adjudicatory independence was protected by the law per Ruritania's constitution.

61 The Seller did not offer any expert evidence to rebut this position. Instead, it relied primarily on "internet searches", excerpts from speeches made at Ruritanian conferences and newspaper articles that suggested that there was no separation of powers in Ruritania. However, such material can hardly constitute reliable material that will inform the thinking of a fair-minded and informed observer. The observer would have assessed such material against the backdrop of Ruritania's constitutional structure, which according to the Purchaser's expert, provides that its judiciary enjoys adjudicatory independence (see [61] above).

62 Faced with the difficulty of having failed to adduce expert evidence to rebut the Purchaser's expert evidence on Ruritania's constitutional structure, the Seller invites this court to ignore the evidence. It does so by making the point that the test for apparent bias involves a "non-judicial observer" who "should not be taken to have detailed knowledge of the law" citing *BOI* at [98]. Thus, the Seller argues that the Purchaser's expert evidence is of no support, the suggestion being that the fair-minded and informed observer would not have such knowledge.

63 This argument is misconceived. Although the fair-minded and informed observer is not a lawyer, he or she is "not wholly uninformed and uninstructed about the law in general" and would "take the trouble to inform himself or herself on all relevant facts that are capable of being known by members of the public generally": *BOI* at [99]. What is meant by the fair-minded and informed observer not having "detailed knowledge of law" is that the observer cannot be taken to have "*specialised* knowledge" [emphasis added]. In our opinion, knowledge that Ruritania's judiciary operates independently from other branches of government is not specialised knowledge. It is certainly something that is capable of being known by members of the public. It seems artificial to

assert on the one hand that the fair-minded and informed observer would be aware of the materials that the Seller relies on and on the other hand, assert that he would not have made the effort to understand the true legal position. The fair-minded and informed observer would have considered both viewpoints, such that he would have the correct appreciation of the context and arguments of both parties.

64 Thus, a fair-minded and informed observer would understand that the Ruritanian Court (and by extension the Panel) sits distinct from the Ruritanian Government. Thus, even if the fair-minded and informed observer has knowledge of the press articles and speeches that the Seller makes reference to (see [61] above), he would view such material against the backdrop of his understanding of the structure of the Ruritanian Court *vis a vis* the Ruritanian Government. It is a holistic analysis that the fair-minded and informed observer would undertake. Thus, the second connection would not be made by the fair-minded and informed observer.

65 There is a further point to be made. This concerns the President's role as a member of the Panel. It is pertinent that this role was not a judicial one or one that involved an adjudicatory function. Instead, the working rules governing the Panel describes the role of its members as providing "opinions, advice and suggestions *independently, objectively and impartially,* and to do so in an *individual capacity based on professional expertise*." This suggests that the President was not part of the Ruritanian Court, and instead would function independently in his capacity as a member of the Panel. Moreover, the President's appointment to the Panel was not a standing appointment – a member of the Panel would only be required to provide his or her services upon the Panel's invitation and their acceptance. In this regard, we find it pertinent

that there was no request for the President to perform any duties as a member of the Panel.

66 From the above, it is apparent that appointment to the Panel would not give rise to a reasonable suspicion or apprehension bias in the fair-minded and informed observer even if the appointee were to adjudicate a matter involving a state-owned entity of Ruritania.

67 We pause here to address two decisions of the Privy Council raised by the parties: *Bolkiah v Brunei Darussalam* [2007] UKPC 62 ("*Bolkiah*") and *Almazeedi v Penner* [2018] UKPC 3 ("*Almazeedi*"). The facts of these cases bear some similarity with one another. Yet both cases reached different conclusions.

68 *Bolkiah* involved an allegation that justifiable doubts had arisen as to the Chief Justice of Brunei's impartiality because the prospects of an extension of his term depended on the Sultan of Brunei. As the proceedings allegedly involved the interests of the Sultan, the allegation was that this caused an appearance of bias on the part of the Chief Justice. This argument was rejected by the Privy Council, which noted that the Chief Justice was a "judge of unblemished reputation", and that a reasonable observer would "dismiss" the "fanciful notion" that he would endanger his reputation to "curry favour with the Sultan" and secure a "relatively brief extension of his contract": *Bolkiah* at [21].

69 In contrast, the majority of the Privy Council in *Almazeedi* found that there *was* an appearance of bias. There, Sir Peter Cresswell ("Cresswell J") (a former English High Court Judge and then judge of the Grand Court of the Cayman Islands) was appointed a judge of Qatar's Civil and Commercial Court.

As a judge of the Grand Court of the Cayman Islands, he was assigned to hear the winding-up of a company whose economic interests were held by Qatari shareholders with strong state connections. Cresswell J made the winding up order and continued to preside over the proceedings until he retired in late 2014. While the proceedings were ongoing, one of the persons representing Qatari interests became Qatar's finance minister and was given direct responsibility for judicial appointments. When this was discovered, Cresswell J's suitability to hear the proceedings was challenged on the basis of apparent bias. The majority of the Privy Council found that apparent bias was established.

70 Lord Sumption dissented in *Almazeedi*, pointing out that the entire case for recusal rested on the notion that a reasonable observer might believe that Cresswell J "might be influenced … by the hypothetical possibility of action being taken against him in Qatar as a result of any decision in the Cayman Islands which was contrary to the Qatari Government's interests". Ultimately, Lord Sumption found this suggestion to "[lie] at the outer extreme of implausibility": *Almazeedi* at [43].

71 It is apparent that *Bolkiah* and *Almazeedi* are conflicting authorities. It is also apparent that *Bolkiah* and the minority view of Lord Sumption in *Almazeedi* are favourable to the Purchaser's position on apparent bias while the majority's view in *Almazeedi* is favourable to the Seller's position. However, it is not necessary for present purposes to resolve the conflict as both *Bolkiah* and *Almazeedi* are distinguishable on the facts. In both cases, the basis of the assertion of apparent bias was that the person who had a direct connection to the appointment of the Chief Justice, in *Bolkiah*, and Cresswell J, in *Almazeedi*, was alleged to be interested in the dispute that was before the court. In *Bolkiah*, it was the Sultan who determined whether the term of the Chief Justice's office would be extended. In *Almazeedi*, it was one of the representatives in the

winding-up proceedings, the Qatar Minister, who was given direct responsibility for Cresswell J's appointment to Qatar's Civil and Commercial Court (where Cresswell J sat concurrently) (see [69] above).

72 This factor is missing in the present case. There is no allegation that any person connected to the Purchaser had any influence on (a) the appointment of the President to the Panel, (b) his continued membership on that committee, or (c) the numbers of engagements or indeed any remuneration that he might receive as a member of that committee. Given that the Panel was constituted by the Ruritanian Court, that would clearly not be the case. If the link is sought to be drawn on the basis of the second connection described above, it fails for the reasons already discussed.

73 Accordingly, *Bolkiah* and *Almazeedi* are not relevant to the present case and we say no more on this point.

The President's non-disclosure does not raise doubts

74 Aside from its primary factual allegation, the Seller also argues that doubts arise by reason of the President's failure to disclose to the parties in a timely manner his appointment to the Panel. It is undisputed that prior to issuing the Second Partial Award, the President was invited to take up an appointment with the Panel on 9 August 2018 and was appointed to the Panel just over two weeks later on 26 August 2018. It is also undisputed that the President only disclosed his appointment to the parties on 18 February 2020, after the issuance of the Second Partial Award (see [30] above).

75 It must be remembered that an arbitrator does not have to disclose every single appointment to the parties. As was held recently by the United Kingdom Supreme Court, an arbitrator only needs to disclose appointments and matters

"which would cause the [reasonable observer] to conclude that there was a real possibility of a lack of impartiality." This, of course, is an objective test: *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 ("*Halliburton*") at [116]. Thus, the test for apparent bias and disclosure are the same – what the fair-minded and informed observer would have perceived. In the circumstances, and in view of our conclusion that there is no reasonable suspicion of bias, it would follow that the question of disclosure does not arise and thus the President's non-disclosure does not raise doubts.

The Third Partial Award dispels a perception of bias

76 In view of our conclusion on apparent bias, it is not necessary to consider the relevance of the Third Partial Award to this issue. For completeness, we are of the view that the Third Partial Award unequivocally puts the point to rest. However, in arriving at this conclusion, we wish to make it abundantly clear that the analysis that follows serves only to supplement our conclusion on apparent bias, and that our conclusion at [66] above stands even without having regard to the Third Partial Award.

The admissibility of the Third Partial Award in OS 7 and OS 8

77 This raises the anterior question of whether the Third Partial Award is admissible in OS 7 and OS 8 given that (a) the assertions therein relate to the Second Partial Award only; and (b) the Third Partial Award was issued over one year *after* the Second Partial Award. This point arises from the Purchaser's application to admit the Third Partial Award into the record for OS 7 and OS 8 (see [45]–[48] above). As noted above, the Seller resisted the application, arguing that the Third Partial Award was not relevant to the issue of apparent bias raised in OS 7 and OS 8.

78 In our opinion, the Third Partial Award can and should be considered in OS 7 and OS 8. It is pertinent that the same allegation of bias in OS 7 and 8 is repeated in OS 9 and there is very good reason why. The allegation of bias is not about the Second Partial Award and the Third Partial Award *per se*. The root of the allegation is that the President's alleged apparent bias – as a result of his appointment to the Panel on 26 August 2018 – has tainted the arbitral process and its outcome, the Second Partial Award and the Third Partial Award, in view of his role as the Presiding Arbitrator of the Arbitration. Accordingly, the entire record of the Arbitration from the time when the alleged bias is said to have arisen (*ie*, 26 August 2018) becomes relevant. This brings into play not just the Second Partial Award but the Third Partial Award as well.

79 Save for the Warranty Claim (which was dealt with in the First Partial Award), the Arbitration proceeded on all the other claims – the Deceit Claims on the Five Topics and the PEDI Claim on three of the Five Topics – together. *They were not heard separately*. Evidence and submissions, pre-hearing and post-hearing, were heard on all the issues pertinent to these claims at the same time. Indeed, it is the Seller's own position that a single award should have been issued for the Five Topics because the evidence and submissions were heard together. It asserts that the Tribunal breached an agreed arbitral procedure by issuing partial awards as the Arbitration proceeded on the footing that the evidence and arguments would address all the claims (save for the Warranty Claim) and a single award would follow. The only reason why two separate awards were issued was because of a *procedural* decision made by the Tribunal, which the Seller contends was wrong. However, that does not change the fact that, *substantively*, the Second Partial Award and Third Partial Award are two parts of one composite award arising from a *single arbitration*. This is readily apparent from the fact that the Third Partial Award refers to findings in the

Second Partial Award for the purpose of sustaining the findings in the Third Partial Award.

80 Furthermore, it is telling that the Seller does not object to the Third Partial Award being taken into consideration in addressing the allegation of apparent bias made in OS 9. It should be noted that the allegation of apparent bias that is made in OS 8 is adopted and repeated in OS 9. Ignoring the Third Partial Award for the purpose of the OS 7 and OS 8 would create an artificial situation. The artificiality is palpable as the corpus of evidence considered for the purpose of OS 7, OS 8 and OS 9 *on the same allegation* will not be the same. Further, to silo the evidence on apparent bias as regards OS 7 and OS 8 by excluding the Third Partial Award cannot be correct as the allegation permeates the position of the President on and after 26 August 2018. It follows that the evidence on and after 26 August 2018 becomes salient to the issue of apparent bias in relation to all three applications. This must therefore include the Second Partial Award *and* the Third Partial Award.

81 Thus, the Third Partial Award is salient to OS 7 and OS 8 in the same way that the Second Partial Award is salient to OS 9. The issue of apparent bias cannot be assessed by putting the Second Partial Award and Third Partial Award into separate evidential silos. That is exactly what the Seller seeks to do by using temporal limits.

82 Ultimately the issue is whether there is a reasonable suspicion of bias as regards the President that tainted the Arbitration and the awards that resulted. The Second Partial Award and the Third Partial Award were the result of that process and thus whatever bias allegedly "contaminates" one award must also "contaminate" the other. It follows that both awards must be taken into account in assessing whether the assertion of apparent bias has been made out.

83 There is a further point on OS 8. In support of its position, the Purchaser makes reference to the case of *Halliburton* for the proposition that the court must "assess the circumstances as they exist at the date of the hearing of the application to remove the arbitrator": at [121]. The argument is that since the Third Partial Award came into existence when the hearing of OS 8 was still alive, *ie*, not disposed of, it must be taken into consideration when deciding whether to remove the President.

84 In *Halliburton*, the relevant provision was s 24(1)(*a*) of the English Arbitration Act 1996, which reads:

> **24 Power of court to remove arbitrator.**
>
> (1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—
>
> *(a) that circumstances* ***exist*** *that give rise to justifiable doubts as to his impartiality;*
>
> [emphasis added in italics; further emphasis in bolded italics]

The UKSC reasoned that the use of the present tense "exist" in the provision directs the court to assess the circumstances as they exist at the date of the removal hearing: at [121].

85 Similarly, Art 12(2) of the Model Law states that an arbitrator "may be challenged only if circumstances *exist* that give rise to justifiable doubts as to his impartiality or independence". The Model Law is given force in Singapore by virtue of s 3 of the IAA. Thus, the reasoning of the UKSC in *Halliburton* applies with equal force.

86 We agree with *Halliburton*. Logically speaking, in assessing whether an arbitrator should be removed, a court must have reference to circumstances

existing at the time it hears the application. The purpose of such an application is to stop an arbitrator from being involved in *further* proceedings. It thus makes eminent sense to consider any and all relevant evidence regardless of when it arose.

87 For the reasons above, the Third Partial Award is also relevant to OS 8 as well as OS 7, and we thus admit it into the record for these applications. It would be artificial and indeed incorrect not to consider the Third Partial Award in deciding whether the Second Partial Award should be set aside on the ground of apparent bias.

The Third Partial Award dispels any doubts over the President's impartiality

88 In our opinion, the Third Partial Award unequivocally dispels any concerns over the President's impartiality. We observe that several of the Tribunal's significant findings in the Second Partial Award and the Third Partial Award are in fact clearly detrimental to the Purchaser. This affirms the President's impartiality. Without being comprehensive, we highlight two examples which we find to be illustrative of the Tribunal's (and thus the President's) objectivity in assessing the issue in the Arbitration.

89 First, out of the five Deceit Claims on the Five Topics and the PEDI Claim on three of the Five Topics, the Purchaser only succeeded on three – the Deceit Claims on the Reserves Representation and Production Representation, and the PEDI Claim on the Reserves. The Tribunal ruled against the Purchaser on the remaining claims. This overall result underscores the Tribunal's even-handedness.

90 Second, even on the Deceit Claim and the PEDI Claim where the Purchaser succeeded, the Tribunal did not agree with all of the Purchaser's

allegations. Instead, the Tribunal found that the Purchaser had failed to establish that the Seller had falsely booked reserves for a number of Fields. The Tribunal rejected the Purchaser's allegation of deceit relating to several Fields, a redevelopment project and one of the wells with undeveloped reserves. As such, while the Purchaser was ultimately successful in establishing liability in its Deceit Claim on the Reserves Representation and the PEDI Claim on the Reserves, it still did not prevail on all aspects of its claims.

91 These examples would be taken on board by the fair-minded and informed observer in making his assessment on apparent bias, leading to the conclusion that there was no cause for concern.

Conclusion on apparent bias

92 For all these reasons, we dismiss OS 8 and decline to remove the President from the Tribunal. For the same reasons, we do not accept the allegation of apparent bias made in OS 9. Consequently, we also decline to set aside the Second Partial Award and the Third Partial Award on the ground of apparent bias.

Issue 2: Breach of agreed arbitral procedure

93 Having determined that there is no appearance of bias on the part of the President, we consider the rest of the Seller's grounds for challenge. We begin with its argument that the Tribunal had breached the parties' agreed arbitral procedure by issuing an award, *ie*, the Second Partial Award, that "unilaterally [severed] the [Reserves] topic from the four remaining topics". This challenge relates to OS 7.

The relevance of the Third Partial Award

94 We first consider whether the Third Partial Award is relevant to the merits of this ground of challenge. As noted above at [45]–[48], the Purchaser sought to adduce the Third Partial Award into the record for *inter alia* OS 7. Two of the arguments that it raises in support of admitting the Third Partial Award are related to this ground of challenge. We elaborate.

The "shortcut" contention

95 The Purchaser's first argument is that it "plainly contradicts [the Seller's] contention that the Tribunal in issuing the Second Partial Award attempted a '*shortcut*'" [emphasis in original]. The "shortcut" is a reference to the Seller's argument in OS 7 that the Tribunal had split the Five Topics into two partial awards because it wanted to create a "potential 'shortcut'" in deciding the Arbitration. In other words, by dealing only with the claims in relation to the Reserves in the Second Partial Award, the Tribunal saved itself the trouble of addressing fully the claims in relation to the other topics.

96 We do not accept the Purchaser's argument because the Seller's "shortcut" argument *is irrelevant*. It is irrelevant because it is based on the purported motivations of the Tribunal in issuing the Second Partial Award. However, the challenge is not based on the motivations of the Tribunal. It is based on breach of an agreed arbitral procedure. Thus, the only facts that *are* relevant are (a) whether there was an agreed arbitral procedure; (b) whether it was breached; and (c) whether such breach was material enough for the court to set aside the award: *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi*") at [68]. Hence, as the Seller's "shortcut" argument has no bearing on the outcome of OS 7, it follows that the Third Partial Award would also not be relevant for the purposes of rebutting the same.

The "materiality" contention

97 The Purchaser's second argument is that the Third Partial Award is relevant because it shows how the Tribunal determined the Deceit Claims on the remaining four of the Five Topics – Projects, Production, Decommissioning and Maintenance. This argument relates to the Seller's contention that the Tribunal's breach of arbitral procedure prejudiced the Seller, and was thus a material breach justifying the setting aside of the Second Partial Award: see *Triulzi* at [54] and [66].

98 We cannot accept that the Third Partial Award is relevant to this issue. To explain, the Seller argues that "the Tribunal may have been *locked in* by its own incomplete determination on Reserves in [the Second Partial Award], which would impair its ability / willingness to adjudicate the [remaining four of the Five Topics] properly and fairly" [emphasis added]. Put simply, its position is that the Tribunal's decision in the Second Partial Award constrained its thinking on the remaining topics.

99 Regardless of whether that was true, in our view, the Third Partial Award would not be able to demonstrate the contrary. The Third Partial Award only shows the reasons and conclusions of the Tribunal. It would not show that the Tribunal found its hands tied by the conclusions in the Second Partial Award – indeed, the only way to ascertain whether this is true would be to ask the Tribunal members themselves.

100 For these reasons, we do not consider the Third Partial Award to be relevant to the merits of this ground of challenge.

