IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 53

Civil Appeal No 9 of 2019

Between

(1) BBA
(2) BBB
(3) BBC
(4) BBD
(5) BBM
(6) BBN
(7) BBO
(8) BBP
(9) BBQ
(10) BBR
(11) BBS
(12) BBT

… *Appellants*

And

BAZ

… *Respondent*

Civil Appeal No 10 of 2019

Between

(1) BBF
(2) BBG
(3) BBH

… *Appellants*

And

BAZ

… *Respondent*

JUDGMENT

[Arbitration] — [Award] — [Setting aside]

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BBA and others
v
BAZ and another appeal

[2020] SGCA 53

Court of Appeal — Civil Appeal Nos 9 and 10 of 2019
Sundaresh Menon CJ, Judith Prakash JA, and Quentin Loh J
24 February 2020

28 May 2020 Judgment reserved.

Quentin Loh J (delivering the judgment of the court):

Introduction

1 These two appeals arise from the sale and purchase of a controlling 64% stake of the shares ("the Shares") in a company, C, which was said to be India's largest manufacturer of generic pharmaceutical products. The buyer was BAZ, a Japanese corporation. The sellers comprised the family members of C's founder and several companies controlled by them ("the Sellers"). The Sellers were led by BBA, a grandson of C's founder. Five of the Sellers were minors ("the Minors").

2 Disputes arose over alleged misrepresentation and concealment of material facts by the Sellers. BAZ commenced arbitration in Singapore on 14 November 2012 against the Sellers, 20 of whom were eventually named as

respondents in the arbitration. In an award dated 29 April 2016 ("the Award"), the majority of the tribunal ("the Majority") held in favour of BAZ.

3 BAZ is the respondent in these appeals. It had applied in Originating Summons No 490 of 2016 ("OS 490") for leave to enforce the Award, and obtained an *ex parte* order for enforcement on 18 May 2016. OS 490 was then opposed by the Sellers. The Sellers split themselves into two groups with each filing a summons on 15 September 2016 to set aside the *ex parte* enforcement order obtained by BAZ:

(a) a group comprising the Minors, being the 5th, 9th, 10th, 11th and 12th defendants in OS 490, filed Summons No 4497 of 2016 ("SUM 4497"); and

(b) the remaining defendants, being the 1st to 4th, 6th to 8th and 13th to 20th defendants, whom we shall call "the OS 784 Sellers" (see [4(b)] below), filed Summons No 4499 of 2016 ("SUM 4499").

4 Before filing SUM 4497 and SUM 4499, the Sellers also commenced proceedings against BAZ on 3 August 2016 seeking to set aside the Award under s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and Arts 34(2)(*a*)(iii) and 34(2)(*b*)(ii) of the UNCITRAL Model Law ("ML"):

(a) The Minors filed Originating Summons No 787 of 2016 ("OS 787").

(b) The OS 784 Sellers filed Originating Summons No 784 of 2016 ("OS 784").

5 In *BAZ v BBA and others* [2018] SGHC 275, the High Court judge ("the Judge") dismissed the OS 784 Sellers' setting aside application and SUM 4499, but allowed the Minors' setting aside application and SUM 4497. Only the OS 784 Sellers appealed.

6 On appeal, three of the OS 784 Sellers (the 5th, 6th and 7th defendants in OS 784) sought separate representation to bring Civil Appeal No 10 of 2019 ("CA 10"), while the remaining OS 784 Sellers brought Civil Appeal No 9 of 2019 ("CA 9"). We will refer to the appellants as the "CA 9 Appellants", the "CA 10 Appellants", or collectively, "the Appellants", as the case may be.

7 We reserved judgment after hearing the parties, and now deliver our decision dismissing CA 9 and CA 10 in their entirety.

Facts

Background to commencement of arbitration

8 It would be helpful to establish the timelines of the salient events in this dispute to appreciate some of the issues that arose and how they came to be resolved by the arbitral tribunal.

9 BAZ approached BBA at the end of 2007 to negotiate the purchase of the Shares. The parties signed the Sale and Purchase Agreement (the "SPA") on 11 June 2008. Completion of the SPA took place on 7 November 2008. BAZ paid the Sellers around INR 198 billion (about US$4.6 billion) for the Shares. After completion, BBA initially continued as a director of C, but he subsequently resigned on 24 May 2009 following differences of opinion with BAZ's appointees on the Board. By that time relations between BBA and BAZ had become strained.

10 The disputes that led to the arbitration arose over an internal report which BAZ alleged the Sellers had concealed from it. It transpired that in September 2004, the then-President of C's Research and Development Department had issued a Self-Assessment Report ("the Report") detailing how C engaged in data falsification to expedite the obtaining of regulatory approval for numerous drug products around the world. The Report did not garner much attention within C, but in 2005, an employee of C blew the whistle by secretly disclosing the Report to the United States authorities. The United States Department of Justice ("DOJ") and the United States Food and Drug Administration ("FDA") began investigations in early 2006. BAZ and the Sellers dispute when BAZ came to know of the Report or when BAZ could, with reasonable diligence have discovered it. Be that as it may, negotiations with the DOJ and FDA led to a settlement or consent decree in December 2011, and C made provision for paying an anticipated settlement sum of US$500 million.

11 As noted, on 14 November 2012, BAZ commenced arbitration against the Sellers under the SPA alleging misrepresentation and concealment of facts regarding the extent of the investigations by the DOJ and FDA.

12 After BAZ commenced arbitration, the following events occurred:

(a) On 13 May 2013, C paid the DOJ the settlement sum of US$500 million.

(b) On 6 April 2014, BAZ announced the merger of C with another company ("Y Co"), under which all of C's shareholders would receive 0.8 Y Co shares for every one share in C ("the Merger").

(c) From 29 September to 10 October 2014, the substantive hearings of the arbitration were held in Singapore.

(d) On 25 March 2015, the Merger of C with Y Co was completed.

(e) On 21 April 2015, BAZ sold all its shares in Y Co in the open market.

(f) On 29 April 2016, the Majority rendered their Award.

13 We note at this juncture that the governing law of the SPA is Indian law and the SPA contains the following arbitration clause:

> **13.14 Dispute Resolution; Arbitration**
>
> 13.14.1 Any and all claims, disputes, questions or controversies involving the Sellers (or any of them) and the Company on the one hand and the Buyer and/or its Affiliates on the other hand … arising out of or in connection with this Agreement, or the execution, interpretation, validity, performance, breach or termination hereof (collectively, "**Disputes**") which cannot be finally resolved by such Parties within 60 (sixty) calendar days of the arising of a Dispute by amicable negotiation and conciliation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the "**ICC**") in accordance with its commercial arbitration rules then in effect (the "**Rules**"), provided that following the Subsequent Sale Shares Closing, the Sellers on the one hand and the Company and the Buyer on the other hand shall be considered as separate Disputing Sides. The place of arbitration shall be Singapore. … The arbitrators shall not award punitive, exemplary, multiple or consequential damages. …
>
> …
>
> 13.14.4 … The Award shall include interest from the date of any breach or other violation of this Agreement and the rate of such interest shall be specified by the arbitral tribunal and shall be calculated from the date of any such breach or other violation to the date when the Award is paid in full.

The Majority's decision in the Award

14 In its Award dated 29 April 2016, the Majority addressing the following key issues.

(1) Time bar defence

15 The Sellers argued that BAZ's claim was time-barred under s 17 of the Indian Limitation Act 1963 (Act No 36 of 1963) (India) ("Indian Limitation Act"). This provided that for a claim based on the defendant's fraud, time begins to run once the plaintiff has discovered, or could with reasonable diligence have discovered, the fraud. BAZ could have discovered the concealment of the Report with reasonable diligence following multiple events occurring between October 2008 and end April 2009. A person in a senior leadership position in BAZ was allegedly informed that the US authorities were in possession of the Report. BAZ, on the other hand, argued that it only became aware of the concealment of the Report on 19 November 2009, such that the commencement of arbitration on 14 November 2012 was within the limitation period.

16 The Majority found that the commencement of the arbitration was not time-barred. It made a finding of fact that notwithstanding two meetings in March 2009 at which the Report was mentioned, this was insufficient to fix BAZ with the requisite knowledge of the fraud. BAZ had acted with reasonable diligence in the entire context and could not have discovered the Report before 19 November 2009 without having to take exceptional measures which it could not reasonably have been expected to take.

