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

[2026] SGHC 67

Originating Application No 1062 of 2025

Between

DSQ

… *Claimant*

And

DSR

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Jurisdiction]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Whether failure to comply with pre-arbitration procedures went to admissibility or jurisdiction]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Whether tribunal breached natural justice by depriving party of reasonable opportunity to respond to case against it]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [*Infra petita* challenge]

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DSQ
v
DSR

[2026] SGHC 67

General Division of the High Court — Originating Application No 1062 of 2025
Andre Maniam J
19 February 2026

31 March 2026 Judgment reserved

Andre Maniam J:

Introduction

1 The parties were, respectively, Employer and Contractor under a design and build contract (the "Contract") for certain works in relation to a railway project. Disputes arose between them, which were referred by the Contractor to arbitration (the "Arbitration") before a three-member tribunal (the "Tribunal") comprising Sir Antony Edwards-Stuart (presiding), Mr Edwin Glasgow CBE, QC, and Mr Harish Salve QC.

2 The Arbitration culminated in an Award dated 2 April 2025, following which the Tribunal issued a Decision and Addendum on 25 June 2025. The Award, as revised by the Decision and Addendum, awarded a sum of money to the Contractor.

3 On 25 September 2025, the Employer applied to court to set aside the Award and the Decision and Addendum on two grounds:

(a) the Tribunal lacked jurisdiction; and

(b) the Tribunal breached natural justice in relation to four aspects of the Award.

4 I address these grounds in turn.

Jurisdiction

Overview

5 Clause 20 of the General Conditions of Contract ("GCC") – set out below at [97] – prescribes a procedure to be followed before a dispute is referred to arbitration.

6 In the Arbitration, the Employer contended that the Contractor had not followed that pre-arbitral procedure before commencing the Arbitration, and so the Tribunal had no jurisdiction.

7 The Tribunal dealt with the Employer's jurisdictional objections as a preliminary question, and ruled in Procedural Order No 5 ("PO5")[1] that the pre-arbitral procedure had been complied with, thus rejecting the Employer's jurisdictional objections.[2]

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[1] Employer's core bundle of documents ("CBD") 269.

[2] Employer's affidavit dated 25 September 2025 ("Employer's affidavit"), Vol 1, p 393.

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8 The Contractor contends that the Award cannot now be set aside for lack of jurisdiction, because:

(a) the Employer is precluded by Art 16(3) of the UNCITRAL Model Law and/or s 10 of the International Arbitration Act 1994 ("IAA") from challenging the Tribunal's jurisdiction in court, for it failed to apply to court for a decision on jurisdiction within the time allowed by those provisions;

(b) after PO5, the Employer waived its right to challenge the Tribunal's jurisdiction;

(c) the alleged non-compliance with pre-arbitral procedure is an issue of admissibility, not jurisdiction; and

(d) in any event, the Tribunal had correctly decided that the pre-arbitral procedure had been followed.

9 The Employer contends that:

(a) Art 16(3) of the Model Law and s 10(3) of the IAA do not apply, as the Tribunal did not rule "as a preliminary question that it has jurisdiction", it was only in the Award that the Tribunal ruled on this;

(b) even if Art 16(3) of the Model Law and s 10(3) of the IAA apply, they do not preclude the Employer from applying to set aside the Award for the Tribunal's lack of jurisdiction, although it had not applied to court under those provisions;

(c) the Employer's jurisdictional objections go to the Tribunal's jurisdiction, not just admissibility of the claims in the Arbitration, and so the court can review the Tribunal's decision; and

(d) the Tribunal was wrong in deciding that it had jurisdiction.

10 I thus address:

(a) whether Art 16(3) of the Model Law and s 10(3) of the IAA apply in this case;

(b) whether Art 16(3) of the Model Law and s 10(3) of the IAA have general preclusive effect;

(c) whether the Employer waived its jurisdictional objections after PO5;

(d) whether the Employer's jurisdictional objections go towards jurisdiction or admissibility; and

(e) in any event, whether the tribunal correctly ruled that it had jurisdiction.

Art 16(3) of the Model Law and s 10(3) of the IAA

11 Section 3 of the IAA provides that, subject to the IAA, the Model Law, with the exception of Chapter VIII, has the force of law in Singapore.

12 Chapter IV of the Model Law, on "Jurisdiction of Arbitral Tribunal", contains Art 16:

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*

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> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

13 The court referred to in Art 16(3) of the Model Law is the General Division of the Singapore High Court, as stipulated in s 8 of the IAA.

14 Sections 10(1)–(5) of the IAA provide as follows:

> **Appeal on ruling of jurisdiction**
>
> 10.—(1) This section has effect despite Article 16(3) of the Model Law.
>
> (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.
>
> (3) If the arbitral tribunal rules —
>
> (a) on a plea as a preliminary question that it has jurisdiction; or

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> (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the General Division of the High Court to decide the matter.
>
> (4) An appeal from the decision of the General Division of the High Court made under Article 16(3) of the Model Law or this section may be brought only with the permission of the appellate court.
>
> (5) There is no appeal against a refusal for grant of permission of the appellate court.

Do Art 16(3) of the Model Law and s 10(3) of the IAA apply in the present case?

15 The Employer says that Art 16(3) of the Model Law and s 10(3) of the IAA do not apply in the present case, as the Tribunal did not rule "as a preliminary question that it has jurisdiction", the Employer says that it was only in the Award that the Tribunal ruled on this.

16 The Employer does not dispute that it had raised a "plea that the arbitral tribunal does not have jurisdiction" for the purposes of Art 16(3) of the Model Law and s 10(3) of the IAA; its point is that the Tribunal did not rule on this as a preliminary question, but only in the Award.

17 The Employer recognises that the Tribunal had made a decision on jurisdiction in PO5 but argues that that did not "finally" decide the Employer's jurisdictional objections.[3] This contention is, however, contrary to the record, and I reject it.

[3] Employer's written submissions at [64].

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18 On 28 December 2021, the Tribunal issued Procedural Order No 2 ("PO2"),[4] provisionally directing that there was to be a determination of the preliminary issues set out in PO2, including:

> A. Are Disputes 1-4 admissible in this arbitration and does the Tribunal have jurisdiction to determine such disputes? In particular:
>
> (i) Was the Claimant entitled to refer Disputes 1-4 to the DAB ["Dispute Adjudication Board"] then appointed under the Contract? Alternatively, was it obliged to do so?
>
> (ii) If not, was the Claimant entitled to refer such disputes directly to arbitration, or was the Claimant obliged to seek and were the Parties obliged to form a new DAB to decide those claims?
>
> (iii) If the answer to (i) is affirmative, was the Claimant entitled to give a notice of dissatisfaction when the existing DAB did not give a decision within 84 days of the reference of Disputes 1-4 to that DAB?
>
> (iv) If the answer to (iii) is affirmative, was the Claimant after the expiry of 56 days from the Notice of Dissatisfaction, entitled to refer Disputes 1-4 to arbitration?
>
> B. Are Disputes 5-6 admissible in this arbitration and does the Tribunal have jurisdiction to determine such disputes? In particular:
>
> (i) If the existing DAB refused to hear any disputes other than that relating to the AEB Boards, was the Claimant entitled to refer Disputes 5-6 directly to arbitration pursuant to clause 20.8 or otherwise? Or
>
> (ii) Were the Parties obliged to form a new DAB to determine Disputes 5-6?

19 The Tribunal framed as preliminary issues for determination, whether it had jurisdiction to determine Disputes 1 to 4, and Disputes 5 to 6 (the six disputes before it), with various sub-issues.

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[4] Employer's affidavit, Vol 1, p 474.

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20 On 14 July 2022, by Procedural Order No 4 ("PO4"),[5] the Tribunal gave directions for written submissions, reply submissions, and brief skeleton arguments on the preliminary issues, and fixed a hearing on 1 September 2022.

21 At that hearing, the Tribunal heard oral submissions from the parties' counsel, and on 16 September 2022 the Tribunal gave its decision on the preliminary issues by PO5, providing its answers to the preliminary issues set out in PO2, as follows:[6]

> A. Are Disputes 1 to 4 admissible in this arbitration and does the Tribunal have jurisdiction to determine such disputes?" Yes.
>
> Was the Claimant [Contractor] entitled to refer Disputes 1 to 4 to the DAB then appointed under the Contract? **Yes.**
>
> If not, was the Claimant entitled to refer such disputes directly to arbitration, or was the Claimant obliged to seek and were the Parties obliged to form a new DAB to decide those claims? **Does not arise.**
>
> If the answer to (i) is affirmative, was the Claimant entitled to give a notice of dissatisfaction when the existing DAB did not give a decision within 84 days of the reference to Disputes 1 to 4 to that DAB? **Yes.**
>
> If the answer to (iii) is affirmative, was the Claimant after the expiry of 56 days from the Notice of Dissatisfaction, entitled to refer Disputes 1 to 4 to arbitration? **Yes.**
>
> B. Are Disputes 5-6 admissible in this arbitration and does the Tribunal have jurisdiction to determine such disputes? **In the light of the answers in relation to Disputes 1 to 4 and the concession by [the Employer's counsel], these do not arise for decision because the answer is Yes to both questions.**

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[5] Employer's affidavit, Vol 1, p 482.

[6] CBD 269.

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22 By PO5, the Tribunal expressly decided that Disputes 1 to 6 were all admissible in the Arbitration and that the Tribunal had jurisdiction to determine those disputes:

(a) for Disputes 1 to 6, that was decided on the basis that the Contractor had complied with the pre-arbitration procedure and so was entitled to refer Disputes 1 to 4 to the Arbitration;

(b) for Disputes 5 to 6, that was decided on the basis of the answers in relation to Disputes 1 to 4 and the concession by the Employer's counsel (which I discuss below at [110]).

23 There is nothing in PO5 or the Tribunal's reasons (attached to PO5) ("PO5 Reasons") that supports the Employer's contention that the Tribunal's decision that it had jurisdiction did not "finally" decide the Employer's jurisdictional objections.

24 The Employer points to *its own* Amended Statement of Defence ("Amended Defence") filed on 7 July 2023, after PO5, in which it purported to maintain its jurisdictional objections:

> JURISDICTIONAL OBJECTION
>
> 7. At the outset, the Respondent's submissions in relation to the jurisdiction of this Hon'ble Tribunal, made in the response to the Submissions on Preliminary Issues on 16 July 2022, are hereby reiterated and are to be read as a part and parcel of the present SOD. The contents thereof are not being repeated to avoid prolixity.
>
> ……
>
> 10. Without prejudice to the submissions made… with respect to lack of jurisdiction and maintainability of the Claimant's Request, the Respondent, in the following paragraphs, sets out its response to the Claimant's

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> claims, without prejudice to its objection regarding the jurisdiction of the Tribunal.

25 The Employer could not, however, by purporting to maintain jurisdictional objections which the Tribunal had already dismissed by PO5, change the fact that its jurisdictional objections had been dismissed.

26 The Employer also points to the Award, in which the Tribunal reiterated its dismissal of the Employer's jurisdictional objections, but that too does not help the Employer.

27 At [68] of the Award the Tribunal set out the awards and declarations the Employer sought, per its Answer to the Request for Arbitration (which preceded PO5), including (at (a)): "That this Arbitral Tribunal lacks jurisdiction to adjudicate on the Claimant's reference being premature and in violation of mandatory pre-arbitration procedure in the Contract".[7]

28 However, the Tribunal went on to say the following (at [69] and [77]):

> 69. Inevitably, the way in which the claims for relief have been put has evolved somewhat over the course of the reference. In particular, no further submissions were made to the Tribunal in support of the challenge to the Tribunal's jurisdiction following the rejection of that challenge by PO 5 dated 16 September 2022. Indeed, at the hearing of the Preliminary Issues counsel for [the Contractor]accepted that if [the Contractor's] submissions in relation to Disputes 1 to 4 did not succeed, then Disputes 5 and 6 should be referred directly to arbitration (as recorded in the Reasons attached to PO 5, at paragraph 22). Further:
>
> (a) Paragraph 7 of the Amended Counterclaim dated 7 July 2023 stated:
>
>> "Without prejudice to the submissions made in the Answer to the Request for Arbitration and the SOD with

[7] CBD 32.