Whether there was a breach of agreed arbitral procedure

101 We now consider the real issue in this ground of challenge – whether there was a breach of an agreed arbitral procedure.

102 The Seller contends that the Tribunal's decision to first issue an award dealing solely with the Reserves without dealing with the other four topics was a "breach of the agreed procedure and common understanding that the Award would address liability on all five topics". It argues that this prejudiced its case in that the Tribunal did not consider submissions and evidence arising in other topics which overlapped with the Reserves.

103 The Purchaser argues that there was no agreed arbitral procedure as asserted by the Seller. It points out that the parties' agreed procedure was contained solely in rr 16.1 and 28.3 of the SIAC Rules 2013, (the "SIAC Rules"), which were incorporated by reference in the Arbitration Agreement in Clause 29.1 of the SPA.

104 The first question is whether there was an agreed arbitral procedure that the Tribunal was to issue only one award dealing with the Deceit Claims on all the Five Topics and the PEDI Claim on three of the Five Topics: *Triulzi* at [68].

105 In our opinion, the Seller's case fails at this very first hurdle because it is unable to point to any agreement that the Tribunal was to deal with all the claims relating to the Five Topics in a single award. Indeed, its written submissions do not cite a single piece of evidence of such an agreement. All it can muster is a reference to the affidavit of the lawyer involved in the Arbitration that cites an email from the President dated 1 May 2018. This email states, *inter alia*, that the Tribunal was aware of the "synergistic interconnection amongst [the Five Topics]." This surely is not an agreed arbitral procedure. All

this email shows is that *the Tribunal* (not the parties) understood that the *substantive merits* of each of the Five Topics were interconnected and as such, evidence and submissions would be heard together. This is a very different matter from *procedural* matters agreed upon by the *parties* and definitely does not amount to an agreement that there would only be a single award dealing with all the claims relating to the Five Topics.

106 Aside from the absence of evidence to support the Seller's argument, we find that the Seller's case falls apart in its own written submissions. In its written submissions, the Seller argues that "[t]he Tribunal gave the parties *the impression* that a full award addressing all five topics was forthcoming and there was no indication otherwise" [emphasis added]. An impression – especially one *unilaterally* given by the Tribunal – does not amount to an agreement between the parties.

107 That the Seller is unable to point to any agreement is not surprising given the rules of the Arbitration. As pointed out by the Purchaser, the arbitral rules were contained solely in the Arbitration Agreement. Rule 28 of the SIAC Rules states that the Tribunal "may make separate awards on different issues at different times". This being the case, *unless there was a specific procedural order by the Tribunal that there would be a single award for all the claims relating to the Five Topics*, the Seller's argument that there has been a breach of arbitral procedure by the issuing of a partial award on a single issue cannot be accepted. The Seller is unable to refer to any such procedural order.

108 In any case, the Seller's argument in this regard is a red herring. The argument ignores the very point that the Seller makes – that the Five Topics are inter-related and inter-connected. If they were so related, it stands to reason that the Tribunal would have evaluated the evidence and arguments on the Five

Topics holistically in determining the merits of the Deceit Claim and the PEDI Claim on each topic. There is nothing to suggest that the Tribunal did not do that. As noted at [79] above, the evidence and submissions on the Five Topics were presented at the same time. That the Tribunal chose to issue an award on one topic first (the Second Partial Award on the Reserves) does not mean that it did not consider *all* the evidence and submissions holistically in so far as they were relevant to the Reserves before issuing the Second Partial Award. Neither does it mean that the Tribunal would have tied its hands on the conclusions on the claims that concern the remaining topics. If the evidence and submissions were evaluated holistically, there is no reason to believe that the Tribunal would not have also formed its views on all the claims at the same time. This squarely addresses the point about prejudice made by the Seller.

109 Accordingly, we conclude that there has been no breach of an agreed arbitral procedure.

Issues 3 and 4: Excess of jurisdiction and breach of natural justice

110 We turn to the issues of whether the Tribunal acted in excess of its jurisdiction, and whether it made findings and decisions in breach of natural justice. We deal with these two issues together as they straddle common ground per the Seller's arguments. Indeed, it may be the case that a challenge on one will be accompanied by a challenge on the other, for instance, when the tribunal is alleged to have breached natural justice because it has exceeded jurisdiction: *CDM and another v CDP* [2021] 2 SLR 235 ("*CDM*") at [16]. Indeed, as regards several of the challenges, this case is similar. However, for good order, we will examine the challenge to the Second Partial Award in OS 7 separately from the challenge to the Third Partial Award in OS 9.

Applicable legal principles

111 We first set out a summary of the principles regarding both grounds.

112 A tribunal acts in excess of jurisdiction when it decides matters outside the scope of the submission to arbitration: Article 34(2)(*a*)(iii) of the Model Law. In determining whether this has taken place, the court will consider: (a) what matters are within the scope of the submission to arbitration; and (b) whether the award involved matters outside such scope, *ie*, whether the award contained a "new difference" outside the scope of the submission to arbitration: *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 ("*Bloomberry*") at [69]. Further, even if the award decides a matter beyond the scope of submission, the court has the residual discretion to refuse to set aside the award, although such discretion should only be exercised if no prejudice has been suffered by the challenging party: *Bloomberry* at [72]. Article 34(2)(*a*)(iii) of the Model Law applies where the tribunal improperly decides matters that had not been submitted to it or fails to decide matters that have been submitted to it: *Bloomberry* at [69(b)].

113 Turning to the principles on breach of natural justice, the foundation of the allegation is the breach of the fair hearing rule. In the context of setting aside an award, our courts have held that parties have a general right to be heard effectively on every issue that may be relevant to the resolution of a dispute; an arbitrator should not base his decisions on matters not submitted or argued before him. A challenge on this ground would only be successful if a reasonable litigant could not have foreseen the possibility that the award would have employed the reasoning that it did: see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(d)]; cited

with approval by the Court of Appeal in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*"). Prejudice is again a salient consideration in this regard.

Challenges to the Second Partial Award

114 Having set out the relevant legal principles, we consider the challenges to the Second Partial Award in OS 7. Broadly, the Seller takes issue with several aspects of the Second Partial Award:

(a) The Tribunal's decision on the proper interpretation of the SEC Standards ("the SEC Standards Complaint"), which was crucial to the Deceit Claim on the Reserves Representation;

(b) The Tribunal's decision on the PEDI Claim on the Reserves ("the PEDI Complaint");

(c) The Tribunal's findings on a document referred to as "the 2012 Business Plan" ("the Business Plan Complaint"); and

(d) The Tribunal's finding on the element of reliance in the Deceit Claim on the Reserves Representation ("the Reliance Complaint").

115 In our opinion, *none* of the Tribunal's decisions on the above aspects warrant setting aside the Second Partial Award.

The SEC Standards Complaint

116 As noted above at [26], the Deceit Claim on the Reserves Representation was based on the tort of deceit/fraudulent misrepresentation under English common law. The Purchaser claimed that three employees of the Seller (Mr X, Mr Y and Mr Z) had made fraudulent misrepresentations about the Reserves.

The allegations were that the Reserves, as represented in the Reserves Representation, were not booked in accordance with the SEC Standards. They were in fact inflated. Consequently the value of the Subsidiary was also inflated, meaning that the Purchaser paid more for the shares that it purchased under the SPA than they were actually worth. The positions taken by the parties were based on the opinions of their respective experts on the SEC Standards.

117 As noted earlier at [12], the SEC Standards require that a development plan must be adopted as regards undeveloped oil and gas reserves before the reserves can be recognised as 2P Reserves or 3P Reserves as the case may be. Adoption of a development plan requires an FID (see [10(j)] above). The Purchaser's position is that there was no FID that permitted the recognition of the Reserves that were stated in the Reserves Representation, and thus the Reserves were not properly booked. On the other hand, the Seller's position was that there *was* an FID. Thus, the dispute between parties was over what circumstances must exist under the SEC Standards before it can be said that there was an FID.

118 The Purchaser's primary case was that an FID required "project sanction or capital commitment, which typically meant board or other internal approval." On the other hand, the Seller's position in the SOD was that an FID only required "sufficient commitment". Thus, once there was "sufficient evidence" of "commitment" to develop particular reserves, they were properly booked. The Seller maintained this position over the course of the Arbitration.

119 It is apparent that the Purchaser's primary case on FID had set the threshold for an FID higher than the Seller's, requiring formal approval of the development plan. However, following the filing of the SOD, the Purchaser formulated an alternative case:

(a) In the SOR, the Purchaser argued that even if its primary position was wrong, none of the disputed volumes of the Reserves were properly recognised *as they failed multiple other requirements in the SEC Standards*. Thus, Mr X, Mr Y and Mr Z could not have honestly concluded that there was a "genuine commitment" to develop the Fields and resources.

(b) In its PHS, the Purchaser argued that it "would make no difference if [FID] had the looser meaning … advocated by [the Seller's] experts" as the facts showed that there was no FID to commit to any of the projects even on the test forwarded by the Seller's experts.

(c) Finally, in its PHB, the Purchaser reiterated that it had advanced a wider case after the SOC. It clarified that its case had widened to include other rules under the SEC Standards.

120 Ultimately, the Tribunal decided in the Second Partial Award that FID simply required "commitment", "unadorned by any adjective, other than perhaps '*firm*' or equivalent" [emphasis in original]. As this was not a position that was advocated by either party or their experts, the Seller argues that the Tribunal's decision was made in excess of jurisdiction, as well as in breach of natural justice.

(1) Excess of jurisdiction

121 In determining whether there has been a decision made in excess of jurisdiction, the first step is to consider what is the scope of the submission to the Tribunal (as noted above at [112]). In determining this scope, the court will consider the parties' pleaded cases: *CAJ* at [51(b)]. While we recognise that the Arbitration proceeded on the memorial track, the approach to ascertaining the

scope of the submission to arbitration ought not to be different in any material sense, with the one observation that in identifying the issues that were raised in the arbitration, regard may be had to the witness statements and supporting documents that are annexed to the memorials. We consider this issue further in relation to OS 9 later in this judgment. In essence, the task remains the same – to scrutinise the documents that the parties have filed to state their cases in order to identify the issues that have been submitted to arbitration. In this regard, the documents set out above at [119] are pertinent.

122 It is clear from the summary above that the correct interpretation of FID under the SEC Standards was clearly an issue that was placed before the Tribunal for determination. Indeed, this was recognised by the Tribunal in the Second Partial Award when it stated that the "critical point of disagreement between [the parties' experts] was the interpretation of [FID]." It is also clear that the Purchaser's case was run on two alternative bases: a primary case based on a stricter standard of FID, and a secondary case based on the standard advanced by the Seller.

123 Accordingly, the Tribunal's finding that the appropriate interpretation was that it required "commitment" is thus well within the scope of submission to arbitration. It is important to remember that excess of jurisdiction concerns the question of whether *the issue* that has been determined by a tribunal falls within the scope of submission to arbitration. The issue must be distinguished from the arguments of the parties on the issue. If the question is whether the tribunal made a determination that does not adopt or is not in line with the parties' respective position on the issue, then that is more pertinent to the question of natural justice: *Soh Beng Tee* at [65(e)]. It therefore seems to us that the Seller's complaint that the Tribunal arrived at an interpretation of FID that was not advanced by either party is more appropriately framed as a complaint

that the Tribunal arrived at a determination of FID in breach of natural justice. Indeed, this is how the Seller has framed its argument on natural justice. We turn to this point now.

(2) Breach of natural justice

124 The Seller argues that the Tribunal's determination that the SEC Standards required "firm commitment" was in breach of natural justice because this interpretation was not advanced by either party, thus a finding of liability based on this interpretation prejudiced the Seller. The specific head of natural justice that the Seller alleges has been breached is the fair hearing rule, *ie*, that the Seller was not given an opportunity to present its position on the interpretation that the Tribunal finally arrived at. Thus, there are two inquiries: first, was there a breach of the fair hearing rule? Second, if there was, did it prejudice the Seller?

125 In our opinion, the Seller's claim does not cross the first inquiry.

126 To begin with, it is not clear to us that the Seller has correctly characterised the Tribunal's interpretation of the SEC Standards. As noted earlier, the Seller claims that the Tribunal decided that the SEC Standards required "firm commitment" for the booking of the Reserves even though this was neither advanced by the parties nor put to the Purchaser's witnesses.

127 However, this is incorrect. As noted above at [120], the Tribunal found that the proper interpretation of the SEC Standards requires that there be "commitment" for there to be an FID. It is clear that Tribunal rejected the primary case of the Purchaser on FID. However, the Tribunal was also not entirely persuaded that the Seller's position of "sufficient commitment" was appropriate as it introduced an element of subjectivity to a test which, it felt,

ought to be objective. This was because the SEC Standards were meant to guide the proper recognition and disclosure of reserves by corporate entities, which required an objective and transparent basis. Thus, introducing a yardstick that was subjective to the entity recognising and disclosing the reserves would defeat that very purpose as it would mean that estimations of reserves would vary based on the individual perspective of each oil and gas producer. This would not aid in establishing a consistent approach to the recognition and disclosure of reserves.

128 In considering the expert evidence regarding the interpretation of the SEC Standards, the Tribunal noted that there was general agreement that the test was an objective test of "commitment" "unadorned by any adjective". The Tribunal thus concluded at paragraph 612 of the Second Partial Award that the test for FID ought to be the objective test of "commitment". We reproduce paragraph 612 in full below:

> After the cross-examination of the Reserves experts, it appears to the Tribunal that there was general agreement, *or at least convergence, that the relevant test was one of "commitment", unadorned by any adjective*, other than perhaps "*firm*" or equivalent. *The evidence and submissions which used "sufficient", "genuine", "adequate" and "demonstrable", do not capture the strength of the requisite decision.* We find that the word "*commitment*", in the sense of "*what you are going to do?*", is the terminology which best reflects the practical application by the SEC of its Standards. Many witnesses used words to similar effect, as noted above.
>
> [emphasis added]

Although the Tribunal did then go on to mention the word "firm", it is clear from paragraph 612 that the crux was "commitment", which was meant to be an objective test. "Firm" only underscored the importance of the applying "commitment" objectively.

129 Any doubt as to whether this was truly the case can be put to rest by examining *how* the Tribunal examined the issues later in the Second Partial Award. First, at paragraphs 826 to 830 of the Second Partial Award, where the Tribunal considered the issue of whether the booking of the Reserves complied with the SEC Standards, the Tribunal did not frame the issue as one of "firm commitment". Instead, it framed the issue as one of "Evidence of Commitment". The Tribunal then went on to consistently apply a test of "commitment" throughout the Second Partial Award – for example, it found that the Seller could not invoke a "track record of delivery in support of its *case on commitment*" [emphasis added] and also explicitly stated that it was applying a "commitment test".

130 Thus, it is incorrect for the Seller to contend that the test that the Tribunal arrived at was "firm commitment". The test was "commitment" *simpliciter*; an objective test.

131 We make two further points in this regard.

132 First, it must be remembered that a tribunal is not bound to adopt an either/or approach and may choose to embrace a middle path between the two parties' positions as long as it is based on the evidence before it – in such a case there is no need to consult the parties unless the tribunal's reasoning represents a dramatic departure from what has been presented by the parties: see *Soh Beng Tee* at [65(d)]; cited with approval by the Court of Appeal in *China Machine*.

133 This was exactly the test of "commitment" embraced by the Tribunal: a middle path between the two parties' cases. On one hand, the Purchaser's case was that FID required "project sanction or capital commitment, which typically meant board or other internal approval." On the other, the Seller's case was that

it required "sufficient commitment", which introduced a degree of subjectivity as it was tailored to the circumstances of the party making the disclosure. In requiring evidence of "commitment", the Tribunal could not be said to have made a decision that was beyond the reasonable contemplation of the parties.

134 Second, the Tribunal had specifically explored the issue of whether the real interpretation of the SEC Standards required only "commitment", unadorned with any adjective such as "sufficient", during the cross-examination of the Seller's witnesses. This is fatal to the Seller's case on the first inquiry:

The President:	In answer to that question you agreed with the formulation "firm commitment".
A:	Yes.
The President:	That strikes me as something quite different to "sufficient commitment" which is also a term you have used.
A:	Correct.
The President:	Which is the better term?
A:	Well, "sufficient" – I don't know what to say about words here, and I know words are quite important, but "sufficient commitment", sufficient to say the company really intends to do this. Now, I would say "firm"—
The President*:*	*So when you use "sufficient" it is effectively the same as "firm".*
A:	*Yes. Yes. A good way of saying it.*
Arbitrator [A]:	*The crucial word is "commitment".*
A:	*Yes, the crucial word is "commitment". The adjectives may vary, but "commitment", you really mean to do it.*

[emphasis added]

135 Thus, the Seller cannot complain that it did not have notice of the Tribunal's approach, nor can it complain that such reasoning was not put to its

witnesses. In other words, it cannot say that there was a breach of the fair hearing rule. In view of this conclusion on the first inquiry, the second inquiry on whether the Seller suffered prejudice does not arise for consideration.

136 Ultimately, properly understood, the Seller's unhappiness stems from the Tribunal's refusal to accept its position on the definition of FID. The challenge that has been made is therefore a challenge on merits disguised as a challenge on the grounds of natural justice and excess of jurisdiction. It therefore ought to fail.

The PEDI Complaint

137 We turn next to consider the Seller's submissions on the Tribunal's findings on the PEDI Claim. The submissions focus on the Tribunal's conclusion on the PEDI Claim on the Reserves.

138 As noted above at [26(c)], the SPA contained a PEDI Clause. The PEDI Clause is found in Clause 14.5(A) of the SPA, and provides as follows:

> (A) Subject to Completion occurring and subject to sub-clause 14.5(B) and Schedule 7 (Limitations on Liability) as applicable, the Seller covenants with the Purchaser to pay to the Purchaser an amount equal to (i) the Relevant Proportion of all Loss suffered or incurred by any member of the Group after the Effective date, and (ii) all Loss suffered or incurred by [Purchaser protected person], in each case to the extent it has arisen or arises in connection with or as a result of ownership or operation of the Licence interests or other assets of the Group or the carrying on of the business carried on by the Group, in each case prior to the Effective Date (the "Pre-Effective date Covenant")

139 The PEDI Clause essentially provides that the Purchaser is entitled to claim a proportion of any losses it suffers from the purchase of shares in the Subsidiary if those losses are a result of the Seller's conduct prior to 1 January 2012 ("the Effective Date"). We refer to such conduct as the "PEDI Conduct".

140 In the SOC, the Purchaser claimed that the PEDI Conduct on the Reserves was to book the Reserves prior to 31 December 2011 in the Subsidiary's 2011 Accounts in a manner "other than in accordance with SEC rules and [the Subsidiary's] own internal reserves policies". This, it claimed, led to losses as the Reserves had to be "de-booked" after the Effective Date, resulting in the writing down of the value of the Subsidiary's assets. We elaborate on this later at [146] below. This claim was upheld by the Tribunal in the Second Partial Award.