(2) Damages for fraudulent misrepresentation

17 The Majority awarded about INR 25 billion in damages for fraudulent misrepresentation after finding that BBA was liable for fraud under the Indian Contract Act 1872 (Act No 9 of 1872) (India) ("Indian Contract Act"). BAZ had not sought rescission but instead relied on s 19 of the Indian Contract Act to seek damages that would put it in the same positon as if the representation had been true. Section 19 states:

> **19. Voidability of agreements without free consent:–** When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> *A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.*
>
> [emphasis added]

18 The Majority stated that it was "not disputed" that under Indian law, the measure of damages recoverable under the second limb of s 19 of the Indian Contract Act would be similar to those recoverable for fraudulent misrepresentation under general tort principles. The Majority relied on the Gujarat High Court decision in *R C Thakkar v Gujarat Housing Board* AIR 1973 Guj 34 ("*RC Thakkar (HC)*") and the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 ("*Smith New Court*"). The Majority noted that because both sides had indicated that the relevant principles were those in *Smith New Court*, "[BAZ] is entitled to recover damages in a sum equal to the difference (if any) between what it paid for its C shares and any other direct losses less any benefits it has received. The object is to restore the Claimant to its position before the acquisition".

19 We pause to make some observations on the nature of the problem the tribunal had to grapple with. The relevant events spanned a number of years and this caused temporal issues in the assessment of damages; a simple comparison of the purchase price for the C shares and sale of the Y Co shares over six years later may not have revealed BAZ's true losses. Further complexities arose in quantifying the loss as the Indian rupee (the denomination in which these transactions were carried out) was not stable, there was a foreign currency element involved as BAZ was a Japanese company, and historical interest rates also had to be considered.

20 The Majority considered several approaches to quantifying damages:

(a) The approach proposed by BAZ's expert ("Dr Ball"), which involved taking the difference between what BAZ paid for and eventually received in exchange for the Shares, less any benefits BAZ was able to obtain (including amounts recoverable through the sale of the Shares and any dividends).

(b) The discounted cash flow ("DCF") method endorsed by the Sellers, which calculated the value of shares based on the present values of expected future cash flows.

(c) An alternative methodology proposed by the Sellers' expert, ("Dr Saunders"), during his oral testimony, which linked any possible loss suffered by BAZ due to the Sellers' failure to disclose the Report to the settlement amount paid by C under the consent decree. This was premised on the incremental effect the Report potentially had on the final settlement sum of US$500 million, and on how much the purchase price paid for C would have been affected if the Report and its effect were known at the time of entering into the SPA.

(d) Two other methodologies modified from the Sellers' proposals. The first was the Sellers' "SAR [*ie*, Self-Assessment Report] adjusted calculation", which took into account the incremental effect of the Report on share prices. The second was the Sellers' "principled alternative market value approach", which considered the market price of the Shares in their "disaster-impregnated" state in May 2013 with a premium for the controlling interest.

21 The Majority held that Dr Ball's approach of quantifying loss and benefit and then setting them off was correct "as a matter of principle", and in line with *Smith New Court*. However, it noted several difficulties and modified Dr Ball's method, by (a) using the closing date for the Merger instead of the Merger transaction date as proposed by Dr Ball as the relevant date for calculation, and (b) accounting for the 6-year time gap between the SPA and the Merger by calculating the "present day value" of money. Regarding the latter, the Majority applied a discount rate of 4.44% which was the midpoint of BAZ's Weighted Average Cost of Capital ("WACC") (see [47] below for the Majority's calculations). The WACC represented the average rate of return that BAZ would seek to make from its investments. Using the WACC *as a discount rate* was in fact a suggestion by the Sellers' expert.

22 Finally, the Majority reminded itself that damages awarded must not be contrary to the prohibition on "punitive, exemplary, multiple or consequential damages", and therefore benchmarked the sum awarded against the two alternative methods of calculation based on the Sellers' approaches. The SAR adjusted calculation yielded a figure of INR 8 billion and the principled alternative market value approach yielded INR 30 billion.

23 Liability for damages was joint and several amongst all the Sellers, with no distinction made with respect to the Minors or the size of the respective shareholding of each seller.

(3) Pre-award interest

24 The Majority awarded pre-award interest of about INR 8 billion, being computed as simple interest of 4.44% per annum on the damages sum of INR 25 billion commencing from the date of closing of the SPA to the date of the Award. The Majority relied on cl 14.14.1 of the SPA (see [13] above) and s 20 of the IAA, which governs interest on awards. It stated that it was mindful of the danger of double counting in providing both for an adjustment to account for the present value of money using BAZ's WACC and also allowing interest from the date of closing. It ultimately concluded that these were "two distinct matters", with the former concerned with the need to adjust for the present value of money and the latter to account for the fact that BAZ had borrowed money and committed its resources to acquiring the Shares at the expense of other matters. The 4.44% interest rate was arrived at having regard to the average of BAZ's WACC.

Enforcement proceedings

25 On 17 May 2016, BAZ commenced simultaneous proceedings for leave to enforce the Award as a court judgment in New Delhi and in Singapore.

(1) Indian enforcement proceedings

26 Before the New Delhi High Court ("the DHC"), both parties stated that the pendency of the Singapore proceedings would not prevent the DHC from adjudicating the enforcement proceedings in India. The DHC reserved judgment

on 6 September 2017 and pronounced judgment on 31 January 2018 ("the DHC Judgment").

27 The issues before the DHC were: (a) whether the damages awarded were contrary to s 19 of the Indian Contract Act and would shock the conscience of the court, (b) whether the Award granted consequential damages which were beyond the jurisdiction of the Tribunal, (c) whether the claim was barred by limitation, and (d) whether the pre-award interest amounted to an award of multiple damages. The DHC also considered whether the Award against the Minors was illegal, *non est* and void, and against the public policy of India.

28 Nath J denied enforcement against the Minors on public policy grounds, but allowed enforcement against the remaining Sellers after deciding the above issues in favour of BAZ.

(2) Singapore enforcement proceedings

29 As noted above, an *ex parte* leave order was made in Singapore on 18 May 2016. The Sellers applied to set aside that order on 15 September 2016. They also filed OS 784 and OS 787 to set aside the Award on 3 August 2016. The hearing was conducted in April 2018, and the Judge delivered her decision ("the Judgment") in December 2018.

Arguments and decision below

30 In OS 784 and OS 787, the Sellers sought to set aside the Award on the following grounds (Judgment at [22]):

> (a) The award of damages, either by itself or together with the pre-award interest, was beyond the scope of the tribunal's jurisdiction because this constituted "punitive, multiple and/or consequential

damages" prohibited by the arbitration clause in the SPA. Hence the Award should be set aside under Art 34(2)(*a*)(iii) of the ML.

(b) There were breaches of natural justice in that the Majority had failed to consider the Sellers' position that the tribunal was not permitted to apply a discount rate and whether it was correct to grant tortious relief in respect of a claim under s 19 of the Indian Contract Act, and had failed to allow the Sellers to present further arguments on subsequent sale of the Swapped Shares by the Buyer, so the Award should be set aside under s 24(*b*) of the IAA.

(c) The issue of time limitation could be reviewed *de novo* given that the time limitation was a jurisdictional issue under Indian law, and the Majority was wrong to find that the claim was not time-barred, so the Award should be set aside.

(d) The Award against the 2nd, 4th, 6th, 7th and 8th plaintiffs in OS 784 (*ie*, BBB, BBD, BBG, BBH and BBM) ("the Non-Management Sellers") was against the public policy of Singapore because they should not be bound by the fraudulent misrepresentation of BBA, and the Award was disproportionate to the sizes of their respective shareholdings in C, so it should be set aside as against them under Art 34(2)(*b*)(ii) of the ML.

(e) The Award against the Minors was against the public policy of Singapore and should be set aside under Art 34(2)(*b*)(ii) of the ML.

31 BAZ's position was as follows (Judgment at [24]):

(a) The Sellers were precluded on the basis of issue estoppel from litigating the jurisdictional challenges against the damages and pre-award interest because these issues had already been canvassed before the DHC and decided by the DHC.

(b) The Sellers were precluded on the basis of the extended doctrine of *res judicata* from raising the jurisdictional challenges against the damages and pre-award interest, as well as their challenge as to the Majority's reliance on *RC Thakkar (HC)*. These challenges should have been raised before the tribunal. The Sellers also waived their right to waive any jurisdictional challenge, or to raise public policy objections.

(c) The tribunal did not exceed its jurisdiction by awarding damages and pre-award interest.

(d) The Sellers could not revisit the issue of time limitation because the merits of an award cannot be reviewed.

(e) There was no breach of natural justice.

(f) The Award against the Non-Management Sellers did not violate the public policy of Singapore.

(g) The Award against the Minors did not violate the public policy of Singapore.

