IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 14

Court of Appeal / Civil Appeal No 45 of 2024

Between

Palm Grove Beach Hotels Pvt Ltd

… *Appellant*

And

(1) Hilton Worldwide Manage Limited
(2) Hilton Hotels Management India Private Limited

… *Respondents*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside — Breach of the rules of natural justice — Whether award rendered *infra petita*]
[Arbitration — Award — Recourse against award — Setting aside — Breach of the rules of natural justice — Whether tribunal's chain of reasoning unforeseeable — Whether parties deprived of opportunity to be heard]

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v
Hilton Worldwide Manage Ltd and another

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Court of Appeal — Civil Appeal No 45 of 2024
Sundaresh Menon CJ, Steven Chong JCA and Belinda Ang Saw Ean JCA
24 January 2025

28 March 2025 Judgment reserved.

Belinda Ang Saw Ean JCA (delivering the judgment of the court):

Introduction

1 This appeal concerns a setting aside of two partial arbitral awards on the principal ground of breach of natural justice. The two Singapore-seated partial awards pertained to contractual disputes between the hotel owner (the "appellant") and the hotel managers (the "respondents") over the management and operation of a luxury hotel in India. Based on the appellant's oral arguments before us, the focus of the appeal is on the appellant's counterclaim. The appellant's remaining arguments as regards the appointment of the hotel's budget expert, the affiliate fees claim, the working capital claim and the suspension claim are set out in the appellant's written submissions.

2 For the reasons below, we dismiss the appeal. We note that despite this Court's numerous reminders of the policy of minimal curial intervention in

arbitral process and repeated cautions against attempts to nitpick at the awards in order to launch backdoor appeals against the merits of the arbitral proceedings, which is clearly beyond the remit of the supervisory court, the hearing below and on appeal demonstrated efforts taken to go through the weeds of the arbitration to mount unmeritorious challenges against the two partial awards. These sorts of challenges are not in keeping with the approach to arbitration. A supervisory court will not trawl through materials before the tribunal with a fine-tooth comb to see whether something was raised (however tangentially) and not dealt with. A submission that a material issue was not dealt with will have to be an obvious point and not something that is open to doubt because doubts are likely to be resolved in favour of upholding the award.

Background facts

The parties and the Management Agreement

3 The appellant is an India-incorporated company that owns various luxury hotels in India. The first respondent and the second respondent are incorporated in the UK and in India respectively. The respondents belong to a group of companies that specialises in the management and operation of hotels under multiple brands, including the "Conrad" brand.

4 Prior to 2011, the appellant began constructing a hotel in Pune, India (the "Hotel") and engaged the respondents to manage and operate it.

5 The parties' relationship was governed by various agreements (the "Hotel Agreements"). The key contract was the Management Agreement as supplemented by the Working Capital Addendum, both dated 5 December 2013 (the "Management Agreement" and the "Working Capital Addendum",

respectively). The key clauses of the Management Agreement which are relevant to this appeal are summarised below:

(a) Clause 3.1.2 provides that the respondents shall have "sole and exclusive right and obligation, with full control and discretion to manage and operate the Hotel in accordance with the Budget" and "[i]nsofar as feasible and in its opinion advisable, … in accordance with local character and traditions".

(b) Clause 3.1.3 requires the respondents to fulfil their obligations "using the skill, effort, care and expertise reasonably expected of a prudent international hotel operator and with the intention of optimising the Gross Operating Profit of the Hotel … whilst having regard to, and not comprising, all other relevant considerations".

(c) Under cl 7.4.1C, the respondents have to deliver to the appellant, for its approval, the Hotel's proposed budget for the forthcoming fiscal year.

(d) In turn, under cl 7.2 as amended by the Working Capital Addendum, the appellant is to provide working capital for the respondents to operate the Hotel based on an approved budget.

(e) However, if the appellant objects to any part of the proposed budget and the parties cannot come to an agreement, cl 7.4.4 provides that a budget expert would be selected in accordance with cl 18.1 to determine the disputed issues. In particular, the budget expert is required to "have due regard to … the current and anticipated future performance of the Hotel and of other comparable hotels".

(f) Finally, under cl 7.6.1, the appellant could terminate the respondents if, in any two consecutive fiscal years, the Gross Operating Profit in each relevant fiscal year was less than 85% of the budgeted Gross Operating Profit (the "Performance Test"), and the respondents failed to pay the shortfall.

6 On 10 March 2016, the Hotel opened for business as "Conrad Pune".

The arbitration

7 Throughout March 2016 to August 2021, the parties disputed over various issues relating to the management of the Hotel. Eventually, the parties resorted to three tranches of arbitration seated in Singapore, presided over by the same tribunal (the "Tribunal") and administered by the Singapore International Arbitration Centre. The appellant is seeking to set aside the partial awards rendered in the last two tranches of arbitration.

8 The second tranche of the arbitration was commenced by the respondents on 3 August 2021. It concerned the parties' cross-claims for breaches of the Hotel Agreements. In the partial award dated 3 July 2023 (the "2nd Partial Award"), the Tribunal allowed the respondents' claim that the appellant had breached the Hotel Agreements by:

(a) failing to pay fees payable and due to the respondents' affiliates thereunder (the "Affiliate Fees Claim");

(b) failing to inject working capital into the Hotel (the "Working Capital Claim");

(c) wrongfully suspending the operations of the Hotel from 1 June 2021 to 18 June 2021 (the "Suspension Claim"); and

(d) interfering with the operation and the management of the Hotel.

The Tribunal also dismissed the appellant's counterclaim for the respondents' failure to manage the Hotel in accordance with the Management Agreement.

9 The appellant commenced the third tranche of the arbitration on 15 February 2023 to seek the appointment of Crowe Horwath HTL under cl 7.4.4 of the Management Agreement (see [5(e)] above) as the budget expert to determine the Hotel's budget for 2023. In the partial award dated 26 October 2023 (the "3rd Partial Award"), the Tribunal appointed Prognosis Global Consulting ("Prognosis") as the budget expert to determine the Hotel's budget for 2023.

The proceeding below and the decision of the High Court

10 On 29 November 2023, the appellant applied to set aside the following decisions made by the Tribunal in the two partial awards:

(a) to dismiss the appellant's counterclaim;

(b) to allow the respondents' Affiliate Fees Claim;

(c) to allow the respondents' Working Capital Claim;

(d) to allow the respondents' Suspension Claim; and

(e) to appoint Prognosis as the budget expert.