141 The Seller's issue is with the Tribunal's finding that the volume of the Reserves stated in the Subsidiary's 2011 Accounts were wrong. The finding was made on the basis that the SEC Standards were breached, which was in turn predicated on the conclusion that the SEC Standards and the SORP (as defined below) were similar. The Seller points to the fact that the Subsidiary's reporting obligation on the Reserves was based on the UK Generally Accepted Accounting Principles and the UK Statement of Recommended Practice (collectively "the SORP"), as the Subsidiary was an entity in the UK and therefore subject to the UK reporting standards. This was common ground in the Arbitration. Thus, a breach of the Subsidiary's reporting obligation on the basis of the SEC Standards would be possible only if it was established that the SEC Standards and the SORP were the same or similar. In this regard, the Seller further points out that the Purchaser did not plead a breach of the SORP, or that the SORP and the SEC Standards were the same or similar. In view of this, the Seller did not have the opportunity to lead expert evidence on the SORP or on whether the SORP and the SEC Standards were the same or similar, and these points were not explored with its factual or expert witnesses.

142 Accordingly, the Seller argues that the Tribunal's finding that the Subsidiary's 2011 Accounts were wrong on the basis stated above was: (a) in

excess of jurisdiction; and (b) in breach of natural justice. The Seller's argument in essence is that: (a) the Tribunal formed its own view that the SORP and the SEC Standards were similar when this was properly a matter for expert evidence and on which there was none; and (b) this view had a direct bearing on the Tribunal's finding that the Subsidiary's 2011 Accounts were wrong.

(1) No excess of jurisdiction

143 We do not accept the Seller's submission on excess of jurisdiction. We emphasise that the Tribunal could not have acted in excess of jurisdiction because there is no dispute that the PEDI Claim on the Reserves was an issue within the scope of submission to the Arbitration. This required the Tribunal to determine whether the volume of the Reserves stated in the Subsidiary's 2011 Accounts was incorrect and which consequently had to be de-booked after the Effective Date. This is the issue that the Tribunal examined and its conclusion was arrived at on the basis stated above. There is thus no "new difference" that was "irrelevant to the issues requiring determination" to speak of and we say no more on this point.

144 It seems to us that the Seller's real complaint is that it was not able to address the Tribunal on whether the SORP and the SEC Standards were indeed the same or similar, which is a complaint that relates to breach of natural justice. We turn to consider this.

(2) Breach of natural justice

145 The Seller's argument is that the Tribunal's equation of the SEC Standards and the SORP was a breach of natural justice as this issue was not pleaded by the Purchaser and was raised for the first time in the Purchaser's Reply PHB. We do not accept this argument and decline to set aside the Second

Partial Award on this basis. It is important to begin by reviewing the parties' cases in the Arbitration.

(A) THE PARTIES' CASES IN THE ARBITRATION

146 It is critical to understand the Purchaser's case in the Arbitration on the PEDI Claim on the Reserves. The Purchaser contended that all relevant decisions on the booking of the Reserves were taken by Mr X, Mr Y and Mr Z by 20 December 2011. In other words, they were the key decision-makers who overbooked the Reserves in the Subsidiary's 2011 Accounts. The overbooking was subsequently de-booked in 2012, 2013 and 2014 resulting in the Subsidiary suffering a loss, of which 49% was borne by the Purchaser, on account of its equity in the Subsidiary.

147 The Purchaser's case was thus essentially based on one proposition: the impairments in 2012, 2013, and 2014 in the Subsidiary's 2011 Accounts (the loss for the purposes of the PEDI Clause) *would not have occurred if not for the improper booking of the Reserves by Mr X, Mr Y and Mr Z in the said accounts prior to the Effective Date*. It is readily apparent that for the PEDI Claim to be made out, it must be shown that the PEDI Conduct *caused the loss*.[124]

148 Before we set out the Seller's argument in the Arbitration, it is important to point out a significant concession made by the Seller. This is that the volume of the Reserves as at year-end 2011 compiled by Mr X, Mr Y and Mr Z were estimated according to the *SEC Standards, and not the SORP*. In other words, despite the reporting obligation of the Subsidiary being under the SORP, the volume of the Reserves was estimated according to the SEC Standards.

149 The Seller's argument in the Arbitration was similar to that stated at [141] above, namely, that there was no evidence of mis-booking of Reserves in

the Subsidiary's 2011 Accounts under the SORP. Accordingly, in order to establish the PEDI Conduct, the Purchaser had to adduce expert evidence to show that the volume of the Reserves stated in the Subsidiary's 2011 Accounts were mis-booked per the SORP, *not the SEC Standards*. However, there was no expert evidence on this point. Alternatively, as the volume of the Reserves as estimated at year-end 2011 was made according to the SEC Standards, the Purchaser had to show that a mis-booking under the SEC Standards was also a mis-booking under the SORP. Again, there was no expert evidence on this.

(B) THE TRIBUNAL'S REASONING

150 The Tribunal accepted the Purchaser's argument in the Second Partial Award. It found that the Seller was unable to carry out key projects in the period before 31 December 2011 because it lacked the financial wherewithal to exploit the Fields. The Tribunal observed that the Seller needed to find a buyer for the Subsidiary's oilfields because they were a large liability on its balance sheet with prohibitively high decommissioning costs. As such, the conduct and motivations of Mr X, Mr Y and Mr Z "contaminated" Project Alpha. In particular, the Tribunal observed that Mr Z played a central role as he was not only the IQRE, carrying an audit responsibility to ensure the integrity of the estimates, but also a key driver of the sale process, and sought to wrap up Project Alpha as expediently as possible. This was the conflict that we referred to at [22]. This being the case, it followed that the Seller had little or no regard for the relevant standards when it came to recognition of the Reserves. In other words, the appropriate standards and tests that should have been applied to book the Reserves, whether it be the SORP and SEC Standards, carried no impact on the conduct of the Seller. Instead, the conduct of the Seller was shaped by its motivation to overstate the Reserves of the Subsidiary in order to induce the Purchaser to enter into the SPA.

151 The Tribunal therefore found that the volume of the Reserves that was estimated for year-end 2011 led directly to the computation of relevant values in the Subsidiary's 2011 Accounts (see paragraph 1083 of the Second Partial Award which we have reproduced at [157] below). In this regard, the Tribunal referred to the evidence of Mr Z on the Seller's internal processes for determining whether the Reserves were recognised, noting that every step in that process was based on the SEC Standards, not the SORP. This was the significant concession referred to above at [148]. The Tribunal noted that Mr Z estimated the Reserves for all the entities in the group that the Seller was part of. It was his computation that was used in the Subsidiary's 2011 Accounts. The Tribunal thus concluded that (a) there was only one process for the booking of the Reserves and the Reserves recognised in the Subsidiary's 2011 Accounts were derived from the same process; (b) this process was administered by Mr Z; (c) the estimates of the Reserves were based on the SEC Standards and not the SORP; and (d) the Reserves were over-booked because of Project Alpha. In short, it was Mr Z's conduct that caused the over-booking of the Reserves in the Subsidiary's 2011 Accounts which in turn caused the subsequent impairment and loss. This was a finding of causation (*ie*, that the PEDI Conduct caused the loss) which the Tribunal was entitled to make as it had to address the question of liability in the Liability Phase.

(C) THE OBSERVATION

152 We now turn to an observation made by the Tribunal in paragraph 1080 of the Second Partial Award, on which much of the Seller's submissions on the challenge as regards the PEDI Claim are premised. At paragraph 1080, the Tribunal noted that "*intention*" under the SORP appeared to be similar to "*commitment*" under the SEC Standards. The Tribunal, however, accepted that it was not fully briefed on the SORP but stated that it did not find it necessary

to have more than a general understanding of the SORP. On this basis, the Tribunal found that the SORP and the SEC Standards were similar. The Seller argues that in observing that "*intention*" in the SORP was similar to "*commitment*" under the SEC Standards to find that the PEDI Claim was made out, the Tribunal breached the fair hearing rule. The question that arises is whether the Tribunal acted in breach of natural justice by making the observation in paragraph 1080.

153 We are of the view that the Seller makes too much of the Tribunal's observation. The Seller does not read the observation in the context of the Tribunal's analysis and conclusion, seeking instead to read it in isolation. It is important to place the observation in its proper context. The observation was made in the context of the Tribunal's analysis on causation which we have addressed above. Further, it is apparent from the discussion in the Second Partial Award that followed the observation that it did not have a meaningful impact on the Tribunal's analysis and conclusion. We make two points.

154 First, the interpretation of the SORP and SEC Standards was not relevant to the Tribunal's analysis on causation. It is important to recapitulate the core findings of the Tribunal on the PEDI Claim on the Reserves. They were that (a) the Reserves were assessed by Mr Z in accordance with the SEC Standards; (b) the booking of Reserves in the Subsidiary's 2011 Accounts was therefore derived from that process; (c) the bookings in the Subsidiary's 2011 Accounts were "contaminated" by Project Alpha; and (d) the impairments for the subsequent years were therefore *caused* by such conduct.

155 Given that the conduct of Mr X, Mr Y and Mr Z was "contaminated" by Project Alpha, the SORP was strictly speaking not pertinent to the recognition of Reserves. In this regard, the Tribunal observed that Mr Y and Mr Z were

recklessly indifferent to the truth or falsity of the quantity of the Reserves. Accordingly, the interpretation of the SORP would have no impact on liability and causation. That is exactly how the Tribunal saw it.

156 The Tribunal therefore analysed the connection between the SEC Standards and the SORP from the perspective of causation. It was in this context that the observation was made. It is important to set out the analysis of the Tribunal. First, the Tribunal noted that the Seller did not suggest that the Reserves booked in the Subsidiary's 2011 Accounts under the SORP differed in any respect for any of the Fields from that determined under the SEC Standards. The Tribunal explicitly recognised this at paragraph 1082 of the Second Partial Award, which we reproduce below:

> It is noteworthy that, at no point in its detailed submissions, does [the Seller]suggest that the volume of Reserves as booked under SORP differed in any respect, for any field, from that determined under SEC Standards at year-end 2011, as compiled under the direction of [Mr Z]. *Its submissions suggest that [the Purchaser] had to prove, by expert evidence, that the [Subsidiary] accounts applying SORP/GAAP, separately considered, involved PED mis-booking.*
>
> [emphasis added]

157 Second, the Tribunal rejected the Seller's argument that the Purchaser needed to prove, by expert evidence, that the Reserves were mis-booked in the Subsidiary's 2011 Accounts per the SORP. Paragraph 1083, which we reproduce below, makes this clear:

> The Tribunal rejects this submission. *The correct inference, on the basis of the materials before us, is that Reserves estimates for year-end 2011, as computed under SEC Standards, led directly to the computation of the relevant values in the [Subsidiary] accounts under SORP/GAAP.*
>
> [emphasis added]

158 Indeed, paragraph 1083 also makes it clear that the Tribunal was of the view that there was no need for the Purchaser to adduce evidence on the similarity or connection between the SORP and the SEC Standards because of the Tribunal's conclusion on causation.

159 Third, consistent with the second point, in paragraph 1086 of the Second Partial Award, the Tribunal stated that the Seller's process on recognition of the Reserves was based on the SEC Standards (the significant concession referred to above) and the Subsidiary's 2011 Accounts were derived from that process. This made it unnecessary to adduce evidence on the similarity between the SEC Standards and the SORP. We reproduce paragraph 1086 below:

> [Mr Z] gave detailed evidence as to how the [Subsidiary] Reserves were computed. *Every step of that process, including all of his reliance on the Reserves Manual, was directed, and directed only, to a calculation under SEC Standards. The volumes booked for purposes of the [Subsidiary] accounts were derived and, on the evidence before us, derived only, from that process.*
>
> [emphasis added]

160 The same point was again made in paragraph 1087 of the Second Partial Award, which we reproduce below:

> It is only necessary to look at the evidence on impairments to establish that the Reserves estimation process for year-end 2011, undertaken by [Mr Z] and the relevant employees, including [Subsidiary]'s Reserves evaluators, involved the identification and the quantification of Reserves, relevantly, for the same projects for all members of the [Seller] group of companies. In this regard, the evidence is clear. There was only one process for booking Reserves. *[Mr Z] acted on behalf of all relevant entities: SEC listing, Canadian listing and UK accounts.* ***Relevantly, his computations were made for and on behalf of [the Subsidiary], which is bound by the PEDI covenant.***
>
> [emphasis added in bold and italics]

161 Fourth, in paragraph 1088 of the Second Partial Award, the Tribunal noted that nowhere in the evidence or the submissions was it suggested that the SORP was relevant to estimating the Reserves in the Subsidiary's 2011 Accounts, and accordingly, it was not relevant to the issue of causation. We reproduce paragraph 1088 below:

> *Nowhere in the voluminous evidence before us, nor in the submissions, is there any suggestion that SORP/GAAP were relevant to the process of estimating the year-end 2011 [Subsidiary] Reserves.* The value of those Reserves in the UK accounts is a different matter. For present purposes, that may raise an issue of valuation, but not of causation, nor of "*loss*" for purposes of a PEDI claim.
>
> [emphasis added]

162 The above demonstrates clearly that the Tribunal saw the issue as one of causation. The Seller's dishonest intention to inflate the value of the Reserves meant that the volumes recognised before 31 December 2011 were false, regardless of the standard used. It follows that when the Reserves were subsequently readjusted by way of impairment to reflect the correct position, the loss would manifest itself in downstream financial statements subsequent to the Subsidiary's 2011 Accounts. This was the case with the impairments reflected in the Subsidiary's accounts for 2012, 2013 and 2014. The similarity or differences between the SEC Standards and the SORP would have no impact on whether a loss would accrue as that would be based on whether there was a mis-booking in the first place. That is solely an issue of causation.

163 Second, the Tribunal specifically recognised that the SORP might be relevant to the quantification of the loss, as opposed to whether there was a loss arising from the PEDI Conduct, on the PEDI Claim on the Reserves. This is evident from the final two sentences of paragraph 1088 which has been reproduced above. The Seller therefore suffered no prejudice. As we have noted

above at [28(e)], the Tribunal bifurcated the Arbitration into the Liability Phase and the Quantum Phase. The Second Partial Award only addressed the issue of liability and causation. While the Tribunal found that the Seller had caused the Purchaser loss, *quantification* of the Purchaser's loss was not an issue on which the Tribunal needed to or did make a finding. It is at that stage that any difference or similarity between the SEC Standard and the SORP might possibly be relevant, as the Tribunal has recognised.

164 Accordingly, how the loss resulting from the PEDI Conduct on the Reserves is to be computed could depend on the standard to be applied. This is a matter that can and should be raised at the Quantum Phase, if relevant. The Tribunal was cognisant of this as paragraph 1088 of the Second Partial Award demonstrates.

165 For the reasons above, we are of the view that the Tribunal did not act in breach of natural justice by making the observation at paragraph 1080. In any case, there is no prejudice as the Tribunal recognised that the issue of any similarity between the SEC Standards and the SORP and the *correct interpretation* of the SORP might be examined in the Quantum Phase.

The Business Plan Complaint

166 We next consider the 2012 Business Plan. This document was the "thrust" of the Seller's defence in the Arbitration. The Seller's contention was that as the 2012 Business Plan included all the relevant projects approved by its global board of directors, the "sufficient commitment" test that its expert had advanced was satisfied. The Purchaser disputed its relevance, arguing that all the 2012 Business Plan showed was an intention to develop the relevant Field – it did not show actual sanction or reasonable certainty to proceed with the relevant projects.

167 As noted earlier, the Tribunal found in the Second Partial Award that the reserves booking process at year-end 2011 was "contaminated" by Project Alpha, and that in turn also "contaminated" the 2012 Business Plan. This meant that the Seller could not rely on the 2012 Business Plan to show that there was FID per the SEC Standards.

168 The Seller argues that the Tribunal's finding was made: (a) in excess of the Tribunal's jurisdiction, and/or (b) in breach of natural justice. This is because the finding was not based on any pleading by the Purchaser to this effect, and further that the point was not put to the Seller's witnesses. We consider both these arguments in turn.

(1) No excess of jurisdiction

169 The Seller asserts that the Purchaser did not dispute the veracity of the 2012 Business Plan or assert that it had been "contaminated" by Project Alpha. It only disputed the relevance of the 2012 Business Plan to the Reserves and says this is clear from the parties' pleadings in the Arbitration. Hence the Tribunal's finding that the 2012 Business Plan was "contaminated" by Project Alpha was made in excess of its jurisdiction.

170 In our view, the Tribunal's findings on the 2012 Business Plan were not made in excess of its jurisdiction. The Seller's contention conflates matters of evidence with matters of jurisdiction.

171 It is critical to bear in mind that the Purchaser's *broad* case in the Arbitration was that the Seller had a culture of pursuing unrealistic targets and manipulating data. The Purchaser claimed that this culture had led to the Reserves Representation, which was an overstatement of the Reserves as of 2011. Thus, the falsity of the Reserves Representation, and whether the Seller

had accurately booked the Reserves, was a key issue that was submitted to the Tribunal for determination. The Seller then offered the 2012 Business Plan as a *key* piece of evidence to rebut the Purchaser's broad case.

172 As such, the Seller cannot argue that taking into consideration the integrity of the 2012 Business Plan was outside the scope of the Tribunal's jurisdiction; it was a key piece of evidence on a core issue before the Tribunal, *ie*, whether the Reserves Representation was false because the Reserves were overstated.

173 The connection between the 2012 Business Plan and the Reserves was made clear during the Arbitration. In an email from Mr Z to Mr Y, it was stated that there should be as much "consistency as possible between the Plan and the Reserves estimates" and that the "target dates for the Reserves process" would need to be aligned with "the Planning process". In cross-examination, Mr Z stated that he was informing the Seller's personnel that if they were going to "book reserves for [their] field" they would have to "make sure [it was] in the business plan." Indeed, it was important for the Tribunal to draw this connection between the 2012 Business Plan and the Reserves as the Purchaser's case was that the Reserves were not properly booked because they had failed to meet the SEC Standards.

174 In light of this, the Seller cannot now say that a finding made by the Tribunal on the 2012 Business Plan was not within the submission to arbitration. It seems to us that this challenge is better understood as being grounded on a breach of the fair hearing rule. We turn to this now.

(2) No breach of natural justice

175 The Seller argues that the Tribunal's finding on the "contamination" of the 2012 Business Plan by Project Alpha was neither pleaded nor put to its witnesses, and thus the Tribunal had charted its own course in making this finding, *ie*, the Seller was denied a fair hearing and/or opportunity to present its case.