32 The Judge held that no issue estoppel arose, that the extended *res judicata* doctrine and waiver did not apply, and that there were no breaches of natural justice regarding the allegations at [30(b)] above; but that the Award should be set aside as against the Minors for being in breach of public policy. These findings are not being appealed against.

33 As for the remaining issues, the Judge held as follows:

(a) The Majority did not exceed their jurisdiction. First, on the consequential damages issue, notwithstanding some infelicitous wording, the Majority was *not* granting consequential damages but was only quantifying BAZ's loss by taking the difference between the purchase price of the Shares and their actual value, which represented the overpayment for the Shares, and accounting for the benefits BAZ obtained (Judgment at [84]). Secondly, on the issue of whether pre-award interest was an award of multiple or punitive damages, this was not the case as the damages and pre-award interest compensated for different things. In addition, mathematically speaking, the WACC rate was applied to different sums of moneys in the quantification of damages and that of the pre-award interest. The Majority had also stated explicitly that it was aware of the dangers of double-counting in using a discount rate to account for the present value of money and awarding interest from the date of acquisition (Judgment at [116]–[117]).

(b) Time bar was not a jurisdictional issue, contrary to the Sellers' contention. Instead, this was an issue of admissibility, given that it targeted the claim and not the tribunal. Thus, the determination of whether the claim was time-barred was for the tribunal to deal with, and it had done so extensively (Judgment at [130]–[132]).

(c) There was no breach of public policy in relation to the Non-Management Sellers. The Non-Management Sellers had argued that the Award should be set aside as against them on the ground that it would offend the public policy of Singapore, in that: (i) the Award imposed liability on them, who were innocent principals, for an agent's

fraudulent misrepresentation; and (ii) it was disproportionate to hold them jointly and severally liable with the rest of the defendants in the arbitration when they only held 0.65% of the Shares. The Judge dismissed the first ground on the basis that it was "an appeal against the factual finding of the Majority dressed up as a public policy challenge". The Judge also dismissed the proportionality argument. The Sellers had failed to show that the principle of proportionality of damages was a stand-alone public policy. The cases relied on did not elevate the principle of proportionality of damages in and of itself to a fundamental substratal legal principle that applied in all cases. Further, the Sellers had failed to identify any underlying public policy to engage the principle of proportionality in the relationship between the damages awarded and the size of the shareholding held by each defendant (Judgment at [164]–[167]).

Issues on appeal

34 We summarise the parties' arguments briefly here for the purposes of crystallising the relevant issues, and revisit these in detail below.

35 The CA 9 Appellants repeated their submission below that the awards of damages as well as pre-award interest were beyond the parties' scope of submission to arbitration, because this was compensation for loss of opportunity that amounted to consequential damages. When taken together with the damages award, the pre-award interest also amounted to double recovery and therefore also constitutes punitive or multiple damages. The CA 9 Appellants further submitted that the seat court was entitled to undertake a *de novo* review of whether BAZ's fraud claim was time-barred, since time-barred claims fall entirely outside the scope of the parties' submission to arbitration.

36 The CA 10 Appellants aligned themselves with the CA 9 Appellants on the excess of jurisdiction submission regarding the award of damages and pre-award interest. Additionally, they argued that the finding of joint and several liability gave rise to three grounds of challenge: (a) a breach of natural justice, in particular of the fair hearing rule, because the Majority found the Sellers jointly and severally liable to BAZ without hearing submissions on this point; (b) an excess of jurisdiction, because the Majority found the Sellers jointly and severally liable even though this was not a matter submitted for determination to the tribunal; and (c) a breach of public policy, because this "ignore[d] the fundamental principle that a shareholder's rights and liabilities in a company is limited to the size of its shareholding" and was also an egregious error of law in the making of an award.

37 BAZ disagreed that any of the above grounds for setting aside were made out.

38 From the above, these issues arise for our determination:

(a) Did the Majority, in awarding damages and/or pre-award interest as it did, fall afoul of the prohibition on "punitive, exemplary, multiple or consequential damages" in the arbitration clause ("the Express Prohibition") and thereby exceed its jurisdiction ("the Damages and Interest Issue")?

(b) Is the seat court entitled to undertake a *de novo* review of whether BAZ's fraud claim is time-barred under the Indian Limitation Act, and if so, would that claim be time-barred ("the Time Bar Issue")?

(c) Does the Majority's finding of joint and several liability give rise to a challenge on the grounds of breach of natural justice, excess of jurisdiction, or public policy ("the Joint and Several Liability Issue")?

The Damages and Interest Issue

39 An arbitral tribunal exceeds its jurisdiction if it decides on issues that are beyond the scope of the arbitration clause, upon a proper construction of the clause (*Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 at [11]). We find that the Majority did *not* breach the Express Prohibition by awarding damages or pre-award interest as it did.

Damages as consequential damages

40 In support of the view that the award of damages breached the Express Prohibition because such damages were compensation for loss of opportunity hence consequential damages, counsel for the CA 9 Appellants, Mr Alvin Yeo SC ("Mr Yeo") first argued that the Merger, being a subsequent event, *should not be considered at all* because it was too far removed from the initial purchase of C shares by BAZ. The correct approach was the DCF approach.

41 In our judgment, this was a submission that should have been urged upon the *tribunal* rather than the seat court, because it went towards the substantive merits of *which approach to quantification* the tribunal should adopt. We repeat the views of this court in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [37] (see to similar effect *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(b)]–[65(c)]) that:

> A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. ***The courts do not and must not interfere in the merits of an arbitral award*** *and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law and the IAA …* [emphasis added in italics and bold italics]

42 Thus, if a tribunal ends up deciding (as the Majority did in this case), for reasons of evidentiary difficulty or any other reason, to deal with quantification in respect of a past transaction by pegging it to a value to be derived from a subsequent transaction, then pursuant to that approach the tribunal may try to achieve temporal commonality between the subsequent incoming receipts (here, from the Merger) and the earlier outgoing expenditure (BAZ's purchase of the Shares in 2008) by discounting the later-in-time value. Mr Yeo rightly conceded this.

43 In the same vein, Mr Yeo's submissions regarding the Majority's reliance on *RC Thakkar (HC)* and *Smith New Court* were not points that were open for the Appellants to take before us. Even if the Majority erred in their understanding or application of the relevant legal principles, it is trite that errors of law or fact, even if serious, go to the merits of the award and are outside the remit of this court: see *BLC and others v BLB and another* [2014] 4 SLR 79 at [53] and [102].

44 Next, Mr Yeo attempted to rely on various portions of the Award that allegedly indicated the Majority's subjective intention to compensate for loss of opportunity via their damages award ("the Impugned Statements"). He highlighted that the Majority had stated at para 1062 of the Award that it would

be overly simplistic to do a direct numerical comparison of the price paid by BAZ for acquiring the C shares and the amount it received from the Merger because this "does not account for the *opportunity cost over those 6 years* of [BAZ] not entering into a transaction with a different generics company or the other business opportunities which could have been taken" [emphasis added] using the money that was diverted to acquiring the C shares. Further, para 1079 of the Award provides that "the fairest way to allow for the Claimant's *loss of the opportunity to utilise the money* during the interim period is to apply the Claimant's average WACC" [emphasis added].

45 We agree with the Judge that whilst there was some infelicitous language used by the Majority, the Impugned Statements must be read in context. The first Impugned Statement (indicated in bold italics below) reads more like a rumination, or extended soliloquy, on the difficulties of trying to equalise or compare cash flows coming in at different points in time:

> 1062. From an accounting point of view, however, it would, be overly simplistic to suggest that this establishes that the Claimant suffered no loss as a result of entering into the transaction. This formulation takes no account of the time, costs and the rehabilitative work carried out by Claimant's officers in order to assist [C]. It does not account for the business or reputational issues faced by [BAZ] as a result of entering into a transaction to acquire a "tainted" generics company; ***it does not account for the opportunity cost over those 6 years of the Claimant not entering into a transaction with a different generics company or the other business opportunities which could have been taken by the Claimant using the money which it diverted to the acquisition of [C] shares***, the warrants and the compulsory acquisition of related companies which arose as a result of entering into the SSPSA; it does not account for the diminution in [C] dividends as a result of the various liabilities and onerous costs faced by [C] in addressing the US investigations; it does not address the business opportunities lost by [C] as a result of taking so long to resolve the various US regulatory issues. It also does not take account of any actions by the Claimant as majority shareholder or other supervening factors which might have led to poor performance by [C] in the intervening period.

> On the benefit side, the simple sale price calculation also does not account for benefits to the Claimant as a result of possible synergies with [C]. Some of the factors identified above are overlapping while others might have the effect of cancelling each other out. [emphasis added in bold italics]

The observation in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [45] is apt here: "The court should not nit-pick at the award. Infelicities are to be expected and are generally irrelevant to the merits of any challenge".