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> respect to maintainability of the arbitration request and lack of jurisdiction of the Tribunal, the Respondent, has set out its counter claims herein below."
>
> At paragraph 176 of the same document, [the Contractor]stated
>
> "In the event the Arbitral Tribunal decides against the jurisdictional challenge of the Respondent ... the Respondent respectfully requests that the Arbitral Tribunal issue an award ... "
>
> (b) However, thereafter no further submissions were made about the Tribunal's lack of jurisdiction (and indeed could not have been validly made following PO 5).
>
> (c) Accordingly, the challenge to the jurisdiction of the Tribunal was determined and rejected by PO 5; alternatively, it was not pursued and the Tribunal finds that it was therefore abandoned and hereby dismisses it.
>
> 77. The hearing of the preliminary issues took place on 1 September 2022. By PO 5 dated 16 September 2022, the Tribunal gave its answers to the preliminary issues, the effect of which was that Disputes 1 - 6 were admissible in the arbitration. That Order and its Reasons (attached to it) are to be treated as forming part of this Award. That Order is attached to this Award as Annex 2.

29 The Tribunal's *primary* position, as stated in [69(c)] of the Award, was that "the challenge to the jurisdiction of the Tribunal was determined and rejected by PO5". Indeed, from the procedural history and PO5 itself, I agree that that is so.

30 The Tribunal then put forward an alternative *secondary* position, that if the challenge to the Tribunal's jurisdiction had not been determined and rejected by PO5, the Tribunal "hereby dismisses it". That was the context in which (at [77] of the Award) the Tribunal referred to PO5 and the PO5 Reasons attached to it, said that those were to be treated as forming part of the Award, and attached PO5 to the Award as Annex 2.

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31 In light of the above, the Employer's contention that, by incorporating PO5 into the Award, the Tribunal only *finally* determined the issue of jurisdiction in the Award, is plainly incorrect: the Tribunal expressly said at [69(c)] that it had already determined and rejected the Employer's jurisdictional challenge by PO5, as indeed the Tribunal had.

32 The Employer also takes issue the Tribunal's statement in [69(b)] of the Award "that no further submissions were made about the Tribunal's lack of jurisdiction" and the Tribunal's statement in [69(c)] of the Award that after PO5, the Employer's jurisdictional challenge was "not pursued". The Employer points to its Amended Defence where it had maintained its jurisdictional objections, as well as its Written Closing Submissions ("WCS") to the same effect.[8]

33 This too does not help the Employer surmount the hurdle that the Tribunal had dismissed its jurisdictional objections by PO5. The Tribunal's characterisation of the Employer's purported maintaining of its jurisdictional objections *thereafter* cannot change the effect of PO5. In any event, at [69(a)] of the Award the Tribunal had noted that the Employer purported to maintain its jurisdictional objections after PO5. In that context, when the Tribunal said at [69(b)] of the Award that "no further submissions were made about the Tribunal's lack of jurisdiction", that simply meant that no *new* submissions were put forward by the Employer, beyond those put forward up to the time of PO5. Indeed, after PO5 the Employer simply purported to maintain its jurisdictional objections, and to reiterate what it had already submitted (which the Tribunal had already considered and dismissed by PO5).

8 Employer's written submissions at [62]–[63].

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34 For completeness, in so far as the Tribunal put forward (as an alternative) a *secondary* position that if the Employer's jurisdictional objections has not been determined and rejected by PO5, the Tribunal "hereby dismisses it" (at [69(c)] of the Award), that does not revive the Employer's right to apply to set aside the Award on jurisdictional grounds, if that right had already been lost because Art 16(3) of the Model Law and s 10(3) of the IAA have general preclusive effect (which I discuss below at [39]).

35 As I mentioned above, I agree with the Tribunal's *primary* position that it had by PO5 determined and rejected the Employer's jurisdictional objection. Accordingly, the alternative *secondary* position does not arise.

36 In the present case, the Tribunal dealt with the Employer's jurisdictional objections as a preliminary question, and ruled as a preliminary question that it had jurisdiction. Accordingly, Art 16(3) of the Model Law, and s 10(3) of the IAA, apply in the present case.

Do Art 16(3) of the Model Law and s 10(3) of the IAA have general preclusive effect?

37 The Employer did not, however, apply to court within 30 days (or at all) to challenge the Tribunal's decision in PO 5, by which the Tribunal had ruled as a preliminary question that it had jurisdiction. Instead, the Employer continued to participate in the arbitration until the Award was issued, and then it applied to set aside the Award on grounds including that the Tribunal had no jurisdiction.

38 The Contractor contends that Art 16(3) of the Model Law and/or s 10(3)(a) of the IAA have general preclusive effect, and in the circumstances of the present case the Employer cannot now challenge the Tribunal's jurisdiction

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and so set aside the Award. The Employer contends that those provisions do not have any preclusive effect.

39 In *Rakna Arkshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 ("*Rakna*"), the appellant Rakna applied to set aside an award on the basis that the tribunal had no jurisdiction. It failed at first instance but succeeded on appeal. The Court of Appeal found that Art 16(3) of the Model Law had general preclusive effect, but not against a non-participating respondent like Rakna. Accordingly, Rakna was allowed to challenge the tribunal's jurisdiction before the court for the purposes of its setting-aside application, and that jurisdictional challenge succeeded.

40 The Employer contends that the Court of Appeal's decision in *Rakna* that Art 16(3) has general preclusive effect was merely *obiter dicta* as the case involved a non-participating respondent, whereas here the Employer participated in the Arbitration.

41 The same contentions – that the finding in *Rakna* as to the general preclusive effect of Art 16(3) was *obiter*, and the point should be decided differently – were put forward in *Republic of Korea v Mason Capital LP* [2025] 4 SLR 308 (see [80], [110]–[113] at [113] of the judgment) but the Singapore International Commercial Court found it unnecessary to decide the point, as it considered the jurisdictional objection to lack substantive merit.

42 My decision is:

(a) the Court of Appeal's reasoning in *Rakna* that Art 16(3) of the Model Law has general preclusive effect is part of the *ratio decidendi* of the case, and as such is binding on me; and

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(b) in any event, if I were not bound by *Rakna*, I would still, with respect, follow the reasoning of the Court of Appeal and likewise conclude that Art 16(3) of the Model Law has general preclusive effect.

43 In *Rakna*, the first instance judge had held as follows (as summarised in *Rakna* at [32]):

(a) the tribunal had ruled on jurisdiction as a preliminary issue (thus bringing into play Art 16(3) of the Model Law and s 10(3) of the IAA);

(b) Art 16(3) of the Model Law and s 10(3) of the IAA had preclusive effect, in that a party who had failed to challenge such a ruling on jurisdiction within the prescribed 30 day period could not thereafter raise the same jurisdictional challenge to set aside an award; and

(c) that preclusive effect applied equally to a non-participating respondent.

44 On appeal, Rakna argued against all three aspects of the first instance decision as summarised above (*Rakna* at [33]):

(a) first, that the tribunal had not made a preliminary ruling on jurisdiction, and so Art 16(3) of the Model Law and s 10(3) of the IAA did not apply;

(b) second, if that had been such a preliminary ruling, Art 16(3) of the Model Law and s 10(3) of the IAA did not have preclusive effect;

(c) third, even if preclusion applied, it would not apply to a non-participating respondent like Rakna.

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45 In the event, the Court of Appeal found in Rakna's favour only on its third argument – that a non-participating respondent who had not brought a court challenge against a tribunal's preliminary ruling on jurisdiction, was not precluded from challenging jurisdiction so as to set aside an award: *Rakna* at [72]–[79].

46 The Court of Appeal did not, however, simply decide in favour of Rakan on that argument, and so not reach a decision on Rakna's first and second arguments: instead, it reached a reasoned decision *against* Rakna on those arguments:

(a) it reviewed the nature of Rakna's jurisdictional challenge in the arbitration, and the character of the order made by the tribunal, and held that the tribunal had ruled on jurisdiction as a preliminary issue (at [55]–[59]); and

(b) it analysed the effect of Article 16(3) of the Model Law and held that it had general preclusive effect (at [60]–[77], see also [47]–[54]).

47 Rakna was allowed to assert lack of jurisdiction for the purposes of its setting-aside application, because the court held that Art 16(3) of the Model Law and s 10(3) of the IAA *applied*, and that Art 16(3) of the Model Law and s 10(3) of the IAA *had general preclusive effect*, ***but*** that such preclusion did not apply to a non-participating respondent like Rakna.

48 A useful test for determining *ratio decidendi* is that stated in *Cross & Harris, Precedent in English Law*, 4th Ed (1991), p 72: "The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him." The English Court of Appeal used that test in *R (Kadhim) v*

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Brent Housing Board [2001] 2 SLR 1674 at [16]–[17] to determine what the *ratio decidendi* of a previous English Court of Appeal decision was.

49 Applying this test, the Court of Appeal's holding that Art 16(3) of the Model Law and s 10(3) of the IAA have general preclusive effect was expressly treated by the court as a necessary step in reaching its conclusion, having regard to the line of reasoning adopted by the court.

50 The Court of Appeal did not *leave open* the point of whether Art 16(3) of the Model Law and s 10(3) of the IAA had general preclusive effect: the court *decided* that those provisions did have general preclusive effect; and it *further decided* that, as an ***exception*** to that general position, a non-participating respondent was not precluded from applying to set aside an award for lack of jurisdiction: *Rakna* at [54].

51 It is also instructive to consider how the Court of Appeal in *Rakna* dealt with its previous decision in *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 ("*Astro*").

52 In *Astro*, the court decided that Art 16(3) of the Model Law did not preclude a respondent from challenging enforcement of a Singapore award (a "passive remedy") on jurisdictional grounds, although that respondent had not pursued the active remedies of challenging jurisdiction in court pursuant to Art 16(3) of the Model Law or applying to set aside the award. The court expressed the *tentative* view (at [132]) that "the position might not be the same in relation to whether such a party may raise such a ground to initiate setting aside proceedings under Art 34", and moreover (at [130]) that the court would be "surprised if a party retained the right to bring an application to set aside a final award on the merits under Art 34 on a ground which they could have raised via

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other active remedies before the supervising court at an earlier stage when the arbitration process was still ongoing."

53 In *Rakna* at [65] the Court of Appeal said this of *Astro*:

> The [c]ourt left open the question of the relationship between the active remedy of setting aside under Art 34 and the active remedy of appeal under Art 16(3), but was of the view that preclusion would apply in that context. This observation was, however, *obiter*.

54 At [68] of *Rakna*, the court added:

> the [c]ourt [in *Astro*] clarified (at [130]) that in setting aside proceedings it would be "surprised" if a party retained the right to bring an application to set aside the final award on the merits under Art 34 on the jurisdictional ground it could have relied on to base a challenge under Art 16(3). With reference to the present case, that clarification is *obiter* in two ways: first, in that this court was not there dealing with an Art 34 challenge; and secondly, in that it was not dealing with the situation of a party who had not participated in the arbitration at all.

55 Notably, the Court of Appeal in *Rakna* did not characterise as *obiter* its own decision on the general preclusive effect of Art 16(3) of the Model Law (and s 10(3) of the IAA) on setting-aside applications. Rakna sought to avoid preclusion by arguing (i) that the provisions had ***no*** *preclusive effect*; and (ii) that even if they had *general preclusive effect*, as an *exception* preclusion did not apply to a non-participating respondent. If either argument succeeded, Rakna would avoid preclusion. In the event, the court decided *against* Rakna on argument (i), but *for* Rakna on argument (ii).

56 The Employer contends that the reasoning in *Rakna* on the preclusive effect of Art 16(3) of the Model Law (and s 10(3) of the IAA) is *obiter* because that case concerned a non-participating respondent, whereas the Employer here participated in the arbitration. I do not agree that *Rakna* can be distinguished in

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this way: the Court of Appeal specifically decided that Art 16(3) of the Model Law (and s 10(3) of the IAA) had general preclusive effect, in rejecting Rakna's argument that they had *no* preclusive effect, and this was treated by the court as a necessary step in reaching its conclusion, having regard to the line of reasoning adopted, *ie*, Art 16(3) of the Model Law (and s 10(3) of the IAA) had general preclusive effect, but there was an exception for non-participating respondents like Rakna.

57 I thus consider myself bound by the reasoning in *Rakna* that Art 16(3) of the Model Law and s 10(3) of the IAA have general preclusive effect, in that a party who had failed to challenge such a preliminary ruling on jurisdiction within the prescribed 30-day period generally cannot thereafter raise the same jurisdictional challenge to set aside an award. As the Employer participated throughout the Arbitration, the "non-participating respondent" exception which availed Rakna does not help the Employer. It follows that the Employer is precluded from seeking to set aside the Award for lack of jurisdiction.