11 The appellant challenged the Tribunal's decision on the above five areas on two grounds:

(a) first, there has been a breach of the rules of natural justice that prejudiced the appellant under s 24(*b*) of the International Arbitration

Act 1994 (2020 Rev Ed) (the "IAA") and Art 34(2)(*a*)(ii) of the UNCITRAL Model Law for International Commercial Arbitration 1985 (the "Model Law"); and

(b) second, the Tribunal failed to decide certain issues submitted for determination, rendering the award *infra petita* to that extent pursuant to Art 34(2)(*a*)(iii) of the Model Law.

12 As the appellant's focus in this appeal is on the counterclaim, for context, we set out the appellant's case on its counterclaim at the hearing below.

13 The appellant argued that there were two aspects to its counterclaim. The first aspect was the respondents' "failure to prepare appropriate [b]udgets for 2020, 2021 and 2022" in accordance with the contractual standards set out under cll 3.1.2 and 3.1.3 of the Management Agreement (at [5(a)]–[5(b)] above), "having due regard in particular to the current and anticipated future performance of other comparable hotels" (the "Preparation Issue"). The appellant submitted that the Tribunal's decision to dismiss the counterclaim should be set aside, as the Tribunal had: (a) failed to apply its mind to the Preparation Issue and thereby breached the rules of natural justice; and (b) failed to determine an issue submitted for its determination, such that the decision rendered was *infra petita*.

14 The appellant submitted that the second aspect of the counterclaim was the respondents' underperformance in operating the Hotel in accordance with cll 3.1.2 and 3.1.3 of the Management Agreement (the "Underperformance Issue"). According to the appellant, its case in the arbitration was that the respondents had underperformed based on the following:

(a) First, the key performance indicators in the accepted industry reports (the "Industry Reports") which benchmarked the Hotel's performance against the performance of competing hotels forming the Hotel's competitive set ("CompSet"). The Industry Reports referred primarily to the reports by Smith Travel Research ("STR") and Hotelligence Demand 360.

(b) Second, the "Four Areas", namely, (i) the use of an obsolete revenue management system; (ii) the establishment of a productive national sales office; (iii) the creation of brand awareness; and (iv) the under-pricing of the Hotel.

15 The appellant's case was that the Tribunal's decision on the Underperformance Issue should be set aside because the Tribunal had made a decision that was contrary to the parties' "common and agreed position" that the respondents' underperformance would be determined based on the Industry Reports. The Tribunal had allegedly breached the rules of natural justice by failing to apply its mind to the parties' cases and adopting a chain of reasoning that had no connection with the "common and agreed position" on evidence so much so that a reasonable litigant could not have foreseen and in turn expect the Tribunal's decision and its chain of reasoning.

16 The judge below (the "Judge") held that none of the grounds for setting aside the 2nd Partial Award or the 3rd Partial Award were made out (*Palm Grove Beach Hotels Pvt Ltd v Hilton Worldwide Manage Ltd and another* [2024] SGHC 125 ("GD") at [198]).

17 On the Preparation Issue, the Judge found that the Tribunal could not be faulted for failing to consider this issue which was not adequately pleaded or

put into issue for the Tribunal's consideration (GD at [60], [65], [111] and [113]). The appellant thus failed to establish that the Tribunal had overlooked the Preparation Issue in breach of the rules of natural justice and/or had rendered an *infra petita* award (GD at [114]).

18 On the Underperformance Issue, the Judge held that the Tribunal had not erred in dismissing the appellant's counterclaim on evidential grounds. First, there was no such common and agreed position on the Industry Reports and the Four Areas as alleged by the appellant (GD at [124]). Second, the Tribunal had addressed its mind to the parties' evidence and submissions before concluding that the counterclaim failed for insufficient evidence (GD at [136]). Third, the burden was on the appellant to adduce expert evidence to prove its counterclaim, and the Tribunal was not obliged to invite parties to call for expert evidence on the matter (GD at [138] and [140]).

19 Turning to the remaining claims, the Judge rejected the appellant's case that the Tribunal had failed to consider the appellant's defences to the Affiliate Fees Claim and the Working Capital Claim (GD at [150], [153], [161] and [166]–[167]). On the Suspension Claim, the Judge found that the Tribunal could not be blamed for failing to address its mind to an alleged defence that had not been put forward by the appellant in the arbitration (GD at [175]–[176]). Finally, on the appointment of Prognosis in the 3rd Partial Award, the Judge held that the Tribunal had not adopted inconsistent lines of reasoning from the partial award rendered in the first tranche of the arbitration (the "1st Partial Award") (GD at [184]), and that parties had every opportunity to submit on why their respective nominee(s) should be appointed (GD at [196]).

Issues to be determined

20 There are three main issues for determination in this appeal:

(a) on the 2nd Partial Award, whether in relation to the Underperformance Issue, the Tribunal had adopted an unforeseeable chain of reasoning and/or deprived the parties of an opportunity to be heard, causing prejudice to the appellant;

(b) on the 2nd Partial Award, whether the Tribunal's alleged failure to consider the appellant's case on the Preparation Issue, the Affiliate Fees Claim, the Working Capital Claim and the Suspension Claim, rendered the award *infra petita* to that extent and prejudiced the appellant; and

(c) on the 3rd Partial Award, whether in relation to the appointment of Prognosis, the Tribunal had adopted an unforeseeable chain of reasoning and/or deprived the parties of an opportunity to be heard, causing prejudice to the appellant.

We propose to discuss the parties' cases in the appeal where necessary in brief and expand upon their arguments where necessary and appropriate in our assessment of each of the grounds raised to set aside the two partial awards.