46 As far as the Majority's subjective intention is concerned, the Impugned Statements must also be read with other portions of the Award. Elsewhere, the Majority affirmed that its task was to "determine what damages, if any, would be required to place [BAZ] *in the position it was in before the acquisition occurred*" [emphasis added] (at para 1049 of the Award), cross-checked the eventual award of damages using a modified version of *the Appellants'* own expert's alternative methodology (at paras 1082–1092), and explicitly reminded itself of the Express Prohibition (at para 1081 of the Award, see [47] below). All these would be inconsistent with any subjective intention to award damages for loss of opportunity, as opposed to usual compensatory damages.

47 Turning then to the second Impugned Statement (at para 1079 of the Award), we note Mr Yeo's acceptance during oral argument of the view that in looking at what the tribunal did, the court should look at *substance and not form*. We need to appreciate the substance of what the Majority was doing; they state at para 1074:

> **Tribunal's Quantification**
>
> 1074. The Tribunal has taken a pragmatic and conservative view in applying the Claimant's methodology, as adjusted where appropriate by erring in favour of the Respondents. In this

> regard, Tribunal accepts that, in ascertaining if the Claimant had suffered any loss, account must be taken of:
>
> a. the value [BAZ] recovered from the [Y Co] transaction at the time the transaction was closed viz. 25 March 2015;
>
> b. the benefits [BAZ] received by way of the dividends; and
>
> c. [BAZ's] "present day value" of money during the period of 6 years when it was holding the [C] shares.
>
> [emphasis added in underline]

From what follows, it seems clear to us that what the Majority was in fact trying to work out was the 2008 value of the 2014 receipt from the Merger with Y Co (with the closing on 25 March 2015) and the 2011 dividends. Hence the Majority concluded at paras 1079 to 1081 as follows:

> 1079. The Tribunal accepts the criticisms made by Mr Saunders and determines that ***the fairest way to allow for the Claimant's loss of the opportunity to utilise the money during the interim period*** is to apply the Claimant's average WACC for that period rather than the 7.5% rate used by Dr. Ball. Taking an average of the 4.35% and 4.53%, the Tribunal would then apply a discount rate of 4.44% within the band given by Nomura to give effect to the present value of the recoverable amount from the [Y Co] transaction.
>
> 1080. Taking into account the recoverable value from the [Y Co] transaction, the dividends received and the discount rate applicable for the "present value" of the recoverable amount from the [Y Co] transaction, the Tribunal has computed the Claimant's losses (excluding interest) as follows:

	INR	
Amount Paid by [BAZ] to acquire [the] Shares (7 Nov 2008)	198,040,245,051.00	[A] = 737.00 * 268,711,323
Amount [BAZ] Expects to Recover Through [the Merger] (23 [*sic*] Mar 2015)	171,930,714,342.71	[B] = 844.00 * 268,711,323 / (1.0444) ^ 6.3749... years

Total Dividends Paid by [C] on 16 May 2011	481,682,789.98	[C] = 2.00 * 268,711,323 / (1.0444) ^ 2.52… years
Sum of Implied [Merger] Price and [C] Dividend	172,412,397,132.69	[D] = [B] + [C]
TOTAL DAMAGES	**25,627,847,918.31**	**[E] = [A] – [D]**

> 1081. The Tribunal is conscious that the arbitration agreement provides that it shall not award "punitive, exemplary, multiple or consequential damages" and "shall be promptly payable in Indian Rupees or other applicable currency net of any tax or other deduction". The Tribunal is also conscious of the need to be fully satisfied that the quantum awarded is the fairest amount which can reasonably be awarded on the evidence available to it, given the limitations of all the methods proposed by the experts. As a benchmark to test the overall reasonableness of the quantum figure arrived at above, the Tribunal now considers the alternative quantum calculations of the Respondents' expert applying in broad terms the alternative test which the Respondents argued would have been preferable to determine quantum.
>
> [emphasis added in bold italics and underline]

48 Mr Yeo eventually conceded during oral argument that *what the Majority was trying to do was to bring the figures from the Merger back to 2008*. However, as we highlighted to Mr Yeo at the hearing, this concession – along with the Mr Saunders's acceptance in the arbitration of the point that "whether damages in this case should account for the time value of money is an issue for the Tribunal to decide" – was problematic for the Appellants' case, because that meant the Appellants' case would then rest on trying to find something objectionable about the ***specific*** *methodology* the Majority employed to bring those values back in time. In this regard, the Appellants pinpointed the problem as the use of the WACC. The use of the WACC allegedly meant that "the objective nature of the Majority's discounting exercise was based on the expected returns on its investments that [BAZ] purportedly did not obtain", in

other words the opportunity to put the INR 198 billion in other investments. Targeting the WACC, however, causes the Appellants problems at two levels.

49 First, the WACC was a figure put forth not only by the *Appellants' expert* in the arbitration, Mr Saunders (as apparent from para 1078 of the Award, where the Majority recounted that "Mr Saunders on the other hand regarded it more appropriate to use the Claimant's weighted cost of capital"), but also by the *Appellants'* ***counsel*** in closing submissions for the Sellers. In particular, counsel had stated that:

> 1580. As a further alternative, and assuming that the time value of money is to be accounted for (which is not accepted), a more reasonable discount rate might be [BAZ's] weighted average cost of capital ("WACC"): paragraph 2.2.24 of Mr Saunders' expert report. As Mr Saunders noted, Nomura had, in the course of valuing [C's] shares in 2008, then assessed [BAZ's] WACC to be between 4.35% and 4.53%.

All this was done without informing the tribunal that adopting the WACC could lead to an excess of jurisdiction, even though *counsel* must have been well aware of the point (leaving aside that Mr Saunders may not have been legally trained). It ill behoves the Appellants to belatedly take this point before us. In this connection, we note that Art 16(2) of the Model Law provides that:

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later that the submission of the statement of defence. … 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.

50 Secondly, even if the Majority erred in using the WACC as the appropriate discount rate, that is an error that goes towards the merits (*ie*, whether they were right in choosing the discount rate they did, or whether they erred in choosing the WACC which assumes a perfect rate of return unaffected

by external events), which the seat court cannot review. In short, the Majority recognised that they had to discount the present value of the Merger to 2008, and all they did was to look around for a rate. The Appellants' complaint is essentially that the Majority chose the wrong rate – they submitted before us that the more appropriate rate was the historical inflation rate with respect to the Indian rupee – but that is a belated attempt to re-litigate the merits. As BAZ pointed out, the analysis of the Indian rupee's historical inflation rate was not presented to the tribunal.

51 For the reasons set out above, we hold that the Majority did not award consequential damages in breach of the Express Prohibition by using a discounting method *per se*, or by using the WACC as the discount rate – in short, by awarding damages as they did.

Pre-award interest as consequential damages

52 The Appellants argued that by choosing the WACC of 4.44% as the interest rate, the Majority awarded interest that covered the *returns on the use of funds* rather than the *cost of funds* (which would have been 1% per annum, the actual cost of funds for borrowing in Japan since BAZ was a Japanese company). That the Majority intended to compensate for such loss of use of opportunity was allegedly clear from para 1122 of the Award, which provides that "[i]n awarding interest from the date of the completion of the [SPA] … the Tribunal is accounting for the fact that [BAZ] having borrowed money had committed its resources to this acquisition *at the expense of others*" [emphasis added].

53 Indian counsel for BAZ, Mr Gopal Subramanium Senior Advocate ("Mr Subramanium"), argued that the Express Prohibition in cl 13.14.1 of the

SPA *does not extend to awards of interest*, which are dealt with in a separate clause, this being cl 13.14.4. For convenience, we reproduce here the relevant excerpts of the dispute resolution clause:

> **13.14 Dispute Resolution; Arbitration**
>
> 13.14.1 Any and all claims, disputes, questions, or controversies involving the Sellers (or any of them) and the Company on the one hand and the Buyer and/or its Affiliates on the other hand … shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce … The arbitrators shall not award punitive, exemplary, multiple or consequential damages. …
>
> …
>
> 13.14.4 The Award shall include interest from the date of any breach or other violation of this Agreement and the rate of such interest shall be specified by the arbitral tribunal and shall be calculated from the date of any such breach or other violation to the date when the Award is paid in full.

54 We proceed on the basis that the arbitration clause is governed by Indian law, absent any submission that the governing law of the arbitration clause differs from the governing law of the SPA (stated in Article 13.15 to be "the laws of the Republic of India without regard to its conflicts of law principles"). Further, absent any submissions on the relevant principles of Indian law, we assume that Indian law is *in pari materia* with Singapore law in this regard.

