IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(I) 8

Originating Summons No 11 of 2021

Between

Asiana Airlines, Inc

… Plaintiff

And

Gate Gourmet Korea Co, Ltd

… Defendant

JUDGMENT

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

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Asiana Airlines, Inc
v
Gate Gourmet Korea Co, Ltd

[2022] SGHC(I) 8

Singapore International Commercial Court — Originating Summons No 11 of 2021
Simon Thorley IJ
23, 24 March, 20 April 2022

27 May 2022 Judgment reserved.

Simon Thorley IJ:

Introduction

1 By this Originating Summons ("the OS") the plaintiff seeks to set aside the Final Award ("the Award") dated 18 February 2021 in an Arbitration ("the Arbitration") (ICC Arbitration No 24544/HTG) together with an Addendum thereto ("the Addendum") dated 2 April 2021 pursuant to s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and Arts 34(2)(*a*)(ii) and 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). The plaintiff, Asiana Airlines, Inc ("Asiana") was the respondent and counterclaimant in the arbitration and the defendant, Gate Gourmet Korea Co, Ltd ("GGK") was the claimant.

2 The OS was filed in the General Division of the High Court (HC/OS 580/2021) on 11 June 2021 and was transferred to the Singapore International Commercial Court ("SICC") on 24 August 2021. Following the filing of affidavits and written submissions, there was an oral hearing before me on 23 and 24 March 2022 where Mr Thio Shen Yi SC ("Mr Thio SC") and Ms Nanthini d/o Vijayakumar appeared on behalf of Asiana and Mr Liew Wey-Ren Colin ("Mr Colin Liew") appeared on behalf of GGK.

Background

3 Asiana is a company (organised and existing under the laws of the Republic of Korea) that is engaged in the business of air travel. It is part of a group of companies, the Kumho Asiana Group ("the Kumho Group").

4 GGK is a company (also incorporated under the laws of the Republic of Korea) that is engaged in the business of providing catering and other services to the airline industry. GGK is a joint venture between Gate Gourmet Switzerland GmbH ("GGS") and Asiana. GGS is a subsidiary of the Gate Gourmet group of companies ("Gategroup").

5 Since April 2003, catering services had been provided to Asiana by LSG Sky Chefs Korea Co Ltd ("LSGK"), a joint venture between Asiana and a German company. Asiana's agreement with LSGK was due to expire in June 2018 and, being dissatisfied with the pricing structure adopted by LSGK, Asiana sought to negotiate a replacement agreement with GGK and the Kumho Group. These negotiations bore fruit and resulted in three agreements, one of which was a Catering Agreement ("the Agreement") dated 30 December 2016 between Asiana and GGK. The Agreement was governed by Korean law.

6 The other two agreements were a Joint Venture Agreement ("JVA") between GGS and Asiana and a Bonds with Warrants Subscription Agreement ("BWA") between an associate company of GGS, Financial Services Sàrl, and the holding company of the Kumho Group.

7 Under the Agreement, GGK agreed to provide catering and handling services to Asiana for 30 years. The Agreement contained an initial business plan ("the IBP") that set out calculations for the pricing mechanism for the catering services that GGK was to provide. The Agreement reflected that the IBP would be replaced with an adjusted "2018 Business Plan". The 2018 Business Plan, in turn, was to be replaced with an adjusted "2020 Business Plan". The Arbitration was the result of a disagreement between the parties as to the correct interpretation of Annex 1.4 to that Agreement ("Annex 1.4").

8 The relevant parts of Annex 1.4 read as follows:[1]

> **Introduction**
>
> ***The terms and conditions for all prices for meals and other Services as of the Commencement Date shall be no less favourable to either Party than the current pricing terms paid by Asiana for any services provided at the Stations that are the same as or similar to the Services. The pricing terms shall be adjusted based on inflation, CPI increases, cost pass-throughs and menu and service changes in accordance with this Annex 1.***
>
> **Business Plan**
>
> The Parties have agreed to adopt the business plan as set out in Appendix 1 (the "**Initial Business Plan**").
>
> Provided that the Initial Business Plan shall be adjusted during the following periods:
>
> i. The Initial Business Plan shall be adjusted in 2018 at least four (4) months prior to the Commencement Date and the Initial Business Plan shall be replaced with the

[1] JP-3 at p 232.

> new business plan starting from the Commencement Date (the "**2018 Business Plan**"). A sample 2018 Business Plan (i.e., prior to adjustment pursuant to this clause) is set out in Appendix 1(a).
>
> ii. Thereafter, the 2018 Business Plan shall be adjusted prior to January 2020 and the 2018 Business Plan shall be replaced with the new business plan starting from January 2020 until the expiration of the Term (unless otherwise terminated in accordance with Clause 11.2 of the Main Agreement) (the "**2020 Business Plan**"), A sample 2020 Business Plan (i.e., prior to adjustment pursuant to this clause) is set out in Appendix 1(b).
>
> The Initial Business Plan, the 2018 Business Plan and the 2020 Business Plan shall be collectively referred to as the "**Business Plan**".
>
> ***The adjustments to the Business Plan shall be limited to any changes to cost elements and passenger numbers based on the actual results during the relevant period. The net profit as committed in the Business Plan will be preserved.***
>
> [emphasis in bold in original; emphasis in bold italics added]

9 The reference to "no less favourable" terms was a reference back to clause 6.1.1 of the Agreement ("the NLF Clause") which provided:[2]

> All prices for meals and other Services to be provided under this Agreement shall be as set forth in Annex 1 and subject to the pricing methodology and adjustment mechanisms set out in this Agreement and Annex 1: provided that, at any time after the Effective Date, Asiana shall provide information requested by [GGK] that [GGK] deems, in its sole discretion, reasonably necessary for it to formulate the pricing terms for the first 12 months after the Commencement Date (the "**Initial Pricing Period**"), which shall be no less favourable to either Party than the current pricing terms paid by Asiana for any services provided at the Stations that are the same as or similar to the Services; provided, that, Asiana shall not be obligated to provide any information that is subject to confidentiality; provided, further, that [GGK] shall use any information furnished by Asiana solely for purposes of formulating the pricing terms for the Initial Pricing Period. The pricing terms shall be adjusted in accordance with Annex 1.

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[2] JP-3 at p 212.

[emphasis in original]

10 Asiana took the position that the IBP represented preliminary projections to be refined in the 2018 Business Plan and the 2020 Business Plan based on the actual results from performance under the Agreement. Accordingly, each subsequent Business Plan should be adjusted wholesale, including the cost elements, passenger numbers and "Net Profit Figures". In short, there was to be a substantive renegotiation at each stage so as to ensure that the adjusted pricing mechanism was to be no less favourable to either party than the current pricing mechanism. This would necessarily involve a renegotiation of the Net Profit Figures. On the other hand, GGK took the position that the word "adjustment" meant what it said and did not encompass a full renegotiation process. Further adjustments were only to be made to the cost elements and passenger numbers. The Net Profit Figures committed in the various business plans could not be adjusted at all, they were to be "preserved".

11 GGK failed to commence operations by the date stated in the Agreement. The parties then entered into a Supplemental Agreement under which GGK was to ensure delivery of services through a third party ("the Alternative Arrangement"). GGK hired a third party, Sharp Do & Co Korea LLC ("SDCK LLC"), and the parties amended the Agreement to provide that GGK remained responsible for the obligations notwithstanding the Alternative Arrangement. SDCK LLC encountered difficulties in the Alternative Arrangement and GGK and SDCK LLC entered into a settlement agreement under which GGK paid SDCK LLC the costs it incurred.

12 Notwithstanding the fact that the parties were unable to agree on the pricing mechanism, GGK nonetheless commenced operations and invoiced Asiana on the basis of its interpretation of the pricing mechanism in the

Agreement. Asiana made some payments but otherwise objected to GGK's interpretation.

13 GGK commenced the arbitration on 6 June 2016 ("the Arbitration") pursuant to clause 28 of the Agreement which provided that the seat of the Arbitration should be Singapore and that the Arbitration should be conducted under the Rules of Arbitration of the International Chamber of Commerce.

14 GGK sought an order that Asiana should pay all outstanding invoices and a declaration that the pricing mechanism in the Agreement was binding and did not require any further agreement.

15 Asiana counterclaimed against GGK for a declaration that GGK was bound to negotiate and agree with Asiana on an adjusted pricing mechanism under the 2018 Business Plan (or, alternatively, on the 2018 Business Plan and the 2020 Business Plan), for an order that GGK repay excess payments based on the adjusted pricing mechanism and for an order that GGK pay for the costs Asiana paid to SDCK LLC arising from the Alternative Arrangement.

16 In the Award, the tribunal (the "Tribunal") allowed GGK's claims and dismissed Asiana's counterclaims. GGK later requested that the Tribunal correct a clerical error. The Tribunal allowed GGK's request and issued the Addendum.

17 Asiana seeks to set aside the Award and the Addendum on the basis that there was a breach of natural justice and a failure to consider all issues placed before the Tribunal. Asiana's complaints in outline are that:

(a) The Tribunal failed to give any or any proper consideration to the expert report of a Korean law expert, Professor Young-Joon Kwon

("Professor Kwon" and "the Kwon Report"), and therefore applied the wrong principles when interpreting the terms of the Agreement. In particular, it failed properly to address the aspects of the Kwon Report which supported the assertion by Asiana that GGK's interpretation of the Agreement might render the Agreement null and void under Korean law under the doctrine of "abuse of power of representation" (see below at [39] and [64]) and that this factor was one that the Tribunal should have taken into account when interpreting Annex 1.4 in accordance with Korean law having regard to the principle of "effective interpretation" (see below at [38] and [41]).

(b) The Tribunal failed to consider Exhibit C-333, which is an Excel sheet setting out the net profitability projection for the Agreement, which again might have impacted on its interpretation of Annex 1.4.

The legal issues

18 In this case Asiana places reliance upon Arts 34(2)(*a*)(ii) and/or 34(2)(*a*)(iii) of the Model Law and/or a breach of natural justice under s 24(*b*) of the IAA. The First Schedule to the IAA contains the Model Law.