Relevant principles on setting aside an arbitral award

21 We start by noting the Judge's remark that he had "carefully considered the affidavit evidence filed by the parties (which included the arbitral record) and their written and oral submissions" (GD at [3]). The arbitral record in the parties' affidavits was voluminous, including pleadings, witness statements, transcripts of the oral hearings, and written submissions. That the Judge had to

sieve through stacks of the arbitration materials is telling of a kitchen sink approach taken to challenge the awards. More to the point, the Judge called out what the appellant did which was to cobble together discrete materials from all over the arbitral record to mount the challenge on the Preparation Issue (GD at [113]):

> More importantly – and I reiterate – the touchstone is not whether the allegation was made in form, but whether the issue was *in substance* adequately and clearly put forward for the Tribunal's consideration. To cross this bar, it is simply not enough for [the appellant] to now string together disparate assertions that stray far and wide across the entire gamut of documents in the arbitral record. In my judgment, the Preparation Issue was simply not an issue that emerged clearly and consistently in the Second Tranche Arbitration. [emphasis in original]

22 This brings us to our first point, which is that where parties have agreed to resolve their disputes by arbitration, they are deemed to accept "the attendant risks of having only a very limited right of recourse to the courts" (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(c)]). The seat court must thus be vigilant and be wary of accusations made by the losing party in the arbitration to use the setting aside application to challenge an award, citing the tribunal's failure to consider and deal with an issue that was never put before the tribunal in the first place. In such a situation, it may well be that the losing party is simply trying to put forward a case it *wishes* it had put forward before the tribunal, and not the case which it had actually run.

23 But at the same time, the Singapore court's policy of minimal curial intervention does not mean that the line for intervention is rarely crossed, as there are still cases where intervention is warranted, and the seat court has intervened. However, the deficiencies in the award must go towards establishing one of the statutorily prescribed grounds for setting aside under the IAA. We

refer to our observations at [2] above and must again caution against an approach that nitpicks at an award in a vain attempt to bring the matter within the statutorily prescribed grounds for setting aside awards under the IAA. A distinction should be drawn here between grounds that are jurisdictional in nature (*eg*, that there was no agreement to arbitrate at all), and those that concern the manner in which the arbitration has been conducted (*eg*, that this was in breach of the rules of natural justice). In the latter category, even where the limited prescribed grounds might, as a technical matter, be said to have been engaged, "the court will exercise its power with restraint, setting aside awards *only* when there is good reason to do so" [emphasis in original] (*CAJ and another v CAI and another appeal* [2022] 1 SLR 505 at [1]; see also *COT v COU and others and other appeals* [2023] SGCA 31 ("*COT*") at [1]–[2] and [27]–[28]). The short point is that a complaining party will also have to demonstrate materiality in and prejudice flowing from the breach. Further, as was explained in *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC*") at [86], the court would take a "generous approach" in reviewing the awards in this context:

> … In short, the court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written … Nor should the court approach an award with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards, with the objective of upsetting or frustrating the process of arbitration. Rather, the award should be read in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it …

24 On a related note, this Court has repeatedly emphasised that the substantive merits of the award are beyond the remit of the seat court faced with a setting aside application. In other words, "there is no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact" (*BLC* at [53]; see also *AKN and another v ALC and another and other appeals* [2015]

3 SLR 488 ("*AKN*") at [37]; *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [57]; *COD v COE* [2023] SGCA 29 at [35]; *COT* at [2]). In this case, it appears to us that various allegations against the merits were dressed up as allegations of breach of natural justice. Specifically in relation to the counterclaim, this was done to mount a case that the appellant wishes it had advanced before the Tribunal. This cannot be countenanced. At risk of repetition, we stress that setting aside applications must not be abused to mount a backdoor appeal on the merits.

25 The second point is that an *infra petita* challenge – *ie*, a complaint that is "directed at the tribunal's failure to deal with a matter falling within the scope of submission to the arbitral tribunal" (see *DEM v DEL* [2025] 1 SLR 29 ("*DEM*") at [53]) – properly falls under the natural justice ground.

26 Below, the Judge observed that it is common for parties challenging an arbitral award on the basis that it is *infra petita* under Art 34(2)(*a*)(iii) of the Model Law to also rely on the natural justice ground for the tribunal's failure to consider and decide on a material issue (GD at [55]). Indeed, this is the way that the appellant has framed its case (see [11] above). However, as this Court has recently clarified in *DEM*, *infra petita* challenges are "better rationalised as a separate and independent natural justice challenge" than a challenge under Art 34(2)(*a*)(iii) (at [54] and [58]). This is because, amongst others, the wording of Art 34(2)(*a*)(iii) of the Model Law only contemplates *ultra petita* challenges where a tribunal exceeds its mandate by "deal[ing] 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 submission to arbitration" (see *DEM* at [56]).

27 It is important to distinguish an *infra petita* challenge under the natural justice ground from a challenge under Art 34(2)(*a*)(iii) of the Model Law, as different principles apply to each ground. A complaint under Art 34(2)(*a*)(iii) requires the court to look at various arbitral sources (including, the parties' pleadings, list of issues, opening statements, evidence adduced and closing submissions) in a holistic manner to determine what matters were within the scope of submission to the tribunal (*CDM and another v CDP* [2021] 2 SLR 235 at [18]). This is a more involved and detailed inquiry than that undertaken in a complaint for breach of natural justice. As explained in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), for an award to be set aside for breach of natural justice, "[a]ny real and substantial cause of concern should be *demonstrably clear on the face of the record* without the need to pore over thousands of pages of facts and submissions" [emphasis added] (at [125]). It is thus inappropriate for an applicant to invoke the principles under Art 34(2)(*a*)(iii) and invite the court to delve into the various arbitral sources, when its case is essentially one for breach of natural justice.

28 In the present case, the conflation of the natural justice ground and the Art 34(2)(*a*)(iii) ground meant that the Judge, as noted above (at [21]), unfortunately had to plow through the arbitral record and undertake an in-depth investigation into the parties' cases in the arbitration. This is unfortunate, and certainly undesirable, as the essence of the appellant's case is that there has been a breach of the rules of natural justice.

29 Having made these preliminary remarks and with the principles of setting aside in mind, we turn to explain our reasons for dismissing the appeal.

Our decision

The Tribunal's decision to dismiss the appellant's counterclaim in the 2nd Partial Award is not set aside

Overview of the counterclaim

30 Counsel for the appellant, Mr Thio Shen Yi SC ("Mr Thio"), in oral arguments introduced his case theory in respect of the counterclaim, *ie*, the Preparation Issue and the Underperformance Issue. According to Mr Thio, the two issues are distinct but related in that if the respondents prepare a budget that is not going to pass muster because they do not want to be held to a higher standard, then that would lead to their underperformance. We add that this is the first time that the appellant has drawn a clear link between the Preparation Issue and the Underperformance Issue.