55 In our judgment, Mr Subramanium is correct that awards of interest on damages are not subject to the Express Prohibition. We arrive at this view not only because the tribunal's power to award interest is addressed in a separate sub-clause from the Express Prohibition, but also because there is a distinction between awarding interest *on* or upon damages, and interest *as* damages. While the latter being a form of damages could presumably be subject to the Express Prohibition (which is against "punitive, exemplary, multiple or consequential *damages*" [emphasis added]), the former is not. The distinction between interest

on damages and interest as damages was recognised and explained in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 ("*Oriental Insurance*") at [129] as follows:

> … [I]t is important to distinguish between "interest as damages" and "interest upon the damages". … [A]n award of interest as damages … comprise[s] the loss to the plaintiff assessed with reference for instance to the compound interest that the money could possibly earn through investment in safe instruments or which could have been used to reduce the debts of the plaintiff and defray the compound interest that he has to pay for those debts. If the loss or damage suffered by the plaintiff can be accurately computed using compound interest, then the plaintiff should be entitled to claim the compound interest as his loss or damage. This is a separate head of claim or damage which is represented by the compound interest. … [emphasis in original]

56 *Oriental Insurance* followed the House of Lords' decision in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2008] 1 AC 561 ("*Sempra Metals*"), which dealt with the issue of whether a claimant seeking a remedy on the ground of unjust enrichment was entitled to an award for restitution of the value of money that is measured by compound interest. Lord Nicholls of Birkenhead held:

> 94 To this end, if your Lordships agree, the House should now hold that, in principle, it is always open to a claimant to plead and prove *his actual interest losses caused by late payment of a debt*. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.
>
> …
>
> 100 … I consider the court has a common law jurisdiction to award interest, simple and compound, *as damages* on claims for non-payment of debts as well as on other claims for breach of contract and in tort.
>
> [emphasis added]

57 It is unnecessary to deal with whether the award of interest breaches the Express Prohibition because we have found the Express Prohibition would not apply to such awards. But for completeness, we would not have found that para 1122 of the Award relied on by the Appellants evinces an intention to compensate for loss of opportunity. When read with para 1123, it becomes apparent that the Majority, in choosing the WACC, was only working with the figures that the parties had seen fit to provide. Further, the underlined portions of the excerpt below give a rather different complexion to the part of para 1122 (in italics) that the Appellants rely on:

> 1121. The Claimant in this instance had succeeded on its claim for damages. The Claimant seeks interest from the date of the closing of the Claimant's acquisition [7 November 2008] of shares from the Respondents. The Respondents point out that they funded this transaction through substantive bank borrowings in the sum of JPY 240 billion in Japan. This, of itself, shows that <u>costs of funds or loss of use of the funds would have been incurred</u>. Deciding the date from which interest on those damages should run is not straightforward in circumstances where, in assessing the "present value" of the price paid for the shares, the Tribunal has already applied from the date of the completion of the [SPA] in 2008, an adjustment equivalent to the Claimant's WACC as applied by Nomura in its assessment prior to the acquisition (using the average between 4.35% and 4.53%). The Tribunal is mindful of the dangers of "double-counting" in providing both for an adjustment to account for the present value of the money by using the Claimant's WACC and also allowing interest from the date of completion.
>
> 1122. Having considered carefully the issues, the Tribunal regards interest and the 2008 present value calculation as two distinct matters which need to be addressed. In applying the Claimant's average WACC for the period to the substantive "loss" analysis, the Tribunal was seeking to make an adjustment to determine the "present value of money" of 2008. *In awarding interest from the date of the completion of the SPSSA, however, the Tribunal is accounting for the fact that the Claimant having borrowed money had committed its resources to this acquisition at the expense of others.* Interest therefore should properly run from the date of completion on 7 November 2008 until the date of this award.

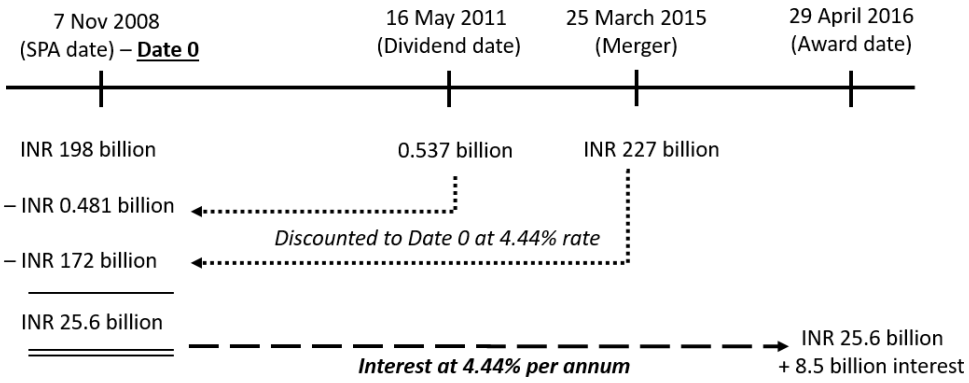
> 1123. The Claimant claimed interest at the rate of 10% per annum but gave no basis or justification for the figure. The Respondents suggested that the Claimant's cost of funds for borrowing in Japan would be relatively low in the region of 1% per annum. Mr. Saunders in his expert report also pointed out that the WACC figures before the acquisition were between 4.35% and 4.53% per annum. The Tribunal notes that while the cost of borrowing in Japan was relatively low, the loss incurred by the Claimant was denominated in Indian rupees.
>
> 1124. Taking into account the average of the Claimant's WACC in 2008, the Tribunal fixes the rate of 4.44 % per annum on a simple basis as the reasonable figure for interest on the sum of INR 25,627,847,918.31 to the Claimant commencing from 7 November 2008 (date of closing of the SPSSA) until the date of this award. …
>
> [emphasis added in italics and underline]

58 We therefore do not accept the Appellants' contentions regarding the characterisation of pre-award interest as consequential damages.

Pre-award interest as punitive or multiple damages

59 The Appellants argued that when taken together with the damages award, the pre-award interest amounts to double recovery and therefore also constitutes punitive or multiple damages. Mr Yeo submitted that the award of damages and pre-award interest purported to compensate BAZ for the loss of use or loss of opportunity over an overlapping period of time.

60 We disagree. As we have found, the Majority quantified damages by calculating BAZ's loss in 2008 by reference to the Merger, discounted *backwards* to 2008. Once they obtained this initial quantum, they were entitled to award interest on the damages to bring that sum *forward* in time, as Mr Yeo correctly acknowledged and as the diagram below illustrates. To that extent, the double recovery argument regarding pre-award interest stands or falls with our findings on damages.



61 In summary, we do not accept that the award of damages either alone or taken with the grant of pre-award interest falls afoul of the Express Prohibition in the arbitration clause.

The Time Bar Issue

62 The CA 9 Appellants submitted that the seat court is entitled to undertake a *de novo* review of whether BAZ's fraud claim is time-barred. First, questions of limitation should be treated as going towards jurisdiction where the governing law of the arbitration agreement *and* substantive agreement adopt this approach, to give primacy to the parties' intentions. In this case, Indian law treats limitation as jurisdictional. Time-barred claims fall entirely outside the scope of parties' submission to arbitration. Secondly, upon a *de novo* review of the limitation issue, BAZ's claim is time-barred. BAZ actually discovered or could have with reasonable diligence discovered the alleged fraud at any time after July 2008, when the DOJ filed a public motion to enforce subpoenas. More than three years had passed from July 2008 to the date of institution of the arbitration and so the claim was brought out of time.

63 BAZ submitted that the Singapore court is *not* entitled to undertake a *de novo* review of whether BAZ's fraud claim is time-barred. It argued that the Sellers had submitted the issue of time bar for the tribunal's determination, and nothing in the SPA precluded the tribunal from hearing matters of limitation. Singapore law and not Indian law applied as regards setting aside, since Singapore is the seat. In any case, Nath J applying Indian law had declined to relook the time bar issue as he found it a mixed question of law and fact and the court could not overturn a finding of fact of the tribunal. Finally, the Majority had fully dealt with the time bar issue and made a finding of fact that BAZ could not with reasonable diligence have discovered the fraud until 19 November 2009.

64 We agree with the Judge that: (a) it is Singapore law, as the *lex arbitri* as well as the law of the seat court, that governs the question of whether limitation should be classified as going towards jurisdiction or admissibility ("the classification question"); and (b) under Singapore law, issues of time bar arising from statutory limitation periods go towards admissibility.

Singapore law governs the classification question

65 As to proposition (a), Mr Yeo accepted – and we affirm to be the correct position in Singapore – that the characterisation question is within the decision-making prerogative of the seat court.