176 The Purchaser argues that the Seller's arguments are an attack on the merits of the Tribunal's determination. It explains that the Tribunal's finding was that Project Alpha had influenced or affected the 2012 Business Plan, and that such a finding was wholly consistent with the Purchaser's basic case: that the Seller was booking the Reserves without justification because it needed to justify the sale price of the Subsidiary pursuant to Project Alpha.

177 In our view, the Tribunal was fully entitled to make its finding on the 2012 Business Plan. An arbitrator's decision might only be considered unfair where the challenging party can show that a "reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award": *Soh Beng Tee* at [65(d)]. This is not so in relation to the point advanced by the Seller.

178 For very much the same reasons why we have concluded that the finding on the 2012 Business Plan was within the submission to arbitration, we are of the view that there was no breach of the fair hearing rule. To reiterate, the Purchaser's broader case was that the pursuit of unrealistic targets and data manipulation was part of the Seller's corporate culture, with such culture extending to Project Alpha and the Reserves evaluation process. Its specific case was that the Seller had aggressively booked the Reserves because it needed to justify the sale price of the Subsidiary as part of Project Alpha. In response, the

Seller offered the 2012 Business Plan as evidence that it was truly committed to the relevant projects. The integrity of the 2012 Business Plan was thus the central evidential plank of the Seller's case that it had properly recognised the Reserves.

179 This being the case, it cannot be said that a reasonable litigant could not have foreseen the possibility that the Tribunal would find that the 2012 Business Plan was "contaminated" by Project Alpha.

180 While we accept that the Purchaser did not plead or put to the Seller's witnesses that the 2012 Business Plan was "contaminated" by Project Alpha, we highlight that the rule in *Browne v Dunn* (1893) 6 R 67 does not apply with as much rigour in arbitration: *BQP v BQQ* [2018] 4 SLR 1364 at [126]. In any case, we point out that the Tribunal's finding in relation to the 2012 Business Plan was wholly consistent with the Purchaser's case that the Seller made the Reserves Representation because it needed to justify the sale price of the Subsidiary as part of Project Alpha. The Seller's witnesses were cross-examined extensively on this, and we reproduce below an excerpt of the cross-examination of Mr Z that demonstrates this:

Q: You were provided, weren't you, with the various cycle drafts of the UK Business Plan; isn't that right?

A: No, I wasn't.

Q: Your evidence is that in 2011, you didn't see business plans; is that right?

A: No, I didn't – I hadn't actually seen the final business plan, no.

Q: Did you see any of the cycles of the business plan in 2011, Mr [Z]?

A: I saw an early one in about October.

Q: Did you see the final cycle 3 one in November?

A: No.

Q: Did the business plan form any part of your decision to approve reserves at [Beta Field]?

A: Absolutely.

Q: How could it if you hadn't seen it, Mr [Z]?

A: Because my reserves team, the reserve evaluators for [Beta, Alpha Fields], when I asked him a question if the project was in the business plan, it was in the business plan. They also had it in their reserves reports.

Q: You say you didn't consider the business plan yourself?

A: No. I'm not going to review 10 business plans.

[Emphasis added]

181 Further, submissions were made by the parties on this point as well. In particular, the Purchaser submitted that the mere inclusion of a project in the 2012 Business Plan could not demonstrate the requisite commitment. Having regard to the manner in which the Arbitration unfolded, a reasonable litigant would have foreseen the possibility that the Tribunal would find that the 2012

Business Plan was "contaminated" by Project Alpha. In light of the above, we do not find there was a breach of the fair hearing rule.

182 Finally, even if we are wrong in our analysis above, we do not see how the Seller can demonstrate that any prejudice arose from the Tribunal's purported breach of natural justice. We make two points in this regard.

183 First, the Tribunal made it clear that the 2012 Business Plan was of limited assistance to the Seller's case on "commitment", even on the Seller's own terms. While the Tribunal concluded that the 2012 Business Plan was relevant to the issue of "*commitment*", the inclusion of a project in a business plan was insufficient on its own to amount to the requisite "*commitment*". The inclusion of a project in the 2012 Business Plan was only "a relevant starting factor" and "not a significant indicator". This was particularly so as the 2012 Business Plan was only a budget for one year, the first year. In other words, the Tribunal did not consider the 2012 Business Plan to be determinative of whether the Reserves were inflated by the Seller.

184 Second, the Tribunal also found that the 2012 Business Plan could not be used as evidence of "*commitment*" because (a) Mr Z had admitted that he did not look at the 2012 Business Plan when evaluating the Reserves; and (b) the Reserves Manual (which was authored by Mr Z) made no reference to any business plan as a relevant consideration.

185 As such, even if there was a breach of the fair hearing rule in the Tribunal finding that the 2012 Business Plan was "contaminated" by Project Alpha, this breach did not alter the final outcome of the Second Partial Award in any meaningful way, *ie*, there was no prejudice suffered by the Seller as a result.

The Reliance Point

186 One of the elements that the Purchaser had to prove in establishing the Deceit Claim on the Reserves Representation was *reliance*, *ie*, that it had relied on the Reserves Representation in entering into the SPA. The Tribunal found that the Seller had made the Reserves Representation with the intention of inducing the Purchaser to enter into the SPA, and that the Purchaser was so induced.

187 Unlike the points above, the Seller does not contend that the Tribunal made a decision in excess of jurisdiction. Instead, its sole contention is that the Tribunal's finding on reliance was made in breach of natural justice. The Seller raises two broad points:

(a) First, that the Tribunal's finding on reliance was made without considering: (a) its submissions on the lack of credibility of the Purchaser's witnesses; and (b) "two fundamental contentions" (see [189] to [196] and [207] below).

(b) Second, that the Tribunal used the PEDI Clause as a "definitive indication" that the Purchaser relied on the Reserves Representation even though this argument was never suggested or advanced by the parties.

188 On the first point, the Purchaser argues that the Seller is attempting to challenge the merits of the Tribunal's decision as the Seller's point was considered and rejected by the Tribunal. On the second point, it argues that the Tribunal's consideration of the PEDI Clause as a "definitive indication" of reliance, whilst not raised by the parties, did not cause any prejudice as the

Tribunal had other evidence to show that the Purchaser relied on the Reserves Representation.

(1) The Tribunal did not disregard important issues

189 On the first point, the Seller's argument on natural justice is put slightly differently. Instead of asserting that neither party had an opportunity to address a finding made by the Tribunal, the allegation is instead that the Tribunal failed to consider or disregarded points made by the Seller. A tribunal that does so may be in breach of natural justice because it would mean that it did not bring its "mind to bear on an important aspect of the dispute before [them]": *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [46]. However, it must be "clear and virtually inescapable" that the tribunal disregarded an important issue or submission. On the other hand, if the facts show that the tribunal misunderstood the case, misunderstood the law *or chose not to deal with a point as they thought it to be unnecessary*, there would be no breach of natural justice: *AKN* at [46].

190 It is important to note that a distinction must be made between two situations – where a tribunal rejects an argument (whether rightly or wrongly), and where the tribunal fails to consider the argument: *AKN* at [47]. The former will not be a basis for setting aside because while parties are free to choose their adjudicators, they must also accept the consequences of the choices they make: *AKN* at [37].

191 This observation is relevant to the present case, as it is clear to us that the Seller's arguments do not concern a breach of natural justice. Instead, they take aim at the merits of the decision that were made by the Tribunal on issues that the Seller says were not considered or disregarded. We elaborate.

(A) THE CREDIBILITY OF THE PURCHASER'S WITNESSES

192 The Seller first takes issue with the Tribunal's treatment of the credibility of the Purchaser's witnesses. During the Arbitration, the credibility of the Purchaser's witnesses was challenged by the Seller. In the Second Partial Award, the Tribunal stated that it would treat the evidence of the Purchaser with caution. Later, it stated that it did not think that the Purchaser's witnesses "were giving untrue evidence with respect to their reliance on [the Reserves Representation] on the basis of the objective circumstances".

193 The Seller argues that the Tribunal's reasoning is "incoherent", asserting that even if the Tribunal had treated the evidence of the Purchaser's witnesses as generally reliable, it could not have "justified the decision to ignore the concealment of internal documentation".

194 It appears to us that the Seller's argument is a thinly veiled challenge against the merits of the Tribunal's decision. That this is the case is patently obvious from its submission that the Tribunal's reasoning was "incoherent". Whether or not this is true, that an arbitral tribunal's reasoning does not make sense to a party is not a ground for setting aside an award.

195 In any event, the Seller's argument mischaracterises the Tribunal's analysis – when viewed in its proper context, it is clear that the Seller's submissions twist the Tribunal's findings. One simply needs to read the complete excerpts to see that the Tribunal's observation on treating the evidence of the Purchaser's witnesses with caution included the caveat that they would accept the evidence "when the objective circumstances suggest it is likely to be reliable". As such, its conclusion that the Purchaser's witnesses were giving truthful evidence that they relied on the Reserves Representation was reached

"on the basis of the objective circumstances". We reproduce the salient extracts from paragraphs 1786 and 1858 of the Second Partial Award:

> [1786] The Tribunal does not accept that there were no notes or internal documents that could have been disclosed by [the Purchaser]. The Tribunal will treat the evidence of [the Purchaser's] witnesses with caution. We will accept their evidence when the objective circumstances suggest it is likely to be reliable or is otherwise inherently credible.
>
> …
>
> [1858] As the Tribunal has said, it does not find credible the evidence of [the Purchaser's] witnesses that there was no internal documentation that could have been disclosed. However, the Tribunal does not think that [the Purchaser's] witnesses were giving untrue evidence with respect to their reliance on the representations about Reserves. *In view of the absence of internal documents, we have reached that conclusion on the basis of the objective circumstances.*
>
> [emphasis added]

(B) THE "FIRST FUNDAMENTAL CONTENTION"

196 We turn to the Seller's point on its "First Fundamental Contention" in the Arbitration. As set out in the Seller's PHB, this was that "[the Subsidiary's] 2011 SEC figures and whether these complied with the SEC Standards was not material to [the Purchaser's] decision to enter [the SPA]". However, the Tribunal found that the Purchaser relied on these figures.

197 The Seller argues that the Tribunal's decision on this point was made in breach of natural justice, raising a myriad of instances where the Tribunal allegedly ignored or failed to consider arguments made by the Seller. We deal with each point in turn, but it suffices for us to say up front that many of the points raised by the Seller suffer from the same flaw: they are, in fact, an attack on the merits.

198 First, the Seller argued in the Arbitration that if the Purchaser had relied on the Reserves Representation, the SEC Standards or the 2P Reserves booked on the Subsidiary's 2011 Accounts would have been mentioned in the Purchaser's internal documents concerning the SPA. The Seller argues that there has been a breach of natural justice, as although the Tribunal accepted that there was no reference to the SEC Standards in the Purchaser's internal documents, it nonetheless rejected the Seller's submission that there was no reliance on the basis of "objective circumstances" that were unidentified or unexplained. This argument is clearly an attack on the merits of the Tribunal's reasoning.

199 Second, the Seller argues that the Tribunal had considered the Purchaser's witness statements in a perfunctory manner, and thus it "was not entitled" to find that the Purchaser's witnesses had relied on the SEC Standards. However, it does not identify any arguments that the Tribunal had failed to consider. Instead, it argues that "[t]he Tribunal's analysis was … *flawed*" [emphasis added]. It is clear once again that the Seller's contention is a challenge to the merits.

200 Third, the Seller argued in the Arbitration that although the Purchaser's case in the SOC was premised on the SEC Standards, there was no mention of the SEC Standards in *the Purchaser's NoA*. Instead, there was a reference to a different set of standards described as the "COGEH Standards". The Seller had raised this in the Arbitration; specifically, in the SOD, it argued that the Purchaser had "no interest in whether or not the [Reserves] were compliant with [the SEC Standards] as opposed, for example, to COGEH", pointing, *inter alia*, to the fact that only the COGEH Standards were referred to in the NoA.

201 The Seller now claims that the Tribunal did not even mention this argument and had most likely overlooked it. But this argument ignores paragraph 1803 of the Award:

> 1803. There are other communications between [the Seller] and [the Purchaser] emphasising the formal significance of the year-end figure. The context indicates that that figure was an estimate made in compliance with regulatory requirements. In the overall context, these were references to the SEC Standards. *The only alternative would be that they were references to COGEH. [The Seller] cross-examined [the Purchaser's] witnesses with the suggestion that they may have had in mind COGEH Requirements, which are not pleaded in the representation, rather than SEC requirements, which are. We do not find that such cross-examination casts doubt on their asserted reliance on the SEC Standards.*
>
> [emphasis added]

Whilst there is no specific reference to the NoA, the substance of the Seller's point was that the Purchaser placed more weight on the COGEH Standards than on the SEC Standards and thus would not have relied on the Reserves Representation (which pertained to the SEC Standards). It is clear from the above passage that the Tribunal did not disregard or ignore this point – it simply rejected it.

202 Fourth, in its PHB, the Seller referred to various admissions by the Purchaser that it did not use the SEC Standards in 2013 to evaluate Reserves; instead, the Purchaser used the "SPE PRMS Guidelines". The Seller argues that this point was ignored by the Tribunal.

203 But tribunals do not have to specifically deal with *every* issue and are only required to determine "essential issues": *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [72] to [74], cited with approval in *BZW and another v BZV* [2022] 1 SLR 1080 at [53]. It is clear from the Seller's PHB that its point on the SPE PRMS Guidelines was not

crucial, taking up two sub-paragraphs in almost 800 pages of submissions. Consequently, the point can hardly be characterised as "an essential issue", and the Tribunal cannot be faulted for not specifically addressing it in a 459-page award. More importantly, the Seller's point related to admissions concerning events in 2013. This *post-dates* the formation of the SPA. Given that the relevant cause of action in the Arbitration is deceit based on a misrepresentation as to the Reserves as at 2011 resulting in an agreement, the SPA, executed on 23 July 2012, the issues of representation and reliance must relate to circumstances that *pre-date* that agreement.

204 Fifth, the Seller argued in the Arbitration that the Purchaser did not accept the Reserves Representation; it had conducted its own analysis and verification on the Reserves. It contends that the Tribunal ignored this submission without explanation.

205 This is demonstrably false. The Tribunal specifically considered this issue in the Second Partial Award under the heading "(vii) Due Diligence". It considered the fact that the Purchaser commenced a "due diligence exercise" after meeting with representatives of the Seller. It also considered the evidence of the Purchaser's witnesses, who stated that in conducting the due diligence exercise, they had relied on and trusted the figures given to it by the Seller in the Reserves Representation. Ultimately, the Tribunal accepted this evidence as being credible. This being the case, the Seller's argument is really a challenge to the merits.

206 Sixth, the Seller argued in the Arbitration that the evidence of the Purchaser's reserves manager undermined the element of reliance. It claims that the Tribunal failed to consider this point, as it was not mentioned in the Award. This again is a challenge to the merits. That said, it seems that there is a clear

reason why the Tribunal did not mention the evidence of the reserves manager: according to his witness statement, he was in fact not involved in the due diligence or decision-making exercise in relation to the SPA. As we have stated, a tribunal is not obliged to consider all issues – only essential (and relevant) ones. If the reserves manager was not involved in the due diligence or decision-making process, it was reasonable for the Tribunal to have regarded his evidence as not relevant.

(C) THE "SECOND FUNDAMENTAL CONTENTION"

207 We now move on to the "Second Fundamental Contention". As set out in the Seller's PHB, this was that the Purchaser "knew and [was] told all the matters said to have falsified the supposed Reserves Representation". In other words, the Seller's Second Fundamental Contention was that the Purchaser was given all the relevant information, which if reasonably scrutinised, would have shown that the Reserves Representation was false, and hence it could not be said that the Purchaser was induced by the Reserves Representation into entering the SPA, *ie*, there was no reliance.

208 The Seller argues that the Tribunal did not even consider this contention as evidenced by the relative brevity of its reasoning, and hence, there was a breach of natural justice because the Tribunal did not bring its "mind to bear on an important aspect of the dispute": *AKN* at [46].

209 In our view, there are two difficulties with this argument. To begin with, it is difficult to accept the proposition that a breach of natural justice can arise simply because a Tribunal's reasoning is brief. It must be remembered that the conclusion that a Tribunal did not consider important issues must be "clear and virtually inescapable": *AKN* at [46]. It seems to us that such a conclusion would not be so clear where a Tribunal *has* engaged in analysis on the issue, however

brief that analysis may be. Brevity in reasoning may also speak simply to an arbitral tribunal not analysing the issues properly (at least in the eyes of the unsuccessful party). But that is a complaint about the merits and not a ground for setting aside the Second Partial Award.

210 Putting this to one side, it appears to us that there is an explanation for the Tribunal's brief reasoning. As pointed out by the Purchaser, it seems that the Tribunal did not place much emphasis on the Seller's argument regarding due diligence because it was *legally irrelevant*. As noted above at [207], the Second Fundamental Contention was essentially that the Purchaser, with reasonable scrutiny, could have discovered the falsity in the Reserves Representation. But, as noted by the Tribunal, under English law (which was the substantive law of the Arbitration) "it is not a defence to an action of deceit to contend that the representee could have uncovered the truth through the exercise of reasonable care".

211 Hence, it appears to us that a possible reason for the Tribunal's brief analysis of the Second Fundamental Contention was because, even if it accepted that the Purchaser could have with reasonable care uncovered the truth, it would not matter. In other words, it was not an "important aspect" of the dispute, and thus the Tribunal deemed it unnecessary and chose not to deal with it at length. This is not a breach of natural justice: *AKN* at [46].

(2) The "definitive indication" – the PEDI Clause

212 Thus, the Tribunal did not disregard or fail to consider important points raised by the Seller on the issue of "reliance", and hence there was no breach of natural justice in this regard. But that is not the end of the matter.

213 The Seller additionally argues that there was a breach of natural justice because the Tribunal had made its decision on reliance based on a point that they did not have notice of, and thus they did not have an opportunity to address it. The portion of the Second Partial Award that the Seller relies on relates to the Tribunal's analysis on the significance of the SPA's PEDI Clause: the Tribunal found that the PEDI Clause was a "definitive indication" of the significance that the Purchaser placed on the Reserves estimate, and demonstrated the reliance it had placed on the Reserves Representation:

> 1853. *A definitive indication of the significance that [the Purchaser] attributed to the Reserves estimates is found in the SPA's PEDI provision.* A PEDI Claim in respect of the Reserves does not require proof of Wilful Misconduct on the part of [the Seller] and there is an absolute obligation to indemnify [the Purchaser] if any Pre-Effective Date conduct in respect of Reserves leads to loss. This stands in stark contrast with the fact that the other aspects of the indemnity, maintenance and decommissioning, are subject to that requirement. *That the parties agreed to this exemption reflects their common understanding of the fundamental importance and materiality of the Reserves estimates for this transaction.*
>
> [emphasis added]

214 It is undisputed that the Purchaser had not made this point during the Arbitration. Indeed, the Purchaser does not seem to contest that this might be a technical breach of natural justice – instead it argues that there was no prejudice to the Seller, because this point "merely reinforced the conclusion that the Tribunal had already independently reached for separate reasons."