31 The appellant's latest contention is that the respondents prepared lowball budget(s) with the knowledge that if they did not achieve 85% of the budgeted Gross Operating Profit over a stipulated period, they could be liable to be terminated or face financial consequences as provided in the Management Agreement (see the Performance Test at [5(f)] above). In other words, the lowball budget(s) was a deliberate ploy on the part of the respondents to enable them to satisfy the Performance Test and to thereby avoid termination or financial consequences under the Management Agreement. As Mr Thio develops his argument, it was in the preparation of the budget that the respondents failed to comply with their obligations under the contract. In essence, the Preparation Issue was couched as a breach of the standard of a prudent international hotel operator as stated in cl 3.1.3 of the Management Agreement (see [5(b)] above) in the deliberate provision of lowball budget(s).

32 This way of framing the Preparation Issue was only advanced in the appellant's oral submissions. We will refer to this latest contention as the "Reformulated Preparation Issue". In fact, we note that the appellant has been putting forth different versions of what the Preparation Issue referred to:

(a) Initially, the appellant described the Preparation Issue as the respondents' "failure to prepare appropriate [b]udgets for 2020, 2021 and 2022" in accordance with the contractual standards set out under cll 3.1.2 and 3.1.3 of the Management Agreement, "having due regard in particular to the current and anticipated future performance of other comparable hotels" (see [13] above).

(b) The appellant's written submissions on appeal defined the Preparation Issue as resting on a breach of not just cll 3.1.2 and 3.1.3 but also cl 7.4.4, which provides that the budget expert is to "have due regard to … the current and anticipated future performance of the Hotel and of other comparable hotels" (see [5(e)] above). We note that the reference to cl 7.4.4 was not as clear in the appellant's case before the Judge. Indeed, the Judge did not refer to cl 7.4.4 in defining the Preparation Issue in his grounds of decision (see GD at [48]).

(c) In the appellant's reply written submissions on appeal, the focus of the Preparation Issue turned to the respondents' "failure to benchmark the Hotel against comparable hotels during the preparation of the Budget" in breach of cl 7.4.4 of the Management Agreement.

(d) During the appeal hearing before us, Mr Thio has summarised the Preparation Issue in terms of lowball budgets as outlined above at [31].

33 The appellant's inability to articulate its own case in the arbitration consistently in earlier proceedings, and the Reformulated Preparation Issue which is articulated with sufficient clarity in oral arguments before this court, suggests that this reformulation of the issue was never presented in the arbitration, nor even before the Judge. As the Judge remarked, the appellant had to "string together disparate assertions that stray far and wide across the entire gamut of documents in the arbitral record" to demonstrate that the Preparation Issue had been raised in the arbitration (GD at [113]). It is thus unsurprising that the Judge found that the Preparation Issue was not adequately pleaded or put into issue for the Tribunal's consideration (see [17] above). To reiterate, the *infra petita* ground is not meant for the losing party to allege that the tribunal failed to consider the case that it *wishes* it had put before the tribunal but never actually did (see [22] above). As succinctly stated in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695, "a tribunal cannot be criticised for failing to consider points not put to it" (at [167]). In other words, the Tribunal's omission to specifically address the Preparation Issue "did not constitute any breach of natural justice because the omission would have been the direct consequence of the appellant's failure to raise the issue" (*DEM* at [62]).

34 Crucially, the appellant's Reformulated Preparation Issue on lowball budget(s) does not strengthen the appellant's submissions that the Tribunal failed to: (a) apply its mind to an essential issue, such that there is a breach of natural justice; and/or (b) resolve an issue submitted for determination. As clarified above, the appellant's complaint is essentially an *infra petita* challenge that falls under the natural justice ground (see [25]). As the principles that apply to natural justice challenges under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law apply equally to *infra petita* challenges (*DEM* at [59]), the appellant

has to establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced the appellant's rights (*Soh Beng Tee* at [29]). In that regard, even if there was a breach of natural justice, as the respondents rightly submit, there is no prejudice caused to the appellant. This is because the Tribunal decided in relation to the Underperformance Issue that there was no evidence before it on the applicable standard of a prudent international hotel operator (see [37] below), and that holding, which is a finding of fact, cannot be reviewed and will rightly stand. Such a finding will equally apply to the deliberate provision of lowball budgets which is ultimately *still* concerned with the obligation to prepare budgets in accordance with such a standard, meaning a budget that a prudent international hotel operator would have prepared.

35 Plainly, the Underperformance Issue is central to the counterclaim. Hence, it is sensible to examine the Underperformance Issue before returning to review the Preparation Issue as well as the Reformulated Preparation Issue.

The Underperformance Issue

36 We begin with the appellant's complaint that the Tribunal breached the fair hearing rule in relation to the Underperformance Issue which concerns the standard that is required of a prudent international hotel operator. In essence, the Tribunal dismissed the appellant's counterclaim as there was no independent expert evidence to prove the standard of a prudent international hotel operator under cl 3.1.3 of the Management Agreement.

37 The material aspects of the Tribunal's finding on the Underperformance Issue in the 2nd Partial Award are reproduced below:

> 583. The Tribunal next turns to the [appellant]'s submissions that the industry rankings demonstrate that the [respondents]

> failed to use the skill, effort, care and expertise reasonably expected of a prudent international hotel operator. The difficulty here for the Tribunal is that the [appellant] has failed to adduce any evidence as to what is the standard required of a prudent international hotel operator. No expert evidence was adduced on this question, the [appellant] solely relying on the STR and Demand 360 rankings. However, whilst these rankings do give some context as to the performance of the Hotel against that of its CompSet in terms of certain data points (for example ADR and occupancy) they do not cover the actions of the hotel operator per se but instead solely compare the way in which a particular hotel performs at a specific point in time. No expert evidence was adduced as to the steps a prudent international hotel operator would have taken, balancing short, medium and long term objectives, to operate the Hotel and explaining how the [respondents]' actions failed to meet this standard. The industry rankings do not assist in determining this question and in the absence of such evidence, the Tribunal is unable to assess whether or not the [respondents] breached their obligations.
>
> 584. The [appellant] identifies certain specific failings on the part of the [respondents], being: the failure to create Conrad brand awareness; the failure to establish and properly run a NSO [national sales office]; underpricing of rooms; and an obsolete RMS [revenue management system]. However, in the absence of expert evidence as to the steps a prudent international hotel operator would have taken, the Tribunal is unable to assess whether the [respondents] did or did not do what was contractually obliged of them. …
>
> 585. The Tribunal therefore finds there is no evidence to support the [appellant]'s counterclaim that the [respondents] failed to operate and successfully run the Hotel as a prudent international hotel operator would do in the case of a luxury hotel.