19 Article 34(1) of the Model Law provides that an application for setting aside an award to the appropriate supervisory court is the sole means by which an award can be challenged. Such an application can only be made on one or more of the grounds specified in Art 34(2). In this case, the relevant grounds are found in Arts 34(2)(*a*)(ii) and/or 34(2)(*a*)(iii), which read:

> …
>
> (ii) the party making the application was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case; or

> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration …

20 The reference to being "unable to present his case" is a reference back to Art 18 of the Model Law, which requires that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

21 Section 24 of the IAA provides:

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

22 The general principles for setting aside an award on the basis of the above provisions were not in dispute. Asiana summarises those principles in paras 58 and 65–67 of its Written Submissions:

> 58. It is trite law that Article 34(2)(a)(iii) also applies where a tribunal fails to consider all the issues that are raised by the parties in the reference:
>
> > (a) A failure on the part of a tribunal to decide matters submitted to it is a failure to exercise the authority that the parties had granted and could therefore be a breach of Article 34(2)(a)(iii) (*CRW Joint Operation v PT Perusahan Gas Negara (Pesero) TBK* [2011] 4 SLR 305 ("*CRW*"), at [31]). It is clear that there is no requirement for an issue to be formally pleaded before a party may invoke Article 34(2)(a)(iii) - it would suffice if the issue was one that was raised before the tribunal and one which the tribunal ought to resolve in order to do justice between the parties (*CKG v CKH* [2021] SGHC (I) [5] ("*CKG*") at [10] and [11]). In determining this, the Court

> may consider parties' pleadings, list of issues, written and oral submissions to determine the issues that were submitted to the Tribunal (see for example, *BLC and others v BLB and another* [2014] 4 SLR 79).
>
> (b) The tribunal is not obliged to deal with each point made by a party – what matters is the resolution of an issue either expressly or implicitly by the Tribunal (*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [72] and [77]).
>
> (c) It would usually be a matter of inference, rather than of explicit indication, that the Tribunal wholly missed one or more important pleaded issues. Any such inference must be clear and virtually inescapable (*AKN and another v ALC* [2015] 3 SLR 488 ("*AKN*") at [46]).
>
> (d) Even if there was a failure by a tribunal to deal with every issue referred to, this would not ordinarily be sufficient to render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either or both of the parties to the dispute (*CRW* at [32]).
>
> (e) It is trite that mere errors of law or even fact are not sufficient to warrant the setting aside of an arbitral award under Article 34(2)(a)(iii) of the Model Law (*CRW* at [33] citing *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 162 at [19] – [22]).
>
> …

65. The right to be heard is an aspect of the rules of natural justice under Section 24(b) of the IAA and also an aspect of being able to present one's case within the meaning of Article 34(2)(a)(ii) of the Model Law. The Singapore Courts have regarded the two as being indistinct, and have dealt with both provisions together (*Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278 at [18]; *ADG v ADI* [2014] 3 SLR 481 at [118]). As such, both grounds will be addressed together.

66. In order to successfully invoke Section 24(b) and Article 34(2)(a)(ii), the Court must be satisfied that (*CRW* at [37] and [38]; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [29] and [82] – [91]):

> (a) The Tribunal breached a rule of natural justice in making the arbitral award. The applicant must specifically identify which rule of natural justice has

> been breached, how it was breached and in what way the breach was connected to the making of the award.
>
> (b) The breach of natural justice caused actual or real prejudice to the party challenging the award (i.e., the breach had to have altered the final outcome of the arbitral proceedings in some meaningful way before curial intervention was warranted). Where the same result could or would ultimately have ensued even if the arbitrator had acted property, there would be no basis for setting aside the award in question.

67. The failure to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him (*AKN* at [46]). The Court of Appeal in *AKN* laid down the following general principles:

> (a) Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem*.
>
> (b) It will usually be a matter of inference, rather than of explicit indication, that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should not be drawn.

23 For its part, GGK summarises its submissions on the relevant principles in ten propositions in paras 77–86 of its Written Submissions but in oral submissions particularly emphasises the following:

> 77. **First**, the threshold for finding of breach of natural justice is a high one, and it is only in exceptional cases that a court will find that threshold crossed (*China Machine New Energy*

> *Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 ("***Jaguar***") at [87]).
>
> …
>
> 80. **Fourth**, a tribunal is not obliged to deal with every argument; all that is required is that the tribunal ensure that the essential issues are dealt with (even if only implicitly), and the tribunal is to be given fair latitude in this respect (*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("***TMM***") at [72]-[74] and [77]).
>
> 81. **Fifth**, a failure by the tribunal to even consider an important pleaded issue is a breach of natural justice, as well as a breach of Art 34(2)(a)(iii) of the Model Law (*CKG v CKH* [2021] SGHC(I) 5 ("***CKG***") at [9]).
>
> 82. **Sixth**, however, any such inference if to be drawn at all must be shown to be "*clear and virtually inescapable*", and is not to be drawn if, inter alia, the facts are consistent with the tribunal having chosen not to deal with the point because it was thought unnecessary to do so (*AKN* at [46]). This is because no party has a right to expect the tribunal to accept its arguments, regardless of how strong and credible it perceives them to be (*TMM* at [94]).
>
> 83. **Seventh**, it is not a breach of natural justice where the matters complained of are the result of the party's own conduct (*CDX v CDZ* [2020] SGHC 257 ("***CDX***") at [34(h)(iii)] and [34(h)(iv)]). If a party seeks to challenge the award on a case which it did not make before the tribunal, but, on seeing the result, wished it had made, that is a misuse of the challenge procedure as there is no breach of natural justice (*CKG* at [11]). It follows that whether there has been a breach of natural justice is to be assessed on the material that was before the tribunal in the arbitration (*CMJ v CML* [2021] SGHC(I) 20 ("***CMJ***") at [70]), and it is not therefore a breach of natural justice if a party had the opportunity to adduce evidence which it did not avail itself of (*CMJ* at [71]).
>
> [emphasis in original]

24 Two aspects of law are however in dispute. The first related to GGK's fourth point set out above. GGK contends, based on *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), that provided the Tribunal dealt with every essential issue, it was not necessary for it to deal with every argument raised on that issue and refers me to [72]–[76]:

72 An arbitral tribunal is not obliged to deal with every argument. It is neither practical nor realistic to require otherwise. Toulson J summed up neatly the extent of the arbitral tribunal's obligation in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 at 284 (see also *Hochtief* ([46] supra) at [80]):

> Nor is it incumbent on arbitrators to deal with *every argument on every point raised. But an award should deal, however concisely, with all* ***essential*** *issues.*

73 All that is required of the arbitral tribunal is to ensure that the essential issues are dealt with. The arbitral tribunal need not deal with each point made by a party in an arbitration: *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83 ("*Hussman*") at [56]. In determining the essential issues, the arbitral tribunal also should not have to deal with *every* argument canvassed under each of the essential issues.

74 What then is considered "essential"? This is not easy to define. Notwithstanding, in my view, arbitral tribunals must be given fair latitude in determining what is essential and what is not. An arbitral tribunal has the prerogative and must be entitled to take the view that the dispute before it may be disposed of without further consideration of certain issues. A court may take a contrary view *ex post facto*, but it should not be too ready to intervene.

75 It may be queried whether the line between issues and arguments is too fine. I do not think so. An argument is a proposition that inclines towards a specific conclusion. It typically contains reasons or premises, either factual or legal or both, which are presented as driving one towards a particular conclusion. An issue, on the other hand, is a topic. It is non-prescriptive, and usually expressed as a question.

76 In proposing that the issue should be determined in its favour, a party may submit different arguments that could operate cumulatively or independently. As long as one argument resolves the issue, there is no justification for insisting that the arbitral tribunal go on to consider the other arguments which have been rendered academic. In *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF*"), Judith Prakash J held (at [60]) that "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made". I completely agree. It is the right to be heard and not a right to receive responses to all the submissions or arguments presented that is protected. Although SEF was about a curial review of an adjudicator's decision under the Building and

> Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), I find that it applies equally to arbitrations.
>
> [emphasis in original]

25 Relying on this passage, GGK contends that the essential issue which the Tribunal had to grapple with in this case was the question of interpretation and this it had done. Asiana's reliance on the principle of effective interpretation was an argument underlying that issue, not a separate essential issue. Any failure of the Tribunal specifically to address that argument was unobjectionable. It had recorded the existence of the argument in para 7.1.2(d) of the Award and, since it was not of itself an essential issue, it was not necessary to consider it further and to expressly reject it.

26 GGK drew my attention to a recent decision of the Court of Appeal in *BRS v BRQ and another and another appeal* [2021] 1 SLR 390 and contrasted the approach taken by the Court in [94] with that in [98] and [106]. In the former, it accepted that if the Tribunal had reached a conclusion based on one argument, it did not need to go on to consider other arguments which, by then, had become academic. In the latter the Court emphasised that a failure to consider arguments on a particular issue, whether explicitly or implicitly, would amount to a breach of natural justice. I do not consider that [75] in *TMM* can be interpreted as rigidly as GGK contends. In seeking to resolve an essential issue, a tribunal must assess all the arguments raised and then determine whether any one argument is decisive of that issue. If satisfied that it is, then there is no need to consider any other arguments. But in considering the decisive argument the Tribunal must take into account all the contentions made both in favour and against that argument in informing its conclusion. It cannot ignore a contention which is a material consideration in the judgmental exercise.

27 The second area of contention lay in the jurisdiction of the Tribunal to adjudicate on matters which were not directly raised on the pleadings but which were appropriate to decide for the purpose of resolving the entirety of the dispute between the parties. GGK asserts that a Tribunal would have exceeded its jurisdiction and thus breached natural justice if it dealt with a dispute which was not contemplated by or not falling within the terms of the submission to arbitration. It relies on *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 (at [44]–[45] and [56]) and *Arjowiggins HKK2 Ltd v X Co* [2022] HKCFI 128 (at [42]). It contends that these cases emphasise that the Tribunal has no jurisdiction to decide any issue that is not referred to it for determination. It is not the Tribunal's duty to resolve all matters in dispute between the parties, it can only act and resolve the issues referred to it under the arbitration agreement.

28 For its part, Asiana relies upon *CKG v CKH* [2021] SGHC(I) 5 ("*CKG*"), a decision at first instance, in support of a submission that even if a party does not expressly seek relief in respect of a given issue, once it is appreciated by the parties that the issue has arisen during the course of the arbitration or will arise in the event that the tribunal decides a pleaded issue a given way, then it must follow that that issue becomes an issue to be decided. It points to Term 29 of the Terms of Reference in this Arbitration (see below at [70]) as being the sort of term that expressly conferred jurisdiction on a tribunal to determine such an issue.