215 We agree with the Purchaser. In our view, there was no prejudice occasioned to the Seller because while the Second Partial Award does state that the PEDI Clause was a "definitive" indication, this does not mean that the Tribunal would have reached a different conclusion without referring to it. It is significant that *prior* to the portion cited above, the Tribunal had already made

several findings in the Second Partial Award that supported the conclusion that the Seller relied on the Reserves Representation.

(a) First, it found at paragraph 1771 that "[o]ne fact is incontrovertible on the whole of the evidence, that is both sides regarded the 2P Reserves estimate of 489 mmboe as a critical element in the transaction, indeed perhaps the most critical element."

(b) Second, it noted at paragraph 1803 that there were "communications between [the Seller] and [the Purchaser] emphasising the formal significance of the year-end figure" – the "year-end figure" referring to the estimate of the Reserves in the Reserves Representation.

(c) Third, at paragraph 1806, the Tribunal accepted that "the fact that [the Subsidiary's] Reserves were compliant with the [SEC Standards] was a *material consideration* in [the Purchaser's] decision-making process" [emphasis added].

(d) Fourth, at paragraphs 1819 to 1823, the Tribunal accepted the evidence of the Purchaser's witnesses that they had relied on the Reserves Representation.

216 As a final point, the Tribunal noted at paragraph 1830 of the Second Partial Award that the Seller's "conduct clearly establish[ed] that it intended to induce [the Purchaser] to rely on [the Reserves Representation]." This is important because earlier in the Second Partial Award, in a section where the Tribunal set out the law on reliance, it noted that where there was "an intention to defraud or deceive", that would "lead to an inference that the fraudster was successful and the fraudulent intention had been successfully carried out", *ie*, it would lead to an inference that there was reliance. This being the case, it appears

that part of the Tribunal's reasoning was that since the Seller had intended to induce the Purchaser, there was a strong inference of reliance.

217 The above findings were all made *before* the Tribunal's observation that the PEDI Clause was a "definitive indication" of reliance. That was made near the very end of the Second Partial Award – in fact, it can be found on the fifth last page, at paragraph 1853, in an 1874-paragraph award. It appears that the "definitive indication" finding was simply an endnote to reinforce the rest of the Tribunal's analysis on reliance – it was not the whole of its analysis, nor was it determinative. This being the case, we do not think that it can be said that the Tribunal would have come to a different conclusion if it had *not* taken the PEDI Clause as being a "definitive indication" of the Purchaser's reliance on the Reserves Representation, *ie*, there was no prejudice occasioned to the Seller.

Conclusion on the challenges to the Second Partial Award

218 Given the many points of challenge raised by the Seller, we end this section by recapitulating the outcomes of the various points of challenge. Briefly, we do not find any of the Seller's arguments that the Tribunal had either exceeded its jurisdiction or made decisions in breach of natural justice persuasive. We thus decline to set aside the Second Partial Award on the bases of these challenges and dismiss OS 7. In summary:

(a) On the SEC Standards Complaint, the Seller's complaint is better framed as one on breach of natural justice as the Tribunal made its decision on an interpretation of the SEC Standards that was not advanced by either party. However, a tribunal is not bound to adopt an "either/or" approach and may choose to embrace a "middle path": *Soh Beng Tee* at [65]. Furthermore, it was clear on the evidence that the Tribunal had given notice to the Seller that it would adopt the

interpretation that it eventually did, having questioned the Seller's expert witnesses on this point. Thus, there was no breach of natural justice.

(b) Similarly, on the PEDI Complaint, the Seller's arguments are again premised on a breach of natural justice arising from the Tribunal not having before it expert evidence on the relationship between the SEC Standards and the SORP. However, the issue that was before the Tribunal was one of causation, namely, whether the PEDI Conduct caused a loss for the purpose of the PEDI Clause. It is therefore apparent to us that the SORP and its similarities to the SEC Standards were not important to the Tribunal's analysis and conclusion. In this regard, we have highlighted the relevant portions of the Tribunal's reasoning in the Second Partial Award which made it plain that while the SORP might be pertinent to the *valuation* of the Reserves in the Subsidiary's 2011 Accounts, it was not pertinent to *causation.* The Tribunal recognised that the issue of the similarities, if any, between the SORP and the SEC Standards may be explored in the Quantum Phase. As such, there was no breach of natural justice and no prejudice suffered by the Seller. There is thus no basis for the Second Partial Award to be set aside on this ground.

(c) On the Business Plan Complaint, once again, it is clear to us that the argument is more appropriately framed as a complaint that the Tribunal's finding that the 2012 Business Plan was "contaminated" by Project Alpha was made in breach of natural justice. We do not accept the argument, as such a finding was consistent with the Purchaser's case and the Seller's defence to it, and thus a reasonable litigant could have foreseen the possibility of the Tribunal examining and reaching a

conclusion on the integrity of the 2012 Business Plan. In any event, we are of the view that there was no prejudice as the Tribunal's finding did not impact or influence the conclusion in the Second Partial Award in any meaningful way.

(d) Finally, on the myriad of allegations made regarding the Tribunal's reasoning on the element of reliance, it suffices for us to say that the majority of the Seller's complaints were thinly veiled attacks on the merits of the Second Partial Award. Its contentions that the Tribunal did not consider important points lack merit – the Tribunal either *did* specifically address those points, or reasoned that they were immaterial and did not require extensive consideration. Thus, we decline to set aside the Second Partial Award on this ground as well.

Challenges to the Third Partial Award

219 As stated above at [3], the Deceit Claim involved the Five Topics covering various aspects of the operations concerning the Fields. The Third Partial Award concerned the Deceit Claim in relation to Production, Projects, Maintenance and Decommissioning. Save for the Production Representation, the Tribunal dismissed the Deceit Claim as regards the other topics in the Third Partial Award (see above at [35]). In relation to the Deceit Claim on the Production Representation (the "Production Deceit Claim"), the Purchaser's case was that the Seller had made fraudulent misrepresentations as to the Subsidiary's production and PE forecasts (see above at [18]). The Seller did not honestly believe that these forecasts were achievable, but nonetheless made the representations to induce the Purchaser to enter into the SPA.

220 In OS 9, the Seller seeks to set aside only those parts of the Third Partial Award which are unfavourable to it (*ie*, the Tribunal's ruling on the Production

Deceit Claim). The Seller raises a multitude of points to argue that the relevant portions of the Third Partial Award should be set aside on the basis that they were rendered in excess of jurisdiction and/or in breach of natural justice. The Seller's arguments can be categorised into six main complaints:

(a) First, that the Tribunal allowed the Production Deceit Claim on the basis of a radically reformulated representation, *ie*, that the Seller had committed deceit in respect of each of the 2012 to 2020 production forecasts and each of the 2012 to 2016 PE forecasts. The Seller argues that the reformulated Production Representation had never been pleaded by the Purchaser and was outside the scope of matters submitted to Arbitration. The Seller thus submits that the Tribunal exceeded its jurisdiction and breached natural justice as the reformulated representation constituted a new claim that the Seller never had an opportunity to test, or answer in evidence and submissions. We refer to this as the "Representation Complaint".

(b) Second, that the Tribunal exceeded its jurisdiction and breached natural justice because the effect of the Third Partial Award is that the Purchaser would be allowed to recover damages as if it had made a claim in respect of the NPV of the Subsidiary's entire business. The Seller submits that the Tribunal's conclusion was not based on an issue that was submitted to arbitration as the Purchaser did not frame a claim in respect of the Subsidiary's NPV, or in respect of any of the Capex or Opex forecasts that fed into the computation of the NPV. We refer to this as the "NPV Complaint".

(c) Third, that the Tribunal exceeded its jurisdiction and breached natural justice because it purported to pre-determine how damages for the Production Deceit Claim would be assessed in the Quantum Phase,

notwithstanding that the parties had agreed that all issues concerning quantum would be deferred to the Quantum Phase as a result of the bifurcation of the Arbitration. We refer to this as the "Quantum Complaint".

(d) Fourth, that the Tribunal exceeded its jurisdiction and breached natural justice in making certain falsity findings in relation to the Production Representation on issues such as the rig schedule, the maturity of the infill wells and the operating efficiency ("OE") optimisations, notwithstanding, *inter alia*, that the Purchaser had not pleaded a case in relation to these. We refer to this as the "Falsity Complaint".

(e) Fifth, that the Tribunal breached natural justice when it failed to consider and/or disregarded the Seller's arguments relating to whether the Seller had reasonable grounds to believe that the production and PE forecasts figures were achievable. We refer to this as the "Honesty Complaint".

(f) Sixth, that the President's partiality is a further basis for the Third Partial Award to be set aside. In this regard, the Seller makes reference to the arguments raised in OS 8. We refer to this as the "Impartiality Complaint". However, given our reasoning and conclusion above at [49]–[92], the Impartiality Complaint necessarily fails. As such, we turn to address the remaining five complaints raised by the Seller.

The Falsity Complaint and the Honesty Complaint

221 It is convenient to dispose of the Falsity Complaint and Honesty Complaint together. These complaints were not pursued with any vigour in the Seller's oral submissions and perhaps for good reason – the Falsity Complaint and Honesty Complaint were thinly disguised attacks on the merits of the Third Partial Award.

222 With regard to the Falsity Complaint, the scope of submission to arbitration clearly included the issue of whether the Production Representation was *false*. There were explicit references made in the Purchaser's submissions to the Subsidiary's (a) unjustified rig schedule, (b) the immature infill wells, and (c) the arbitrary changes to the OE. The Seller's witnesses were also cross-examined on these three points in the Arbitration. Having considered the evidence in question and in deciding to reject these points, the Tribunal cannot be said to have acted in excess of jurisdiction in dismissing the Falsity Complaint.

223 We note that the Seller's submissions on the alleged breach of natural justice on the Falsity Complaint are intertwined with its arguments on excess of jurisdiction. The factual matrix relied on for both grounds are identical. Indeed, during oral submissions, the Seller accepted that the outcome for both grounds would be the same as one would follow the other. An analogy can be drawn from the observations by the Court of Appeal in *CDM* at [16]:

> At the outset, it is essential to bear in mind that while the appellants relied on: (a) an excess of jurisdiction; and/or (b) a breach of natural justice to justify setting aside the impugned segments of the Award, the factual matrix for *both* grounds was in fact identical. Put another way, the breach of natural justice alleged by the appellants *required* the Tribunal to have exceeded its jurisdiction, because the appellants accept that if they had the opportunity to engage the issues which had in fact been placed before the Tribunal, it would follow that the Tribunal

> could not have acted in breach of natural justice. Thus, as was conceded by the appellants' counsel before us, the appellants failing to establish that the Tribunal had acted in excess of its jurisdiction would necessarily be fatal to their breach of natural justice argument.
>
> [emphasis in original]

224 As the breach of natural justice alleged by the Seller required the Tribunal to have exceeded its jurisdiction such that it could then be argued that the Seller was caught by surprise and deprived of an opportunity to address the "falsity" of the Production Representation, the two grounds stand or fall together. It is undisputed that the falsity of the Production Representation was a critical issue that was placed before the Tribunal in the Arbitration. The Seller also had the opportunity to address this and thus no prejudice was occasioned. As such, it follows that the Seller's argument on natural justice fails as well.

225 With regard to the Honesty Complaint, the Seller complains that the Tribunal acted in breach of natural justice in failing to consider its arguments on whether the Seller had an honest belief in the achievability of the production and PE forecasts. As noted above (at [189] and [210]), we begin by emphasising that it is not necessarily a breach of natural justice for a Tribunal not to refer to a party's argument in detail in its written grounds. What is key is that the Seller had the opportunity to make its submissions on whether it held an honest belief in the achievability of the production and PE forecasts. It is not disputed that the Seller had the opportunity. Moreover, it is clear to us that the Tribunal did in fact consider the Seller's arguments and the evidence in support thereof, but chose to reject them. For example, the Seller claimed that the Tribunal had ignored its argument that it had forecasted in 2014 (*ie*, in the period after the sale) that the Seller could achieve production in excess of 100 mboed. This would have affected how the Tribunal determined the issue of whether dishonesty was present in the purported misrepresentation. However, there was

no failure to consider the Seller's arguments as the Tribunal expressly recognised that argument in its reasons. This is apparent from paragraph 957 of the Third Partial Award:

> Further, [the Seller] invoke evidence that officers of [the Seller] itself expressed the view for a period after the sale, that such a level of production was capable of achievement. They accept that that does not determine the state of mind of [the officers of the Seller] …

After reviewing the other evidence holistically, the Tribunal rejected that argument and concluded that one of the Seller's officers had a dishonest state of mind.

226 This being the case, there is no basis for the Seller to challenge the Tribunal's reasoning. To otherwise entertain this argument would require the court to effectively re-examine the merits of the Tribunal's determination. Accordingly, we find that the Honesty Complaint discloses no breach of natural justice.

227 We therefore dismiss the Falsity Complaint and Honesty Complaint.

The Representation Complaint

228 We now turn to the Representation Complaint. This was the thrust of the Seller's submissions in oral submissions. The nature of the Representation Complaint necessitates a closer look at documents that were filed in the Arbitration to determine the scope of the Production Representation that was pleaded and whether the Tribunal's findings were made in excess of jurisdiction. We begin with a summary of the relevant background facts leading up to the Production Representation.

(1) The relevant background

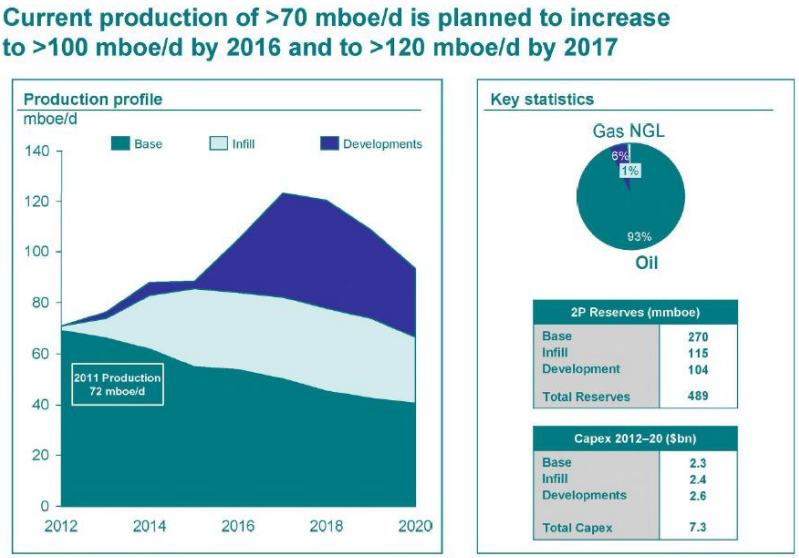
229 During the course of negotiations leading up to the signing of the SPA on 23 July 2012, the Seller provided the Purchaser with the production and PE levels that the Subsidiary was capable of achieving. Three sets of representations are key in the lead-up to the Purchaser's own financial model ("the Purchaser's Acquisition Model") which it relied on to make its indicative offer for the shares under the SPA.

230 The first was a financial model titled "OM Version 47" ("OM 47") which was provided by the Seller to the Purchaser on 14 March 2012. OM 47 contained detailed projections of the Subsidiary's total production, Opex and Capex for each of the Fields from December 2012 until the cessation of production. It suffices to note at present that the cessation of production for some of the Fields ran past 2020 (the final year in the production forecasts figures presented), all the way to 2040. OM 47 also calculated an NPV (which was dependent on the production, Opex and Capex figures therein) for 100% of the Subsidiary's shares at US$5.977bn.

231 The second is a 20 March 2012 presentation that the Seller delivered to the Purchaser (the "March Presentation") that expanded on the figures found in OM 47. The March Presentation was a comprehensive deck of 121 slides that included a wide range of forecasts in relation to production, such as the Subsidiary's production figures for the years 2012 to 2020, and other PE figures. Broadly, the March Presentation stated that the Subsidiary's overall production and PE figures would increase from 2012 onwards because of various projects, both new and existing. Several representations contained in the March Presentation are significant to our analysis below and warrant further scrutiny. They are as follows:

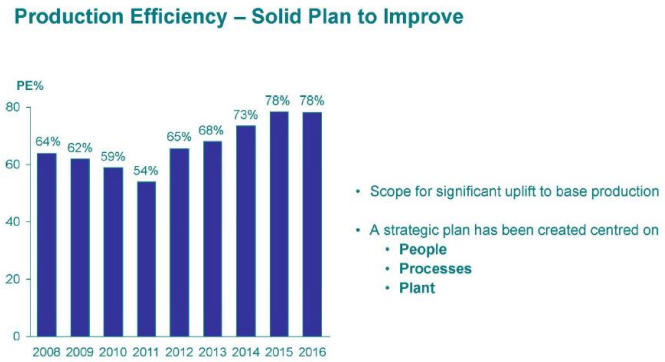
(a) Slides 7 and 121 of the presentation summarised the Subsidiary's production forecasts in the following terms: "Current production of >70kboepd rising to >100kboepd by 2016 and to >120kboepd by 2017 through defined projects ready for execution". We reproduce the relevant extract from the slides:

(b) Slide 10 of the presentation reiterated in its heading that "current production of >70mboe/d is planned to increase to >100mboe/d by 2016 and to >120 mboe/d by 2017", and further, contained a graph showing the Subsidiary's production forecasts for each year between 2012 and 2020. We reproduce Slide 10 in its entirety:



(c) Slide 55 of the presentation stated that there was a "solid plan to improve" the PE, and displayed a chart which showed the Subsidiary's

PE increasing between 2012 to 2016. We reproduce Slide 55 in its entirety:



232 The third is a revised financial model titled "OM Version 48" ("OM 48") that the Seller provided the Purchaser on 16 April 2012. OM 48 was followed by a presentation by the Seller on 17 April 2012 that explained the differences between OM 47 and OM 48. Among other things, OM 48 lowered the 2012 production targets from 70.7 mboed to 65 mboed, and modified the Capex and Opex for certain projects, suggesting that the Seller was continuously re-assessing the accuracy of the data in the OM 47. This resulted in a minor reduction in the total NPV from US$5.977bn to US$5.955bn for 100% of the shares in the Subsidiary, thus implying an NPV of US$2.918b for 49% of its shares.