38 The appellant submits that the Tribunal's decision and reasoning were "surprising and unforeseeable". According to the appellant, based on how both parties ran their cases in the arbitration, there was an implied understanding that the Underperformance Issue could be dealt with on the footing of the evidence presented to the Tribunal – in particular, the parameters and data set out in the Industry Reports. The appellant argues that the Tribunal should have but failed to: (a) deal with the Industry Reports; (b) inform the parties of the need for

independent expert evidence; or (c) at the very least, give fair notice to the parties before departing from their common understanding.

39 First, we agree with the Judge that there was no such implied understanding between the parties that the Tribunal should determine the Underperformance Issue based on the Industry Reports.

40 The appellant emphasises that the respondents, in their Pre-Hearing Submissions in the arbitration, have affirmed the relevance of the Industry Reports and relied on them extensively to advance their case that they had not underperformed.

41 Specifically, the respondents submitted in their Pre-Hearing Submissions that the occupancy rate, average daily rate and revenue per available room are the three parameters used to judge a hotel's performance. The respondents then noted that their witness had confirmed that these parameters are the basis for judging the performance of a hotel in the hospitality industry based on a comparison of the hotel with the CompSet. Notably, the respondents went on to explain the Hotel's performance with reference to the Industry Reports across three time periods – prior to Covid-19, during the Covid-19 period until the Hotel's operations were suspended, and after the suspension of the Hotel's operations. It thus appears that the respondents had accepted the data in the Industry Reports as valid metrics against which the Hotel's performance could be measured.

42 Counsel for the respondents, Mr Kelvin Poon SC ("Mr Poon"), submits that the respondents' case throughout the arbitration was that the appellant could not rely on the Industry Reports to prove underperformance. The Industry

Reports did not define what the standard of a prudent international hotel operator was.

43 Mr Poon explained that the respondents, in certain paragraphs of their Pre-Hearing Submissions, did make reference to the Industry Reports. However, in doing so, the respondents were simply responding to the appellant's case on the Industry Reports, but they never abandoned their primary case. The respondents' primary position in their Pre-Hearing Submissions was that the only requirement with respect to the respondents' performance is the Performance Test stated in cl 7.6.1 of the Management Agreement (see [5(f)] above), which had yet to kick in as of 2020 due to the Covid-19 pandemic. In other words, the respondents' case was that whether they had underperformed in breach of the Management Agreement should be determined based on the test set out in the contract, and not based on non-contractual metrics such as the data in the Industry Reports. Against this context, it is clear that the respondents engaged with the Industry Reports only for completeness, or in the words of the Judge, to mount an "airtight" defence (GD at [129]).

44 Indeed, this was the position taken by the respondents not just in their Pre-Hearing Submissions but also throughout the arbitration:

(a) In the respondents' Reply to the Statement of Defence, they pleaded that the appellant's allegations of underperformance were premature, irrelevant and did not entitle the appellant to damages because the sole contractual obligation relating to the respondents' performance was satisfying the Performance Test, which had yet to kick in. Although the respondents also dealt with the Industry Reports, this was only to

demonstrate that the respondents have done everything to ensure that the Hotel performs well, even by the metrics considered by the appellant.

(b) Similarly, in the respondents' Post-Hearing Brief, they submitted on the Hotel's performance prior to Covid-19 and during Covid-19, with specific references to the Industry Reports. However, once again, this was in the context of responding to the *appellant's* case that the Hotel underperformed in comparison to its CompSet. In doing so, the respondents also made clear that the CompSet's performance does not serve as the standard or metric for evaluating whether the Hotel underperformed under the Management Agreement, and that while the data in the STR and Demand 360 reports is no doubt commercially relevant, it is the appellant's reliance on them to claim underperformance under the Management Agreement that is misplaced.

45 Given the respondents' primary position in the arbitration (which the Tribunal understood and summarised at [543] of the 2nd Partial Award), their engagement with the Industry Reports was not a reflection of their position, and it would be inaccurate to suggest that their submission on those reports, as well as other evidence adduced by the parties on the reports, was to be the basis upon which the Tribunal would decide the Underperformance Issue.

46 For completeness, we also agree with the Judge that there was no common and agreed position that the Underperformance Issue should be decided based on the respondents' compliance (or lack thereof) in the Four Areas. The passages in the arbitral record which the appellant referred to in its written submissions do not reflect any such implied position. We also note that the appellant did not make any oral submissions before us on the Four Areas.

47 Finally, the respondents had consistently challenged, from the outset in their pleadings, the appellant's failure to explain what the standard of a prudent international hotel operator entailed. For instance, the respondents alleged in their Reply to the Statement of Defence that the appellant had failed to elucidate the requirements or the standard of a "prudent international hotel operator", and similarly alleged in their Rejoinder to the Counterclaim that the appellant had not provided the legal requirements or the standard of a "prudent international hotel operator". In light of this, it would not be fair to infer that the respondents shared the appellant's understanding that evidence led by the parties (including the Industry Reports and the Four Areas) was sufficient to determine whether the respondents had underperformed in breach of the standard of a prudent international hotel operator, even if the Tribunal had rejected the respondents' primary case that the relevant test is the Performance Test.

48 As there was no common understanding as to how the Underperformance Issue should be decided, it cannot be said that the Tribunal adopted an unforeseeable chain of reasoning in finding that the Industry Reports were irrelevant and that independent expert evidence was necessary. It was entirely within the remit of the Tribunal, as a fact-finder, to determine the kind of evidence needed for a party to prove its case and the relevance of the evidence put before the Tribunal. An error in the assessment of evidence is at most an error of fact, which, as we have emphasised above (at [24]), is not a ground for setting aside an award.