29 I shall not consider the reasoning in *CKG* further since, subsequent to the oral hearing, the Court of Appeal gave judgment on the appeal from that decision (*CKH v CKG and another matter* [2022] SGCA(I) 4 ("*CKH*")). The parties were given an opportunity to provide further written submissions in relation to that judgment which they did.

30 The issue in *CKH* was whether an arbitral tribunal erred in failing to take into account an outstanding debt (referred to as the "Principal Debt") when making its award. A request was made to the tribunal that it should make an additional award in respect of the Principal Debt but the Tribunal declined to do so on the basis that there was no plea in the counterclaim for the Principal Debt.

31 Having acknowledged that there was no pleading in relation to the Principal Debt, the judgment continued in [16] and [17] as follows:

> 16 The pleadings are the first place in which to look for the issues submitted to arbitral decision. But matters can arise which are or become within the scope of the issues submitted for arbitral decision, even though they are not pleaded. Whether a matter falls or has become within the scope of the agreed reference depends ultimately upon what the parties, viewing the whole position and the course of events objectively and fairly, may be taken to have accepted between themselves and before the Tribunal. CKH cited to the court the familiar case of *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*") for the passages in it emphasising both that pleadings "provide a convenient way for the parties to define the jurisdiction of the arbitrator" and that, where jurisdiction to adjudicate upon a dispute is in question, "it is necessary to refer to the pleaded case of each party to the arbitration and the issues of law or fact that are raised in the pleadings to see whether they encompass that dispute" (*Kempinski* at [33] and [34]). Both statements are true, but the decision in *Kempinski* itself shows that they are not the end of the matter. Other considerations may show a different picture. As the Court of Appeal observed in *CDM and another v CDP* [2021] 2 SLR 235 at [18], the question of what matters are within the scope of the parties' submission to arbitration is answerable by reference to five sources: the parties' pleadings, the agreed list of issues, opening statements, evidence adduced, and closing submissions at the arbitration.
>
> 17 Arbitration is consensual and parties and changing circumstances can lead implicitly as well as expressly to a widening of the scope of an arbitration. In Kempinski that occurred when it came to light, during ongoing proceedings (commenced in 2002) to enforce a hotel management contract, that Kempinski had entered into a new management contract with a different operator on 28 April 2006, which potentially affected its right to insist on specific performance of the original

> management contract; and when disclosure applications and orders, written submissions and expert opinions followed regarding the effect of this new contract, without any amendment of the pleadings (*Kempinski* at [17]–[19]), Kempinski was held to have "ample notice of Prima's case on this particular point" and "did not suffer any prejudice in any way since it was given ample opportunity to address this issue of law" (*Kempinski* at [51]). It was a case where, in the words of this court in *CBX and another v CBZ and others* [2021] SGCA(I) 3 at [48], "[t]he conduct of parties to litigation before an arbitrator or judge may and does on occasion widen the scope of the issues falling for determination in a way which deprives a pleading objection of any force".

32 The judgment then continued to consider the five sources referred to at the end of [16] and concluded in relation to the facts in that case in [29] as follows:

> 29 It follows that the Tribunal's Award is vulnerable to being set aside, if not corrected, since, having rejected CKG's reliance on the debt-to-log conversion in clause 4 of the April 2011 Minutes, the Award failed to consider or adjudicate upon the appropriate set-off. However, the matter goes further, in our view, than set-off. In the light of the course of events, presentations and statements which we have set out, we consider that it was incumbent on the Tribunal to treat CKG as having in reality advanced the Principal Debt with 2% interest *per* month not merely as a set-off, but as an item to be given full weight, whichever way the balance of account might as a result shift. It was, as CKH's own expert himself recognised (see [21] above), in substance a "[c]ounterclaim" which was being introduced as an element in an overall statement of account, made up of items due one way or the other and the overall balance of which would, moreover, be expected to be of substantial relevance when it came to matters such as costs.

33 Whilst the jurisdiction of a tribunal is determined by its terms of reference and by the relief sought by the parties in their pleadings, it is always open to a party to plead its case in the alternative and, in appropriate circumstances, to amend its claim for relief during the proceedings so as to raise new issues. However, as the judgment in *CKH* makes clear, the way in which an arbitration develops may lead to a widening of its scope explicitly by an

amendment of the pleadings or by the consent of the parties but, equally, it may arise implicitly in circumstances where the point in issue is clearly raised and there is an adequate opportunity to address it. In these circumstances it will become apparent, objectively, that the parties have accepted that the point necessarily falls to be determined as though it was a pleaded issue and/or the subject of requested relief.

Korean law on the interpretation of contracts

The pleadings and submissions

34 Put very simply, underlying all Asiana's contentions is the assertion that the Tribunal erred in identifying the principles of Korean law that it applied when reaching its conclusion on the proper meaning of the contractual provisions which were in dispute. Mr Thio SC accepts that if this was merely an error of law or fact, then this court could not intervene. But, he says, the reason the Tribunal fell into error was due to its failure to consider properly or at all the expert evidence of Professor Kwon. Such a failure, he contends, constituted a failure to consider all the issues raised in the case and therefore amounted to a relevant breach of natural justice.

35 I shall address this issue first. The Arbitration was conducted memorial style, with four rounds of pleadings each supported by evidence. I shall consider each pleading in turn.

36 The Statement of Claim considered the Korean law principles in paras 135–140:

> 135 Under Korean law, the touchstone for the interpretation of a contract is the objective meaning of its wording. The Supreme Court of Korea has affirmed the primacy of the text in construing contracts: "In case where the parties to a contract have executed the contract terms in the form of an affirmative

document that disposes or establishes a right of a party, *the existence and substance of the expressed intent should be upheld in accordance with the actual wording thereof absent special circumstances, when the objective meaning of the wording is clear* […]"

136 Therefore, where the wording of the contract is clear, it must be upheld according to the ordinary meaning of its terms. *Only in the case of "clear and convincing counterevidence" rebutting the written terms of the contract may the court or tribunal depart from their objective meaning.*

137 *To the extent the text is, however, ambiguous, Korean law looks to establish what the reasonable intentions of the parties would have been when entering into the contract, applying an objective point of view.* Thus, a court or tribunal may use subsidiary means of interpretation to arrive at a reasonable interpretation. It may consider factors such as common sense, the factual circumstances leading to the contract, and the purpose of the transaction:

> "[A] reasonable interpretation should be made in accordance with logic and empirical rules, by taking into account comprehensively of the contents of the text, motives and circumstances leading to the agreement, the purpose of the agreement, and the true intent of the party etc."

138 Here, sophisticated commercial parties negotiated the Catering Agreement over the course of 11 months, with the assistance of counsel. The language in the pricing mechanism is unambiguous and, in accordance with Korean law, should be given its ordinary meaning.

139 In all cases, the factual background supports the plain reading of the Catering Agreement, including the commercial purpose of the transaction and its negotiation history. The history of the drafting, and the price presentations which ensured the Parties' mutual understanding on the pricing mechanism, confirm the Parties' intentions behind the inclusion of specific language in the Catering Agreement with regard to pricing.

140 The text of the Catering Agreement and the negotiations leading to it make clear that – contrary to the Respondent's case – the Parties did not defer agreement on the pricing methodology but rather agreed a detailed pricing mechanism in the Catering Agreement itself (Section 3.1.1). Moreover, Asiana is wrong to contend that the "no less favourable" wording in Clause 6.1.1 and Annex 1.4 cuts across the pricing mechanism (**Section 3.1.2**).

[emphasis added]

37 The relief sought by GGK included a request for a declaration in relation to the true interpretation of Annex 1.4:

> … to DECLARE that the pricing mechanism set forth in the Catering Agreement, including the contribution per passenger as calculated under both the Initial Business Plan and any subsequent Business Plan adjusted by the Claimant pursuant to Annex 1.4 of the Catering Agreement, including the 2020 Business Plan, is binding upon the parties and does not require any further agreement between them …

38 In response, in the Defence it was accepted that the parties "[appeared] to be largely in agreement with these Korean law principles on contractual interpretation". Paragraphs 100–104 read as follows:

> 100. Asiana and GGK agreed that the Catering Agreement and its annexes should be governed by and construed in accordance with the laws of Korea. Korea is a civil law jurisdiction (as is Switzerland, where [GGS] is incorporated) in which the principles of contract interpretation are relatively straightforward. *In this arbitration, the Parties appear to be largely in agreement with these Korean law principles on contractual interpretation. That said, Asiana provides the following responses to GGK's arguments concerning Korean law on contractual interpretation.*
>
> 101. First, GGK refers to Korean Supreme Court Case No. 93Da3103 (Exhibit CLA-1) to explain the principles of contract interpretation under Korean law. Asiana does not dispute that the principles on contract interpretation are well summarized in Case No. 93Da3103. However, Asiana must point out that GGK submitted a (partly) wrong translation and omitted important portions of this decision. That has resulted in an incomplete and somewhat distorted characterization of the relevant Korean jurisprudence on contract interpretation. To rectify this, Asiana submits as follows:
>
> (1) *The language of the contract is not given primacy under Korean law when the objective meaning of the wording is not clear. Indeed, GGK appears to agree with this point.*

(2) The factors that need to be considered for contract interpretation where the language is not clear are set out in Case No. 93Da3103:

> (a) [GGK] provided a translation of this decision in footnote 191 of the SOC: "[…] while taking into account in combination the following factors: the content of the text of the document, the motive and circumstances of the contract, the purpose and underlying intention of the parties, and prevailing business practices in the same transaction."
>
> (b) However, a correct translation of this part of the decision reads as follows: "[…] while taking into account holistically the following factors: the motive and underlying circumstances of the relevant language of the contract and the contract itself, the purpose and true intention that the parties are willing to achieve through the contract, and business practices."
>
> (c) The nuances of the two translations are slightly different in that (i) "the content of the text of the document" is not an independent factor to be considered, (ii) the motives and circumstances to be examined are those of the "parties" (which [GGK] fails to mention), and hence the parties' relevant correspondence and conduct need to be considered, and (iii) business practices are not limited to those of the "same transaction".

(3) GGK omitted the last sentence of the rationale (or summary of the decision) in Case No. 93Da3103, the English translation of which is as follows: "In particular, when the substance of the contract alleged by one party imposes a significant responsibility on the other party, the interpretation of the text thereof must be construed more strictly" (emphasis added). The principle of 'strict interpretation' under Korean contract law … calls for a stricter, narrower interpretation if the interpretation asserted by one party imposes a grave obligation on the other party.