58 In any event, if I were not bound by virtue of *Rakna* to hold that Art 16(3) of the Model Law and s 10(3) of the IAA have general preclusive effect, I would nevertheless, with respect, follow the Court of Appeal's decision and reach the same conclusion.

59 The Employer contends that its position is supported by the express wording of Art 16 of the Model Law, the *travaux préparatoires*, and policy considerations. However, the Court of Appeal in *Rakna* had considered the express wording of Art 16 of the Model Law, the *travaux préparatoires*, and policy considerations, in arriving at the opposite conclusion.

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60 The Employer points to the phrase "*may* request" in Art 16(3) and the lack of stipulated consequences if such a request is not made, and argues this indicates that Art 16(3) is permissive. The same point was addressed in *Rakna* at [68] where the court said that the permissive interpretation of Art 16(3) as only one remedy available to the parties, was explained in *Astro* at [119], but "no great weight is placed on the wording of the provision", and in any event, the view expressed in *Astro* was that the court would be surprised if a party retained the right to apply to set aside an award on jurisdictional grounds on which it could have brought a court challenge under Art 16(3) but did not.

61 The court in *Rakna* went on at [69] to cite Nata Ghibradze's article, "Preclusion of Remedies under Article 16(3) of the UNTITRAL Model Law" 27 Pace International Law Review 345 (2015). The court noted that the article undertook a wide-ranging review of the *traveaux*, literature, and case law relevant to Art 16(3) and its meaning, and that the author observed that "many courts and the greater part of the legal scholarship support the preclusive effect of Art 16(3)".

62 At [70] of *Rakna*, the court also cited Gary Born, *International Commercial Arbitration*, at p 1106 for the view that "the only exception to the requirement that a party must challenge the arbitrator's positive jurisdictional ruling under Art 16(3), 'is where a party does not participate at all in the arbitral proceedings; in this instance, the Singaporean court would permit a challenge to a final arbitral award under Article 34 of the Model Law'". Further, the court cited Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2nd Ed, 2016) at pp 148–149 for the similar view that a party "may simply refuse to have anything to do with the arbitration, in which case he has the right to await the award itself and then challenge it under Model Law, Art 34".

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63 The Employer does not directly confront the observation in *Rakna* at [69] that many courts and the greater part of the legal scholarship support the preclusive effect of Art 16(3); nor does the Employer directly confront the other commentaries cited in *Rakna* at [70]. Instead, the Employer puts forward views to the contrary, which are minority views.

64 In particular, the Employer cites Shaun Pereira, "Deferred Challenges to Jurisdiction Under the Model Law" (2018) 35(6) Journal of International Arbitration 719, an article published after *Astro* and the first instance decision in *Rakna*, but before the Court of Appeal's decision in *Rakna*. Pereira suggests that one would have expected clearer and more express indications in Art 16(3) to the effect that its inclusion was intended to upend the fundamental architecture of the Model Law, a cornerstone of which is the curial court's supervision over arbitral awards on the grounds set out in Article 34(2).

65 With respect, the court in *Astro* at [130] had already observed that the supervisory court exercises control at two points in time: *immediate* court control over pending arbitration proceedings (such as on an application under Art 16(3) of the Model Law) and *delayed* court control over the arbitration award. Interpreting Art 16(3) as having general preclusive effect does not deprive the supervisory court of the right to exercise court control on the issue of jurisdiction: it simply means that where Art 16(3) is triggered, the dissatisfied party *must* seek immediate court control, rather than simply continue participating in the arbitration only to apply to set aside the award thereafter (on the same issue of jurisdiction).

66 Pereira also argues that if Art 16(3) of the Model Law is regarded as having preclusive effect, there would be an unwarranted asymmetry in the availability of appellate review of a first instance court decision, in that Art

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16(3) provides that the first instance court's decision "shall be subject to no appeal", whereas there is no equivalent stipulation in Art 34 in relation to setting-aside.

67 This asymmetry is evident on the face of the Model Law, but that did not move "many courts and the greater part of the legal scholarship", or the Court of Appeal in *Astro* and *Rakna*, away from the view that Art 16(3) has general preclusive effect in relation to a later setting-aside application on the same jurisdictional ground.

68 There is moreover a good policy reason for the asymmetry. In the context of Art 16(3) of the Model Law, there is still a pending arbitration, indeed one that can continue while an application to court is still pending. Allowing an unrestricted right to appeal the first instance decision would mean that the arbitration might proceed for an even longer period before the issue of jurisdiction is finally determined: that would risk greater wastage of time and costs if the court were eventually to decide that the tribunal had no jurisdiction.

69 As the court in *Astro* observed at [130]:

> In the light of the *travaux* which we have examined, it appears to us that there is a policy of the Model Law to achieve certainty and finality in the *seat of arbitration*. This is further borne out by the strict timeline of 30 days imposed under both Arts 13(3) and 16(3), the design of which seems to be to precipitate an early determination on issues of composition and jurisdiction so that the arbitration can continue.

70 The 30-day timeline under both Art 13(3) and 16(3) of the Model Law is stricter than the 3 months allowed in Art 34 on setting-aside, consonant with the former provisions dealing with a challenge while the arbitration is pending, whereas a setting-aside application is brought when the arbitration has culminated in an award. It is likewise consonant for there to be a restriction on

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rights of appeal where the court is addressing a pending arbitration, rather than an arbitral award. Indeed, Art 13(3) on challenging an arbitration has the same restriction as does Art 16(3) on jurisdictional challenges: the Model Law stipulates that the first instance court decision "shall be subject to no appeal". Section 10(4) of the IAA has relaxed the position slightly in relation to jurisdictional challenges, in that an appeal against a first instance court decision under Art 16(3) may be brought with the permission of the appellate court: s 10(4). Even so, the Singapore legislature has still decided to place some restriction on appeal rights in the case of immediate court control in relation to a pending arbitration (under Art 16(3) or s 10) as permission from the appellate court must still be sought, as compared to delayed court control in relation to an arbitral award (under Art 34) where neither the Model Law nor the IAA places any restriction on an appeal.

71 As for policy reasons, the court in *Rakna* stated at [72]:

> …the reason for the adoption of Art 16(3) was to effect a compromise between the policy consideration of avoiding wastage of resources (the wastage that results from the setting aside of an arbitral award for lack of jurisdiction after the entire arbitration has been completed), and the policy consideration of preventing parties from trying to delay arbitral proceedings by bringing challenges before the court. Article 16 requires parties to an arbitration to bring out their challenges to jurisdiction at an early point of the proceedings.

72 The court went on at [75] to consider the position of a respondent (like the one in *Astro*) who had failed in its jurisdiction objection then participates in the arbitration; the court said:

> By doing that, the respondent would have contributed to the wasted costs and it is just to say to such a respondent that he cannot then bring a setting-aside application outside the time limit prescribed in Art 16(3) though he can continue to resist enforcement.

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73 Thus, even if I were not bound by the reasoning in *Rakna* to hold that Art 16(3) of the Model Law and s 10(3) of the IAA have preclusive effect in relation to a setting-aside application on the same jurisdictional ground (that could have been pursued under those provisions, but was not) I would still have reached the same conclusion.

74 It follows that I consider that the Employer (who was not a non-participating respondent like Rakna) is precluded from seeking to set aside the award on its jurisdictional challenge. It ought to have brought that to court within 30 days, pursuant to Art 16(3) of the Model Law and/or s 10(3) of the IAA; not having does so, it cannot now rely on the same as a ground to set aside the Award.

Did the Employer waive its jurisdictional objections after PO5?

75 The Contractor argues that even if Art 16(3) of the Model Law and/or s 10(3) of the IAA did not preclude the Employer from challenging jurisdiction again, the Employer had waived its right to do so by its conduct after PO5.

76 I do not accept this. As I noted above at [24]–[33], the Employer purported to maintain its jurisdictional objections even after the Tribunal had dismissed those by way of PO5. It was futile for the Employer to continue taking the position that the Tribunal had no jurisdiction, whilst not applying for the court to determine that pursuant to Art 16(3) of the Model Law and/or s 10(3) of the IAA. Be that as it may, the Employer's conduct in the arbitration does not amount to a waiver of its jurisdictional objections: the Employer continued to say that the Tribunal had no jurisdiction. As for the Employer's failure to apply to court under Art 16(3) of the Model Law and/or s 10(3) of the IAA, I view

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that as giving rise to preclusion as discussed in the previous section, rather than as a waiver.

Do the Employer's jurisdictional objections go towards jurisdiction or admissibility?

77 The Contractor says that the Employer's jurisdictional objections (based on non-compliance with pre-arbitral procedure) go towards the *admissibility* of the Disputes which the Contractor referred to the Arbitration, rather than towards the *jurisdiction* of the Tribunal. The Employer says that its jurisdictional objections go towards the Tribunal's *jurisdiction*, and not *admissibility*.

78 The Employer relies on *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 ("*Lufthansa*") at [54]–[63] as Court of Appeal authority that non-compliance with pre-arbitral procedure goes towards a tribunal's jurisdiction.

79 In *Lufthansa* at [35]–[53], the court held that:

> "… the parties had not intended that the Dispute Resolution Mechanism (including the arbitration clause) contained in the Cooperation Agreement was to be incorporated as part of the Supplemental Agreements. The Appellant was accordingly not bound by it, and the Tribunal thus did not have jurisdiction over the Appellant and its dispute with the Respondent. We therefore allowed the appeal on this ground." (At [53].)

80 The court went on to say at [53], "This is sufficient to dispose of the matter in the Appellant's favour, but we comment on the remaining issues as they are of some importance." From that alone, one might have thought that the court's "comments" on the remaining issues were going to be *obiter*. However, after discussing non-compliance with of pre-arbitral procedure at [54]–[62], the court stated its "ruling" at [63]:

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> Given that the preconditions for arbitration set out in cl 37.2 had not been complied with, and given our view that they were conditions precedent, the agreement to arbitrate in cl 37.3 (even if it were applicable to the Appellant) could not be invoked. The Tribunal therefore did not have jurisdiction over the Appellant and its dispute with the Respondent. This was the second ground on which we allowed this appeal.

81 The court's reference to its "ruling" on non-compliance with pre-arbitral procedure as the "second ground" on which the appeal was allowed, points to that ruling being part of the *ratio decidendi* rather than *obiter*.

82 In *DRO v DRP* [2025] SGHC 255 ("*DRO*"), the General Division of the High Court did not, however, regard *Lufthansa* to be binding authority on the distinction between admissibility and jurisdiction. The court pointed out (*DRO* at [59]) that this was not argued in *Lufthansa* – it was not one of the issues that the court had to decide (as set out in *Lufthansa* at [16]), instead, the court in *Lufthansa* proceeded on the uncontested premise that non-compliance with pre-arbitral procedure was a matter going to jurisdiction. Thus, the court in *DRO* concluded at [59] that *Lufthansa* was not binding authority that non-compliance with pre-arbitral procedure was a matter going to jurisdiction.

83 The court went on to hold (*DRO* at [60]–[63]) that non-compliance with pre-arbitral procedure should be treated as a matter of admissibility rather than jurisdiction. The court cited *BTN v BTP* [2021] 1 SLR 276 ("*BTN*"), a decision of the Court of Appeal subsequent to *Lufthansa*. In *BTN*, the distinction between admissibility and jurisdiction was expressly discussed, whereas it was not in *Lufthansa*. The court in *BTN* decided that a tribunal's decision on the *res judicata* effect of a prior decision is a decision on admissibility, not jurisdiction.

84 In arriving at that decision, the court at [70]–[71] approved of Jan Paulsson commentary on Jurisdiction and Admissibility:

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> 70. Jan Paulsson further states (Jan Paulsson, "Jurisdiction and Admissibility" (2005) in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (Gerald Aksen *et al* eds) (ICC Publishing, 2005) at p 616) that, following the lodestar of this distinction as set out in the preceding paragraph, tribunals' decisions on objections regarding preconditions to arbitration, like time limits, the fulfilment of conditions precedent such as conciliation provisions before arbitration may be pursued, mootness, and ripeness are matters of admissibility, not jurisdiction.
>
> 71. In our judgment, determinations of *res judicata* issues should likewise be treated as decisions on matters of admissibility, not jurisdiction.

85 However, the court in *DRO* stated at [61]:

(a) the issue in *BTN* concerned whether a tribunal's decision on the *res judicata* effect of a prior decision went to admissibility or jurisdiction, and not preconditions to arbitration;

(b) the court in *BTN* did not have to decide whether a condition precedent to arbitration is a matter of admissibility;

(c) thus, the court's approval of Jan Paulsson's view that the fulfilment of conditions precedent / preconditions to arbitration was a matter of admissibility, was *obiter*.