49 The appellant's complaint that the Tribunal's reasoning was "unexpected" alludes to the principles of natural justice. However, a complaint that the losing party was taken by surprise is a multi-faceted one. It may be due to, for instance, the tribunal misinterpreting a party's case or the tribunal adopting a reasoning that none of the parties have put forth. But not every such

complaint amounts to a breach of the rules of natural justice. The relevant test is whether the tribunal's chain of reasoning was one which the parties had reasonable notice of and one which had sufficient nexus to the parties' arguments (*BZW and another v BZV* [2022] 1 SLR 1080 at [60(b)]). As the respondents highlight, the court would intervene only upon "a dramatic departure from the submissions, or [if] an arbitrator receiv[es] extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties" (*Soh Beng Tee* at [65(d)]).

50 This high threshold is not satisfied in this case. The Tribunal's reasoning essentially accepted the respondents' case that the appellant was fully aware of. Although the respondents did not specifically allege that the appellant ought to adduce independent expert evidence, they have, as mentioned above (see [47]), consistently challenged the appellant's failure to prove the standard of a prudent international hotel operator. The Tribunal in the 2nd Partial Award agreed with this and found that:

> 572. … As the claim of breach is made by the [appellant], the burden of proof is on the [appellant] to demonstrate what that standard comprises, identifying the relevant international hotel operators and explaining what is the standard of expertise required from those operators and then detailing the ways in which the [respondents] failed to meet such standard.

As such, the Tribunal's chain of reasoning was one which the appellant had reasonable notice of and one which had sufficient nexus to the parties' arguments.

51 Finally, the various points that the appellant raised to support its case that the Tribunal's reasoning was unexpected were tangential and contrived:

(a) As to whether the Tribunal should nevertheless have alerted the parties to the need for independent expert evidence, we agree with the Judge that doing so would have amounted to "an act of indulgence" in favour of the appellant (GD at [140]). There is, however, no breach of natural justice in not doing so.

(b) During the hearing before us, Mr Thio submitted that the Tribunal had simply ignored the Industry Reports despite the parties' extensive engagement with them. We do not accept this submission. In the relevant paragraph of the 2nd Partial Award as reproduced above (at [37]), the Tribunal noted the appellant's reliance on the Industry Reports and found that while they do give some context as to the performance of the Hotel against that of its CompSet in terms of certain data points, they do not cover the actions of the hotel operator *per se*. The Tribunal thus concluded that the Industry Reports "do not assist" in determining whether the standard of a prudent international hotel operator has been breached. It is clear that the Tribunal had expressly dealt with the relevance of the Industry Reports. The appellant's real complaint is that the Tribunal failed to accord sufficient weight to the Industry Reports and erred in its assessment of evidence. But this is an error of fact at best, which is not a ground for setting aside an award (see [24] above).

(c) Mr Thio also highlighted that the appellant had in fact called an independent expert, Mr Nikhil Morsawala ("Mr Morsawala"), and that the Tribunal was wrong to conclude that there was no independent expert evidence. In particular, Mr Morsawala's expert report concluded that the respondents did not exercise the required skill, diligence, care and efficiency expected of a leading international hotel chain leading to substantial financial and reputational losses to the appellant. This

> submission is also without merit. Mr Morsawala was an expert opining on the quantum of damages, *not* on underperformance. On that note, as acknowledged by Mr Thio, the appellant did not put forward Mr Morsawala's evidence in support of its case that the respondents had underperformed. In fact, having relied on the Industry Reports to support its case in the arbitration, the appellant is unlikely to have regarded Mr Morsawala's expert evidence as relevant to the issue of breach. The appellant's belated reference to Mr Morsawala's expert evidence is thus a mere afterthought.

For the above reasons, the appellant's contention that the Tribunal's chain of reasoning was unforeseeable, is untenable and lacks merits.

52 The appellant's case that it was deprived of an opportunity to be heard is hopeless. The appellant was fully aware that the standard of a prudent international hotel operator was one of the disputed issues in the arbitration and had ample opportunity to address the Tribunal on this issue. For instance:

> (a) In the appellant's oral opening submissions in the arbitration, counsel for the appellant acknowledged that the presiding arbitrator had raised a very relevant question in relation to what ought to be the standard of a prudent international hotel operator. He then explained that the appellant had, in its Pre-Hearing Submissions, set out case law that clauses of agreements have to be given their commercial meaning in the ordinary sense. More specifically, the appellant submitted in its Pre-Hearing Submissions that the standard must be accorded a meaning which gives effect to the commercial wisdom and the reasoning with which the parties entered into a contractual relationship.

(b) At the end of the evidentiary hearings, on 5 August 2022, the presiding arbitrator conveyed the issues to the parties that the Tribunal had identified and which the Tribunal would like the parties to focus on in their Post-Hearing Brief. One such issue raised by the Tribunal was what the standard of a prudent international hotel operator under cl 3.1.3 referred to, and where the Tribunal could find the evidence relating to that. In the appellant's Post-Hearing Brief, the appellant expressly addressed the respondents' contention that it is unclear what the standard of a prudent international hotel operator entailed. Specifically, the appellant submitted in its Post-Hearing Brief that its interpretation of the standard was not disputed by the respondents and that the meaning of the standard was clear from: (a) the terms of the contract; (b) the contemporaneous communication between the parties; and (c) the respondents' own subsequent conduct.

53 In the 2nd Partial Award, the Tribunal found the appellant's above submissions on the standard of a prudent international hotel operator to be inadequate. The appellant had only addressed the issue of interpretation of the term "prudent international hotel operator", for which there was no ambiguity in the Tribunal's view. Having failed to adduce sufficient evidence to discharge its burden of proof in the arbitration, the appellant cannot now complain that it was deprived of an opportunity to present its case.

The Reformulated Preparation Issue

54 We now return to the Preparation Issue and its reformulation, and the contention that the Tribunal's failure to consider this issue rendered the 2nd Partial Award *infra petita*. In our view, as already explained above (at [34]), the Tribunal would have dismissed the counterclaim in its entirety in light of its

finding that there was no evidence on the standard of a prudent international hotel operator.