102. *Second, one additional principle of contract interpretation under Korean law, which was not mentioned by GGK, is the principle of "effective interpretation" … According to this principle, when in doubt, the interpretation that renders the contract effective shall prevail over the*

> *interpretation which renders the contract null and void, or the relevant parts of the contract without effect.*
>
> 103. GGK argues that "the language in the pricing mechanism is unambiguous." However, GGK has not provided any specific explanation or reference as to which part of the Contract is allegedly "unambiguous" in this regard. In Asiana's view, the pricing mechanism under the Catering Agreement, including how to formulate the 2018 BP in light of the "no less favourable" principle is not without some ambiguity. Not only is the phrase "The net profit as committed in the Business Plan will be preserved" unclear in and of itself, it conflicts or is incompatible with various other sections of the Catering Agreement if construed against them as GGK suggests it should be.
>
> 104. Therefore, in this Section, Asiana will provide a proper construction of the pricing mechanism of the Catering Agreement in accordance with the principles of Korean law, by taking into account the following factors:
>
> (1) The relevant language of the Catering Agreement;
>
> (2) The drafting history of the Catering Agreement and its relevant parts (to ascertain the motives and true intention of the Parties underlying the contract);
>
> (3) The parties' relevant correspondence and conduct (to further ascertain the motives and true intention of the Parties underlying the contract); and
>
> (4) The business practices.
>
> [emphasis added]

39 In paras 213 and 214, attention was first drawn to the contention that Asiana's interpretation of the Agreement should be preferred because the principle of "abuse of power of representation" would have the effect of rendering the Agreement void:

> 213. If GGK is alleging that Asiana had committed to guarantee fixed amounts of net profits for GGS for 30 years in order to secure the commercial interest of a third party (here, [Kumho Group), the party to the BWA and the recipient of the BWs), *which proposition is denied for the avoidance of doubt*, this would lead to the result under Korean law that the Catering Agreement is rendered null and void in full or in part. That is because,

> according to the principle of "abuse of power of representation" … under Korean law, if a party knowingly or negligently enters into a contract with a representative of another company who has abused its representative authority (for instance by entering into a contract that brings a loss to his/her company and is only beneficial to a third party) then such contract is deemed null and void. This is why Asiana doubts that GGK is indeed suggesting that the pricing mechanism under the Catering Agreement was directly linked to the BWA.
>
> 214. If there are ways to interpret a contract that would preserve the validity of its terms, such construction should be preferred over an interpretation that would invalidate the contract or parts thereof. Asiana submits that its interpretation of the Catering Agreement under which the net profit figures in the IBP are not deemed to be fixed and guaranteed (including because, among other reasons, they are not linked to the BWA) is construing the contract in a way that would preserve the validity of the Catering Agreement, and hence must be upheld.
>
> [emphasis added]

40 The Request for Relief in para 299(2) invited the Tribunal to reject the claim for a declaration. There was no request for a declaration that if GGK was entitled to the declaration sought by them that the Agreement should be declared void. Such a claim was the antithesis of Asiana's position which was that the Agreement was valid so as to entitle it to make a claim for a not inconsiderable sum on its Counterclaim.

41 In the Reply, GGK reiterated its position on interpretation and accepted that the principle of "effective interpretation" was a means of interpretation:

> 158 The Parties largely agree on the relevant factors to interpret a contract under Korean law. In its Statement of Claim, GGK outlined those principles based on Korean Supreme Court precedent as follows:
>
> i) The text of a contract has primacy where its objective meaning is clear;

> ii) Only where the objective meaning of the text is ambiguous, the court or tribunal may use subsidiary means of interpretation such as commercial common sense, the factual circumstances leading to the contract, and the purpose of the transaction.
>
> 159 Asiana essentially agrees with the above and supplements them with the principle of "effective interpretation", whereby an interpretation which renders contractual clauses effective takes precedence over an interpretation which does not. GGK does not dispute this.

42 It went on in para 162 to repeat its contention that "the wording of the agreement has primacy where the objective meaning is clear *on its face – i.e.* without resorting to subsidiary means of interpretation"

43 It was in the Rejoinder that the Kwon Report was submitted (see para 24(c)). In para 25, Asiana identified three key disputed issues the first of which was:

> **Contract Interpretation**. Both parties agree that their interpretation of [the Agreement] is supported by the plain language, negotiation history and post-contractual conduct. ….

44 In paras 91–96 the Rejoinder addressed "Korean Law's Approach to Contractual Interpretation" as follows:

> 91. This issue—whether GGK's interpretation is consistent with business common sense—is of some significance. While GGK has tried to downplay this issue in its submissions, the issue needs proper and adequate treatment in this arbitration, for the following reasons.
>
> 92. **First**, the terms of the CA are governed by Korean law. This sets the CA apart from those governed by common law legal principles, as the Korean courts are not strictly bound by the literal meaning of the language used (in the English law sense) and can rely on factual context and commercial purpose of the clauses in question. In particular, where there is a dispute over two potential interpretations of the contractual terms—as is the case here—the Korean courts are empowered to prefer the construction which is consistent with business common

> sense and reject the other. This is confirmed by Professor Kwon, Asiana's Korean law expert (and the only legal expert in this arbitration).
>
> 93. **Second**, GGK cannot continue to feign ignorance at the fact that there is a genuine dispute between the Parties as to the proper construction of the key pricing terms of Annex 1.4. It is trite that language used in complex commercial contracts often have more than one potential meaning, despite the best efforts by lawyers and external financial advisors. In such cases, Korean law allows courts to have regard to considerations of commercial common sense.
>
> 94. **Third**, it is not necessary to conclude that a particular interpretation would produce an extreme, absurd or irrational outcome before having regard to the commercial purpose of an agreement. The Korean courts are free to favor an interpretation over another because it is the more commercially reasonable interpretation of the contract.
>
> 95. **Fourth**, it is consistent with the Korean court's approach to contractual interpretation to rely on independent financial and industry expert evidence to aid the interpretation exercise. Here, it is clearly significant that GGK has been unable to adduce any expert evidence to support its position that the fixed net profits in the Initial Business Plan was commercially reasonable. As will be explained below, one can only conclude from GGK's omission that no reasonably minded financial expert would have endorsed its interpretation from a commercial perspective.
>
> 96. In this context, the issue is not (as GGK puts it) whether the Tribunal "needs experts to tell them how to read a contract". That is simply non-sense—the real issue for the Tribunal is to decide whether, based on the objective meaning of the terms used in the contract and in light of all relevant factual and commercial context, the Parties could have reasonably agreed to be bound by the excessive net profit figures in the IBP to be applied throughout the 30-year term of the CA. As explained below, there is ample evidence for the Tribunal to reject that interpretation from a commercial perspective.

45 In paras 132–134, Asiana amplified its submissions on the "abuse of power of representation" aspect relying on aspects of the Kwon Report:

> 132. There is yet another reason why GGK's interpretation of the CA cannot be assisted by its package deal theory.

> That is because GGK's suggestion that the BWA and the [Agreement] must be considered as part of the "relevant factual background" in interpreting the pricing mechanism in the [Agreement] would lead to an interpretation that would render the [Agreement] null and void under Korean law.

133. This has always been a key position in Asiana's defence, which GGK cannot now brush it away "as an aside". It is clear from the brevity of its response that it has nothing of substance to say on the matter.

134. In order to assist the Tribunal, Asiana has engaged an independent Korean law expert, Professor Kwon, to set out the principles governing the doctrine of abuse of power of representation under Korean law. Professor Kwon explains as follows:

> > The doctrine of abuse of power of representation provides that if a representative director of a company [the "**Company**"], who assumes a duty of care towards the [Company], abuses his or her power of representation by executing a contract with a counterparty [(the "Counterparty")], with a view to conferring a benefit to himself or herself or a third party [(the "**Third Party Affiliate**" or "**Third Party**", respectively)] against the [Company's] interests, such a contract is deemed null and void, provided that the [Counterparty] was aware or should have been aware of the representative director's abuse of his or her power of representation. The doctrine is well established in the cases before the Korean Supreme Court. Prior to the oral hearing the parties submitted Skeleton Arguments. The primary contention of both was that the plain and ordinary meaning of the wording in dispute was clear on its face so that the objective meaning could be determined from that wording. They disagreed however as to what that plain and ordinary meaning was. No further comments were made on the question of the Korean law on interpretation nor were matters arising out of the abuse of power principle discussed further.

46 GGK elected not to give an oral opening but Asiana did. On the first day of the Arbitration, Asiana's counsel said this:[3]

> First, the language of the contract supports Asiana's case.
>
> Second, Asiana's case is also supported by the background and factual matrix in which the catering agreement was concluded and parties' subsequent conduct, all of which confirms Asiana's interpretation. Finally, Asiana's interpretation is entirely consistent with business common sense and how a rational commercial enterprise would act.

47 When dealing with the expression in Annex 1.4 "net profit … will be preserved" Asiana's counsel said this:[4]

> If you look at the wording of draft annex you will see the wording, "the net price as committed in the business plan will be preserved". The parties are in disagreement as to what this language means. GGK says that this means the net profit as stated in the Initial Business Plan will be preserved and unchanged throughout the 30 years' service time. *Asiana says that because the meaning of this phrase is not clear on its face, such a Korean law requires that the tribunal should look at the relevant surrounding materials to glean the parties' intention.*
>
> [emphasis added]

48 Asiana's counsel then continued:[5]

> Given the language of the catering agreement does not support its case, GGK resort to certainly external factors to try and establish its case. I will spend a bit of time now showing you why these external factors have no bearings on the proper construction and application of the parties's agreement in this case. GGK [*sic*] heavily on two external factual circumstances in this dispute. They first say that [the] Chairman … of Kumho Group approved the business plan. They also say that a lot about the BWA package deal. But I will explain in a moment why this is all irrelevant factually and legally to determining the catering price under catering agreement.

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3 JP-68, Transcript Day 1, p 12 at lines 3–11.

4 JP-68, Transcript Day 1 p 36 line 17 to p 37 line 2.

5 JP-68, Transcript Day 1 p 37 line 25 to p 38 line 12.

49 As with the Skeleton Arguments, no further comments were made on the question of the Korean law on interpretation nor were matters arising out of the abuse of power principle discussed further. However, it is clear that counsel was advocating the view that Korean law only required reference to the relevant surrounding materials where the meaning of a given phrase was not clear on its face.

50 GGK did not seek to cross-examine Professor Kwon so I can turn next to the closing submissions. Both sides used a selection of slides to illustrate their oral submissions.