233 On the basis of the data in OM 47, the March Presentation and OM 48, the Purchaser's Acquisition Model was constructed and used to calculate the offer price for the purchase of the Subsidiary's shares under the SPA. The model adopted assumptions that were more conservative than OM 48, thus valuing the Subsidiary's NPV at approximately US$3.15bn (as opposed to US$5.955bn). Based on this valuation, on 30 April 2012, the Purchaser made an indicative

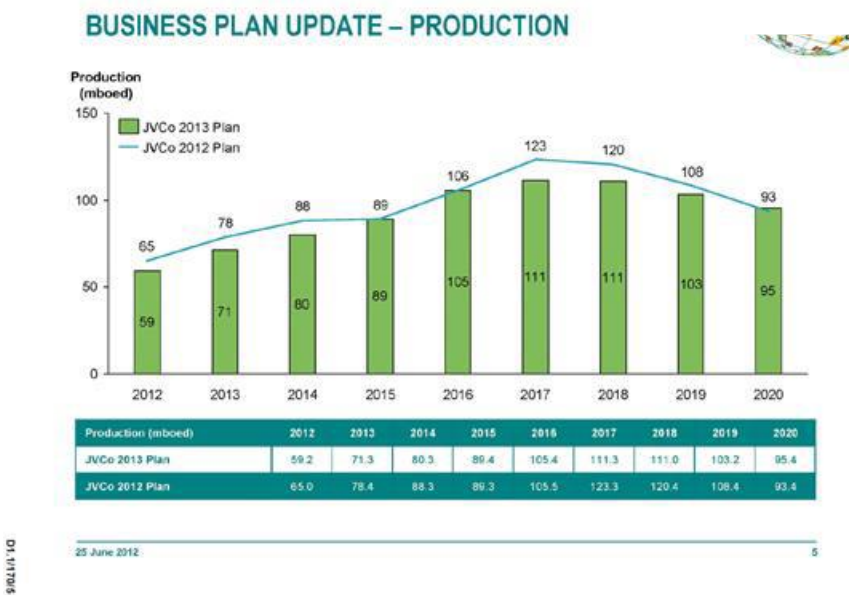
offer which valued 49% of the Subsidiary's shares at between US$1.4bn and US$1.6bn.

234 In or around June 2012, and unbeknownst to the Purchaser, the Seller identified a "production gap" between its own internal production forecasts and those shown to the Purchaser in the March Presentation for most of the years between 2012 and 2020. While the Seller explored options to plug the "production gap", a first draft of the Seller's internal business plan for the five-year period from 2013 was circulated on 18 June 2012 ("the 18 June Base Plan"). As compared to OM 48, the 18 June Base Plan had lower production figures, but higher Capex and Opex over the same period, therefore valuing the Subsidiary's NPV at only US$1.8bn.

235 However, tellingly, the 18 June Base Plan *was not disclosed to the Purchaser*. Instead, a new sales case was presented to the Purchaser in an updated financial model known as Operating Model 51 (the "New Sierra") on 25 June 2012. Prior to presenting the New Sierra, further adjustments were made to the 18 June Base Plan in quick succession between 21 June 2012 and 24 June 2012 ("the June Adjustments"). The New Sierra had incorporated the successive changes in the June Adjustments. These adjustments included the modification of, *inter alia*, the Capex and Opex figures, in order to make the Subsidiary's business look more valuable. The first adjustment produced an updated sales case (as of 21 June 2012) which increased the Subsidiary's NPV from US$1.8bn (under the 18 June Base Plan) to US$2.5bn (as at 21 June 2012). Further adjustments were then made that increased the Subsidiary's NPV figure from US$2.6bn (as of 22 June 2012) to US$3.09bn (as of 24 June 2012). These had the effect of inflating the Subsidiary's NPV until it approached the Purchaser's valuation under the Purchaser's Acquisition Model based on the March Presentation. *Tellingly*, the New Sierra did not capture the "production

gap" that the Seller identified in June 2012 and the data in the 18 June Base Plan before the June Adjustments

236 On 25 June 2012, the Seller presented the New Sierra to the Purchasers. However, the New Sierra was pitched as an "update" to the Seller's business plan and included the Subsidiary's updated production forecasts ("the June Update"). These production forecasts are pertinent to our analysis of the merits of the Representation Complaint. Slide 5 of the June Update, which presented the Subsidiary's production forecasts for the period between 2012 and 2020, is particularly relevant and we reproduce it below:



Production (mboed)	2012	2013	2014	2015	2016	2017	2018	2019	2020
JVCo 2013 Plan	59.2	71.3	80.3	89.4	105.4	111.3	111.0	103.2	95.4
JVCo 2012 Plan	65.0	78.4	88.3	89.3	105.5	123.3	120.4	108.4	93.4

237 It is common ground that the Purchaser's Acquisition Model was not updated following the June Update. On 23 July 2012, shortly after the June Update was provided, the SPA was executed. The purchase price for a 49% stake in the Subsidiary was stated in the SPA as US$1.5bn.

(2) Excess of Jurisdiction

238 We now turn to the key issue in relation to the Representation Complaint. This concerns the scope of the Production Representation and whether the Tribunal had allowed the Purchaser to reformulate and advance a broader case than pleaded. In essence, the argument was that the reformulation expanded the Production Representation to a range of years rather than confining it to a single year.

(A) THE SELLER'S CASE

239 The Seller asserts that the Purchaser had made a deliberate choice to confine the Production Representation's production and PE forecasts to only 2016 (*ie*, a single year instead of a range of years). The Seller emphasised that this was deliberately defined by the Purchaser at multiple points in the proceedings in the following terms: "[the Subsidiary] was capable of achieving overall increased Production Efficiency of 78%, and increased average daily production of more than 100 mboed *by 2016*" [emphasis added]. Thus, the scope of the Production Representation as pleaded was limited to the production and PE forecasts for a single year only, namely, 2016. Having chosen to define the Production Representation by reference to a *specific year*, it was not open to the Purchaser to expand the representation to a range of years between 2012 and 2020.

240 The Seller therefore asserts that the sole question on the Production Representation before the Tribunal was whether the production and PE forecasts for 2016 were false. It was allegedly on this basis that the parties canvassed their respective cases on the Production Deceit Claim, including in their "pleadings", factual evidence, document disclosure and PHS, and thereafter in the evidentiary hearing, where cross-examination was done on this basis, and in oral

closings. The Seller further asserts that the Purchaser attempted to re-engineer its case at the eleventh hour by advancing, for the first time in its PHB, a radically expanded Production Deceit Claim concerning the production and PE forecasts for 2012 to 2020 and 2012 to 2016 respectively. This was objected to by the Seller in its reply PHB (*ie*, the final document that was submitted in the Arbitration).

241 Despite the Seller's objections, the Seller alleges that the Tribunal failed to respect the boundaries of its jurisdiction and the rules of natural justice, by allowing the Production Deceit Claim on the basis of the radically expanded representation, *ie*, that the Seller had committed deceit in respect of each of the 2012 to 2020 production forecasts and each of the 2012 to 2016 PE forecasts. This reformulated representation was never pleaded and was therefore plainly outside the scope of matters submitted to arbitration. This constituted a new claim that the Seller never had an opportunity to properly test in evidence or make submissions on. Thus, the Seller argues, the Tribunal's determination that the Deceit Claim for Production was made out on the basis of the production and PE forecasts for those years was in excess of jurisdiction and also in breach of natural justice.

(B) THE PURCHASER'S CASE

242 The Purchaser refutes the Seller's allegations on the basis that the scope of the Production Representation was one of the issues submitted for determination by the Tribunal and that it was clear that the Purchaser did not limit its case for the Production Deceit Claim to a single year only, *viz*, 2016. The Purchaser asserts that the point was evident from multiple sources including the NoA, parties' memorials, opening statements, the evidence adduced, the PHS and the PHB. This was plainly a live issue in the Arbitration, and it is

incorrect for the Seller to allege that the Purchaser's Production Representation was limited to just 2016. Thus, the Production Deceit Claim did encompass the production and PE forecasts for 2012 to 2020 and 2012 to 2016 respectively. The Tribunal was therefore entitled to arrive at the finding that it did. The Purchaser further contends that the Seller had pursued a litigation strategy of seeking to artificially confine the Purchaser's case in the Arbitration, but had ultimately failed in its gamble.

243 As the Tribunal observed in the Second Partial Award, the Arbitration did not involve "pleadings" in the formal commonly understood sense of the term in court proceedings. Rather, pursuant to the SIAC Rules and relevant procedural orders, the parties opted for a memorials-based system. The Tribunal thus noted that any reference to "pleadings" was no more than a convenient analogy, when lawyers from common law traditions were primarily involved.

244 It is apposite to note that, in line with international arbitral practice, in a memorials-based process and unlike a pleadings-based process, the parties in the Arbitration developed their case by way of multiple documents consisting of submissions with supporting evidence in the form of witness statements and the salient documents that were relied upon (see [28] above). These were referred to as the "memorials" and included the SOC, SOD, SOR and the Rejoinder.

245 Regardless of the system adopted, we reiterate that the scope of a tribunal's jurisdiction is not necessarily limited by the "pleadings" or memorials. A practical view must be taken regarding the substance of the dispute being referred to arbitration (*Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 ("*Prometheus Marine*") at [58]). The court must not apply an unduly narrow view of what the issues in the arbitration were. Rather, "it is

to have regard to the totality of what was presented to the tribunal whether by way of evidence, submissions, pleadings or otherwise and consider whether, in the light of all that, these points were live" (*CJA v CIZ* [2022] 2 SLR 557 ("*CJA*") at [38]; see also [113] above).

246 In undertaking the analysis, the court will ordinarily examine the scope of the parties' submission to arbitration by reference to five sources (though not all of these materials may feature in every arbitration): the parties' pleadings, the list(s) of issues, opening statements, the evidence adduced, and closing submissions at the arbitration (*CDM* at [18]). Ultimately, in considering whether jurisdiction had been exceeded, the court ought to accord a margin of deference to the arbitral tribunal and examine the arbitration "in the round to see whether or not an issue was live" (*CJA* at [1]).

247 We now turn to assess the corpus of materials making up the parties' cases in the Arbitration to discern what matters were within the scope of the submission. This follows the approach taken by the Court of Appeal in *CJA* where an exercise to track through the chronology of the parties' "pleadings" was undertaken by the court to examine what were the issues in the arbitration.

(C) THE SCOPE OF THE PARTIES' SUBMISSION TO ARBITRATION

248 In determining the scope of the parties' submission to arbitration, we consider the NoA, SOC, SOD, the SOR and Rejoinder in turn.

(I) THE NOA

249 We begin with the Purchaser's NoA, and cite the relevant portion for ease of reference:

> 56. Leading up to the signing of the SPA on 23 July 2012, the [Seller] made *inter alia* the following representations in respect

> of [the Subsidiary's] actual and anticipated production efficiency and production volume figures to the [Purchaser]:
>
> > 56.1 The [Seller] had reasonable grounds to believe, and did believe, that [the Subsidiary] would produce more than 70 thousand barrels of oil equivalent per day ("mboed") in 2012.
> >
> > 56.2 The [Seller] had reasonable grounds to believe, and did believe, that [the Subsidiary's] production would rise through "defined projects ready for execution." Further, the Seller represented that they had reasonable grounds to believe, and did believe, that [the Subsidiary's] production would reach 111 mboed by 2017.
>
> 57. In fact, future production efficiency and production volume representations made by the [Seller] were false and divorced from reality. The actual PE on most of the assets in 2013 and early 2014 were not remotely close to the PE projected by the [Seller]. In Technical Appendix 2 to the McKinsey Report, McKinsey elaborated on [the Subsidiary's] production efficiency figures…

A few observations can be made. Noticeably, the NoA made *no reference* to 2016 (which was alleged by the Seller to be the Purchaser's only case on the Production Representation). Instead, paragraph 56 of the NoA referred to the representation made by the Seller – that it had reasonable grounds to believe and did believe the Subsidiary would produce more than 70 mboed *in 2012* which would rise and reach 111 mboed *by 2017*. Thus, a continuum of years was referred to instead of just one particular year. This paragraph of the NoA specifically cited Slides 7, 10 and 121 of the March Presentation (see [231] above), as well as Slide 5 of the June Update (see [236] above). As observed from the content in these slides, the slides referred to a range of dates and years and were not limited to 2016 only. For example, within Slide 10 of the March Presentation and Slide 5 of the June Update, what was provided were some graphs depicting the production capabilities of the Subsidiary from 2012 through to 2020. This is important as it made it apparent that the Production Representation that the Purchaser relied upon for the Production Deceit Claim regarding the production figures was not limited to 2016 only.

250 The NoA then went on in paragraph 57 to explain that the forecasted production and PE figures were false and divorced from reality as the actual PE figures in 2013 and early 2014 were not remotely close to the projections that were given by the Seller. A technical report was cited to support this. Again, nothing therein suggested that the Purchaser had intentionally limited the scope of the Production Representation to only 2016. If the Purchaser's case was solely focused on 2016, then the reference to 2013 and 2014 would be entirely redundant. Thus, looking at the initial submission to arbitration, it appears that the Purchaser's case was not limited to the production and PE forecasts for 2016 only.

(II) THE SOC

251 The Production Representation was then couched by the Purchaser in the SOC in the following manner under the heading "Production misrepresentation":

> 106. The [Seller], through Mr X [and two others] represented to the [Purchaser] that they believed that, *despite its mature asset base*, [the Subsidiary] was capable of achieving overall increased Production Efficiency ("PE") of 78%, and increased average daily production of more than 100 mboed, by 2016 (the "production representation") (see paras 378 to 384 below).
>
> 107. In particular, on 20 March 2012, in the [Subsidiary's] March Presentation, Mr X represented to [the Purchaser's officers] his belief that:
>
> > 107.1 [The Subsidiary] was a unique asset in the North Sea with "Current production of >70 [mboed] rising to >100 [mboed] by 2016 and to > 120 [mboed] by 2017 through defined projects ready for execution."
> >
> > 107.2 PE would increase across the [Subsidiary's] portfolio from 54% to 78% in four years (from 2011 to 2015) based on a "solid plan to improve" PE, and that PE would increase for all assets.
> >
> > 107.3 In order to achieve higher PE and production, [the Subsidiary] had a "[c]lear strategy developed with robust organisation to deliver through the upgrading of [Work

> Management System – Maximo]"; and that there had been a "[p]ositive outcome from the recent [Key Programme 4 for Advanced Life Assets or KP4] inspection".
>
> 108. On 25 June 2012, in the 2013 Business Plan Update, Mr [X] represented to [another group of the Purchaser's officers] his belief that [the Subsidiary] was capable of achieving increased production of more than 110 mboed *by 2017*.
>
> [emphasis omitted from original]

252 The Seller has urged us to focus on the language used in paragraph 106 which refers to the representation that the Subsidiary was capable of achieving PE of 78% and increased average daily production of more than 100 mboed "by 2016", which was then defined as the "production representation". The Seller argues that by identifying and defining the Production Representation in this manner, the Purchaser had chosen to bring a Production Deceit Claim that was based on a Production Representation restricted to the production and PE forecasts for 2016. The Seller contends that this must be the ordinary and plain reading of "by 2016".

253 However, when one continues to read on from paragraph 107 of the SOC, it is not so clear that the Purchaser's case in the Arbitration was so limited. Paragraph 107 *explained and particularised* what was said in paragraph 106. It signalled this by starting with the phrase "[i]n particular", and goes on to extract a quote from Slide 7 of the March Presentation stating: "Current production of >70kboepd rising to >100kboepd by 2016 and to >120kboepd by 2017 through defined projects ready for execution". What is clear from this quote is that the Purchaser's case was that they were misled that current production levels would *rise to* a certain level by 2016, and would *continue to rise* in 2017. It is evident that the Purchaser's case was much broader than the Seller asserts it to be, as the phrase "rising to" signals a range of dates up to 2016, and then to 2017. This also explains the use of the words "by 2016" which as the Tribunal found, and

we agree as well, had suggested a period of time before 2016 and not just that single year alone. We address this in further detail below (see [258]). We cannot see how it can be said that the Purchaser had restricted its case to just one year, 2016. This is also reinforced in paragraph 108 of the SOC where reference was made to the June Update slides in the footnote (specifically, Slide 5 (see above at [236]) which showed that mboed would reach 111.3 by 2017) where the Seller made the representation that the Subsidiary was "capable of achieving increased production of more than 110 mboed *by 2017*" [emphasis added].

254 Reading on from paragraph 107.2 of the SOC, it was then asserted that: "PE would increase across the … portfolio from 54% to 78% in four years (from 2011 to 2015) based on a 'solid plan to improve' PE, and that PE would increase for all assets". The Purchaser's allegation was that the Seller had represented that PE figures would improve between 2011 to 2015. Again, it is not immediately clear how it could be said that the Purchaser's case was limited to just 2016. The years before that appeared to be equally important as well.

255 For completeness, the Purchaser's case on what the Production Representation was, was also replicated further down in the main body of the SOC between paragraphs 378 to 380. We reproduce these paragraphs below:

> 378. [Mr X and two other representatives from the Seller] represented that they believed that, despite its mature asset base, [the Subsidiary] was capable of achieving overall increased Production Efficiency of 78%, and increased average daily production of more than 100 mboed, by 2016 (the "production representation").
>
> 379. On 20 March 2012, [Mr X] delivered the [March Presentation] to [several representatives of the Purchaser] (amongst others). [Mr X] made the following representations:
>
> > 379.1 [The Subsidiary] was a unique asset in the North Sea with "Current production of >70 [mboed] rising to >100 [mboed] by 2016 and to > 120 [mboed] by 2017 through defined projects ready for execution."

> 379.2 Asset-by-asset PE forecasts by year showed increasing PE for all assets. Overall, there was to be an increase in PE across the [Subsidiary's] portfolio from 54% to 78% by 2016, based on a "solid plan to improve" PE.

> 380. On 25 June 2012, Mr X delivered his 2013 Business Plan Update to [two of the Purchaser's representatives]. [Mr X] revisited his prior production forecast, and represented his belief that [the Subsidiary] was capable of achieving increased production of more than 110 mboed by 2017.

Paragraphs 378 to 380 essentially tracked and followed what had already been stated in paragraphs 106 to 108 of the SOC, save that (a) there were some minor differences in wording, and (b) a graph taken from Slide 55 of the March Presentation was attached in the main body this time. Again, a range of years was referred to and not just 2016. Paragraph 380 also had a footnote reference to Slide 5 of the June Update as well which again references a range of years (see above at [236]). In a memorials-based system, the Purchaser's SOC must necessarily be read together with the documents attached thereto such as the presentation slides. From our reading of the SOC and the documents attached thereto, we do not see how the Purchaser could be construed as running a Production Deceit Claim that was specifically restricted to the production and PE forecasts for *only* 2016. It seems to us that the reason why certain parts of the Purchaser's "pleadings" refer to 2016, was that it was lifted wholesale from

the heading of or the text used in the March Presentation Slides (see above at [231]). But that has to be read contextually with all the other materials setting out what was represented to the Purchaser graphically in the relevant slides (given the memorials-based system that was voluntarily adopted by the parties).