55 In any event, the documents that the appellant relies on do not support its case that the Reformulated Preparation Issue had been put forward for the Tribunal's determination, *ie*, that the respondents breached the Management Agreement by deliberately preparing lowballed budgets to avoid the consequences under the contract. During the hearing, Mr Thio directed our attention to the appellant's pleading in the Counterclaim which alleged that the respondents had submitted a low budget for 2020 and 2021 so as to easily pass the Performance Test and to disguise their absolute failure in managing and operating the Hotel in breach of cl 3.1.3. The appellant also emphasises that the following passage of the Counterclaim expressly linked the preparation of the budgets to the standard of a prudent international hotel operator:

> … the [respondents] had intentionally and deliberately proposed fraudulent and deliberately undermined Budgets … which not only in itself is a breach of the Management Agreement, but also of a 'Manager' that has failed to fulfill its covenants and obligations under clause 3.1.3 of the Management Agreement to use the skill, effort[,] care and expertise reasonably expected from an international hotel operator while maximizing the GOP [Gross Operating Profit] of the Hotel.

56 The above passages, read in isolation, appear to encapsulate the Reformulated Preparation Issue that Mr Thio has summarised in his oral submissions. However, the Counterclaim must be read as a whole. On a holistic reading, it is apparent that any allegation relating to the preparation of the budgets was made in support of the principal submission that the respondents had underperformed (*ie*, the Underperformance Issue). For instance, the appellant pleaded in the Counterclaim that the respondents' underperformance under the Management Agreement was "demonstrated by", amongst others, the

respondents having "lowered the Budget" and having "provided a meager [*sic*] Budget". In other words, as the Judge noted, the appellant's case was that the unsatisfactory budgets "evidenced" the respondents' breach in underperformance (GD at [78]). Based on our reading of the Counterclaim, it is not apparent that there was a distinct, independent claim for breach in the preparation of the budgets.

57 The other arbitral documents filed by the appellant reinforce this view. To highlight a few examples:

(a) The appellant's list of issues under the "Counter Claims" was limited to: (a) damages for causing loss of business and profit to the appellant; (b) damages for harm caused to the goodwill and reputation of the Hotel; and (c) pendente lite and future interest on all sums due to the appellant, none of which relate to the Reformulated Preparation Issue. Further, as the respondents pointed out in their submissions below, the way Mr Morsawala in his expert report quantified the damages also suggests that the counterclaim was limited to the Underperformance Issue. On this point, Mr Thio explained that the failure to seek damages in relation to the budgets did not detract from the appellant's position that the Reformulated Preparation Issue had been raised as a standalone breach, as there was still utility in obtaining a declaration for breach (namely, that such a declaration would inform the preparation of the next budget). This explanation is an unconvincing afterthought.

(b) Second, in the appellant's Post-Hearing Brief, the appellant stated that the respondents' demonstrated underperformance under the Management Agreement was the mainstay of the appellant's case, both

in its counterclaim and defence. The appellant also submitted that its claims for breach of the Management Agreement for underperformance were clearly established after the evidentiary hearings. Being the final set of submissions in the arbitration, the appellant's Post-Hearing Brief confirms that the thrust of its counterclaim was the Underperformance Issue.

The Preparation Issue

58 For completeness, we agree with the Judge that the Tribunal cannot be faulted for not considering the Preparation Issue which "was simply not an issue that emerged clearly and consistently" in the arbitration (GD at [113]) and hence "not adequately pleaded" and "never properly submitted" as a counterclaim (GD at [60] and [111]). We have also pointed out above (at [32]) the fluidity of the appellant's case on the Preparation Issue, which suggests that this issue was indeed never formulated properly and submitted as an essential issue for determination by the Tribunal. From this perspective, the Tribunal's explanation for dismissing the appellant's counterclaim in the 2nd Partial Award is unsurprising:

> 578. Whilst the [respondents] were obliged to use the skill, effort, care and expertise reasonably expected of a prudent international hotel operator in *preparing* the Budget, *the [appellant] has not made any submissions that the [respondents] were in breach of such obligation.* The claim asserted is that the Hotel did not *perform* in accordance with the Budget. However, given Clauses 7.4.10 and 20.13 of the Management Agreement make clear, the Budget is not a guarantee of performance, there is no breach by the [respondents] in this regard. [emphasis added]

59 However, even if the Preparation Issue were pleaded, our view is that the *infra petita* ground would not have been made out. The observations of this court in *AKN* are apposite in this regard (at [46]):

> ***To fail 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. 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* … 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. [emphasis in original in italics; emphasis added in bold italics]

As we have already noted, it cannot be said that the Tribunal failed to "consider an important issue that has been pleaded in an arbitration", when the Preparation Issue was not even pleaded. Going further, even if the Preparation Issue had been pleaded, there was no "clear and virtually inescapable" inference, nor is it "demonstrably clear on the face of the record" (see [27] above), that the Tribunal had failed to consider an important pleaded point in breach of the rules of natural justice.

60 In sum, the Tribunal cannot be faulted for not considering an issue which was never adequately put forward as a counterclaim in the arbitration. Although the appellant takes issue with the Judge dismissing its case for having *inadequately* put forward the Preparation Issue, as opposed to having *failed* to do so, this is a point of semantics. That the Preparation Issue was cursorily raised or alluded to by the appellant, does not distinguish this case from a situation

where a party made no mention of the issue at all. The appellant's *infra petita* challenge in relation to the Preparation Issue (whether reformulated or not) fails.

61 For the above reasons, there is no basis to set aside the Tribunal's decision to dismiss the appellant's counterclaim in the arbitration, be it on the Underperformance Issue or the Preparation Issue (whether reformulated or not).

The Tribunal's decision to allow the respondents' claims in the 2nd Partial Award is not set aside

62 Having dealt with the key issue in this appeal, we briefly address the remaining *infra petita* challenges against the 2nd Partial Award, namely, the Affiliate Fees Claim, the Working Capital Claim and the Suspension Claim.

The Affiliate Fees Claim

63 On the Affiliate Fees Claim, the appellant submits that the 2nd Partial Award is *infra petita* and that the Judge erred in concluding that the Tribunal had considered the appellant's defence. According to the appellant, its defence was not that it had no contractual obligation to pay affiliate fees in general, but that the contractual provisions in the Hotel Agreements did not justify the specific affiliate fees in question. The Tribunal is said to have ignored the appellant's defence in simply pointing to various clauses in the Hotel Agreements that establish the appellant's *general* obligation to pay affiliate fees, without "identify[ing] what actual work [they] were payable for". Further, the Tribunal's remark in the 2nd Partial Award that the appellant's defence was limited to asserting that the fees were waived and that there was no contractual entitlement in the absence of invoices being provided, allegedly supported the appellant's case that the Judge overlooked the appellant's defence.