86 The court in *DRO* went on to decide at [62]–[63] that a precondition to arbitration is a matter that goes to admissibility and not jurisdiction, for the reasons summarised at [63]:

(a) in principle, this is consistent with the distinction between jurisdiction (*ie*, the power of the tribunal to hear a case) and admissibility (*ie*, whether it is appropriate for the tribunal to hear it): see *BTN* at [68];

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(b) the Court of Appeal in *BTN* has approved of this view, albeit *obiter*; and

(c) this would be in line with the general consensus in international arbitration that preconditions to arbitration should be treated as matters of admissibility rather than jurisdiction, and there is no reason why Singapore should adopt a contrary position.

87 I respectfully agree with the reasoning and conclusion in *DRO* that *Lufthansa* is not binding authority on (a) the distinction between admissibility and jurisdiction, or (b) that non-compliance with pre-arbitral procedure was a matter going to jurisdiction: see [82] above. I also agree that a precondition to arbitration (such as compliance with pre-arbitral procedure) is *generally* a matter of admissibility rather than jurisdiction: [83]–[86], save that I would couch this as a *general* proposition, because there may be cases where the general rule is displaced, and a precondition to arbitration is a matter of jurisdiction rather than admissibility. This is also how the Hong Kong Court of Final Appeal expressed the point in *C v D* [2023] HKCFA 16 at [47]–[50].

88 In *C v D*, Justice Ribiero stated that:

(a) Parties could expressly agree that compliance with a pre-arbitration condition is amenable to review by the court, and if so, that would resolve the issue of reviewability (at [47]).

(b) The court would only reach that conclusion if there is unequivocally clear language to that effect, for "it would be contrary to all normal expectations to find that such was the parties' intention. They have opted to submit their disputes to an arbitral tribunal rather than a court for resolution. It would be surprising to discover that they intend

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to have a court involved and to undergo two rounds of decision-making to determine whether a pre-arbitration condition has been met." (At [48].)

(c) Gary Born's commentary in *International Commercial Arbitration, Vol 1: International Arbitration Agreements* (Wolters Kluwer, 3rd ed, 2020) at p 1000 expresses the view that pre-arbitration conditions should be regarded as presumptively non-jurisdictional (at [49]).

(d) "Such a presumption is consistent with the consensual basis of the tribunal's jurisdiction: in the absence of unequivocal language to the contrary, an objection to how the tribunal has resolved an issue concerning a pre-arbitration condition does not challenge the tribunal's authority to arbitrate conferred by the parties' consent." (At [50].)

89 That the distinction between jurisdiction and admissibility may vary from case to case, is also illustrated by the decision in *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263("*Swissbourgh*"). In that case, the court noted at [206] that the failure to exhaust local remedies has traditionally been regarded by international courts as a matter that goes towards the *admissibility* of the claim, and not the *jurisdiction* of the tribunal. However, at [209] the court considered that the state in question had made exhaustion of local remedies a pre-condition for its consent to arbitration, and so the court found that failure to exhaust local remedies should be taken to be an issue concerning the *jurisdiction* of the tribunal.

90 *Swissbourgh*, though, concerned a state making an offer to arbitrate, which an investor could accept on the terms of the offer, thus forming an

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arbitration agreement. The present case is different: it is between two commercial parties, not an investor and a state; and there is already an arbitration agreement between the parties based on the FIDIC form, specifically in Clause 20 with a provision for arbitration in Sub-Clause 20.6

91 Returning to *DRO*, the Employer seeks to distinguish that case on the basis that the arbitration clause there did not make it clear that compliance with pre-arbitral procedure was a condition precedent to arbitration.[9] The court in *DRO* did indeed find that there were no clear words creating a condition precedent to arbitration (at [69]–[76]). However, this finding was separate from and subsequent to the court's finding at [58]–[63] that a precondition to arbitration was a matter going to admissibility and not jurisdiction. Thus, the court summed up its decision at [100] by saying at (b) that "In my view, conditions precedent to arbitration are matters going to admissibility", followed by (c) that "In any event, cl 25.7 of the Contract is not a condition precedent." Whether the clause was a condition precedent was thus a separate matter from the court's reasoning and conclusion on admissibility versus jurisdiction.

92 The Employer also seeks to distinguish *DRO* on the basis that the pre-arbitral procedure there involved negotiation steps, whereas that in the present case involves a potentially binding adjudicative reference to a DAB. I do not agree that this difference justifies me reaching the conclusion that the pre-arbitral procedure in the present case goes towards jurisdiction rather than admissibility.

93 The pre-arbitral procedure in the present case does involve reference to a DAB, rather than just negotiation steps. However, Sub-Clause 20.4 provides

[9] Employer's written submissions at [59].

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that "The decision [of the DAB] shall be binding on both Parties, who shall promptly give effect to it *unless and until it shall be revised in an amicable settlement or an arbitral award* as described below." [Emphasis added.] A party dissatisfied with a DAB's decision may give notice of dissatisfaction as further provided in Sub-Clause 20.4, and after allowing for a period for parties to attempt to settle the dispute amicably, arbitration may be commenced. In other words, a DAB's decision remains binding only if the matter is not otherwise settled between the parties, no notice of dissatisfaction is duly given, or no arbitration is duly commenced. It is arbitration, rather than reference to a DAB, that ultimately decides a dispute between the parties, if either party does not accept the DAB's decision, and they do not settle the matter amicably. That leaves the case squarely within the general rule that pre-arbitral procedure is generally a matter going to admissibility rather than jurisdiction. As the court observed in *C v D* (see [88(b)] above), having agreed to submit their disputes to arbitration rather than to a court, the parties likely intended for the arbitral tribunal to resolve any dispute over compliance with pre-arbitral procedure, rather than to have a further round of decision-making before a court to resolve *that* dispute.

94 The Employer also cited Christopher R Seppala, *Arbitration Clause in FIDIC Contracts for Major Works*, The International Construction Law Review, Vol 22, Part 1, January 2005 for the proposition that if a dispute submitted to arbitration has not gone through the prescribed pre-arbitral process, the arbitrators "will be exceeding their jurisdiction". However, that commentary does not refer to, let alone discuss, the admissibility/jurisdiction distinction; it is more than 20 years old, pre-dating the Singapore cases that have discussed this issue, such as *Swissbourgh*, *BBA v BAZ* [2020] 2 SLR 453 ("BBA"), *BTN*, and *DRO*. With respect, this commentary does not assist me on the issue.

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95 I consider the general rule to apply in the present case, and thus regard the Employer's jurisdictional challenge (based on non-compliance with pre-arbitral procedure) to go towards admissibility of the claims that the Contractor submitted to the Arbitration, rather than towards the jurisdiction of the Tribunal. Accordingly, the Tribunal's decision on the Employer's jurisdictional challenge was a decision on admissibility, which the court cannot review: *BBA* at [73]; *BTN* at [68]).

Did the Tribunal correctly decide that it had jurisdiction?

96 In any event, the jurisdictional ground of the Employer's setting-aside application fails because I consider that the Tribunal had correctly decided that it had jurisdiction.

97 The contract, based on the FIDIC form, had a multi-tiered dispute resolution mechanism in Clause 20 of the GCC, save that Sub-Clause 20.6 was amended by the Particular Conditions of Contract:[10]

(a) Sub-Clause 20.2 (Appointment of the Dispute Adjudication Board) provides that:

> Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4.
>
> ……
>
> Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the DAB has

[10] CBD 493–497; 501.

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given its decision on the dispute referred to it under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision], unless other disputes have been referred to the DAB by that time under Sub-Clause 20.4, in which even the relevant date shall be when the DAB has also given decisions on those disputes.

(b) Sub-Clause 20.3 (Failure to Agree Dispute Adjudication Board) addresses the possible failure to agree on a DAB, and related matters.

(c) Sub-Clause 20.4 (Obtaining Dispute Adjudication Board's Decision) provides that:

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, … then after a DAB has been appointed pursuant to Sub-Clause 20.2 [Appointment of the DAB] and 20.3 [Failure to Agree DAB] either Party may refer the dispute in writing to the DAB for its decision…" As stated in the same Sub-Clause, the DAB is to give its decision "[w]ithin 84 days after receiving such reference, or the advanced payment referred to in Clause 6 of the Appendix – General Conditions of the Dispute Adjudication Agreement, whichever date is later, or within such other period as may be proposed by the DAB and approved by both Parties.

……

The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below.

……

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference or such payment, the either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

… Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

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> If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

(d) Sub-Clause 20.5 (Amicable Settlement) provides that:

> Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

(e) Sub-Clause 20.6 (Arbitration) – as per the Particular Conditions of Contract – provides that:

> Any dispute not settled amicably and in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by arbitration…"

98 In the present case, a DAB was constituted and the Contractor referred a dispute (the "AEB dispute") to it. Before the DAB gave its decision on the AEB dispute (and, as such, before the DAB's appointment expired per Sub-Clause 20.2), the Contractor referred four other disputes to the DAB: Disputes 1 to 4, which it later referred to the Arbitration.

99 The DAB, however, declined to decide Disputes 1 to 4 on the basis that it had only been appointed for the AEB dispute.[11] In the event, the DAB did not give its decision on Disputes 1 to 4 within 84 days of those disputes being referred to it, or at all. After 84 days had passed, the Contractor issued a notice of dissatisfaction, and a further 59 days later, the Contractor filed and served its Request for Arbitration on 18 December 2020.

[11] CBD 578.

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100 There is no issue with the Contractor not observing the timelines in Clause 20, as such. The Employer's objection, more fundamentally, is that the Contractor was not entitled to refer Disputes 1 to 4 to the DAB – it should have taken steps to have a new DAB appointed to decide those disputes – and so it was misconceived for the Contractor to have issued a notice of dissatisfaction in relation to the DAB not deciding Disputes 1 to 4, and thereafter to have commenced the Arbitration.

Disputes 1 to 4

101 The Tribunal decided that the Contractor was entitled to refer Disputes 1 to 4 to the DAB, and consequently the Contractor was entitled to have issued a Notice of Dissatisfaction when the DAB failed to give a decision on those disputes within 84 days, and the Contractor was entitled to have commenced the Arbitration when it had.

102 The Tribunal's reasoning, which I agree with, was stated in the Tribunal's PO5 Reasons at [25]–[30]:

> 25. Clause 20.4 provides that "If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, … then after a DAB has been appointed pursuant to Sub-Clause 20.2 … either Party may refer the dispute in writing to the DAB for its decision…" This wording is unfettered: thus, if a fresh dispute arises between the parties then, after a DAB has been appointed under clause 20.2 following the issue of a notice of an intention to refer a dispute to a DAB, either party may refer that fresh dispute in writing to the DAB for its decision."
>
> 26. …there is no link between the dispute mentioned in the first sentence of clause 20.4 and the dispute which resulted in the giving of a notice of an intention to refer a dispute to a DAB under clause 20.2…once a DAB has been appointed under clause 20.2, any other dispute which has arisen in the meantime may be referred to it.

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> 27. This makes commercial sense. It would be unwieldy for there to be a series of DABs in place at the same time, each dealing with a separate dispute. We doubt that the parties who entered into this agreement could have intended that it could lead to such an outcome. In this context it is to be noted that the General Conditions of Dispute Adjudication Agreement require the members of a DAB to be "experienced in the work which the Contractor is to carry out under the Contract" (clause 3). There is no requirement for a member of the DAB to have any greater level of experience of knowledge in relation to the subject matter of a particular dispute."
>
> 28. …the question of whether any particular DAB can (or must) deal with more than one dispute is put beyond doubt by the last paragraph of clause 20.2. The expiry of the appointment of a DAB occurs when it has given its decision on the dispute referred to it under clause 20.4 *"unless other disputes have been referred to the DAB by that time under Sub-Clause 20. 4"*. If further disputes could not be referred to the DAB already appointed, these words would be empty of content.
>
> 29. When these provisions of clauses 20.2 and 20.4 are read together, as they must be, it leaves no room for argument as to whether a particular DAB is (a) confined to one dispute only, or (b) must deal with any further disputes referred to it prior to the date on which it gives its decision in the first dispute. In our view, the latter is the only realistic and commercially sensible interpretation.
>
> 30. [The Employer's counsel's] submission that the words of clause 20.4 must be understood as limited to fresh claims relating to the [AEB dispute] finds support neither in the language of the clause nor any commercial logic.