256 The more plausible and indeed reasonable reading of the SOC is that the case submitted to the Tribunal was much broader than just 2016. It included years before and after 2016. The pith of the Purchaser's case appeared to be that the representations were made *graphically* by the Seller in the identified slides at the March presentation. Those slides were the source of the representations and were what enticed the Purchaser to enter into the SPA. The real issue put to the Tribunal was whether the Seller had an honest belief in the achievability of the production and PE figures *as represented in those slides*.

257 As the slides referred to the Subsidiary's ability to progressively increase and achieve the production and PE figures over the successive years, this necessarily meant that the accuracy of the figures for each year would have been important to the Purchaser. The Purchaser would be concerned with whether it was indeed possible for the production and PE figures to ramp up year-on-year and reach a certain optimal level by a given year. Further, as the Subsidiary owned and operated mature oil fields, *ie*, the Fields, it is the overall performance of the Fields over the span of years that would have been of significance to the Purchaser. It would be artificial to limit the Purchaser's case to just one specific year. The wording employed in the various paragraphs of the Purchaser's SOC was "by" which connotes a different meaning from "in" as the former refers to a continuum of time as opposed to the latter which is static. This was also how the Tribunal saw it in the Third Partial Award, which we will address next.

258 We agree with the reasoning of the Tribunal on the distinctions between the use of the terms "by" and "in" in relation to "2016". The Tribunal noted as follows: "The words have quite distinct meanings. 'In' is clearly confined to the time identified. 'By' is not … 'By' refers … to the fact that annual production was forecast to increase over a period of time and was expected to exceed 100mboed *in 2016 for the first time* in the projections provided." [emphasis added] Thus, the years before and shortly after 2016 would be important in helping to assess the credibility of the Production Representation as to whether production was expected to cross the key threshold figures of >100 mboed and >120 mboed by 2016 and 2017 respectively. Again, this is reinforced by the fact that the preceding phrase "rising to" was utilised as well, which indicates a forward-looking period of time instead of being static.

259 We should also point out that if the Purchaser's real gripe was only with the 2016 numbers, it could have simply referred to the individual forecasted production figure of 105.4 mboed in 2016 instead of expressing it as being "more than" 100 mboed "by" 2016. That would have been much more specific and direct if that was indeed the intention. When seen against other parts of the SOC, it is quite clear that the Purchaser's case was not limited to just 2016. Paragraph 110.2, for instance, made reference to other years and stated that: "In contrast to 'current production' of 70 mboed represented … average actual production was 52.8 mboed in 2012. It continued to fall (not increase) to 35.8 mboed in 2013 and 32.7 mboed in 2014." As we have alluded to above at [250], references to the figures in the other years for production would be entirely irrelevant if the Purchaser's case was focused solely on 2016. What emerges upon a holistic reading of the SOC is that the Purchaser had run a broader case than what the Seller asserts.

(III) THE SOD

260 We turn next to the SOD. It is evident from the SOD that the Seller did not seek to answer a case that was limited to production and PE forecasts for 2016 only. Paragraphs 312 and 313 of the SOD are relevant. We reproduce the salient part:

> 312. The production and PE targets that the [Purchaser] rely on were set out in a Management Presentation dated 20 March 2012. The production and PE targets were set on the basis of a detailed plan, disclosed to the [Purchaser] in the VDR as Operating Model 47. …
>
> 313. Though the [Purchaser] rely on the Management Presentation as the primary source of the Production Representation, the production targets were in fact revised downwards twice before execution:
>
> > 313.1. On 17 April 2012, the [Seller] provided the Claimants with an updated model, Operating Model 48 (the "April Update"). The Respondents referred to Operating Model 48 internally as the "Sierra" plan. The April Update lowered the 2012 production target from 70.7 mboed to 65 mboed.
> >
> > 313.2. On 27 June 2012, the [Seller] provided the [Purchaser] with a further updated model, Operating Model 51 (the "June Update"). The [Seller] referred to Operating Model 51 internally as the "New Sierra" plan. The June Update lowered the production targets for every year from 2012 to 2020, with the exception of 2015 and 2016, which remained about the same. …

Paragraph 312 begins by explaining that the Purchaser had claimed to rely on *the production and PE forecasts set out in the March Presentation*, and that the forecasts were derived from the financial model known as OM 47. The Seller was therefore acknowledging that reliance was placed by the Purchasers on the *targets* set out in the March presentation which included the range of years projected therein. This was an acknowledgment by the Seller that the Purchaser's case was based on the March Presentation and this can only be

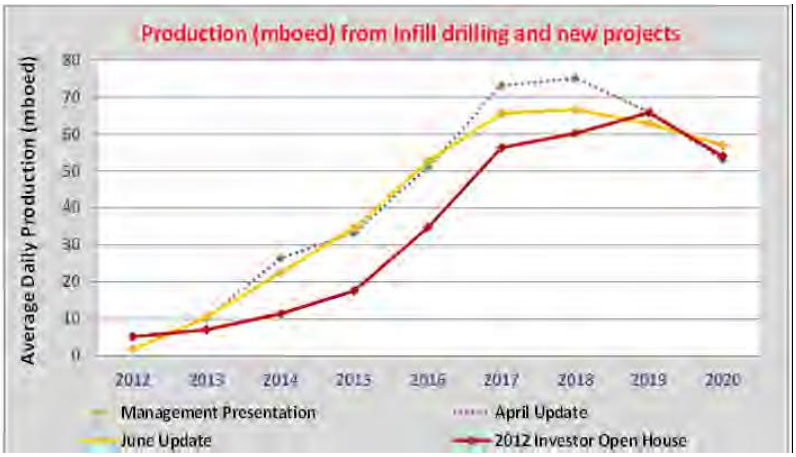
sensibly understood as referring to all the pertinent information shown in the slides.

261 Moving then to paragraph 313, which dealt with production, the Seller refuted the Purchaser's reliance on the March Presentation slides, asserting that reliance could not have been placed as the production figures were "in fact revised downwards twice". Paragraphs 313.1 and 313.2 goes on to detail the two revisions made. In particular, paragraph 313.2 asserted that the "June Update lowered the production targets *for every year from 2012 to 2020, with the exception of 2015 and 2016*, which remained about the same" [emphasis added]. The "June Update" was a presentation made by the Sellers and contained the forecast figures in the New Sierra. This statement undermined the Seller's assertion that the Purchaser's case was limited to a single year in 2016, and was consistent with its understanding that the Purchaser's case was based on the information presented in the March Presentation slides. If not, there would be no need to refer to the other years between 2012 and 2020 and argue that reliance could not be placed upon the slides because the figures were subsequently revised downwards. This demonstrated that the Seller knew that the case that it had to meet was one concerning a range of years.

262 The next few paragraphs in the SOD made this clear. In particular, we observe that paragraph 315.1 of the SOD included a chart that compared the production from infill wells shown in the March Presentation, OM 48, and New Sierra *for the period 2012 to 2020*. It also explained why the sales cases were not created "out of whole cloth":

> 315.1 First, the sales cases were not created out of whole cloth, but simply accelerated the pace of execution of the infill drilling and new projects that [the Subsidiary] was in any event planning to execute. That point is demonstrated by comparing the production profiles of [the Subsidiary's] internal 2012 investor open house plan with the production profiles contained

in the Management Presentation, the April Update and the June Update, as shown in the figure below:

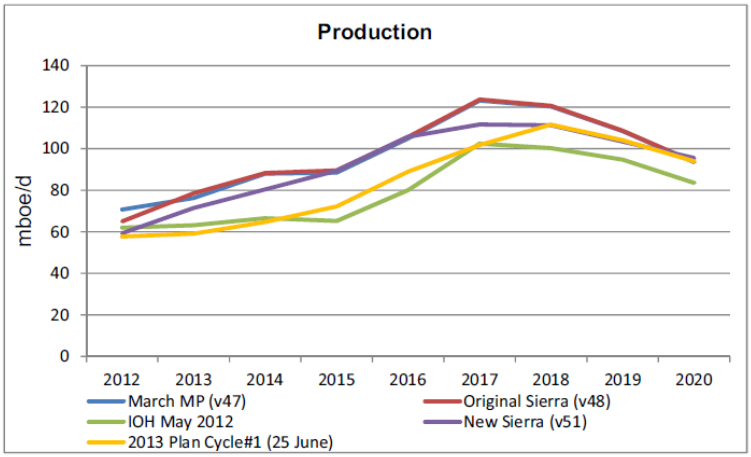


There were dates both *before and after* 2016 that were examined by the Seller in the chart. Once more, it is clear that the Seller was trying to refute the Purchaser's case on the basis that the production figures on a *continuum* over a number of years were not inaccurate.

263 In relation to PE, the SOD also sought to meet a broader case than just 2016. It was asserted that the decline in PE figures between 2011 to 2013 was due to unanticipated and unforeseeable events affecting some of the Subsidiary's assets, but that this was only temporary, as PE then improved between 2013 to the first quarter of 2016. This was argued by the Seller to prove its point that there could have been a genuine belief that PE figures would have increased to 78% by 2016 (in an attempt to dispel the misrepresentation claimed). The Seller therefore put into issue the integrity of the PE figures for 2011 to 2016. This being the case, the Seller cannot now claim that the case brought by the Purchaser was limited to just 2016.

(IV) THE SOR

264 We move to the next document, the SOR (filed by the Purchaser). Quite unremarkably (as was also done in the SOC), it specifically identified in the relevant footnotes, Slides 7 and 55 of the March Presentation and Slide 5 of New Sierra as being the ultimate source of the Production Representation. The later paragraphs also go on to detail why the Purchaser was doubtful of the integrity of the production forecasts that were given by the Seller and a graph (that was prepared by the Purchaser) was attached to support the point. We reproduce the graph below:

> 508. Original Sierra and New Sierra both contained higher production than the IOH and the Base Plan, as shown in the graph below prepared by the [Purchaser].
>
> 
>
>
> 509. The [Seller] defend[s] the credibility of the production forecasts in Original Sierra and New Sierra by asserting that those plans are underpinned by the same activity set as the Base Plan, and that the only material difference between them was an acceleration in the sales cases of the pace at which the infill drilling and new projects were to be delivered. That assertion is incorrect for two reasons.
>
> 510. First, the sales cases do not envisage delivery of the same levels of production on an accelerated scale. In fact, they show higher production being delivered faster between 2012 and 2020. …

265 A plain reading of the SOR reveals that the crux of the Purchaser's complaint was that the production forecasts *between certain* years were inaccurate. This was all done with charts that included references to a period running from 2012 to 2020. For completeness, more charts were also attached, containing figures between 2012 and 2020 which identified Capex and Opex as ingredients of the production and PE forecasts, and how the higher production figures represented on the back of lower Capex and Opex was inherently implausible.

(V) THE REJOINDER

266 The Rejoinder, the next document filed by the Seller, is also significant. It shows that the Seller was fully aware that the Purchaser was not restricting its Production Representation to 2016. In fact, there was an express acknowledgment by the Seller that a much broader case was being run by the Purchaser (we had brought the Seller's attention to this important paragraph during the course of oral arguments):

> 266. Perhaps cognizant of these difficulties in their case —all of which were explained at length in the SoD—the [Purchaser] ha[s] now revised their case on reliance to make two additional points:
>
> > 266.1 **First**, the [Purchaser] now say that "[t]he production and PE targets were central to the [Purchaser's] decision to enter into the transaction". They do not make that claim by reference to the 2016 production and PE targets, but instead they do so by reference to production and PE over the life of the fields. That is not open to the [Purchaser]. Their pleaded case alleges fraud only in relation to the 2016 production and PE targets and they must make good that claim in relation to those targets. They have not even attempted to do so.
> >
> > 266.2 In any event, even if the Claimants were permitted to run this new case, it would effectively collapse their Production Deceit claim into their Reserves Deceit claim. The Claimants' new case is that "[p]roduction and

> PE are inseparable from reserves" and that "[p]roduction and PE had a direct bearing on [the Subsidiary's] available 2P reserves base, which was crucial to [the Purchaser's] decision to enter into the transaction". If that is in fact the [Purchaser's] case there is no separate Production Deceit claim.
>
> [emphasis in original]

It appears from paragraph 266.1 of the Rejoinder that the Seller was discontent with the fact that the Production Deceit Claim as framed by the Purchaser was not made solely with reference to production and PE forecast for 2016, but also to the production and PE forecasts "over the *life of the [F]ields*" [emphasis added]. The Seller claimed that the Purchaser was not allowed to do this at this late stage since the Purchaser's "pleaded" case had shifted and it had yet to make good the newly expanded case. However, if the Seller's characterisation of the Purchaser's case in the Rejoinder was indeed correct, which we do not accept given the analysis of the NoA, the SOC and the SOR above, it could not then feign ignorance and continue to defend the claim in the Arbitration on the basis that the Purchaser's case was only limited to 2016. If a "new" and expanded case was indeed framed by the Purchaser in the SOR, then absent any jurisdictional objections by the Seller, the Tribunal was free to consider that point in its decision. The onus was on the Seller to seek a specific direction that the Purchaser ought to be restricted to its initial case. If the Seller runs its case on a narrow footing, that is a choice it has made.

267 Paragraph 266.2 of the Rejoinder reaffirmed the point that the Seller understood clearly that the Purchaser's case was not limited to just 2016. The Seller asserts before us that in extending the case to production and PE forecasts "over the life of the [F]ields" the Purchaser had essentially *collapsed* their Production Deceit Claim into their Deceit Claim on the Reserves Representation. But the very premise of that argument goes against the Seller's

argument that the Purchaser's "pleaded" case was only based on 2016. The Reserves Representation was based on the life of the Fields. If the Production Deceit Claim was collapsed into the Deceit Claim on the Reserves Representation, it must follow that the former is not limited to 2016. By making the argument, the Seller recognises that the Purchaser was putting forward in the Arbitration an *expanded* case regarding production and PE forecasts "over the life of the [F]ields".

268 There were other references in the Rejoinder where the Seller attempted to refute the Purchaser's case on the merits, and made repeated submissions acknowledging that the Production Representation extended beyond the forecasts in 2016. For instance, it was argued that "[t]here was no sales case at all in relation to the 2016 PE forecasts or indeed *in relation to any PE forecast*" and that "[t]he same is true of the 2016 production forecasts and indeed the production forecasts for *any other year*" [emphasis added]. These points were argued before the Tribunal. Therefore, it is difficult to see how it can be credibly contended that the Production Deceit Claim was restricted to 2016.

(VI) THE PHS

269 Having canvassed the materials above which make up the "Memorials", we now turn our attention to the PHS. There is strictly no need to refer to the PHS should the Memorials be sufficient to demonstrate that the scope of the Production Representation extended beyond 2016, but we cover this point for the sake of completeness.

270 Starting with the Purchaser's PHS, the Purchaser reiterated that the Production Representation was not limited to 2016. It is stated in paragraph 6.12 of the PHS that: "the [Seller] represented to the [Purchaser] that the [Subsidiary] had current average daily production of more than 70 mboe/d rising to more

than 100 mboe/d by 2016 and more than 120 mboe/d by 2017 … Again, the representation was made in writing in three slides in the March Presentation". The footnotes made reference to slides 7, 10 and 121 in the March Presentation, the same slides that were referred to in the SOC. It would be remembered that Slide 10 of the March Presentation contained, *inter alia*, graphs showing a range of dates for production forecasts for each year between 2012 and 2020 (see above at [231]). These same slides were again cited further down the Purchaser's PHS where it was asserted that production was forecasted by the Seller to "rise to" certain figures by 2017. It is therefore clear from the Purchaser's PHS that the Production Representation as regards the production forecast was not limited to 2016.

271 Paragraph 6.13 of the Purchaser's PHS then addressed the PE forecast. It cited Slide 55 of the March Presentation (see above at [231]) which showed the Subsidiary's PE increasing between 2012 to 2016. The same point was made further down the Purchaser's PHS where it was asserted that: "[i]n slide 55 of the March Presentation [the Seller] forecast that overall production efficiency would rise from 54% in 2011 to 78% in 2016". It is again, therefore clear that the Production Representation as regards the PE forecast was not limited to 2016.

272 As can be observed, the Production Representation was presented in the Purchaser's PHS in the same way as it had been in the "Memorials". A range of dates was asserted. It appeared from the Seller's PHS that it understood that to be the case.

273 In refuting the Purchaser's position that there was an actionable misrepresentation in the Production Representation, the Seller had argued in paragraph 251 of the Seller's PHS, that: "most of the evidence on which the

Claimants rely as demonstrating the materiality of the implied representations and their reliance on them relates to total production and to PE *over the life of the field* and not to the 2016 production and PE targets" [emphasis added]. The Seller continued by stating that in running an expanded case concerning the life of the Fields, this would "effectively involve their Production Representation claim collapsing into their Reserves Representation claim" as production and PE are inseparable from the Reserves due to the direct bearing they have on each other.

274 This argument demonstrated (for the second time, the first being in the Rejoinder) that the Seller was well aware that the Production Representation was not limited to 2016. Indeed, the Seller appeared to have accepted that the claim concerned the *life of the Fields.* Regardless of whether the Seller agreed that a separate Deceit Claim for Production existed (in light of its argument that that claim had been collapsed into the Deceit Claim on the Reserves Representation), the fact is it was aware that the Purchaser was running a much broader case. Being aware of this broader case, the Seller cannot now complain that it would have put its case differently had it known that the Purchaser's case went beyond 2016.

275 Having recognised the breadth of the case run by the Purchaser from the Purchaser's PHS (even assuming that was not apparent from the Memorials), the Seller had to decide how to meet the case being run by the Purchaser. This would include whether to amend its Memorials, file further witness statements, engage in an expanded discovery process, file further PHS, and decide on the scope of the cross-examination.

276 It is unclear whether the Seller did this or decided as a matter of strategy not to address the Purchaser's case fully. Whatever the choice it made, it goes

without saying that it would have been carefully considered and deliberated. We note in this regard that the evidence from the Seller's witnesses was also not limited to the achievability of the Subsidiary's production and PE forecasts for 2016 only. It dealt with the forecasts for various years apart from 2016 (such as 2012–2014 and 2016–2017, and also for the years 2013–2015).

277 If the Seller was of the view that the Purchaser's case on the Production Deceit Claim ought to be restricted to 2016 only, it ought to have raised a jurisdictional objection at an appropriate juncture. It is important to raise jurisdictional objections to a tribunal. Where a jurisdictional challenge has been raised, it must lead to a jurisdictional ruling by the tribunal. It is incumbent upon the tribunal to do this. If not, the new claim or issue that was raised would not be properly submitted to the tribunal's jurisdiction (see *CBX and another v CBZ and others* [2022] 1 SLR 47 at [47], [55] and [56]).

278 If the party does not raise a jurisdictional objection, its failure to do so and its continued participation in the arbitration might be taken as suggesting that it is ready, able and willing to proceed further with the hearing on that basis (*China Machine* at [165]–[172]).