66 Mr Yeo, however, also argued that the seat court, in answering the characterisation question, should be guided by the governing law of the arbitration agreement and substantive agreement (in this case Indian law) because that would be consistent with the parties' intention as to how their rights should be determined and governed. He stressed that the Merger took place in

India and involved Indian sellers and shares in an Indian company, and that the parties would have taken advice on Indian law. We disagree that the parties' choice of governing law is necessarily relevant to the seat court's determination of the classification question. As this court held in *BNA v BNB and another* [2020] 1 SLR 456 at [56] and [59]–[63], where the parties had not chosen the *lex arbitri*, it did not follow that the governing law of the agreement should also be taken as the express governing law of the arbitration agreement. It was but a *starting point* that could be displaced if the law of the seat materially differed from that starting point. The parties' intention is a neutral factor as it could equally be said that parties, despite all the connecting facts to India and Indian law, specifically chose Singapore as the seat. That meant and included the choice of *the seat's* laws to govern the classification question *independently of their choice of governing law*.

67 Mr Yeo additionally attempted to rely on the Foreign Limitation Periods Act (Cap 111A, 2013 Rev Ed) ("FLPA") in support of his argument. Section 3(1) of the FLPA provides:

> **Application of foreign limitation law**
>
> **3.**—(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in Singapore the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be applied in the determination of any matter —
>
> (*a*) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and
>
> (*b*) the law of Singapore relating to limitation shall not so apply.

68 The FLPA does not assist the CA 9 Appellants because it answers neither the question of which law governs the classification question, nor the question of how the classification question should be decided. Instead, it

addresses the different concern of whether the forum's statute of limitations or a foreign one should apply to a cause of action.

69 Traditionally, Singapore (like other common law countries prior to reform) construed statutes of limitation as imposing either substantive or procedural time bars. A substantive time bar extinguished the claim, which was rendered invalid or non-existent for all purposes. This was exemplified by language found in foreign limitation statues to the effect that the right was "extinguished" if the claimant did not bring its claim within the prescription period: see *Time-Barred Actions* (Francesco Berlingieri OBE ed) (Lloyd's of London Press Ltd, 2nd Ed, 1993) at p 4; Article 35 of the Convention for the Unification of Certain Rules for International Carriage By Air, also known as the Montreal Convention (which provides that the right to damages "*shall be extinguished* if an action is not brought within a period of two years" [emphasis added]); and Article III(6) of the Hague-Visby Rules (under which a party is "*discharged from all liability* … unless suit is brought within one year of their delivery" [emphasis added]). A procedural bar, on the other hand, only barred a remedy by limiting the time for bringing an action, with a common formulation being that an action "shall not be brought" after the expiry of the limitation period (see *eg*, s 6 of Singapore's Limitation Act (Cap 163, 1996 Rev Ed)). While a procedural bar took away the remedy of enforcing a debt by taking out an action, that debt remained good for other purposes such as operating as a set-off: *Halsbury's Laws of Singapore* vol 9 (Butterworths Asia, 2020) at para 110.1108.

70 Difficulties, and sometimes intractable problems, arose in international commercial cases or arbitrations as a result of this procedural-substantive distinction, because the forum always applied its own procedure. We need only pick two examples. First, the forum's time bar is procedural in nature and is

three years for claims in contract, but the foreign governing law of the agreement, though also procedural in nature, has a longer limitation period of six years. A second example is where the foreign three year limitation period is procedural in nature and the forum's six year limitation period is substantive in nature; it may be argued that theoretically speaking neither would apply, leaving a gap. In the converse situation both statutes would potentially apply, though it is probably more defensible to adopt the shorter substantive limitation period (see Law Reform Committee, January 2011, *Report of the Law Reform Committee on Limitation Periods in Private International Law* at paras 1 and 8–11).

71 The FLPA was enacted to resolve the above problems and bring the Singapore position in line with that of other Commonwealth jurisdictions post-reform. As explained by the Minister for Law (*Singapore Parliamentary Debates, Official Report*, 8 April 2012, Vol 89, Mr K Shanmugam, Minister for Law):

> Traditionally, the common law characterises time bars as procedural in nature. Therefore, according to the principle that a forum applies its own procedure, the forum would apply its own time bars, even if a foreign country's law is applicable to the issue at hand. So you could have a Singapore court applying Singapore time bars to an issue which is substantively governed by French law. …
>
> … It is therefore incongruous to say, on the one hand, that an issue is governed by a foreign law and, on the other hand, to apply the forum's time bar to that issue.
>
> The UK, Australia and Canada have introduced legislation to reform the common law position. The basic position is, if an issue is governed by a foreign law, that foreign law's limitation period will apply; and the forum's limitation period will not apply. Such an issue has not yet arisen in our courts. Nevertheless, we think it prudent to clarify the law in this area.
>
> Clause 3 lays down the general rule that, when the law of a foreign country applies to a matter before the Singapore court,

> that country's law relating to limitation will apply, and Singapore's law relating to limitation will not apply.

The Minister further stated that after the enactment of the FLPA, "[t]he choice of Singapore as an arbitral seat will no longer automatically require the adoption of Singapore limitation periods. That will help enhance Singapore's status as a neutral arbitral seat".

72 The above clarifies that the FLPA deals with whether a foreign or forum limitation statute should apply to a claim, and does *not* affect which law governs the classification question or how the classification question should be answered. In other words, while the FLPA may well have the effect of treating foreign limitation statutes *as if* they were substantive in terms of applicability, this does not turn every objection into a jurisdictional issue.

Issues of statutory limitation go towards admissibility

73 Next, our answer to the classification question is that issues of time bar which arise from the expiry of statutory limitation periods go towards admissibility, not jurisdiction; they are matters for the tribunal and not the court to decide. Consequently, such issues cannot be reviewed *de novo* by the seat court in setting aside applications: *AKN v ALC* at [112]; *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [163].

(1) The distinction between jurisdiction and admissibility

74 This court in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 ("*Swissbourgh*") distinguished between jurisdiction and admissibility as follows:

> 207 Jurisdiction is commonly defined to refer to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it": *Waste Management, Inc v United Mexican States* ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet (8 May 2000) at [58]. To this, Zachary Douglas adds clarity to this discussion by referring to "jurisdiction" as a concept that deals with "the existence of [the] adjudicative power" of an arbitral tribunal, and to "admissibility" as a concept dealing with "the exercise of that power" and the suitability of the claim brought pursuant to that power for adjudication: [Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009)] at paras 291 and 310.

75 In *Swissbourgh*, this court quoted Chin Leng Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (Cambridge University Press, 2018) ("*Chin Leng Lim*") at p 118, which set out two ways of distinguishing between jurisdiction and admissibility:

> … The more conceptual reading would focus on the legal nature of the objection: is it directed against the tribunal (and is hence jurisdictional) or is it directed at the claim (and is hence one of admissibility)? The more draftsmanlike reading would focus on the place that the issue occupies in the structure of international dispute settlement: is the challenge related to the interpretation and application of the jurisdictional clause of the international tribunal (and hence jurisdictional), or is it related to the interpretation and application of another rule or instrument (and is hence one of admissibility)?

76 In our judgment, the "tribunal versus claim" test underpinned by a consent-based analysis should apply for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility.

77 The "tribunal versus claim" test asks whether the objection is targeted at the tribunal (in the sense that the claim *should not be arbitrated* due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and *should not be raised at all*). Jan Paulsson explains the test in

these terms (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) ("Paulsson") at pp 616 and 617; see also CIArb Guideline 3 on Jurisdictional Challenges (2015) at paras 6–8 of the preamble and the commentary on Article 3):

> … the nub of the classification problem is whether the success of the objection necessarily negates consent to the forum. Our lodestar takes the form of a question: is the objecting party taking aim at the tribunal or at the claim? … in the event the [time limit] was exceeded, was it the parties' intention that the relevant claim should no longer be arbitrated by … arbitration but rather in some other forum, or was it that the claim could no longer be raised at all? Opting for the former conclusion would mean that the objection is jurisdictional …
>
> …
>
> To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:
>
> - If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
> - If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final.

78 Consent serves as the touchstone for whether an objection is jurisdictional because arbitration is a consensual dispute resolution process: jurisdiction must be founded on party consent. For this reason, arguments as to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional, as are questions of the claimant's standing to bring a claim or the possibility of binding non-signatory respondents (Robert Merkin QC & Louis Flannery QC, *Merkin and Flannery on the Arbitration Act 1996* (Informa Law, 2019, 6th Ed) at ch 30.3 ; see also Michael Hwang & Si Cheng Lim, "The Chimera of Admissibility in International Arbitration" in Neil

Kaplan & Michael J Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum* (Kluwer Law International, 2018) at pp 277–278). A similar consent-based analysis was adopted by this court in *Swissbourgh* (at [206] and [209]).