103 The Employer argues that the DAB was not a standing DAB appointed for the duration of the project, but an *ad hoc* DAB whose appointment could expire before the end of the project; and more specifically, the DAB was appointed only to decide the AEB dispute (and so it could only decide that dispute)

104 Indeed, the DAB was not a standing DAB, it was an *ad hoc* DAB whose appointment could expire before the end of the project, but that does not avail the Employer. The DAB need not be a standing DAB for the Contractor to be

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able to refer other disputes to it: Clause 20 contemplates that other disputes may be referred to an *ad hoc* DAB before it has given its decision on the first dispute referred to it, and Sub-Clause 20.2 makes specific provision for the duration of the DAB's appointment to be extended in that event (see [28] of the PO5 Reasons set out above).

105 As for the contention that the DAB was appointed only to decide the AEB dispute (and so it could only decide that dispute), the Dispute Adjudication Board Agreement[12] does not support this. First, the fee structure in [3] is on a "per dispute" basis, "for each dispute referred", which leaves open the possibility of further disputes being referred to the DAB. Second, clause 4(e) of the General Conditions of Dispute Adjudication Agreement (in the Appendix to the Dispute Adjudication Board Agreement) requires DAB members to "comply with the annexed procedural rules and with Sub-Clause 20.4 of the Conditions of Contract", and rule 2 of the Procedural Rules states that "The DAB shall proceed in accordance with Sub-Clause 20.4 and these Rules." [32] of the PO5 Reasons duly cites these provisions of the Dispute Adjudication Board Agreement.

106 If Sub-Clause 20.4 allowed the Contractor to refer other disputes to the DAB, then the DAB members were obliged to decide those other disputes, for Sub-Clause 20.4 obliged them to do so, and they had agreed to comply with it. The fact that there was only one dispute (the AEB dispute) when the DAB was appointed, and in that sense the DAB was appointed to decide that dispute, does not mean that it could *only* decide that dispute. Pursuant to Sub-Clause 20.4, which the DAB members agreed to comply with, other disputes could validly be referred to it (as the Tribunal decided, which I agree with).

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107 Finally, the FIDIC Contracts Guide (1st Ed, 2000) supports the Tribunal's interpretation. Commenting on the standard Sub-Clause 20.2, the Guide says at p 308:

> … the appointment expires when the ad-hoc DAB has given its decision, unless (by that time) another dispute has been referred to it in accordance with the procedure specified in Sub-Clause 20.4 If a Party wishes to refer a second dispute to the same ad-hoc DAB, the Party should first:
>
> - consider whether the DAB has the expertise which would be appropriate for making a sound decision on this second dispute, and
> - ascertain whether the DAB is willing to consider, and to give a decision on, this second dispute. A Party's correspondence with a DAB must be copied to the other Party.
>
> If so, of if the Party is reluctant to accept the delay involved in appointing another DAB, the Party is entitled to refer the dispute to the same DAB. If the other Party is then reluctant to have the second dispute referred to the same DAB, this other Party cannot (under the Contract) prevent this reference to the same DAB. Unless this other Party is entitled by the applicable law to prevent this second reference, it must either seek the first Party's agreement or participate in the reference to the same DAB.

108 The Guide says that a party wishing to refer a second dispute to an existing DAB *should* do two things. It then says that if that has been done, *or* "if the Party is reluctant to accept the delay involved in appointing another DAB", that party is *entitled* to refer the second dispute to the same DAB, and the other party "cannot (under the Contract) prevent this reference to the same DAB".

109 That is the position here: the Contractor did not wish to appoint an additional DAB (or DABs) for Disputes 1 to 4, and so it referred those disputes to the existing DAB: it was *entitled* to do so, as the Guide says, and as the Tribunal decided.

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Disputes 5 to 6

110 The Contractor approached Disputes 5 to 6 differently from Disputes 1 to 4. With the DAB declining to decide Disputes 1 to 4 on the basis that it would only decide the AEB dispute (and the Employer agreeing with that), the Contractor did not refer Disputes 5 to 6 to the DAB (a referral it was entitled to make, as with Disputes 1 to 4). The Contractor simply submitted Disputes 5 to 6 to the Arbitration, along with Disputes 1 to 4.

111 The Tribunal decided that Disputes 5 to 6 were admissible in the Arbitration and that the Tribunal had jurisdiction to determine them, primarily based on a concession by the Employer's counsel in the course of oral submissions, which the Tribunal summarised at [22] of the PO5 Reasons:

> At the end of his submissions [the Employer's counsel] very properly and helpfully accepted that if the Respondent [Employer] was wrong on Disputes I to 4, then it would be sensible for Disputes 5 and 6 to be referred directly to arbitration: he said that this would make sense since the claims were inextricably tied up with Disputes 1 to 4. This was a realistic submission which we consider to be both appropriate and correct. However, [the Employer's counsel] submitted that if Disputes I to 4 could not properly be referred to the DAB, then Disputes 5 and 6 could not be referred either. We agree with this submission.

112 The transcript of the hearing bears out the concession by the Employer's counsel:[13]

> Employer's Counsel: I think on 5 and 6 we don't have much to say, except that if we are wrong on 1 to 4 then we would say that it is sensible that 5 and 6 also goes to the Tribunal. We don't say that it should go back to the DAB.
>
> Mr Glasgow: That's helpful.
>
> Employer's Counsel: … As to what the accounts would be at the end would ultimately all be mixed up, and therefore we

13 Employer's affidavit, Vol 9, p 12039 (transcript page 65 line 13 to page 66 line 7).

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> would say it makes sense if 1 to 4 are going to arbitration then 5 and 6 also goes to it.

113 The Employer's counsel expressly conceded that if the Tribunal ruled against the Employer on Disputes 1 to 4 (such that Disputes 1 to 4 would continue in the Arbitration), then "it is sensible that 5 and 6 also goes to the Tribunal. We don't say that it should go back to the DAB."

114 Given the Employer's counsel's concession, the Employer's jurisdictional objections to Disputes 5 to 6 would stand or fall with its jurisdictional objections to Disputes 1 to 4. With that concession, and with the Tribunal dismissing the Employer's jurisdictional objections to Disputes 1 to 4, the Tribunal accordingly ruled as follows in relation to Disputes 5 to 6, and correctly so:

> B. Are Disputes 5-6 admissible in this arbitration and does the Tribunal have jurisdiction to determine such disputes? **In the light of the answers in relation to Disputes 1 to 4 and the concession by [the Employer's counsel], these do not arise for decision because the answer is Yes to both questions.**

115 Although the concession by the Employer's counsel coupled with the Tribunal's decision on Disputes 1 to 4 was decisive of the jurisdictional objections to Disputes 5 to 6, in the PO5 Reasons the Tribunal gave further reasons for rejecting the jurisdictional objections to Disputes 5 to 6, at [33]–[40]:

> 33. The Tribunal is not concerned with any rights or remedies that may exist between the parties to the Dispute Adjudication Agreement. The question for the Tribunal is whether a wrongful refusal to accept the referral of a dispute affects the obligations of the parties to the principal Contract.
>
> 34. In our view it does. The refusal of a DAB to accept a valid referral of a dispute may cause the contractually agreed dispute resolution machinery in relation to the DAB to

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break down. In this particular case, for the reasons given by [the Contractor's counsel], and realistically accepted by [the Employer's counsel], the situation would become unworkable if a DAB was required to determine Disputes 5 and 6 whilst Disputes 1 to 4 were the subject of arbitration proceedings. It would put the cart before the horse.

35. For all these reasons, we find that the DAB was wrong to refuse to accept the referral of Disputes 1 to 4, with the result that the dispute resolution machinery relating to the DAB broke down and/or became unworkable. Accordingly, the Claimant is entitled to refer Disputes 1 to 6 to arbitration and this Tribunal has jurisdiction to hear and determine them.

36. It is not necessary in the light of the conclusions which the Tribunal has reached as to the proper interpretation of the material clauses in the Contract and their application to the events which occurred for it to determine such issue as there may be as to the reasons why the DAB acted as it did, and, on the Tribunal's conclusions, did so in breach of the obligation imposed by clause 20.4 of the General Conditions: the corollary of the right of a party to refer a dispute to the DAB is an obligation by the DAB to accept that referral. However, in view of the submissions that have been made by both parties and, for the avoidance of any doubt, the Tribunal notes that there is no dispute as to the fact that the Respondent's Engineer did nothing by its letter dated 25 July 2020 to persuade the DAB to accept, and much to dissuade it from accepting, the claims which the Tribunal concludes had been properly referred to it.

37. In this context, we should make it clear that there has been no attack by the Respondent on the ability of this Tribunal to hear and determine disputes under this Contract once they have been properly referred to it following the operation of the contractual dispute resolution machinery. The points raised by the Respondent concern the admissibility of Disputes I to 6 in this arbitration.

38. [The Employer's counsel's] reliance on the arbitration provided for in Clause 8 of the Procedural Rules appears to be misplaced. First, the submission that the DAB had the authority to decide whether or not it would admit fresh issues assumes that the DAB had the jurisdiction to admit the new claims. Second, once it is accepted that it has this jurisdiction, we do not find any power in the DAB to decline that jurisdiction. That being so, a refusal

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> by the DAB to entertain a claim enables the Claimant to invoke the remedy of arbitration under the General Conditions.
>
> 39. The real issue that is the subject of this hearing is whether or not the Claimant has properly complied with the dispute resolution machinery of the Contract, namely the hearing of Disputes I to 6 by a properly constituted DAB and the issue of a notice or notices of dissatisfaction or, in the light of the events that occurred, is relieved from doing so, and, in consequence, whether the disputes are properly admissible in these arbitration proceedings. For the reasons that we have now given, we consider that they are.
>
> 40. Accordingly, our answers to the preliminary issues are set out in the Order above.

116 In summary, the Tribunal decided that:

(a) in this case, for reasons accepted by the Employer's counsel, the situation would become unworkable if a DAB were required to determine Disputes 5 to 6 whilst Disputes 1 to 4 were the subject of arbitration proceedings (at [34]);

(b) with the DAB's wrongful refusal to accept the referral of Disputes 1 to 4, the dispute resolution machinery relating to the DAB broke down and/or became unworkable, and accordingly, the Contractor was entitled to refer not just Disputes 1 to 4, but also Disputes 5 to 6, to the Arbitration (at [35], [38]);

(c) in light of the DAB's wrongful refusal to accept the referral of further disputes, the Contractor was relieved from having to refer Disputes 5 to 6 to the DAB, and could proceed to refer them to the Arbitration (at [35], [38], [39]).

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117 I consider that the Tribunal was correct to reach these conclusions. I agree with the Contractor's submission that if support were required from an express contractual provision, Clause 20.8 (Expiry of Dispute Adjudication Board's Appointment)[14] would supply that:

> If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:
>
> (a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and
>
> (b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

118 The phrase "there is no DAB in place, whether by reason of the expiry of the DAB's appointment *or otherwise*" [emphasis added] aptly covers the situation where a DAB has wrongfully refused to accept the referral of further disputes (which were properly referred under Sub-Clause 20.4), and so (as the Tribunal found) the dispute resolution machinery relating to the DAB broke down and/or became unworkable. To require the Contractor to go through the motions of referring Disputes 5 to 6 to the DAB would be an exercise in futility; to require the Contractor to take steps to appoint another DAB would deprive the Contractor of its contractual right under Sub-Clause 20.4 to refer Disputes 5 to 6 to the DAB, for the DAB to decide. With the DAB refusing to accept referral of further disputes, "there is no DAB in place" within Sub-Clause 20.8.

119 For the above reasons, I decided that the Employer's attempt to set aside the Award on jurisdictional grounds fails.

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[14] CBD 497.

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Natural Justice

120 The Employer applies to set aside the Award (or parts thereof) on the basis of alleged breaches of natural justice.

121 The Employer alleges four such breaches:

(a) in relation to Claim H4, the Tribunal adopted a methodology for computing the applicable cap for prolongation costs which was not pleaded by the parties, thereby depriving the Employer of a reasonable opportunity to be heard;

(b) the Tribunal failed to apply its mind to essential issues, having failed to consider:

(i) the Employer's case on repudiatory breach under applicable legislation;

(ii) the Employer's case that the Contractor could, and should, have pre-casted Location Box ("LB") foundations, and that this caused the delay in the Works; and

(iii) the Employer's evidence on whether the changes to the Auto Location Huts ("ALHs") constituted variations for Claim H2.