279 It appears that the Seller had raised some form of jurisdictional objection (albeit not formally), but the Tribunal eventually decided that it had jurisdiction over the matter as the Purchaser had run a much broader case than production and PE forecast for 2016. The Tribunal recognised the Seller's complaint in the Third Partial Award, but ultimately came to the view that the Seller's interpretation of the Purchaser's case was "unreasonable and clearly incorrect as the Purchaser had run its case on a broader basis than asserted":

> 316. The [Purchaser] contend that the reference to production "by 2016" should be understood as a reference to that being the first year in which production exceeded 100mboed. They

> contend that the pleaded misrepresentation should also be understood as referring to production in 2017 and, further, to the forecasts for the whole period 2012–2020. They point out that the pleading replicates the precise language used in the March Presentation (slides 7 and 10).
>
> 317. As we have noted, in their pleadings the [Seller] cha*nged the language of the pleaded representation, from "by" to "in", and then made submissions based on the changed language. That is impermissible.* The words have quite distinct meanings. "In" is clearly confined to the time identified. "By" is not.
>
> 318. The *Tribunal finds* that the [Seller's] interpretation of the pleading, as concerned only with production in 2016, is an *unreasonable and clearly incorrect interpretation.*
>
> …
>
> [emphasis added]

In essence, the Tribunal found that the Seller was trying to artificially restrict the Purchaser's case to 2016 by changing the language of the pleaded representation from "by" to "in", which was impermissible given the distinct meanings.

280 In our view, the Tribunal was entitled to find that the Purchaser's "expanded" case was properly within its jurisdiction to decide. In fact, from the materials cited above from [248]–[268], it cannot be gainsaid that this was even an "expanded" case by the Purchaser, as it appeared to us that this was the Purchaser's case from the very beginning where the allegation that was made was not just as regards 2016 only, as the charts depicting the source of the Production Representation covered years before and after 2016.

281 The Seller has tried to draw an analogy with the facts in *CAJ* in order to persuade us that the Tribunal had exceeded its jurisdiction. But in our view, that case is not relevant as the circumstances are different. We explain.

282 In *CAJ*, the appellants raised an unpleaded defence in their written closing submissions *for the first time.* The defence raised was that the appellants were entitled to an *ex post facto* extension of time ("EOT") to complete their obligations under the contract. The respondent filed their written closing submissions objecting to the EOT defence on the basis that it was not pleaded, after which proceedings were declared closed without the tribunal ruling on the admissibility of this new defence. The tribunal accepted the EOT defence in the award. The Court of Appeal set aside the tribunal's decision to accept the EOT defence on the basis of excess of jurisdiction and breach of natural justice. The Court of Appeal reasoned that as the EOT defence was not pleaded and featured *for the first time* in the appellant's closing submissions, it would only fall within the parties' scope of submission to arbitration. The EOT defence had to be properly introduced by an amendment to the pleadings (*CAJ* at [52]). It was wrong to conclude that so long as the point was covered in closing submissions, then that would be sufficient to bring it within the scope of submission to arbitration (*CAJ* at [50]). As the EOT defence was fact-sensitive in nature, the correct procedure would have been for the tribunal to invite submissions on whether an amendment to the pleadings should be allowed, and if allowed, the following orders such as "consequential amendments to the respondent's pleadings, specific discovery, leave to adduce fresh evidence (both factual and expert) to meet the new EOT Defence, and recalling witnesses for cross-examination" should have been made (*CAJ* at [40]).

283 It is apparent from the analysis above that *CAJ* is different from the present case. Unlike *CAJ* where the EOT defence was raised in the closing submissions *for the first time* right at the end of the arbitral process, it is clear from the Memorials and the Purchaser's PHS cited above that the Purchaser was running a case on the Production Representation that was not limited to 2016.

Further, the Seller was aware that this was the case, at the latest, by the time the PHS was filed.

284 Having set out the scope of the parties' submissions in some detail and the issues that were placed within the scope of the submission to the Tribunal, we now turn our attention to address the issue of whether the Tribunal decision contained a "new difference" outside the scope of the submission to arbitration (*Bloomberry* at [69]).

(D) WHETHER THE TRIBUNAL EXCEEDED THE SCOPE OF SUBMISSIONS

285 It is apparent from the Memorials that the Production Deceit Claim was not framed as narrowly as the Seller suggests. The Seller was aware that a broader case was being run by the Purchaser. The broader case was within the Tribunal's jurisdiction to decide. Turning to the relevant portion of the Third Partial Award which is contested by the parties, the scope of the Production Representation as found by the Tribunal essentially tracks what was presented graphically in the relevant slides:

(a) The Tribunal found that the "pleaded production representation is directed to forecasts for the period 2012–2020", and that issues of falsity, honest belief or reasonable grounds, and reliance would be considered on this basis. This follows the graphs provided in Slide 10 of the March Presentation and Slide 5 of the June Update.

(b) The Tribunal found that in respect of the PE forecasts, this "aspect of the case will be confined to 2012–2016", which follows what has been set out in Slide 55 of the March Presentation.

286 By scoping the Production Representation in this manner, the Tribunal was not acting beyond the pale. In fact, the Tribunal was careful to only refer to the slides that the Purchaser had cited and did not give the Purchaser *carte blanche* on its claim. This can be observed from how the Tribunal confined the forecast for the PE figures to only 2012–2016 as presented in the March Presentation, despite the fact that the other parts of the New Sierra had also provided OE figures up to 2017: "The Respondents' March Presentation provided PE figures for 2012–2016 (Slide 55). The June Update provided the OE figures up to 2017 (Slides 7–8). The former is pleaded."

287 Given the above materials, it cannot be said that the Third Partial Award involved matters outside the scope of submission to arbitration such that it would constitute a "new difference" that was irrelevant to the issues requiring determination by the Tribunal (*Bloomberry* at [69]; *CRW* at [30]). Hence, we conclude that the Tribunal's finding on the Production Deceit Claim in the Third Partial Award cannot be set aside on the basis that it was made in excess of jurisdiction. For all these reasons above, we dismiss the Representation Complaint. It also follows that there is no basis for concluding that there was a breach of natural justice on this issue.

The NPV Complaint

288 We turn next to the NPV Complaint. The nub of the Seller's complaint is that the Tribunal exceeded the scope of submission to arbitration because the "effect" of the Third Partial Award was to allow the Purchaser to succeed on an "NPV Claim" which had not been made in or submitted to arbitration.

289 It is common ground between the parties that the Tribunal's conclusion that the Purchaser had "established falsity of the production and PE forecasts by reason of the differences between the Base Plan and New Sierra" is within the

scope of submission to arbitration. However, the Seller alleges that the Tribunal then overstepped its boundaries by going on to make two further findings.

290 First, the Tribunal found that the objective of the June Adjustments with respect to the Production Representation was "not only directed to the quantum of annual production", but also "directed to influencing the [Purchaser's] computation of NPV and, therefore, the prices it would be willing to pay". The Tribunal explained that while the influencing of the NPV computation and the Capex and Opex forecasts were not themselves the subject of the Production Deceit Claim, the inter-relationship of these elements for the purposes of valuation of the Subsidiary was pleaded. The Tribunal then concluded that both parties understood that these forecasts would be used to compute the NPV of the Subsidiary for the purpose of making the offer for the shares to be acquired under the SPA:

> 364. Similarly, notwithstanding the focus on NPV computations derived from the forecasts provided from March to June, there is no misrepresentation alleged with respect to the NPV. However, both parties understood that the forecasts of production and costs would be computed in that manner by the Claimants for the purpose of determining their valuation and, accordingly, their offer. What mattered was not any NPV calculation by the Respondents, but how the forecasts they provided would be computed by the Claimants.

The Seller asserts that the effect of the Tribunal's conclusion is that the Purchaser was allowed to succeed in a deceit claim in respect of the entire NPV of the Subsidiary – a claim that the Seller states was never pleaded and would expose it to far greater potential liability in terms of damages.

291 Second, the Tribunal found that it would adopt "the Base Plan, in its iteration on 23 June, as the standard to determine the falsity of New Sierra". As a result, the Tribunal concluded that "[d]amages will be assessed on the basis that the whole process of manipulation in the June Adjustments is reversed".

The Seller's complaint in this regard is that none of the parties had pleaded or made submissions as to how damages should be assessed as a result of any finding of falsity. This was due to the bifurcation of the Arbitration into the Liability and Quantum Phases with matters pertaining to the assessment of the quantum of damages being left to the latter.

292 Having considered the parties' submissions and evidence before us, we find that the Tribunal did not act beyond the scope of its jurisdiction in making these findings.

293 We begin with the first complaint (see [290] above). It is important to note that the Seller does not dispute that the production and PE forecasts were related to or based on its Capex, Opex and NPV. The Tribunal found that the Capex and Opex figures that were presented were an essential component of the forecasts as the "viability and do-ability" of the production and PE forecasts "depended on the reasonableness of" the expenditure that was reflected under Capex and Opex. In other words, if there was insufficient Capex and Opex, the forecasts would not be realisable. The Tribunal also found that the June Adjustments were not a *bona fide* exercise and involved "senior executives seeking to improve the appearance of the production forecasts solely for the process of sale by getting production, Capex, Opex, and, therefore, NPV back to Original Sierra". Hence, the June Adjustments were a "manipulation directed to producing an NPV of about the same as in Original Sierra" and "strongly supports the [Purchaser's] case on falsity of the production forecasts".

294 What the Tribunal had found was that the production and PE forecasts were false as a result of the Capex and Opex figures having been manipulated. It followed that the NPV that resulted was also inaccurate. In other words, it was the manipulation of the Capex and the Opex that enabled the Seller to arrive

at an NPV in the New Sierra that was similar to the NPV that was presented to the Purchaser in the Original Sierra in the March Presentation. The Tribunal's explanation is coherent. While no misrepresentation was alleged as regards the Capex and Opex figures and also the NPV, both sides understood that the production and PE forecasts would be used for the "purpose of determining their valuation and, accordingly their offer", and "[w]hat mattered was not any NPV calculation by [the Seller], but how the forecasts they provided would be computed by [the Purchaser]". It is inconceivable that the production and PE forecasts were achievable without the commensurate level of investment in Capex and Opex. If therefore higher Capex and Opex were needed than what was stated by the Seller in order to achieve the forecasted production and PE numbers, that would naturally mean that the NPV was overstated and ought to be adjusted downwards to take into account the correct amount of investment in the Capex and Opex. This is axiomatic and really a matter of common sense.

295 These numbers were represented to justify the asking price from the Seller's point of view, and to compute the offer price from the Purchaser's point of view. While it is true that the Purchaser did not make a case based on the NPV itself, since it came to a different price eventually after doing its own internal calculations in the Purchaser's Acquisition Model, the point that the Tribunal was making was that these figures had a material influence on the calculation of NPV from the Purchaser's perspective and resulted in it putting in an offer price that was higher than the true numbers for the Subsidiary warranted. This is axiomatic as it is inconceivable that the Purchaser would have maintained its original price if it had been given the true picture. However, recognising that the Capex and Opex figures had a direct influence on the NPV, and therefore the price that the Purchaser was prepared to pay for the shares under the SPA, is *not the same* as saying that the Purchaser has brought a deceit claim based on the entire NPV of the Subsidiary. That would be to conflate the

implications of finding that the Production Deceit Claim was made out, with the factual conclusions that must be arrived at in order to find that the claim has been made out. In order to find that the Production Deceit Claim had been made out, the Tribunal had to find that the production and PE forecasts were false. In order to do that, the Tribunal had to examine the integrity of the key components that undergirded the forecasts. The key components were Capex and Opex. If those were found to be false, it would follow that the NPV that was computed would have to be adjusted as the price that the Purchaser would have been prepared to pay for the shares under the SPA would be less. That is the consequence of finding that the Production Deceit Claim has been made out. But that does not mean that a deceit claim for the NPV of the Subsidiary has been made. The issue is one of characterisation, that is, the impact the false NPV had on the price that was offered by the Purchaser as a result of the changes to the Capex and Opex figures made by the June Adjustments.

296 Further, it is a *non-sequitur* for the Seller to argue that the Tribunal had exceeded the scope of submission to arbitration just because the "effect" of the Third Partial Award is that the Tribunal allowed the Purchaser to recover "as if it had made an NPV claim" (*ie*, a claim based on fraudulent misrepresentation of the Subsidiary's NPV). The role of this court exercising its supervisory function is not to decide whether an award can be challenged based on what the "effect" of an award is, but rather, on the basis of what was actually decided by the Tribunal. All the Tribunal decided was that the Production Deceit Claim succeeded on the basis that the forecasted production and PE figures for the relevant years were false. Manipulation of the Capex and Opex was evidence of the deceit. The New Sierra did not contain the additional Capex or Opex required to achieve the forecasted production and PE without which those figures were unsustainable. Thus, the manipulation of the Capex and Opex

figures naturally influenced the NPV calculation by the Purchaser causing it to put in an offer at an inflated price.

297 The fact that the Purchaser was now in as good a position as it would have been had it made an NPV claim as a result of establishing the Production Representation and therefore the Production Deceit Claim, does not necessarily mean that the Tribunal decided a deceit claim on NPV. As the Tribunal had painstakingly emphasised, while it was cognisant that the Purchaser "did not plead that the NPV, Capex or Opex figures were themselves deceitful", these were necessarily linked concepts: "This purpose [*ie*, the manipulation in the June Update] goes beyond the pleaded production forecasts to encompass Capex and Opex forecasts and NPV computation, which are not of themselves the subject of the deceit claim. However, the inter-relationship of these elements for purposes of valuation was pleaded."

298 Ultimately it must be remembered that the Production Representation was based on the March Presentation which was the Original Sierra. To maintain a veneer of truth, New Sierra projected a similar figure using production and PE forecasts that were slightly adjusted downwards. However, the Capex and Opex were adjusted pursuant to the June Adjustments but to a level that could not sustain the production and PE forecasts that were represented. Thus, whether these revised figures could sustain the production and PE forecasts in the March Presentation was relevant to the issue of the falsity of those forecasts. This was an issue plainly within the Tribunal's jurisdiction to examine and decide.

299 The Tribunal thus did not exceed the scope of submission to arbitration in referring to the relationship between the Production Representation, Capex

and Opex, and their influence on the computation of the NPV. The Seller's NPV complaint therefore does not engage Art 34(2)(*a*)(iii) of the Model Law.

300 The second of the Seller's complaints, outlined at [291] above, also does not hold water. The Purchaser has to be put back in the position it would have been had the fraudulent misrepresentation *not been made.* In other words, the falsity needed to be underdone and reversed. In stating that damages would be assessed on the basis that the June Adjustments were reversed, what the Tribunal had done was to simply "undo" the effects of the falsity. What the reversal would entail, was a matter for the Quantum Phase. While we accept that it was not strictly necessary for the Tribunal to have stated this, it does not mean that the Tribunal was precluded from doing so as. The Tribunal was merely stating a point that was consequential from its conclusions on falsity.

301 This point is related to the next issue raised by the Seller on how the Tribunal had pre-determined the manner in which damages would be assessed, to which we now turn.

The Quantum Complaint

302 As alluded to previously (see [28(e)] above), the essence of the Seller's complaint on this point was that the Tribunal had exceeded the scope of the submission to arbitration as it purported to make findings on the quantum of damages in spite of the bifurcation order. Specifically, the Seller's unhappiness is that the Tribunal had prejudged or pre-determined an issue that was left for the Quantum Phase by stating that "damages will be assessed on the basis that the whole process of manipulation in the June Adjustments is reversed". The Seller's view is that the Tribunal's comments foreclosed evidence or arguments on how to value the loss in a different manner. The Seller's expert has thus, during the Quantum Phase, placed reliance on the Tribunal's finding that the

Base Plan represented the truth in respect of the production and PE forecasts and is the "starting point for making adjustments".

303 Properly construed, this is not *really* a point on whether the Tribunal exceeded its jurisdiction. The issue of the quantum of damages was always an issue to be addressed in the Arbitration. The argument instead is that the Tribunal prejudged the issue as it ought to have been decided in the Quantum Phase and not the Liability Phase in view of the bifurcation order.

304 But in our view, as the Tribunal has yet to come to a definitive conclusion on the appropriate quantum of damages, there can be no question of breach of natural justice or for that matter prejudice. We make two points.

305 First, the Tribunal had simply pointed out what it felt was the consequence of its findings on liability and did not purport to assess damages – that remains an exercise for the Quantum Phase. If the observation of the Tribunal was incorrect, it would be open to the Seller to make that argument in the Quantum Phase.

306 Second, it remains open for the Seller to (a) dispute the methodology utilised by the Purchaser's expert to value the loss, and (b) put forward its case on the proper methodology for assessment of damages with its own expert report. To put it another way, given that the Quantum Phase is ongoing, the issue is not foreclosed as there is still the opportunity to refute that point. There would be no possible basis at this stage to say that there was a breach of natural justice. The question at this stage is whether there is sufficient material to demonstrate that the Third Partial Award should be set aside on the basis of a breach of natural justice, and specifically, prejudgment. We are unable to say that there is. Ultimately, there is no prejudice caused to the Seller as it is still

open to it to ventilate its points on damages in the Quantum Phase. The challenge is premature.

Breach of Natural Justice

307 In so far as the Seller's argument concerning breach of natural justice overlaps with their excess of jurisdiction arguments, these are also dismissed. The Seller's argument on the natural justice point is that the findings by the Tribunal on the scope of the Production Representation, amongst other things, breached natural justice as the Seller did not have a reasonable opportunity to address the "expanded" Production Representation. Whether a breach of natural justice is made out depends on whether the aggrieved party "has been given a fair opportunity to deal with an issue that has been raised in the arbitration" (*Phoenixfin Pte Ltd and others v Convexity Ltd* [2022] 2 SLR 23 at [52]) and whether there was prejudice suffered. Those issues naturally do not arise where the issue had been properly submitted to arbitration.

308 As we have decided that the findings made by the Tribunal were not made in excess of jurisdiction, the Seller's failure to establish its excess of jurisdiction argument is necessarily fatal to its natural justice complaint for the same reasons canvassed at [223]–[224] above (see also, *CDM* at [16] and [47]). Thus, we do not find that the Third Partial Award can be set aside on the grounds of a breach of natural justice. We therefore dismiss OS 9.

Conclusion

309 To conclude, we dismiss the Applications in their entirety. We invite submissions on costs, including quantum, which are to be filed within 21 days from the date hereof, limited to 25 pages each. The parties are to take note of

the Court of Appeal's guidance in *Senda International Capital Ltd v Kiri Industries Ltd* [2022] SGCA(I) 10 in this regard.

Kannan Ramesh
Judge of the Appellate Division

Dominique Hascher
International Judge

Arjan Kumar Sikri
International Judge

OS 7 and OS 8
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OS 9
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