79 Conversely, admissibility relates to the "nature of the claim, or to particular circumstances connected with it": *Case Concerning the Northern Cameroons (Cameroon v United Kingdom), Preliminary Objections, Judgment of 2 December 1963 (Separate Opinion of Judge Sir Gerald Fitzmaurice)* [1963] ICJ 97 at 102. It asks whether a tribunal may decline to render a decision on the merits for reasons other than a lack of jurisdiction, and is determined by the tribunal on the basis of their discretion guided by, amongst others, principles of due administration of justice and any applicable external rules: Friedrich Rosenfeld, "Arbitral praeliminaria – reflection on the distinction between admissibility and jurisdiction after BG v Argentina" (2016) 29 Leiden Journal of International Law 137 at 148–151.

(2) Statutory time bars

80 Applying the "tribunal versus claim" test, a plea of statutory time bar goes towards admissibility as it attacks the claim. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense discussed at [69] above. In both cases the complaint is that *the claim is stale and therefore defective*, and not – barring express provision in the arbitration clause (*eg*, "the tribunal shall have no jurisdiction to hear claims that are time-barred under statute") – that the bringing of claims that are out of time under limitation laws *falls outside the scope of consent to*

arbitration. Express provision by the parties is necessary given that statutes of limitation do not generally target or affect arbitral jurisdiction by design.

81 This lack of express provision means that we cannot accept the CA 9 Appellants' attempt to recast the statutory time bar objection as a jurisdictional one by asserting that there was no consent to arbitrating time-barred claims. More importantly, a further reason why the CA 9 Appellants cannot succeed is that if at all, this was a point they should have taken before the tribunal (see [49] above on raising jurisdictional objections in a timely manner). As noted by the Judge at [125], they did not pursue the time bar point as a jurisdictional objection though they were aware of this possibility, having mounted a different jurisdictional argument relying on the condition precedent to resolve the dispute within 60 days by negotiation:

> … On the facts, time limitation does not fall under Art 34(2)(*a*)(iii). First, clause 13.14.1 of the SPSSA does not show that the issue of time limitation is outside its scope. The only reference to time stipulations in the clause is that the parties are to submit to arbitration their claims, disputes, questions or controversies arising out of or in connection with the SPSSA which "cannot be finally resolved by such Parties within 60 (sixty) calendar days of the arising of a Dispute by amicable negotiation and conciliation". This condition precedent was picked up by the Sellers in their Answer to the Request for Arbitration, in which they objected to the Tribunal's jurisdiction on the basis that the condition precedent was not fulfilled. Second, time limitation is not outside the parties' scope of submission to arbitration – the Sellers specifically pleaded that the Buyer's claim was time-barred and submitted the issue for determination by the Tribunal (see [93] of Award). This is also set out in their Answer to Request for Arbitration – in contrast to their jurisdictional objection on the basis of the condition precedent, the Sellers set out the time limitation issue as one of their defences under the Defence Case (see para 96).

82 In our judgment, statutory time bars go towards admissibility, and this accords with the position taken in other jurisdictions: Gary Born, *International*

Commercial Arbitration vol 1 (Kluwer Law International, 2nd Ed, 2014) at pp 912–913.

83 We recognise that Indian law may take a different view. Mr Yeo relies on *Noharlal Verma v Disst. Coop. Central Bank Limited* (2008) 14 SCC 445, where the Indian Supreme Court held at [27], interpreting the wording of s 3(1) of the Indian Limitation Act, stated that "limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a Court or an Adjudicating Authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits". However, given our finding that Singapore law as the *lex arbitri* applies, Mr Subramanium's concession below that limitation goes to jurisdiction under Indian law would not affect our determination of the classification question. As noted, Nath J in the DHC considered limitation in this case to be a mixed question of law and fact and declined to reopen the tribunal's findings of fact.

84 Accordingly, we decline the CA 9 Appellant's invitation to undertake a *de novo* review of whether BAZ's fraud claim is time-barred.

The Joint and Several Liability Issue

85 The CA 10 Appellants were found jointly and severally liable for damages even though they allegedly held only 1.743% of the Shares in the SPA. Their natural justice, jurisdictional and public policy challenges before us were premised on this finding. We set out here our reasons for rejecting each head of challenge.

Breach of natural justice

86 Counsel for the CA 10 Appellants, Mr Narayanan Sreenivasan SC ("Mr Sreenivasan"), argued that there was a breach of the fair hearing rule because the Majority found the Sellers jointly and severally liable to BAZ without inviting submissions on this point, or giving any indication that joint and several liability was where they were going to end up. Instead, they simply concluded at para 401 of the Award that:

> [BAZ] is not seeking to fix liability for innocent misrepresentation upon the Respondents. The Respondents all currently enjoy the full benefit of a contract which would not have been entered into but for the fraud of their agents. There is no doubt in the Tribunal's mind that a correct application of the law would render all Respondents jointly and severally liable for any fraud committed by their agents in the course of entering into a contract to which they are principals.

87 He also highlighted how joint and several liability had not been specifically pleaded by BAZ to put the Sellers on notice, and how para 27 of the Terms of Reference ("TOR") did not delineate BBA's role in each of his capacities (as principal, as agent for C, and as agent for the Sellers) or contain any reference to BAZ seeking to hold the Sellers jointly and severally or vicariously liable for all fraudulent misrepresentations made by their agent. Paragraph 27 of the TOR provides:

> It is the Claimant's case that 1st Respondent, [BBA], acting as agent for the other Respondents, misrepresented and concealed from the Claimant the fact that the Company had intentionally fabricated data for regulatory submissions to regulators around the world, as well as the source and severity of the pending US regulatory investigations of the Company relating to those practices.

88 On behalf of BAZ, it was contended that according to *Chong Kim Beng v Lim Ka Poh (trading as Mysteel Engineering Contractor) and others* [2015] 3 SLR 652 at [12]–[13], where the facts to establish joint liability are pleaded,

there is no requirement that the words "joint and several" must be used in pleadings. BAZ had pleaded the necessary facts based on agency and vicarious liability. In any case, it was a consistent theme in the pleadings and submissions that BAZ was seeking to hold all the Sellers jointly and severally liable for BBA's fraud.

89 There was no dispute that the applicable legal principles are that the applicant must establish (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach did or could prejudice its rights: *Soh Beng Tee* at [29]; *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [48].

90 We find that there was no breach of natural justice. Dealing first with the point that the tribunal did not invite submissions on joint and several liability, the short answer is that ***the Sellers did not take the point*** before the tribunal at all, as Mr Sreenivasan accepted. The Majority cannot be faulted for not foreseeing any complications and not dealing with this issue in depth in the Award, when nothing was put forward to suggest that this was going to be anything *other than* a straightforward issue. The observations of this court in *China Machine New Energy Corporation v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 (at [168] and [170]) apply equally here:

> … An assertion that the tribunal has acted in material breach of natural justice is a very serious charge, not just for the imputation that such an allegation makes as to the *bona fides* and professionalism of the tribunal, but also for the grave consequence it might have for the validity of the award. For this reason, *there can be no room for equivocality in such matters*. An aggrieved party cannot complain after the fact that its hopes for a fair trial had been irretrievably dashed by the acts of the tribunal, and yet conduct itself before that tribunal "in real time" on the footing that it remains content to proceed with the

> arbitration and obtain an award, only to then challenge it after realising that the award has been made against it. …
>
> …
>
> … if a party intends to contend that there has been a fatal failure in the process of the arbitration, then there *must* be fair intimation to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding.

91 Next, and related to the above, the onus was on *the Sellers* to highlight the issue of joint and several liability to the tribunal in light of the state of the TOR and the pleadings. As this court stated in *Soh Beng Tee* at [55(h)]–[55(i)], citing the New Zealand High Court in *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, an arbitrator is not under any general obligation to disclose what he is minded to decide just so the parties may have a further opportunity of criticising his mental processes before he finally commits himself. The overriding task for the plaintiff is to show that "a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result". The TOR and pleadings are in our judgment clear for a reasonable party in the Sellers' position to have foreseen the possibility of the tribunal adopting the reasoning of joint and several liability and run their case accordingly:

(a) Paragraph 27 of the TOR (see [87] above) provides that BBA was "acting as agent *for the other Respondents*" [emphasis added], without distinction between the respondents *inter se*.