51 Counsel for GGK reiterated its submission that "Korean law does not allow commercial reasonableness to trump the plain wording of the contract" (see also slide 7 of GGK's closing submissions).[6]

52 So far as concerns Asiana's oral closing, the relevant slide was slide 34 in relation to which counsel for Asiana said this:[7]

> I will now come to the Korean law principles. The issue is whether there's an interconnection between the BWA and the [Agreement] in financial terms. We say there's none because the interconnection between these two agreements let's put it this way more simple, these two agreements function separately from each other. In other words, there is no trigger in one agreement that would generate obligations or payments under the other, it has no shared income, nothing. They function separately one from the other. But what we say is that the one agreement has been made, which is the catering agreement by Asiana, and it has given or favoured another company of the group. *And this, depending on the circumstances and what the conditions are, could have triggered the doctrine of abuse of power of representation* because a director of a company assumes a duty of care towards the company and he can abuse his power of representation by executing a contract with a

6 JP-72, Transcript Day 5 p 25 lines 5–7; see also Slide 7.

7 JP-72, Transcript Day 5 p 81 line 9 to p 83 line 8.

> counterparty with a view to conferring a benefit to himself or itself or a third party against the parties company's party interests. I think we all understand the principle, of course. What is specific here in the point I am making is whether in Korea there's that principle is expressed clearly, precisely, whether it's how it's applied. Is it severely monitored? Are there decisions by the Supreme Court looking at that? And this is the point we are making. There has been a legal opinion and we have seen that the situation could give rise to an invalidation of the [Agreement] under Korean law. I put this as a matter of principle. And if you go to the next slide, 34, it says contracts in violation of the Monopoly Regulation and Fair Trade Act. And if I go to the highlighted section: Apart from this abuse of bargaining position being an unfair trade practice under the Fair Trade Act it deals with Professor Kwon's expert report in saying that there are various aspects under which under Korean law the contract could be seen as not valid. And the next slide goes to the same point. *As we have not had cross - examination of Professor Kwon and have not at length discussed these principles, I believe that this is in the domain of what the arbitrators are perfectly well equipped to deal with themselves and look at it themselves, so that I am not going to belabour this point and these legal opinions more in detail, but I think they are important --it's important to see that they are on the record and that they are properly understood.*

53 Slide 34 stated the following, referencing Professor Kwon's expert report at para 32:

> The validity of an act that violates the Monopoly Regulation and Fair Trade Act (the "Fair Trade Act") may be decided differently in each case, but the Korean Supreme Court has provided any act that violates the Fair Trade Act may be found to be in violation of Article 103 of the Civil Act:
>
> > [The Fair Trade Act] specifies an act of a business operator's trading with the counterparty by improperly using its bargaining position, which may impair fair trade, as one of unfair trade practices prohibited thereby (Article 23(1)-4). Apart from this abuse of bargaining position being a unfair trade practice under the Fair Trade Act, an agreement executed by the business operator, who desires to make such act realized, with the counterparty to realize its abuse of bargaining position may be assessed to bring unjust profits to itself while causing the counterparty to make excessive payment in return or to assume any other undue burden, by using its superior position due to the

> difference in economic power. In such case, such agreement is a juristic act contrary to good morals and social orders and thus is null and void.
>
> [emphasis added]

54 It will be seen that counsel was not contending that the Agreement was invalid, merely that it could give rise to an invalidation argument and invited the Tribunal to make its own assessment of the weight to be attached to Professor Kwon's evidence. There was no suggestion that the analysis of Korean law in the Defence needed to be qualified.

The Award on interpretation

55 At para 2.2.16 the Tribunal recorded that Asiana had filed the Kwon Report and at paras 5.3.5 to 5.3.9 said this:

> 5.3.5 Respondent argues that the notion that the net profit figure in the Initial Business Plan was meant to be fixed for 30 years is commercially unreasonable. It says it would never have entered into the [Agreement] on this basis for the simple reason that the net profit figure in the Initial Business Plan would, by any measure, produce a return for Claimant that far exceeds what is reasonably expected in the industry, all at Respondent's expense.
>
> 5.3.6 In support of this proposition, Respondent points to: (a) the fact that Korean Courts are not bound by a literal interpretation of a contract and are free to favour one interpretation over another, because it is more commercially reasonable; (b) Mr [X]'s opinion that the net profit figure in the Initial Business Plan could not have formed a commercially reasonable basis for entering into the [Agreement]; and (c) Mr [Y]'s opinion that a cost-plus contract that guaranteed net profits for 30 years is unprecedented in the aviation catering industry. Reliance is also placed on Mr [Y]'s view that the guarantee of net profits as reflected in the Initial Business Plan would be commercially unjustified, having regard to his opinion that the Initial Business Plan was not sufficiently robust to be relied on by two commercial parties as a guarantee of the stated net profits for 30 years.

> 5.3.7 With respect to Claimant's assertion that the commercial reasonableness of its net profits being fixed for the 30-year term of the [Agreement] requires to be considered against the background of the suite of other agreements made at the same time amongst affiliated entities of Claimant and Respondent (i.e., as part of a package deal), Respondent says that Claimant has submitted no evidence at all to prove that there ever was a link between the [Agreement] and the BWA.
>
> 5.3.8 Respondent also contends that considering the BWA as part of the relevant factual background when construing the pricing mechanism in the [Agreement] would lead to an interpretation that would render the [Agreement] null and void under Korean law.
>
> 5.3.9 Respondent argues that, in circumstances where one party's interpretation would render the contract void while the counter-party's interpretation would give full effect to it, the Korean Courts are bound by the principles of effective interpretation to adopt the latter.

56 In para 7.1.2 the Tribunal set out its conclusion as to the Korean law principles of contract interpretation:

> 7.1.2 From a review of the disputing Parties' written submissions, it is apparent that they agree that the following Korean law principles of contract interpretation apply:
>
> (a) *The text of a contract has primacy where its objective meaning is clear.*
>
> (b) *Where the objective meaning of the wording of the agreement is clear on its face, a party may not use subsidiary means to create ambiguity when none exists in the wording itself.*
>
> (c) *Only where the objective meaning of the text is ambiguous,* may the court or tribunal use subsidiary means of interpretation such as commercial common sense, the factual circumstances leading to the contract (including the drafting history), the purposes of the transaction(s); and prevailing business practice to ascertain the interactions of the parties.
>
> (d) In construing a contract, the principle of "effective interpretation" applies, whereby an interpretation that renders contractual clauses effective takes precedence over an interpretation which does not.

> (e) Any reasonable interpretation based on subsidiary means of interpretation must take into account comprehensively the context of the text, the motives and circumstances leading to the agreement, the purpose of the agreement and the true intent of the parties.
>
> (f) Korean law applies a principle of "strict interpretation" to the effect that the text of a contract must be construed more strictly where it imposes a significant responsibility on the other party. However, this principle comes into play only where the meaning of the text is ambiguous. It does not operate to displace the ordinary meaning of the wording of the agreement.
>
> [emphasis added]

57 Having reached the conclusion that the text has primacy where its objective meaning is clear and that subsidiary means can only be used where ambiguity exists in the wording itself, the Tribunal went on to consider the various aspects of the wording of the Agreement which were in dispute. In each case it concluded that the meaning of the wording was clear on its face (see paras 8.1.6–8.1.11; 8.2.1–8.2.3; 8.2.4–8.2.8 and 8.2.12; and 8.3.9–8.3.10). The Tribunal went on to make it clear that it was only considering the subsidiary means on the basis that it was wrong in its conclusion that the objective wording was clear from the text and that there was no element of ambiguity (see paras 8.1.12, 8.2.3, 8.2.13, 8.2.30 and 8.3.3).

58 No reference was made in the dispositive parts of the Award to the Kwon Report or to the potential invalidity of the Agreement on the basis of the interpretation placed on the disputed wording by the Tribunal.

Asiana's contentions on interpretation

59 I have outlined the complaints made by Asiana in [17] above. In a little more detail, on the question of interpretation of contracts under Korean law, Asiana contends that the analysis of law set out in para 7.1.2 of the Award cites

only from the Statement of Claim and from the Defence, it does not consider the subsequent pleadings and submissions, particularly the Rejoinder, and thus makes no reference to the Kwon report.

60 In adopting the approach that it did, it is said that the Tribunal was adopting a common law approach to interpretation by focusing unduly on the words used in the Agreement whereas, had it focused on the Kwon Report, it should have concentrated more on the intentions of the parties as discerned not only from the wording of the Agreement but also taking into account the motives and circumstances leading to the execution of the contract, the purpose that was to be achieved by the contract as well as any relevant prevailing business practices. It should also have taken into account the Korean law principle of "effective interpretation".

61 The importance of taking the principle of effective interpretation into account in this case lies, so Asiana contends, in the fact that its contention on interpretation was based upon treating the Agreement as a self-standing contract which therefore stood to be interpreted independently from the other contracts, *ie*, the JVA and BWA. The alternative, which was advocated by GGK, involved considering the interpretation of the Agreement on the basis that the three agreements formed a suit of contracts forming a package deal. This the Tribunal accepted when assessing the commercial reasonableness of the Agreement in paras 8.1.16 and 8.2.28 of the Award.

62 However, in so doing, the Tribunal, it is said, failed to take into account that if one did consider the three agreements as part of a package, the consequence would, or might be, that the Agreement would be null and void under Korean law. Accordingly, the Tribunal should have had regard to the

principle of effective interpretation and interpreted the Agreement as contended for by Asiana so as to render it valid.

63 The potential or actual invalidity of the Agreement if considered as part of a package was due to the doctrine of abuse of power of representation through the application of Art 107(1) of the Civil Act of Korea and also possibly Art 103 of the Civil Act of Korea, although emphasis was placed in oral argument on Article 107.

64 This doctrine was considered in detail in at paras 41–53 of the Kwon Report and was well summarised in para 42 as follows:

> The doctrine of abuse of power of representation provides that if a representative director of a company, who assumes a duty of care towards the company, abuses his or her power of representation by executing a contract with a counterparty, with a view to conferring a benefit to himself or herself or a third party against the company's interests, such a contract is deemed null and void, provided that the counterparty was aware or should have been aware of the representative director's abuse of his or her power of representation. The doctrine is well established in the cases before the Korean Supreme Court.

65 Asiana's contention is that, on the facts, if the Agreement was to be interpreted as contended for by GGK so as to give what Asiana contended were unreasonable returns to GGK, this could only be justified on the basis that this provided reasonable commercial returns when viewing the three agreements as a unitary whole. However, GGK was not a party to the other two agreements: see above at [6].