122 I address these four complaints in turn.

First complaint: in relation to the capped amount for prolongation costs

123 Clause 2.1 of the GCC provided that the Contractor would get an extension of time or payment in the event that it suffered delay or incurred costs as a result of the Employer's failure to give it right or possession to the worksite;

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such payment would be:[15] "Payment of any such cost plus reasonable profit subject to a maximum of [monetary amount] per day for every Km. For length less than a kilometre pro-rata amount shall be calculated."

124 The Employer says that the parties' quantum experts had agreed on how the capped amount should be calculated if Clause 2.1 applied (the "Subtraction Method"), but the Tribunal – without prior notice to the parties – departed from that, applied another method (the "Overall Length Method") and arrived at a higher cap – which meant that the Employer's was liable for more than if the Subtraction Method had been applied.

125 The Employer recognises that the Contractor had in its written closing submissions ("WCS") put forward the Overall Length Method, but it says that:

(a) the Tribunal had not decided on the Overall Length Method because it was what the Contractor sought in its WCS, but instead the Tribunal coincidentally arrived at the same method independently; and

(b) if the Tribunal had relied on the Contractor's WCS, it was too late for the Contractor to have put forward the Overall Length Method in its WCS, and the Employer was deprived of a fair and reasonable opportunity to respond to it.

126 The Employer's first submission: that the Tribunal coincidentally arrived at the same method that the Contractor had contended for, is a strange one. I cannot glean from reading the Award, that the Tribunal had arrived at the same method one of the parties had contended for, by coincidence, rather than by simply agreeing with that party's contention. There is nothing in the Award

[15] Employer's affidavit, Vol 1, [122].

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to indicate that the Tribunal did not have in mind the Contractor's WCS in which the Contractor contended for the Overall Length Method.

127 The Employer suggests that the Tribunal meant to apply the Subtraction Method, but it mistakenly applied the Overall Length Method instead.[16] If that were the case, this would be a complaint about an error in the Tribunal's reasoning (which the court cannot interfere with: "poor reasoning on the part of an arbitral tribunal is not a ground to set aside an arbitral award": *AKN v ALC* [2015] 3 SLR 488 at [59]), and not a natural justice complaint.

128 The Employer sought correction of the Award in relation to the capped amount, and suggested that there was a computational error – referring to [577] of the Award which had mentioned the Subtraction Method, as described in the Contractor's quantum expert's rebuttal report. In response, the Contractor contended that the Tribunal had not committed itself to adopting the Subtraction Method but "expressed its understanding of the approach but then proceeded to compute the capped amount using its own methodology."[17]

129 In so far as the Employer says the phrase "its own methodology" in that submission by the Contractor was an admission that the Tribunal had not simply accepted the Contractor's contention of the Overall Length Method, but coincidentally arrived at the same method independently, I do not accept that. In context, the Contractor was simply contrasting what the Tribunal did using "its own methodology" with the use of the Subtraction Method, *ie*, the Tribunal used the methodology which it had decided on, and not the Subtraction Method mentioned by the quantum experts.

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[16] Employer's written submissions, at [86].

[17] CBD 300

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130 The Tribunal concluded at [73] of the Decision and Addendum:

> Even if, which the Tribunal does not accept, the answer produced by the Tribunal's method of calculation was wrong, the Tribunal considers that this was the result of an exercise of its judgement rather than being a computational or similar error. There is no error in the figures resulting from an omission to account for any step in the methodology adopted by the Tribunal.

131 Notably, the Tribunal characterised what it had done as an "exercise of its judgment" – it did not agree with the Employer's suggestion that it had meant to use one method (the Subtraction Method) but mistakenly used another (the Overall Length Method) instead.

132 The core question (which underpins the Employer's second submission) is whether it was deprived of a fair and reasonable opportunity to respond to the Overall Length Method put forward in the Claimant's WCS. The answer to that is: no.

133 In the Contractor's WCS, it had put forward the Overall Length Method, with the Subtraction Method as an alternative case[18] Both sides filed their WCS on 16 September 2024, following which there was a hearing of oral closing submissions on 3 October 2024. At that hearing, the Employer had a fair and reasonable opportunity to respond to the Overall Length Method which the Contractor was contending for, but the Employer said nothing about it. On 14 October 2024, the Employer submitted a document entitled "Supplementary Written Quantum Submissions", but that too said nothing about the Overall Length Method.

[18] Contractor's affidavit, Vol 8, p 9249.

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134 In the circumstances, the Employer has not made out its complaint that there was a breach of natural justice in this regard. I am reinforced in the conclusion by the Court of Appeal's decision in *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [52]:

> When, however, the court has to consider whether a party has been afforded natural justice during arbitration proceedings, the pivotal question is always whether that party has been given a fair opportunity to deal with an issue that has been raised in the arbitration either by the other party to by the tribunal itself. The extent of the opportunity needed to be given depends on the nature of the issue. *If the issue is a legal one, then sufficient time to make legal submissions is all that is required…* [emphasis added.]

135 The issue in the present case was a legal one: in Clause 2.1, what does "every Km" in the phrase "subject to a maximum of [monetary amount] per day" mean? The Tribunal decided that that meant the overall length of the track, and so it used the Overall Length Method (which is what the Contractor had contended for) and calculated the capped amount by taking the overall length of the track, multiplied by the relevant period of delayed access for which the Employer alone was reasonable, multiplied by the monetary amount stated in the Clause 2.1, to produce the "capped" loss.

136 The Employer had a fair and reasonable opportunity to respond to that method, first at the hearing of oral closing submissions on 3 October 2024, and then in its "Supplementary Written Quantum Submissions": there was no breach of natural justice.

137 The Employer contends that it is not open to parties to put forward new arguments in closing submissions – all arguments have to be pleaded from the outset, and if a new argument is raised in closing submissions (as the Contractor had done) and the Tribunal wished to consider it, then the Tribunal had to

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specifically seek the Employer's response to the argument. I do not accept this. Conventionally, pleadings contain material facts not arguments; it would be too much of an interference with the arbitral process to hold that closing submissions can only contain arguments that had been pleaded from the outset, unless the tribunal specifically requests a response (despite a general right of response having been afforded).

138 The Employer cites *COT v COU* [2023] SGHC 69 ("*COT*") for the propositions that "[a] closing submission should not generally … advance a case which falls outside the pleadings" (at [179]) and if it does then "it is open to that party to seek to amend the pleadings, and it is within the power of the tribunal to allow the application to amend, even if the opposing party withholds its consent" (at [181]).

139 In that portion of *COT* (from [167] to [211]), the court was not discussing breach of natural justice but rather whether the tribunal had exceeded its jurisdiction. To determine that, the court reviewed:

(a) the notice of arbitration (where the claimant said its claim arises from or is connected with legal obligations assumed by the respondents, which obligations are "contained in or evidenced by" a non-disclosure undertaking dated 17 March 2026 ("NDU-3"));

(b) the terms of reference (which tracked the notice of arbitration on the above point);

(c) the pleadings (where the claimant pleaded in its statement of claim that a contract on basic or essential terms was concluded by 17 March 2016 by words or conduct, and that NDU-3 was issued pursuant

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to that contract; and in its statement of reply that NDU-3 "evidences the contract");

(d) the lists of issues, after the evidential phase (where the claimant included in its list, the following issue: "Whether a contract on full or basic/essential terms was concluded by words and conduct between [the claimant] and the Respondents (or any one or more of them) between 15 March 2016 and 18 March 2016);

(e) the closing submissions, where the claimant carried through its position from the list of issues (that on or by 17 March 2017, the parties "had reached an agreement on all essential terms" and the claimant "regarded a contract on full terms to have been concluded by words or conduct on or by 18 March 2016").

140 The court noted at [205] that:

> Despite having had notice – albeit in their view late notice – of the claimant's case as set out in the list of issues, the respondents continued to assert their position that the claimant's case remained whether the parties had concluded an agreement on 17 March 2016 on the terms set out in NDU-3 and did not respond to the claimant's case as advanced in its closing submissions. This was the respondents' position even when they were given the opportunity to respond to the claimant's closing submission in reply closing submissions.

141 In the event, the court concluded (at [206]–[211]) that the tribunal had not exceeded its jurisdiction.

142 The court then turned to consider the alleged breach of natural justice – with the respondents alleging that they did not have an opportunity to respond to the alleged "new case" put forward by the claimant, *ie*, that a contract had

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been formed by words or conduct by 18 March 2016, as distinct from a contract being formed on 17 March 2026 on the terms of NDU-3.

143 The court said at [227] that "It is perhaps true that the claimant did not plead this issue", but went on to say at [227]–[228]:

> 227. But the claimant's list of issues did no more than to make patent what had until then been latent in the claimant's case. And the claimant's list of issues made that issue patent with complete clarity. From that point forward, the respondents could no longer claim not to have reasonable notice of the case they had to meet on this issue. Second, even at that late stage, it was possible for the respondents to engage with that issue. Instead, the respondents decided to take the all-or nothing position that the issue fell outside the terms or scope of the submission to arbitration. …
>
> 228. What happened in this arbitration is not that the tribunal deprived the respondents of a reasonable opportunity to be heard on this issue. What happened is that the respondents took a tactical decision to press on with their closing submissions without addressing this issue, despite having had sufficient and reasonable notice of it, hoping that the tribunal would uphold the jurisdictional objection. …

144 The court thus rejected this allegation of breach of natural justice (at [229]).

145 It is noteworthy that the decision in *COT* itself contradicts the Employer's present contention that all legal arguments must be pleaded from the outset, otherwise there will be a breach of natural justice unless the tribunal specifically invites a response to new arguments. Although the court said it was "perhaps true" that the claimant had not pleaded the issue (of a contract being formed by words of conduct), as that was made patent in the list of issues (after the evidential phase) the respondents had a fair and reasonable opportunity to respond – which they did not take – and so there was no breach of natural justice.

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146 Returning to the present case, the relevant issue is how Clause 2.1 should be construed. Notably, the Employer does not say that this issue was unpleaded, or otherwise not before the Tribunal. On the contrary, the Employer's affidavit states at [121]:

> Claim H4 relates to [the Contractor's] claim for prolongation costs for the alleged delay caused by [the Employer]. Amongst other things, one of the issues was whether Clause 2.1 of the Contract was workable, and if so, what would be the appropriate amount subject to the "cap" in Clause 2.1".

147 Ironically, it was the Contractor that said that the Employer could not rely on the "cap" in Clause 2.1 because the Employer had not pleaded this, but the Tribunal did not accept that. Both parties' quantum experts provided workings as to how the "cap" might be computed based on the Subtraction Method, and the Contract's WCS advanced the Total Length Method as its primary contention, alternatively the Subtraction Method.[19]

148 The Employer says that the Subtraction Method was agreed between the quantum experts, but the Contractor disputes that characterisation.[20] The Contractor says that the Subtraction Method was first proposed by the Employer's quantum expert, following which the Contractor instructed its quantum expert to provide calculations using the Subtraction Method with certain added assumptions. In any event, in deciding how Clause 2.1 should be construed, and in particular how the "cap" should be computed, the Tribunal was not bound to accept the Subtraction Method, and the Employer does not suggest the Tribunal was bound to do so. The Employer's complaint is that there was a breach of natural justice in that it did not have a fair and reasonable opportunity to respond to the Contractor's submission on the Total Length

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19 Employer's affidavit, Vol 8, p 9249.

20 Contractor's written submissions, at [75].

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Method – but it had that opportunity, both oral and in writing – it just did not take the opportunity to do so. As in *COT*, in those circumstances there is no breach of natural justice.

149 This conclusion is fatal both to the Employer's second submission (that it did not have a fair and reasonable opportunity to respond to the Contractor's WCS which contended for the Overall Length Method) and its first submission (that the Tribunal had coincidentally arrived at the Overall Length Method without considering the Contractor's WCS on the point). If indeed the Tribunal had coincidentally decided in the same way that the other party had contended for (which I have found not to be the case), the point remains that the Employer had a fair and reasonable opportunity to respond to that contention: there was no breach of natural justice, and in any event no prejudice caused to the Employer. The Employer's argument that the Tribunal somehow overlooked *the Contractor's contention* (but arrived at the same outcome) goes nowhere unless the Employer can say this might have made a difference to the outcome, but it would not have, since the Tribunal arrived at the same outcome that the Contractor had asked for.

150 I thus dismiss the Employer's first natural justice complaint.

Second complaint: in relation to the Employer's case on repudiatory breach under applicable legislation

151 The remaining complaints are ones that are *infra petita* (literally, "below what was asked"): complaints that the Tribunal did not consider material points in the Arbitration and so breached the rules of natural justice.