(b) In its Request for Arbitration, BAZ pleaded that BBA sought "compensatory damages against *[BBA] and the other Respondents* for whom [he] acted as agent" [emphasis added], and that negotiations with BAZ had been "conducted *on behalf of the Respondents* by [BBA]".

(c) Its Statement of Claim likewise reiterated that BBA "acted on behalf of *the selling shareholders collectively* in negotiating the transaction with [BAZ]" [emphasis added]. The request for relief in the Statement of Claim did not distinguish between the Sellers *inter se*. It is also significant that the Sellers were all represented by the same set of counsel, suggesting that even they themselves did not consider there to be any relevant divergence in their interests. As the Majority noted in the Award:

> 387. There is no denial on the part of the Other Respondents that [BBA] acted as the agent in the negotiation and finalisation of the SPSSA (Answer to Request paragraph 54]. ***The Respondents have filed their defence in this arbitration collectively through their legal representatives***. *In their Defence, however, it was made clear that, even if a case of fraud is made out against [BBA], it is denied that* ***all the Other Respondents*** *could be fixed with liability for any fraudulent acts committed by [BBA] or the others.* [emphasis added in italics and bold italics]

Although a peripheral observation, we note that this submission does not appear to have been made before the Delhi High Court.

92 In view of how the TOR and the pleadings were framed, it does not assist the Appellants to insist, as Mr Sreenivasan did before us, that it should nonetheless be incumbent on BAZ to make clear it was relying on joint and several liability because joint and several liability was not the "default" position under s 238 of the Indian Contract Act. Nor is it necessary for us to deal with Mr Subramanium's argument in response that it is s 43 and not s 238 of the Indian Contract Act that is relevant.

93 Finally, even if the tribunal did not have the benefit of hearing arguments or receiving submissions on joint and several liability, that can only be attributed

to how the Sellers ran their case. Mr Sreenivasan accepted that the respondent Sellers had taken the position that BBA had no authority *at all* to act *for the other respondents* in the arbitration. As seen from the way they advanced their case at para 387 of the Award (reproduced at [91] above), "all the Other Respondents" had advanced their case, to adopt Mr Subramanium's words, in one compendious lot; further at para 396 of the Award, "[t]he Other Respondents" as a whole had "opted to align to the defence of the Claimant's claims with [BBA] without saying any more". There was no alternative argument on what the position would be if BBA was found to have authority. Having put all their eggs into one basket (on the issues of whether BBA was liable for fraud and if so, whether that liability could be attributed to the Sellers) and failed on their primary submission, the Sellers, including the CA 10 Appellants, cannot now complain the tribunal did not hear them out on the fall-back position (of liability apportionment).

94 To summarise, the TOR and pleadings make clear that BAZ was seeking relief against all the Sellers without differentiation. If the CA 10 Appellants failed to make the point on joint and several liability before the tribunal, it is far too late now to bring this complaint before the seat court in setting aside proceedings. In this regard, several of Mr Sreenivasan's submissions before us – notably the argument that various portions of the SPA allegedly showed that the transaction was not structured as a single deal, with there being provisions limiting liability of each shareholder to the actual consideration received by them – should have been advanced (if at all) before the tribunal.

Excess of jurisdiction

95 The CA 10 Appellants' first argument on excess of jurisdiction was that the Majority had found the Sellers jointly and severally liable even though this

was not a matter submitted for determination to the tribunal. Before the Award was released, the issue of apportionment of damages was not pleaded, raised or submitted by either party to the tribunal. Further, the "Issues for Determination" section at para 46 of the TOR did not list the apportionment of liability or damages as an issue. In response, BAZ relies on essentially the same points it raised in defence of the breach of natural justice point.

96 This can be dealt with shortly. We have rejected the CA 10 Appellant's contentions on whether the issue of joint and several liability was sufficiently pleaded or raised to the tribunal above (at [90]–[94]). As for whether the apportionment of liability or damages was submitted to the tribunal in the TOR, we find this to be the case and that para 46(g) of the TOR in particular confers upon the tribunal the mandate to deal with all issues arising from reliefs and remedies, including the apportionment of liability as between the Sellers:

> **Issues for Determination**
>
> 46. For the purpose of ensuring a final resolution of the matters in dispute in this arbitration, the Tribunal may determine all issues or questions (*whether of fact or law, of liability or quantum*) which have arisen or may arise out of the matters submitted herein, and subject to Article 23(4) of the ICC Rules, including the following principal issues:
>
> …
>
> [If the Respondents be found liable]
>
> …
>
> g. *To ascertain such proper and appropriate reliefs and remedies to which each party may be entitled …*
>
> [emphasis added]

97 The CA 10 Appellants' second argument on excess of jurisdiction is that it was disproportionate to hold each Seller jointly and severally liable for the

full quantum of the Award, in light of their distinct and separate shareholding and bearing in mind a shareholder's limited liability. For that reason, the Majority *in effect* awarded punitive or exemplary damages, in breach of the Express Prohibition. More generally, any damages that "do not reflect culpability and which are not limited to what flows from actual liability" would be punitive.

98 We also do not accept this argument, which is incorrect at two levels. First, the CA 10 Appellants are essentially contending that joint and several liability should not have been imposed *because of* the various reasons cited, such as the lack of blameworthiness. But the question of whether joint and several liability should have been imposed was a question for the tribunal to answer, in light of what the legal test was under Indian law for imposing such liability. Secondly, even if the Majority held that liability was to be joint and several, the imposition of joint and several liability *per se* does not transform an otherwise unobjectionable award of damages into punitive or exemplary damages. As BAZ submitted, the practical effect of joint and several liability is to *assist the successful party* in obtaining damages from the wrongdoers. Imposing joint and several liability does not change the nature and quantum of damages to make them "punitive" or "exemplary", which in all likelihood are terms with specific legal meaning (which Mr Sreenivasan did not canvass before us).

Breach of public policy

99 The CA 10 Appellants argued that it would be a breach of public policy to find the Sellers jointly and severally liable to BAZ, as this ignores the fundamental principle that a shareholder's rights and liabilities in a company are limited to the size of its shareholding. BAZ's response was that the principle

of limited liability was irrelevant here as it was concerned with recovery of company debts in the insolvency context.

100 We agree with BAZ. Limited liability simply means that "the liability of the members to contribute towards the assets of the company on winding up is limited … Where a company is limited by shares, a member cannot be asked to pay more than the amount (if any) unpaid on his shares when the company is wound up": *Walter Woon on Company Law* (Tan Cheng Han ed) (Sweet & Maxwell, Revised 3rd ed, 2009) at para 1.57. The doctrine does not limit shareholders' liability in relation to torts committed by their agents in the sale of their shares.

101 Lastly, the CA 10 Appellants argued that an egregious error of law in the making of an Award amounts to a breach of public policy and the finding of joint and several liability is such an error. To demonstrate the severity of such an error, Mr Sreenivasan argued there could be wider consequences for shareholder agreements with "drag-along" clauses and collective sale agreements. BAZ disagreed that public policy was engaged.

102 It is settled jurisprudence that mere errors of law do not cross the high threshold of making out a breach of Singapore's public policy: *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [57]; *AJU v AJT* [2011] 4 SLR 739 at [62]. The CA 10 Appellants' arguments were redolent of an attempt to recast an "egregious" error of law as a matter of public policy. This is something this Court has taken a firm stand against and rejected since 2007: see *PT Asuransi* and *AJU v AJT*.

103 Mr Sreenivasan's attempts to provide analogies were also unhelpful. These analogies are drawn from the context of court-administered matters

where errors at first instance could be corrected on appeal. This is completely inapplicable to arbitration where the principle is that of limited curial intervention. Broad and general arguments based on unconscionability or potential repercussions of general fairness before a court will be given short shrift.

104 Accordingly, we reject all three grounds raised by the CA 10 Appellants premised on the finding of joint and several liability.

Conclusion

105 For the above reasons, we dismiss CA 9 and CA 10.

106 Costs must follow the event. The CA 9 Appellants will pay the sum of $100,000 inclusive of disbursements to BAZ, and the CA 10 Appellants will pay the sum of $90,000 inclusive of disbursements to BAZ. There will be the usual consequential orders.

Sundaresh Menon	Judith Prakash	Quentin Loh
Chief Justice	Judge of Appeal	Judge

Yeo Khirn Hai Alvin SC, Rajan Menon Smitha, Stephanie Yeo Xiu Wen, Li Yiling Eden (WongPartnership LLP) for the appellants in CA/CA 9/2019;
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Gopal Subramanium Senior Advocate (*ad hoc* admitted), Suresh Divyanathan, Leong Yu Chong Aaron, Cherisse Foo Ling Er (Oon & Bazul LLP) for the respondent in both appeals.