66 Asiana summarises its submissions on the abuse of power of representation in paras 95–98 and 103–105 of its Written Submissions, as follows:

95. Again, the Tribunal failed to give any consideration or provide any explanation whatsoever on the implications of such a finding on Asiana's reliance on the Korean law principles of contractual interpretation, that would effectively render the Catering Agreement invalid under Korean law (pursuant to Articles 103 and 107 of the KCC). If the Catering Agreement was entered into by a director of Asiana with a view to conferring a benefit on a third party (in this case the wider Kumho Group), thereby satisfying the elements to invoke the Doctrine of Abuse of Power of Representation, the Catering Agreement would be deemed null and void. Further, GGK's own evidence confirms that executing the Catering Agreement and the BWA as part of the same package deal was GGK's actual intent and it actively participated in the deal, which would be contrary to public policy under Article 103, thereby rendering the Catering Agreement null and void. In order to avoid this conclusion, the Doctrine of Effective Interpretation would allow the Tribunal to come to an alternative interpretation that the Parties did not intend to preserve the net profits set out in the IBP as a fixed sum.

96. The Tribunal therefore failed to give consideration to Asiana's arguments on the Doctrine of Effective Interpretation.

97. Asiana submits that it has suffered real and actual prejudice as a result of the Tribunal's failure to consider Asiana's arguments.

98. Had the Tribunal applied its mind to Asiana's arguments, there is a real possibility that the Tribunal may have rejected GGK's "package deal" argument, and therefore accepted an interpretation of Annex 1.4 to the Catering Agreement that would not have the effect of preserving the Net Profit Figures in the IBP for the whole term of the Catering Agreement. It would avoid a finding that would lead to the invalidity of the Catering Agreement under Korean law, which governs the Catering Agreement.

…

103. Even if the Tribunal was entitled to solely apply an objective interpretation of the Catering Agreement, it was still required to determine the consequences of the interpretation it adopted.

104. The Tribunal came to the conclusion that:

> (a) On an objective interpretation of the IBP, there is no language requiring the Parties to agree to either of the 2018 or 2020 Business Plans.
>
> (b) The objective meaning of the Net Profit Clause was that the Net Profit Figures in the IBP would be fixed for the term of the Catering Agreement and the yearly Net Profit Figure in the IBP would be used in the calculation of the Contribution Charges for the duration of the Catering Agreement.
>
> 105. The effect of this Tribunal's interpretation would be that the Parties intended to guarantee GGK's profit under the Catering Agreement in exchange for Gategroup's overall investment into the Kumho Group (i.e., an endorsement of GGK's package deal theory).

67 Drawing all this together, on the interpretation aspect Asiana contends that not only was the Tribunal wrong in its analysis of Korean law, which it accepts is not a ground for setting the Award aside, but that the reason the Tribunal erred was due to its failure to consider fully or at all the unchallenged expert evidence of Professor Kwon. Had the Tribunal done so, it would have appreciated that Korean law mandated a more nuanced approach to interpretation which did not afford primacy to the wording of the Agreement but required the intention of the parties to be discerned by reference to other factors including the avoidance of invalidity.

68 Finally, Asiana asserts that if, notwithstanding the above, the Tribunal was satisfied that the interpretation of the Agreement was as contended for by GGK and as found by the Tribunal, the Tribunal should have gone on to declare that the Agreement was null and void. Asiana acknowledges that it did not seek a declaration to this effect and, indeed, that its counterclaim was predicated on the Agreement being valid. However, basing itself on the reasoning in *CKG* and on appeal in *CKH*, it contends that the Tribunal would not be acting in excess of its jurisdiction in granting of such a declaration since it was a necessary

consequence of the adopted interpretation. The issue of invalidity in the event of such an interpretation was raised before the Tribunal and thus came within the scope of the issues which the Tribunal should have decided.

69 Further, in this case, it submits that the Tribunal had express power to decide the issue pursuant to term 29 of the Terms of Reference of the Arbitration dated 28 November 2019.

70 Term 29 provides:

> The Arbitral Tribunal shall decide the issues necessary to adjudicate the claims for relief of the parties as set forth above, and any claim added pursuant to Article 23(4) of the ICC Rules. More specifically, the questions of fact or law to be resolved by the Arbitral Tribunal in order to make the decision on the requests for relief mentioned above shall be those appearing from the parties' submissions, statements and pleadings and, in addition, any further questions of fact or law which the Tribunal, in its own discretion, may deem necessary or appropriate to decide on, after hearing the parties, for the purpose of resolving the present dispute.

71 It is however also necessary to note term 30 which provides:

> It is also noted that pursuant to Article 23(4) of the ICC Rules: "After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."

GGK's contentions on interpretation

72 For its part, GGK contends that the Tribunal's analysis of Korean law in para 7.1.2 is accurate and that the principles of Korean law there set out were common ground. It asserts that the wording of the Agreement does have primacy if the objective meaning of the language used is clear and the various secondary indicia prayed in aid by Asiana only become relevant in

circumstances where there is ambiguity in the language used. Whilst it is accepted that the principle of effective interpretation exists, it is denied that the principle can be invoked so as to displace the clear meaning of the language used so as, in effect, to rewrite the contract with other language which has a contrary meaning.

73 GGK does not accept that on the interpretation preferred by the Tribunal the Agreement would be null and void but asserts that the issue of validity did not arise for decision in the Arbitration. Asiana's case was the antithesis of this since the counterclaim was predicated on the Agreement being valid. In the Rejoinder Asiana made it clear that it was not disputing the fact that the pricing mechanism set out in the Agreement was binding. What it was seeking was that the Tribunal should determine the correct application of the pricing mechanism which was "consistent with the Parties' agreed contractual terms and the commercial purpose for which those terms were entered into".[8] Accordingly, Asiana's case was based on the premise that the Agreement was not void (see the transcript extract at [52] above).

74 GGK contrasts the facts in this case with those in *CKH*. It asserts that a proper review of the five sources referred to at the end of [16] of *CKH* in relation to the facts of this case demonstrates clearly that neither party had invited the Tribunal to decide the question of validity. The contrary was asserted in the Rejoinder and that position has been maintained in the submissions.

75 In those circumstances, GGK contends that the Tribunal had neither the power nor the obligation to make a finding in relation to the validity of the Agreement.

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8 Respondent's Statement of Rejoinder para 29.

The Kwon Report

76 With that background, I can turn to consider the Kwon Report.

77 The crucial paragraphs are paras 9 and 10 which read as follows:

> 9. Contract interpretation is intended to clarify and conclusively determine what the parties' intended to achieve through the contract. *As a matter of starting point, the Korean courts seek to discern the objective meaning of the words as used in the contract.* However, this is not just to identify its meaning in the dictionary but to understand what the parties to the contract had intended at the time of formation of the contract based on objective standards. If the parties' intent at the time of the formation of the contract has been clearly expressed in its wordings without any room for dispute from an objective viewpoint, the court will likely render its interpretation of the contract based on such wording.
>
> 10. However, where the objective meaning of the words cannot be discerned because their meaning in the dictionary or the scope which the words intend to define is not clear or because, even if the meaning or the defined scope is fairly clear, there is a dispute between the parties as to what they intended to express using said words, the court would consider circumstances other than the words in the contract in order to clarify the parties' intent.
>
> [emphasis added]

78 It is clear from the italicised sentence in para 9 that the first task when seeking to identify the objective intention of the parties is to have regard to the wording used. If the objective meaning of the words is clear, then it is "likely" that the words will be given that meaning. The Report did not go on to consider the "unlikely" circumstances in which the words will not be given that meaning.

79 Paragraph 10 went on to consider what approach should be taken in circumstances where the wording is not sufficiently clear such that primacy cannot be given to the words used. This will occur either when the wording is

not clear on its face or where, although the meaning is fairly clear, there is a dispute between the parties as to what they intended by the words used. The former poses no difficulty; if both parties have proposed differing interpretations both of which are tenable, then the wording is ambiguous and recourse necessarily has to be had to other means to resolve the ambiguity. A measure of care, however, has to be taken in approaching the latter, where the meaning of the words tends to support one interpretation but there is a dispute as to whether the parties intended the words to have that meaning. First, there must be a credible alternative meaning that the wording could be given, otherwise the wording would be clear. There must therefore be a measure of ambiguity in the wording used even if, on balance, the wording used favours one particular interpretation. Secondly, there must be a credible dispute as to what the parties intended.

80 The starting point, however, is a lack of clarity in the wording. It is insufficient that one party should merely raise an argument on ambiguity; it must be a tenable argument. As the Kwon Report has made clear from the opening words of para 11, "[i]n such cases", it is only in those circumstances that Korean law requires that the parties' intent should be discerned by reference to external factors. This is reinforced by the last sentence of para 12:

> In short, given that what we intend to eventually clarify by way of contractual interpretation is the parties' intent, not the text itself, other factors than the words should, as a matter of course, be taken into account, *wherever necessary*.
>
> [emphasis added]

81 Read in context, it is clear that the italicised words are a reference back to the primacy of the meaning of the wording used where that meaning is objectively clear as set out in para 9. If that meaning is clear it will be unnecessary to have recourse to external factors.

82 The Kwon Report goes on to consider the principle of effective interpretation in paras 20–26. In order for the principle to be invoked it is necessary that there should be two rival interpretations, one of which would render the contract null and void (see para 20).

83 A common example which Professor Kwon gave in para 22 relates to an indemnity clause (which, in its plain language, places no limitation on the scope of its application) where one party was contending for a wide meaning of the word which would render the contract void and the other for a narrower meaning which would render it valid. The court will then give the word the narrower meaning which both accorded with the intention of the parties and rendered the contract valid.

84 In so doing, the court is placing a meaning on the words used because there are two tenable alternative meanings, one of which would have the effect of invalidating the contract. Professor Kwon did not suggest that where the objective meaning of the words used clearly expresses the intention of the parties the principle of effective interpretation requires the court to rewrite the contract so as to cure any possibility of invalidity. Rewriting is not interpretation.

85 From the above analysis of the reasoning in the Kwon Report, I am satisfied that Professor Kwon was not suggesting that recourse *must* be had to the external factors referred to in paras 11–13 of the Kwon Report in circumstances where the objective meaning of the words used is clear from the language actually used. They are interpretational tools for use where there is an element of ambiguity in the meaning of those words.