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152 For such complaints to succeed, the Employer needs to satisfy the following four cumulative conditions (per *DKT v DKU* [2025] 1 SLR 806 at [8]):

(a) the point must have been properly brought to the Tribunal for its determination;

(b) the point must have been essential to the resolution of the dispute;

(c) the Tribunal must have completely failed to consider the point; and

(d) even if the Tribunal had failed to consider the point, there must have been real or actual prejudice occasioned by the breach of natural justice.

153 The second natural justice complaint relates to the termination of the Contract. When the Employer terminated the Contract, it relied on a contractual clause to do so. In the Arbitration, it also argued that the Contractor's conduct was repudiatory, and so, under applicable local legislation, it was entitled to terminate the Contract. The Employer alleges that the Tribunal failed to consider whether it was entitled, under applicable legislation, to terminate the Contract for repudiatory breach on the part of the Contractor.

154 The Employer's complaint is not borne out by the Award, in particular [713] and [774(4)].

155 At [713] of the Award, the Tribunal said:

> At this point it is necessary to consider the issues arising out of Electrical Interlocking ("EI") and NTC 8 [Notice to Correct 8]

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> because it is also [the Employer's] case that, in relation to EI [the Contractor] was refusing to complete its scope of work, which amounted to a repudiatory breach, or that [the Contractor] did not comply with NTC 8 and this "enabled [the Employer] to terminate the Contract vide a letter of termination issued under Clause 15.2" [[The Employer's] written Closing Submissions, paragraph 463].

156 At [774] of the Award, the Tribunal provided its answers to the issues in relation to NTCs and termination. That included (at [774(4)]):

> Whether [the Contractor] repudiated the Contract and, if so, whether [the Employer] can rely on the same? **No (see paragraphs 381-389 and 391-403 above).**

157 The Tribunal thus dismissed the Employer's contention that it was entitled to terminate the Contract for repudiatory breach. It appears from that, that there is no breach of natural justice: the Tribunal addressed the point.

158 The Employer complains that the Tribunal did not cite the provision of the local legislation that it was relying on, but that does not avail the Employer: the Tribunal expressly decided that the Contractor had not *repudiated* the Contract, and that was fatal to the Employer's contention (whether based on local legislation, or otherwise) that it was entitled to terminate the Contract for *repudiatory breach*.

159 The Employer contends nevertheless that despite [713] and [774(4)] of the Award (reviewed above), a closer read of the Award will reveal that the Tribunal actually failed to deal with the issue of termination for repudiatory breach.

160 The Employer points to the Tribunal's analysis of the Contractor's Claim H10 (the Contractor's claim for damages resulting from termination) at [455]–[470] of the Award. The Tribunal prefaced that by considering "The

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course of events in the absence of termination – Claim H10" at [446]–[449] of the Award, noting at [447] that the Contractor had made four claims arising as a consequence of the termination, including Claim H10 for lost profit and overheads on the balance of work (*ie*, amounts that it would have earned but for the termination). The Tribunal then discussed "Claim H10 – the background" at [450]–[458], then "Claim H10 – the likely course of events in the absence of termination" at [459]–[469].

161 At [467]–[470] of the Award, the Tribunal concluded, in relation to Claim H10:

> 467. Further, as we discuss in Section XII of this Award, we are doubtful whether [the Contractor] could have been able to overcome the problems relating to Electrical Interlocking, but we can reach no firm conclusion about this. But it is sufficient for the purposes of this Award that [the Contractor] has failed to demonstrate that it could have done so.
>
> 468. Considering the material as a whole, therefore, the Tribunal considers that [the Contractor], on whom of course the onus lies, has not shown that it could, in the circumstances, have brought this contract to a successful and profitable conclusion…
>
> 469. In these circumstances, the Tribunal is not satisfied that [the Contractor] has proved this part of its claim. Whether or not [the Contractor] suffered any loss as a result of the wrongful termination of the Contract is a matter of speculation.
>
> 470. Accordingly, Claim Hl0 fails and is dismissed.

162 The Employer contrasts the above discussion of Electrical Interlocking ("EI") in relation to the Contractor's Claim H10, with the discussion of the same matter of EI in relation to the Employer's claim for repudiatory breach.

163 As the Tribunal had noted at [713], the Employer's case was that "in relation to EI [the Contractor] was refusing to complete its scope of work, which

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amounted to a repudiatory breach, or that [the Contractor] did not comply with NTC 8 [which related to EI] and this 'enabled [the Employer] to terminate the Contract…'". The Employer makes this point: how could the Tribunal have dismissed the Employer's contention of termination for repudiatory breach in relation to EI, when the Tribunal expressed at [467] that:

> (a) it was doubtful whether the Contractor could have been able to overcome the problems relating to EI, and that the Tribunal could reach no firm conclusion about this; and
>
> (b) the Contractor had failed to demonstrate that it could have overcome those problems?

164 The short answer is: at [713]–[774] the Tribunal was discussing the *Employer's contention* that it was entitled to terminate the Contract for repudiatory breach by the Contractor in relation to EI (finding that the Employer had wrongfully terminated the Contract), whereas at [446]–[470] the Tribunal was discussing EI in relation to the *Contractor's claim* for damages resulting from wrongful termination.

165 After noting at [713] the Employer's case of termination for repudiatory breach in relation to EI, the Tribunal went on to make the following findings:

> 714. El is an extremely complex issue and [the Employer] dealt with it at some length in its submissions, both written and oral. [The Contractor's] position is that it was never the subject of a valid notice of termination and that the issues raised by it were resolved by an agreement reached between the parties on 6 December 2019 [[The Contractor's] written Closing Submissions, at paragraph 204]. In these circumstances, the Tribunal must consider it.
>
> ……

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769. It is not necessary for the Tribunal to come to a final decision on whether NTC 8 was appropriately responded to by [the Contractor], because the Contract was not terminated for a breach of this notice. As we have noted at paragraph 752 above, on 5 November 2019, the PMC wrote to [the Contractor] to say that it had not complied with NTC 8. If correct, that would have entitled [the Employer] to issue a notice of termination under clause 15.2. At that point it did not do so.

770. Instead, discussions continued and, ultimately, the sequence of events culminating in the meeting on 6 December 2019, at which the parties agreed a way forward.

771. The only inference to be drawn from these events is that by about mid December 2019 [the Employer] had elected not to terminate the Contract on the ground of a failure to comply with NTC 8, but rather to resolve the issue by other means in the light of the agreement reached on 6 December 2019. Accordingly, thereafter it was not open to [the Employer] to issue a notice under clause 15.2 for non-compliance with NTC 8.

772. Thus, and assuming that there had been a failure to address the issues raised in NTC 8 in time, both parties continued to seek to find ways of resolving this issue and the ultimate termination took place after two more notices to correct were issued: the last being NTC 10. Thus the issue of whether [the Employer] complied with NTC 8 falls away.

773. However, that is not the end of the matter. The evidence summarised above leaves the Tribunal in no position to conclude with any degree of probability as to whether EI approval was ever likely to be achieved if the Contract had not been terminated as it was. It is for [the Contractor] to satisfy the Tribunal that the EI issues could have been resolved if the Contract had not been terminated in July 2020, but it has not done so.

G. The Tribunal's answers to the issues in relation to NTCs and termination

774. The Tribunal's answers to all the Agreed Issues are set out in Annex 1, which is attached to this Award. However, for the sake of completeness, and because they impact of many of the other issues which are addressed in the Award, for the reasons given above the Tribunal's answers to the issues relating to NTCs and termination are as follows:

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…

(2) Whether [the Employer] is entitled to rely on any or all of the NTCs when purporting to terminate under clause 15.2? **No. For the reasons given above [the Employer] elected not to rely on any non-compliance with NTC 8 after 6 December 2019.**

(4) Whether [the Contractor] repudiated the Contract and, if so, whether [the Employer] can rely on the same? **No (see paragraphs 381-389 and 391-403 above).**

…

(6) Whether [the Employer] made an election and affirmed the Contract? **Save in relation to NTC 8, as discussed above, this issue does not arise and, since it is not necessary to decide it, the Tribunal does not do so.**

(7) Whether the Contract was validly terminated? If not, did such termination amount to a deliberate breach? **No to both questions.**

……

166 Thus, in relation to the Employer's contention that it was entitled to terminate the Contract for issues relating to EI (whether for repudiatory breach or on the terms of the Contract), the Tribunal found:

(a) at a meeting on 6 December 2019, there was an agreement between the parties on a way forward (at [770]);

(b) after that meeting and agreement, the Employer elected not to terminate the Contract on the ground of a failure to comply with NTC 8 (relating to EI), and thereafter it was not open to the Employer to terminate the Contract for non-compliance with NTC8 (at [771], [774(2)]); accordingly the issue of whether the Contractor complied with NTC8 falls away (at [772]);

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(c) thus, the Employer was not entitled to terminate the Contract for repudiatory breach (in relation to EI) (at [774(4)]), and the Contract was not validly terminated (at [774(7)]).

167 There is no inconsistency between those findings, which relate to the Employer electing not to terminate the Contract in relation to EI in light of an agreement between the parties, and the Tribunal finding (at [467]–[470], [773]) that the Contractor had not proved that it could overcome the EI issues (and so the Tribunal dismissed the Contractor's Claim H10).

168 In any event, the issue is not whether the Tribunal's decision was well reasoned, it is whether there was a breach of natural justice by the Tribunal failing to address the Employer's contention that it was entitled to terminate the Contract for repudiatory breach: there was no such breach of natural justice.

169 I thus dismiss the Employer's second natural justice complaint.

Third complaint: in relation to the Employer's case on pre-casting of Location Box ("LB") foundations

170 The Employer says that the Tribunal failed to consider the essential issue of whether the Contractor could have performed the pre-casting of LB foundations before the formation was complete.

171 The Tribunal did consider the pre-casting issue and related matters: that is evident not only from [244] of the Award which the Employer refers to, but also [323], [372], [387] and [389] (which the Contractor refers to) – all these paragraphs are set out below, together with [242]–[243] for context:

> 242. Mr ["K" – the Employer's witness] was asked whether access to track was necessary to establish the

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foundation level of the location box, and his answer initially was that it was not so required, and he went to say that *"top of the foundation has no relationship with the rail* [Day 7/103]: this was in direct conflict with the Employer's pleaded case that it was *"general practice"* that when location boxes are cast along a track the rail level is used as a reference for the location box foundations [B/2.2/41 0].

243. Mr [K] said that the absence of any relationship between the rail level and the top of the LB foundation was consistent with the last drawing approved by the PMC, Rev E. In this he was correct: however, he did not tell the Tribunal that the previous versions of the drawing, from April 2017 - well before the planned start of cable laying - until June 2019, when Rev E was approved, required the top of the LB foundation to be at rail level, nor did he volunteer any explanation for the change in this fairly fundamental requirement. The Tribunal suspects that the problems with access to the completed formation, or possibly problems connected with the procurement of the LBs, made the requirement to install them before the start of cable laying impracticable – or at least without adding to the substantial delay that had already accrued."" Regrettably, the Tribunal finds that it is a reflection of Mr [K]'s approach to giving his evidence to the Tribunal that he was not prepared to offer any explanation for this apparent abandonment of general engineering practice.

244. It is, perhaps, possible that the foundations for the LBs could have been constructed before the formation, but this might have involved constructing the formation around in situ LB foundations: however, the Tribunal did not understand any witness to say that this could or should have been done. It had been put to Mr ["A" – the Contractor's witness] in cross-examination that the only requirement in the contract and reflected in the Method Statement for the "Installation of Location Box/Junction Box" dated 5 July 2019 was the horizontal dimension of a minimum of 2.825 m from the centre line of the track. To this he said: *"if the track is there, then yes, we agreed on it. If the track is not there then how?"* [Day 5/26]. [the Contractor's] counsel understandably did not explore this rather perceptive observation.