64 We are not persuaded. To begin with, it is not even clear that the alleged defence was in fact part of the defence the appellant had put before the Tribunal. Even if the alleged defence was indeed presented to the Tribunal, the essence of the appellant's complaint is that the Tribunal misinterpreted the appellant's case. As held in *AKN*, the inference that a tribunal failed to consider a party's case should not be drawn if the facts are "also consistent with the arbitrator simply having misunderstood the aggrieved party's case" (at [46]). To the extent that the appellant takes issue with the Tribunal's lack of explanation as to when and how the Affiliate Fees Claim arose under each of the contractual provisions, an inadequate explanation in itself is a mere error of law (*CVV and others v CWB* [2024] 1 SLR 32 ("*CVV*") at [35]).

The Working Capital Claim

65 Next, on the Working Capital Claim, the appellant submits that the 2nd Partial Award is *infra petita* as the Tribunal failed to consider the two defences raised by the appellant:

(a) first, if the respondents were entitled to call a *force majeure* event (*ie*, Covid-19) to excuse their non-performance of important financial obligations, then the appellant must equally be entitled not to perform its financial obligations, including the obligation to provide working capital to the Hotel (the "Force Majeure Defence"); and

(b) second, the Working Capital Addendum (see [5(d)] above) required the respondents' request for working capital to be accompanied by a cash flow statement, but the respondents failed to provide a cash flow forecast (the "Wrongful Request Defence").

66 On the Force Majeure Defence, the appellant's complaint is that this defence was not examined in relation to the Working Capital Claim but only in relation to the Suspension Claim. This complaint is without any merit. As the Judge found, the Tribunal's reasoning under the Suspension Claim suggests that the Tribunal had considered and "implicitly rejected [the appellant]'s Force Majeure Defence with regard to the Working Capital Claim" (GD at [161]). More specifically, the Tribunal found that the *force majeure* clause does not state that if one party calls a *force majeure* event, all obligations of the parties become suspended. There was no obligation for the Tribunal to, as the appellant alleges, "expressly address each defence raised in relation to each claim", as an issue "may be implicitly resolved" (*TMM* at [77]). Further, even if there was a breach of natural justice, there is no prejudice caused to the appellant – given the Tribunal's finding that invoking a *force majeure* clause does not suspend all of the parties' obligations, the Tribunal would have rejected the Force Majeure Defence in any event.

67 As to the Wrongful Request Defence, the appellant accepts that the Tribunal expressly referred to this defence in the 2nd Partial Award but alleges that the Tribunal recited the defence "without substantively addressing or analysing it". This is essentially a challenge on the merits. An allegation of inadequate explanation in itself is not capable of sustaining a challenge against an award.

The Suspension Claim

68 We turn to the Suspension Claim. According to the appellant, its defence was that it was not liable for the Hotel's suspension because it had no authority to instruct the general manager of the Hotel to do so (the "Agency Defence"). The appellant submits that the 2nd Partial Award is *infra petita* as the Agency

Defence was completely overlooked, and that the Judge erred in finding that the appellant did not adequately plead this defence.

69 We do not accept this submission. As was accepted by Mr Thio in the course of the hearing, the Agency Defence was alluded to in the appellant's reply witness statement and one paragraph in the appellant's Pre-Hearing Submissions. This was woefully insufficient to raise the Agency Defence as an essential issue in the arbitration. Similar to the Preparation Issue (whether reformulated or not), the Tribunal cannot be faulted for failing to address an issue that was not properly put to it.

70 For completeness, Mr Thio emphasised during the hearing that the Tribunal's attention was drawn to cl 7.5.5 of the Management Agreement which provides that the Hotel's general manager is not obliged to follow the appellant's proposals, and that the Tribunal should have engaged with this clause. This does not take the appellant's submission any further. A tribunal "need not deal with each *point* made by a party", so long as "the *essential issues* are dealt with" [emphasis in original] (*TMM* at [73]).

71 To conclude, none of the *infra petita* challenges in relation to the respondents' claims in the arbitration were established. We emphasise that in a post-award complaint that the award is *infra petita*, the seat court will not engage in a hair-splitting exercise to see if a tangential point has been missed and set aside the award on that ground. A submission that an essential issue was not dealt with will have to be a fairly obvious point and not something that is open to doubt. Any doubt will be resolved in favour of upholding the award in line with the policy of minimal curial intervention and the "generous approach" in reviewing arbitral awards (see [23] above).

The Tribunal's decision to appoint Prognosis in the 3rd Partial Award is not set aside

72 Finally, we turn to the 3rd Partial Award. The appellant argues that the Tribunal's decision to appoint Prognosis as the budget expert should be set aside because the Tribunal departed from the reasoning adopted in the 1st Partial Award, thereby adopting an unforeseeable chain of reasoning and depriving the parties of the opportunity to be heard. This is similarly without any merit.

73 In the 3rd Partial Award, the Tribunal expressly referred to the test of independence it had set out in the 1st Partial Award and proceeded to apply the same in appointing Prognosis as the budget expert. The appellant's attempt to fault the Tribunal for failing to adopt the same line of reasoning as that in the 1st Partial Award is unmeritorious when the 3rd Partial Award involved different candidates, different evidence and different submissions from those which led to the 1st Partial Award. Further, contrary to the appellant's allegation that the parties were not given an opportunity to address the Tribunal on Prognosis' independence, both parties had made extensive submissions on that issue, and those submissions were expressly summarised by the Tribunal in the 3rd Partial Award. There is thus no breach of natural justice in relation to the appointment of Prognosis in the 3rd Partial Award.

Conclusion

74 For all of the above reasons, we dismiss the appellant's appeal. The appellant has not established any of the grounds for setting aside the 2nd Partial Award or the 3rd Partial Award. Consistent with both parties' submissions on costs, we order costs against the appellant in the sum of $60,000 all-in. The usual consequential orders apply.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Thio Shen Yi SC, Chin Yen Bing Arthur and Sim Zi Yan Nicole (TSMP Law Corporation) for the appellant;
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