86 More specifically, Professor Kwon did not suggest that the principle of effective interpretation has overriding effect or is required to be taken into account where the objective meaning of the words used is clear, such that the principle becomes a mechanism for rewriting a contract where the clear objective meaning of the words used could lead to a conclusion that the contract is void. As counsel for Asiana accepted, where the intention is clear from the wording and that wording cannot mean anything else then the parties are left with the consequences of the wording they have chosen.[9]

The Award and the Kwon Report: General principles of interpretation

87 Reverting to para 7.1.2 of the Award, (see [56] above), whilst the principles of interpretation there stated were derived from the parties' early pleadings and not from the Kwon Report, there is no material difference between the principles set out in paras 7.1.2 (a)–(c) and those which I have identified in the Kwon Report. In both cases it is clear that the wording used has primacy where its objective meaning is clear. Recourse to subsidiary means of interpretation is only required where the objective meaning of the text is ambiguous.

88 In para 7.1.2(d), the Award identified the principle of effective interpretation but did not consider its impact further. I shall consider this further below (see [94] to [100]).

89 The Tribunal concluded that in all contested respects the objective meaning of the wording used in the Agreement was clear on its face (see paras 8.1.6; 8.2.7; 8.2.12; and 8.3.10). It went on to consider various subsidiary means of interpretation in the event that its primary conclusion on the clarity of

[9] Day 2 Transcript at p 46 line 5 to p 47 line 17.

meaning was wrong, not because it felt obliged to do so when the wording was clear (see paras 8.1.12; 8.2.3; 8.2.13; 8.2.30; and 8.3.3).

90 It is correct to say that in reaching those conclusions the Tribunal did not expressly refer to the Kwon Report. This might be due either to the fact that it did consider the Kwon Report but concluded that it added nothing or that it overlooked the need to consider it having reached the conclusion from reading the pleadings that the principles of interpretation under Korean law were common ground.

91 Whatever be the case, in the circumstances of this case any failure to address the contents of the Kwon Report does not amount to grounds for setting aside the Award whether under Arts 34 (2)(*a*)(ii) or 34 (2)(*a*)(iii) of the Model Law or by reference to the principles of natural justice since a review of the Kwon Report would not have given the Tribunal cause to reconsider its analysis of the legal principles in para 7.1.2 which it then applied in reaching its conclusions on the clarity of wording.

92 Accordingly, it cannot be said that the Tribunal missed a pleaded issue or that in considering the issue of interpretation it ignored evidence or arguments material to that issue which, if taken into account, would or might have influenced the outcome. Even if the Tribunal overlooked the need to review the Kwon Report, no prejudice has been caused to Asiana by this failure as it would not have caused the Tribunal to alter its conclusions on the applicable principles of interpretation.

93 For all these reasons, I conclude that Asiana has not made out a case for setting aside the Award on the ground that the "Tribunal failed to properly consider the expert evidence put before it on Korean Law and [Asiana's]

arguments on contractual interpretation" (see Asiana's Written Submissions at sections IV(A)(1) and (2)).

The Award and the Kwon Report: The principle of effective interpretation

94 In Asiana's Written Submissions at section IV(A)(3), Asiana asserts that the Tribunal failed to consider Asiana's arguments on the principle of effective interpretation and the abuse of power of representation. It contends that it should have done so. It should have gone on to conclude that the Agreement would be invalid on the basis of the interpretation proposed by GGK and either preferred the interpretation proposed by Asiana or declared the Agreement to be void.

95 It is correct that the Tribunal did not consider these matters. Having set out the principle in para 7.1.2(d), it did not consider it further. I conclude that the Tribunal was correct not to do so. Certainly, having regard to the fact that the threshold for a finding of breach of natural justice is a high one, I am satisfied that Asiana's arguments do not approach this threshold.

96 First, for the reasons given above, the Kwon Report does not support an argument that the principle should be applied when the objective wording of the provision in question is clear. It is not a licence to rewrite the contract.

97 Secondly, it formed no part of Asiana's case at the Arbitration that the factual matrix was such that an interpretation which favoured GGK would render the Agreement void. Asiana's case had to be that it was valid, regardless of the interpretation, in order to support its claim under the Counterclaim. It was consistent in its contention that the Agreement was not linked to the other two agreements and emphasised that it relied on the principle not because it would make the Agreement void but only that it *could* (see above at [68]). The first

time that Asiana contended that there should be a finding of invalidity was in this OS. This is a classic case of a party seeking to challenge an award on a case which it did not make before the Tribunal.

98 Third, neither party sought relief of that nature. In particular, the relief Asiana sought was set out in term 27 of the Terms of Reference. It did not seek relief, in the alternative, in the form of a declaration that on the basis of GGK's preferred interpretation the Agreement would be null and void. The issue of invalidity was thus not expressly raised.

99 Nonetheless Asiana contends that it was open to the Tribunal to consider the issue and, indeed, that it was obliged to do so since it was pleaded as a consequence in the Rejoinder[10] and fell to be decided under the principles laid down in *CKH*. I do not accept this. The facts here are significantly different to those in *CKH*. I have considered all of the five sources set out in *CKH*: pleadings, agreed list of issues, opening statements, evidence adduced and closing submissions in the course of this judgment. I am satisfied that "*viewing the whole position and the course of events objectively and fairly*" it cannot be said that the parties in this case "*accepted between themselves and before the Tribunal*" (see *CKH* at [16]) that the issue of invalidity fell to be decided.

100 Accordingly, I conclude that Asiana has not made out a case for setting aside the Award on the ground that the Tribunal failed to consider "Asiana's arguments on the Principle of Effective Interpretation and the Abuse of Power of Representation" (see Asiana's Written Submissions at section IV(A)(3)).

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[10] Day 1 Transcript at p 56, lines 20–25.

Exhibit C-333

101 Asiana relies upon Exhibit C-333 ("C-333") as supporting two further grounds for seeking to set aside the Award. C-333 was adduced not by Asiana but by GGK as an exhibit to the Rejoinder to Counterclaim, the final pleading. However, although adduced, it was not specifically referred to in either the text or the footnotes to the text. It was however referred to during the cross-examination of Asiana's financial expert in an attempt to show that GGK's prices complied with the requirements of both clause 6 and of Annex 1.4, that the prices for the services provided by GGK should be no less favourable to either party than the "current pricing paid by Asiana for any services … that are the same or similar to the Services" (the "NLF Clauses").[11]

102 The purpose of the cross-examination was to seek to demonstrate, using C-333, that the projected return on investment under the Agreement over the years would equate to that which notionally would have been achieved had the previous arrangement with LSGK been continued (see [5] above) whereas Asiana's projections would generate less than half that return. Accordingly, GGK relied on C-333 in its closing submissions in support of its contention that GGK's pricing did comply with the NLF Clauses.

103 Asiana however relied heavily on that cross-examination in its closing submissions as demonstrating the contrary when like with like was properly compared. On this basis GGK's projected return would be more than twice as high as LSGK's notional return, whereas on Asiana's figures the two would be approximately the same. Hence, Asiana contended that this analysis served to

[11] JP-71, Transcript Day 4 at pp 150–155

support its contentions as to the proper interpretation of the Agreement and undermined GGK's proposed interpretation.

104 Additionally, in its closing submissions Asiana sought alternative declaratory relief as is shown in Slide 65:

> …
>
> (3) Declare that GGK is bound to agree with Asiana the 2018 Business Plan by replacing the Initial Business Plan in its entirety and 2020 Business Plan by replacing the 2018 Business Plan in its entirety, in accordance with Asiana's interpretation of the NLF Provisions and the pricing mechanism in the CA.
>
> > (1) Primary: Declare that GGK is bound to agree with Asiana the 2018 Business Plan in line with the NLF-Compliant 2018 Business Plan (Appendix 1 to RWS-6).
> >
> > (2) Alternative: Declare that GGK is bound to agree with Asiana the 2018 Business Plan and the 2020 Business Plan on the basis that (i) the net profit figures and other elements in the Initial Business Plan are subject to adjustment, and (ii) such adjustment shall comply with the NLF Provisions in the CA and the net profit projected by GGK in its Exhibit C-333.

105 The Tribunal did not make any reference to C-333 in its award. Asiana contends that this demonstrates, first, that it failed to consider the arguments raised by Asiana as to the effect that it should or might have had on the interpretation of the NLF Clauses. Secondly, Asiana asserts that if it would or might have had an impact on the interpretation of the NLF Clauses, then, in turn, this would or might have had an impact on the question of the interpretation of scope of the "adjustments" to the Business Plan and the fixing of the net profits figures set out in Annex 1.4. Thirdly it caused the Tribunal wrongly to ignore the request for the alternative declaration.

106 For its part, GGK contends, first, that the Tribunal was entitled to disregard the request for alternative relief as it was made too late and was not

accompanied by any request to introduce a new claim or seek new relief contrary to Article 23(4) of the International Chamber of Commerce ("ICC") Rules and terms 29 and 30 of the Terms of Reference. Not only was the Tribunal entitled to disregard it, had it acceded to the request it would have exceeded its jurisdiction and would have acted in breach of natural justice in not providing GGK with the opportunity to respond to the request.

107 Secondly, it says that Asiana deployed its argument based on C-333 as a means of illustrating how its proposed interpretation of the NLF provisions would work. Since the Tribunal held that such an interpretation was inconsistent with the clear wording of the NLF Clauses, any further consideration of C-333 would be irrelevant and thus an academic exercise.

108 The nub of Asiana's arguments based on C-333 amounts to this. C-333 demonstrated that the adoption of the net profit figures in Appendix 1 of the Agreement which were to be "preserved" by virtue of Annex 1.4 would lead to an outcome which was significantly less favourable to Asiana than would have been the case if, notionally, the agreement with LSGK had continued for the next 30 years. Hence, in order to pay due regard to the NLF Clauses, it would be essential to adopt Asiana's proposed interpretation of Annex 1.4.

109 The flaw in this argument lies in the Tribunal's findings on interpretation. In all respects it held that the relevant wording of the Agreement was objectively clear. This applied to the word "adjusted" in article 1.4 (see the Award at paras 8.1.4–8.1.11), that the net profit figures were fixed (paras 8.2.1–8.2.12) and, in para 8.3.10 that the NLF Clauses:

> … mandate that, as at 1 July 2018 (the date that Claimant was to start providing catering services to Respondent) and for 12 months thereafter, all else being equal, Claimant's pricing terms and conditions for its meals and services were not to

> exceed the pricing terms that were charged by LSGK for meals or services that were the same as, or similar to, Claimant's meals or services, provided that such pricing did not result in Claimant being treated less favourably than was LSGK before the Commencement Date.