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> 323. What was driving the start of the cabling work was the delay in and rate of construction of the formation, and, more specifically, stretches of formation of sufficient length in suitable locations (starting at an ALH ["Auto Location Hut"] or LB). The fact that, historically, some drawings had been submitted late or that there had been some delay in procurement of, for example, LBs, might have been neither here nor there. Prompt submission of the design drawings or early procurement of LBs would have made no difference whatever to the date on which cable laying could start.
>
> …
>
> 372. For the reasons given by [the Contractor's delay expert], at paragraph 8.4.10 of his first report, we do not consider that procurement or installation of LBs was on the critical path. We discuss this later in this award. In any event, the design of the LB foundations was varied in June 2019 to remove the requirement for the top of the foundation to be level with the rail [see F/1054/2837]. Pending this variation, there seems to have been an understanding that installation of LBs did not have to precede the laying of the cable, as the Contract originally required.
>
> …
>
> 387. As to other potential causes of delay, subcontractors for all block sections had been engaged by June 2019 [1/1.1/139). In relation to LBs, the requirement for full compliance with IP65 was withdrawn in February 2019 since none of the approved suppliers in [country "X"] could meet the standard. The first purchase order of 200 LBs was placed on 10 April 2019, with a view to delivery on 25 May 2019. At about the same time [the Contractor] resumed the pre-casting of LB foundations. Thus the delay in the procurement of the LBs was largely driven by the impossibility of finding an approved supplier who could provide a box which was suitably watertight. Specially constructed prototypes were ordered, but these failed the test. This was not due to any fault by [the Contractor]: the contractual obligation of meeting IP65 was incapable of being met and had to be abandoned. The problem in sourcing the LBs arose from the contractual requirement that they should be from approved suppliers and should be IP65 compliant. [The Employer] admits that this requirement could not have been met as none of the approved suppliers had LBs that complied with IP 65 and, surprisingly, puts the fault at [the Employer]'s door for not having sought a

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> variation. In any event, 200 LBs were delivered by one supplier between 2 November and 19 December 2019, 100 LBs having already been delivered by another supplier by 24 October 2019, with a further 100 LBs which were delivered in February 2020.
>
> …
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> 389. Accordingly, the Tribunal finds that any delay in the provision of LBs did not affect the progress of T2 cable laying during 2019. If it had done, the responsibility would have rested with the Employer.

172 From the Award, in particular [372], the Tribunal found: “we do not consider that procurement or installation of LBs was on the critical path” (see also [389]). That being the case, the Employer’s natural justice complaint about the pre-casting issue leads nowhere: even if there were any breach of natural justice in relation to the pre-casting issue, the Tribunal’s finding that procurement and installation of LBs were not on the critical path meant that even if the Tribunal had found that the Contractor could have, and should have, pre-cast the LBs, the Tribunal would have found that did not contribute to the delay to the Works. Any breach of natural justice thus would not have caused the Employer any prejudice, and prejudice is an element that the Employer needs to establish to set-aside an Award (or part thereof) for breach of natural justice.

173 In any event, I do not agree with the Employer’s specific complaints in relation to this alleged breach.

174 First, the Employer points to [244] of the Award where the Tribunal observed that it was “possible” that the LB foundations could have been constructed before formation, but said that no witness had mentioned whether the pre-casting of LB foundations could have been done before the formation was complete.

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175 This mischaracterises what the Tribunal said at [244]:

(a) The Tribunal did not merely say it was possible that the LB foundations could have been constructed before formation, it added "this might have involved constructing the formation around in situ LB foundations".

(b) In context, the Tribunal's statement that it "did not understand any witness to say that this could or should have been done" referred not merely to the possibility of pre-casting the LB foundations, but also that "this might have involved constructing the formation around in situ LB foundations" as the Tribunal had just said.

(c) At [244] the Tribunal had also referred to what the Contractor's witness Mr "A" had said about installing LBs a minimum of 2.825 m from the centre line of the track, and how could that be done if the track was not there?

176 Second, the Employer says that the Tribunal did not apply its mind to the "fact" (which had been brought to its attention) that the LB could have been installed anywhere within the right of way, and did not have to be placed on the formation. This was not a "fact" as the Employer puts it, for the Contractor had disputed it: the Contractor's evidence was that the LBs were meant to be constructed on the blanket/formation.[21]

177 Third, the Employer says the Tribunal completely failed to consider the Employer's evidence that the parties had arrived at an understanding that the Contractor should, and could, perform pre-casting of the LB foundations to

[21] Contractor's affidavit, at [118].

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expedite the Works. The evidence cited for this[22] rests on the Engineer having allowed the Contractor to pre-cast the LB foundations, which the Contractor had sought permission for. It was nevertheless the Contractor's position, as it maintained in the Arbitration, that pre-casting was not technically workable or practical since the final location and height of LBs could only be confirmed from the actual track, as was reflected in the Contractor's Reply to Amended Defence in the Arbitration, at [82].[23]

178 Ultimately, these criticisms of how the Tribunal dealt with the pre-casting issue do not reveal any breach of natural justice, all the more so when set against the backdrop of the Tribunal's finding that procurement and installation of LBs was not on the critical path, and so whether or not the LBs could or should have been pre-cast did not cause the delay to the Works.

179 I thus dismiss the Employer's third natural justice complaint.

Fourth complaint: in relation to the Employer's evidence on whether the changes to the Auto Location Huts ("ALHs") constituted variations

180 The Employer's fourth and last natural justice complaint is that the Tribunal allowed the Contractor's Claim H2 for additional payment due to variation works required by the Employer in relation to the ALHs).

181 The Tribunal specifically addressed Claim H2 in "Section XIII. The ALH Variation (H2)" running from [775]–[813] (on liability) and [807]–[818] (on quantum and interest) of the Award. *In that section*, the Tribunal did not

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22 Employer's affidavit, vol 1, at [173]–[180]; also see the Contractor's affidavit, at [115].

23 Contractor's affidavit, at [110].

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mention the evidence of the Employer's witness Mr K, and so the Employer says the Tribunal must have failed to consider Mr K's evidence on Claim H2.

182 The Tribunal did however mention Mr K's evidence on other aspects of the case. More pertinently, the Tribunal said at [312] that it had undertaken "careful consideration of *[Mr K's] evidence as a whole*" and at [313] that it approached "*all of his evidence* with considerable reservation" [emphasis added]. Those references go against the Employer's contention that the Tribunal had failed to consider Mr K's evidence on Claim H2.

183 The Tribunal's criticisms of Mr K's evidence as a whole (at [312] – [313]) merit fuller examination.

184 At [240]–[245] of the Award, the Tribunal reviewed Mr K's evidence on the pre-casting issue; [242]–[243] of the Award have been set out at [171] above. At [242] of the Award, the Tribunal noted that Mr K's evidence that access to track was not necessary to establish the foundation level of the LB was in direct conflict with the Employer's pleaded case that it was "general practice" that when LBs are cast along a track the rail level is used as a reference for the LB foundations. At [243] of the Award, the Tribunal said, "Regrettably, the Tribunal finds that it is a reflection of Mr [K's] approach to giving his evidence to the Tribunal that he was not prepared to offer any explanation for this apparent abandonment of general engineering practice".

185 At [306]–[311] of the Award, the Tribunal reviewed Mr K's evidence on HDD ("horizontal direct drilling"). At [310] of the Award, the Tribunal said Mr K had made a blatant attempt to divert cross-examination by introduction, for the first time and without any advance notice, an entirely new method of

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construction. At [311]–[313] of the Award, the Tribunal's criticism of Mr K's evidence was biting:

> 311. Unfortunately, in the case of Mr [K], this digression about HDD was not an isolated incident. In the course of his evidence, Mr [K] more than once answered a question that he had not been asked.
>
> 312. The Tribunal will have to refer to other parts of Mr [K's] evidence later in this Award, but the Tribunal feels compelled to say at this point that after a careful consideration of *Mr [K's] evidence as a whole* it is left with an indelible impression that his evidence appeared at times as an attempt to help his employer's case, and not, we regret to say, to be of assistance to the Tribunal.
>
> 313. Accordingly, in these circumstances, we approach *all of his evidence* with considerable reservation. [Emphasis added.]

186 At [828], the Tribunal referred to Mr K's evidence in relation to the Contractor's Claim H1, which concerned the change in the number and location of Level Crossing Gates. The Tribunal said, "…[the Employer] relies on the evidence of Mr [K] who expressed his view that [the Contractor's witness] Mr [H's] calculation of the time spent was too high." At [831], the Tribunal said it found no reason, in light of the exchanges between the Contractor and the Engineer, to doubt the truth and reliability of the evidence given by [the Contractor's witnesses Mr H and Mr "CG"], none of which was challenged when they gave oral evidence. The Tribunal then said at [832]:

> To the extent that there are differences between the evidence given by [Mr H] and [Mr K], for the reasons set out in Section VII above, the Tribunal is not assisted by the latter.

187 That reference to Section VII in [832] of the Award would appear to be a typographical error (the correct reference being to section VI instead). Although there were references to Mr K's evidence in Section VII (which ran at [374], [376] and [441], the Tribunal's reference to and criticism of Mr K's

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evidence "as a whole" was in [312]–[313] of the Award, which were in Section VI (running from [171]–[313]), not Section VII (running from [314]–[370]).

188 This is reinforced by the (correct) reference to section VI in the very next paragraph of the Award – [833], where the Tribunal said that Mr S's evidence was of limited assistance to the Tribunal, for principally, three reasons as set out at [319]–[336].

> 833. For the reasons ***also*** *explained in Section VI* above, the Tribunal was not impressed by the evidence given by Mr ["S" – the Employer's delay expert] on a number of matters and it finds that the serious criticism made by the Contractor in respect of his expert evidence on this issue to be justified. [Emphasis added.]

189 The reasons the Tribunal referred to at [833] of the Award would be those at [319]–[333] (in Section VI) of the Award, where the Tribunal said that Mr S's evidence was of limited assistance to the Tribunal for, principally, three reasons as set out in that part of the Award.

190 Given the various references to and criticisms of Mr K's evidence on other aspects, the Tribunal saying that (at [312]) that it had carefully considered his "evidence as a whole", and (at [313]) that it approached "all of his evidence" with considerable reservation, I cannot draw the inference that the Tribunal failed to consider his evidence on Claim H2 merely because the Tribunal did not specifically mention Mr K's evidence on Claim H2 in Section XIII where that claim was discussed. For such an inference to be drawn, it would have to be clear and virtually inescapable (*AKN v ALC* [2015] 3 SLR 488 at [46]) – it was not.

191 In any event, given the Tribunal's criticisms of Mr K's evidence, and how it dealt with Claim H2, even if the Tribunal had failed to consider Mr K's

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evidence in relation to that claim, I am not persuaded that Mr K's evidence on that "could reasonably have made a difference" to the Tribunal – "it is evident that there is no prospect whatsoever that the material…would have made any difference because it wholly lacked legal or factual weight."[24]

192 I reach this conclusion not only because of what the Tribunal said of Mr K's evidence (as discussed above), but also because of how the Tribunal approached Claim H2.

(a) The Tribunal found from the wording of a letter from the Engineer, that the Engineer had issued an instruction which constituted a variation under the Contract, to change the size of the ALH building(s) (at [798]).

(b) The Tribunal said if the Employer had wished to maintain its pleaded denial of the Contractor's pleaded case, that should have been clearly put to the one witness (Mr G) who gave evidence in support of the Contractor's case (at [797]), but it was not (at [787]) – Mr G's evidence on this claim was not challenged in cross-examination, and so the Tribunal described his evidence as "unchallenged" (at [801], [802], [803].

(c) The Tribunal found the Contractor's Mr G to be a credible witness and accepted his evidence (at [800]–[806]).

193 Mr K's evidence could not reasonably have made a difference to these matters: it could not reasonably have changed the Tribunal's decision (based on

[24] Employer's Written Submissions, at [80], citing *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 12530 at [54].

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the wording of the Engineer's letter) that the Engineer had issued a variation amounting to a variation to change the size of the ALH building(s), it could not have changed the failure to put the Employer's denial of the Contractor's pleaded case to Mr G in cross-examination, and it could not reasonably have changed the Tribunal's view of Mr G as a credible witness.

194 In the circumstances, even if there were any breach of natural justice, that would not have caused any prejudice to the Employer.

195 I thus dismiss the Employer's fourth natural justice complaint.

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Conclusion

196 For the above reasons, I dismiss the Employer's application to set aside the Final Award dated 2 April 2025 and the Decision and Addendum dated 25 June 2025.

197 Unless the parties can agree on costs, they are to file their costs submissions, limited to eight pages excluding any schedule of disbursements, by 17 April 2026.

Andre Maniam
Judge of the High Court

Koh Swee Yen, SC, Pang Yi Ching Alessa, Daniel Gaw Wai Ming, Ooi Shu Min and Shawn Ang De Xian (WongPartnership LLP) for the claimant;
Poon Kin Mun Kelvin, SC, Vellayappan Balasubramaniyam, Divyesh Menon, Ho Linming and Ku Chern Ying Vanessa (Rajah & Tann Singapore LLP) for the defendant.

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