110 The arguments based on C-333 focused on the favourability, one way or the other, of the projected return to GGK over the full term of the Agreement as contrasted with the notional return to LSGK over the same period. This was irrelevant having regard to the way in which the Tribunal interpreted the NLF Clauses on a limited temporal basis. Asiana's first contention set out at [105] above thus fails.

111 Further, in so far as it might be said that there was relevance in assessing the commercial common sense of the Agreement, such a consideration was irrelevant to interpretation when the objective meaning of the words used was clear. Asiana's second contention thus also fails.

112 In para 12 of its Skeletal Reply Submissions Asiana does not dispute that if the Tribunal's acceptance of GGK's interpretation of the NLF Clauses was correct then the request for the alternative declaration was moot. I have held that it was. There was thus no need for the Tribunal to consider the request for the alternative declaration.

113 For all these reasons, I also conclude that Asiana has not made out a case for setting aside the Award on the ground that the Tribunal failed properly to address Exhibit C-333.

Conclusion

114 The OS falls to be dismissed with costs. The parties have agreed that I should assess costs without a further hearing on the basis of the costs schedules

and written submissions provided by each of them unless I was of the view that a further hearing was necessary.

Costs

115 On the hearing on 24 August 2021 which resulted in the transfer to the SICC, the court ordered as follows in relation to the assessment of costs:

> (1) HC/OS 580/2021 is to be transferred to the Singapore International Commercial Court pursuant to Order 110 Rules 12 and 58 of the Rules of Court.
>
> (2) In accordance with Order 110 Rules 12(5)(c) and 58(2) of the Rules of Court, after the transfer of HC/OS 580/2021 to the Singapore International Commercial Court, the parties are to continue to pay the hearing fees and court fees that are payable in the General Division of the High Court.
>
> (3) Order 59 of the Rules of Court is to continue to apply to the assessment of costs that are incurred in respect of all proceedings in and arising from HC/OS 580/2021 before its transfer to the Singapore International Commercial Court.
>
> (4) Order 110 Rule 46 of the Rules of Court is to apply to the assessment of costs that are incurred in respect of proceedings in and arising from HC/OS 580/2021 on or after its transfer to the Singapore International Commercial Court.
>
> (5) The issue of whether costs should be assessed on a standard basis or on an indemnity basis is reserved to the Singapore International Commercial Court.

116 In its written costs submissions GGK seeks:

(a) An award of costs on an indemnity basis

(b) Pre-transfer costs at S$81,600.00 if assessed on an indemnity basis and S$40,000 if assessed on a standard basis.

(c) Post-transfer costs at S$95,336.00 if assessed on an indemnity basis and S$50,000 if assessed on a standard basis.

(d) Disbursements at S$17,285.00.

117 For its part, Asiana contends:

(a) That costs should not be awarded on an indemnity basis.

(b) That costs should not be granted for two firms of solicitors.

(c) That the quantum sought on a standard basis, both before and after transfer is excessive.

Indemnity basis

118 GGK puts its case in two ways. First, it contends that clause 19.1 of the Agreement provides for an indemnity in favour of the innocent party where there has been any breach of that Agreement. Secondly, it contends that, in any event, Asiana has behaved unreasonably in its conduct of this case such as to warrant an award of indemnity costs on the basis of established principles.

119 Clause 19.1 provides:

> If there has been a breach of any representation, warranty, covenant or obligation set forth in this Agreement, the breaching Party shall indemnify and hold harmless the other Party, its affiliates, servants, officers, directors, employees, agents and contractors from and against any and all liabilities, claims, costs and damages resulting from or arising out of any breach by the breaching Party of any representation, warranty, covenant or obligation in this Agreement.

120 The reference to costs in that clause is to be contrasted with the language used in clause 8.2.4 which reads:

> Asiana agrees that on-time payment of invoices and other amounts due is of the essence under this Agreement, and that any payments not received on the due date therefor shall accrue interest at a rate of 8% per year above the three month LIBOR, or the highest rate chargeable under the applicable law,

> whichever is lower, until paid in full. Any such interest shall be payable on demand. Asiana agrees that such charge is not a penalty but a true measure of damages incurred by [GGK]. In addition, Asiana shall reimburse [GGK]on a fully indemnified basis for losses incurred by [GGK] (including fees and expenses of legal counsel) with regard to late payments. In case of a dispute regarding an invoice, Asiana shall not be entitled to withhold or set-off the disputed amounts and the mechanism set forth in Clause 8.3 below shall apply.

121 The Agreement is to be construed in accordance with the law of the Republic of Korea. I have no understanding of the manner in which successful litigators are compensated for the sums incurred by way of legal fees. I have received no evidence from Korean lawyers to assist me in determining whether the word "costs" in clause 19.1 would be interpreted as including the fees of legal counsel. In these circumstances I cannot reach a conclusion on the proper interpretation under Korean law of clause 19.1. The burden rests on GGK to satisfy me that on its proper interpretation, clause 19.1 would have entitled it to be indemnified in respect of any costs incurred in the Arbitration and this it has not done.

122 In the Award, the Tribunal referred to clause 8.2.4 but not to 19.1 in para 9.1.4, and made it clear in para 9.1.3 that it was going to award costs on the basis provided for in Article 38(5) of the ICC Rules, which is a discretionary and not an indemnity basis. This it did in paras 9.2.19–9.2.25.

123 In *CDM and another v CDP* [2021] 2 SLR 235 (at [52]–[56]) the Court of Appeal rejected a submission that there was a presumption of indemnity costs in the event of an unsuccessful application to set aside an arbitral award and reiterated at [56] the high hurdle that a party had to cross in order to obtain such an order:

> We emphasise that in deciding whether to order indemnity costs, the court should have regard to all the circumstances of

> the case, and whether a party has behaved *unreasonably* (see *Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm) at [25]). Critically, "[c]osts on an indemnity basis ***should only be ordered in a special case or where there are exceptional circumstances***" (*Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2011] 1 SLR 582 at [29]).
>
> [emphasis added]

124 I accept that such a special case might exist where the parties' contractual agreement so provides (see *BNP Paribas SA v Jacob Agam and another* [2018] 3 SLR 1 at [127]) but I also agree with GGK's submission that in doing so the court would not be enforcing the contract but taking it into account in the exercise of its discretion on costs.

125 This court's power to award costs is circumscribed by O 59 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") and Appendix G of the Supreme Court Practice Directions 2013 for pre-transfer costs, and by O 110 r 46 of the Rules of Court for post-transfer costs. In the former case an award of costs on a higher "indemnity" scale is permissible. In the latter it is not. The distinction between the two and the rationale behind the distinction has recently been explained in a recent decision on costs in the SICC, *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2022] SGHC(I) 6 ("*Lao Holdings*") (at [26]–[87]). Insofar as it concerns post-transfer costs at [83] the Court said this:

> 83 The fundamental purpose of an award of costs in the SICC under O 110 of the ROC is to compensate the successful party for reasonable costs incurred in the legal proceedings. The phrase "reasonable costs" is applicable to all costs, provided that they are reasonable. The qualification that the costs must be reasonable is only intended to provide a means for the court to ensure discipline in the pursuit of the case, as well as to prevent an unsuccessful party from being oppressed by the successful one. It is not intended to incorporate any further attenuation on the basis of considerations of social policy which

> may be appropriate in domestic courts. *The starting point, therefore, in assessing costs in the SICC must be the costs actually incurred by the successful party, ie, the costs payable by the successful party to its solicitors, and its experts or consultants where relevant, which is then subject to the single attenuation for reasonableness.*
>
> [emphasis added]

Pre-transfer costs

126 With this background, I turn to consider pre-transfer costs. First, I do not consider that it is appropriate in this case to take into account clause 19.1 in considering whether or not to award indemnity costs for the reasons I have given. Secondly, although there are elements of Asiana's argument which were subsequently abandoned at the hearing, I do not consider that taken overall its conduct can be said to have approached that which the court would recognise as being such as to justify an award of indemnity costs. Pre-trial costs will therefore be assessed on the standard basis with reference to Appendix G.

127 By any standard, this is a substantial case. Necessarily there has been extensive documentation and the arguments have not been straightforward. GGK has employed two sets of counsel to assist in the case, Colin Liew LLC, as Singapore Counsel and LALIVE SA and LALIVE (London) LLP collectively who had been GGK's counsel in the Arbitration. Asiana contends that this is unreasonable and that only in exceptional cases should the costs of two counsel be allowed. In my judgment, each case must be decided on its own facts and the surrounding circumstances. In the present case, having regard to the nature of the case and the foreign law elements involved, it was not only reasonable but sensible and proportionate to employ two counsel. Had Mr Liew sought to do the job on his own it would, in all probability, have been more expensive and time consuming.

128 GGK's pre-transfer costs amounted to S$81,600.00 (US$60,000.00) and it seeks an award of S$40,000.00 on the basis of an Appendix G assessment. In the circumstances of this case, I consider that this is an appropriate sum.

Post-transfer costs

129 GGK's post transfer costs were initially said to amount to S$95,336.00 (US$70,100.00) which were subsequently updated to S$99,416.00 to include later incurred costs. In its written submissions GGK seeks an award on either the indemnity or the standard basis. For the reasons I have given this is not the appropriate approach. For its part, Asiana accepts that Appendix G did not apply but submits that the court should continue to have regard to it save in complex cases and that it should be considered alongside the other factors set out in para 152(3) of the SICC Practice Directions. This is consistent with the approach set out in *Lao Holdings*. I consider that this is a complex case, and that little weight should be attached to Appendix G. The starting point is the actual costs incurred, attenuated by considerations of reasonableness.

130 I do not propose to consider all the factors in para 152(3) of the SICC Practice Directions individually. Taken in the round, this is a setting-aside application which was well prepared, thoroughly yet succinctly argued and the expenditure incurred was proportionate to the complexity of the issues involved. I conclude that an appropriate award for post-transfer costs is S$80,000.00.

Disbursements

131 GGK seeks an award of S$17,285.00. This is not challenged by Asiana.

Conclusion on costs

132 Asiana shall pay to GGK S$120,000.00 by way of costs together with disbursements of S$17,285.00.

Simon Thorley
International Judge

Thio Shen Yi SC and Nanthini d/o Vijayakumar
(TSMP Law Corporation) for the plaintiff;
Liew Wey-Ren Colin (Colin Liew LLC) for the defendant.