IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 23

Originating Summons No 4 of 2020

Between

Gokul Patnaik

… *Plaintiff*

And

Nine Rivers Capital Limited

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]
[Civil Procedure] — [Affidavits] — [Striking out]

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Gokul Patnaik
v
Nine Rivers Capital Ltd

[2020] SGHC(I) 23

Singapore International Commercial Court — Originating Summons No 4 of 2020 and Summons No 830 of 2020
Vivian Ramsey IJ
25–26 June 2020

12 November 2020 Judgment reserved.

Vivian Ramsey IJ:

Introduction

1 In these proceedings (SIC/OS 4/2020), the applicant ("Mr Patnaik") applies under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") to set aside SIAC Award No. 073 of 2019 dated 24 June 2019 (the "Award") made in arbitration proceedings ARB133/17/KRW (the "Arbitration").

2 Mr Patnaik seeks to set aside the Award on three grounds:

(a) that the Award contained decisions on matters beyond the scope of the submissions to arbitration and so should be set aside under Article 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law");

(b) that there was a breach of the rules of natural justice in connection with the making of the Award and so should be set aside under s 24 of the IAA; and/or

(c) that the Award is contrary to the public policy in Singapore and so should be set aside under Article 34(2)(*b*)(ii) of the Model Law.

3 In support of the application under Article 34(2)(*b*)(ii) of the Model Law, Mr Patnaik has filed an expert affidavit on Indian law by Justice Ananga Kumar Patnaik ("Justice Patnaik's Affidavit"). The respondent ("Nine Rivers") has applied to strike out that affidavit ("the Strike Out Application") on the ground that the affidavit deals with issues of *Indian* law and public policy and is irrelevant to an application under Article 34(2)(*b*)(ii) of the Model law, which concerns the question of whether the Award is in conflict with the public policy of *Singapore*.

Background

4 The background to the Arbitration has been set out in the Award and I summarise it as follows.[1] In 2009, the parties to the Arbitration were involved in completing an investment of 300 million Indian Rupees ("INR") to be made by Nine Rivers into Global Agrisystem Private Limited ("GAPL"), a company incorporated under the laws of India.

5 Ultimately this led to an investment being made pursuant to a Share Subscription and Shareholders Agreement dated 4 March 2010 ("the SSSA").

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[1] Gokul Patnaik's 1st affidavit dated 24 September 2019 ("Gokul's 1st Affidavit") at Exhibit GP-1.

Pursuant to the SSSA, Nine Rivers, as "Investor", subscribed to the following "Investor Securities" in GAPL:[2]

> (a) 100 equity shares of face value INR 10, each at a premium of INR 15.7, for an aggregate sum of INR 2,570 ("Investor Equity Shares");
>
> (b) 3,000,000 Cumulative Compulsorily Convertible Preference Shares of GAPL ("CCPS") bearing 6.67% dividend per annum, having a face value of INR 30 each at a premium of INR 70 per CCPS ("Investor CCPS").

6 The SSSA defined GAPL as the "Company". Each of Mr Patnaik, an Indian citizen, and Katra Finance Limited ("Katra Finance"), a company incorporated under the laws of Mauritius, were defined as a "Promoter". Gokul Patnaik Associates Private Limited, a company incorporated under the laws of India; Gokul Patnaik (HUF), duly constituted and recognised as a Hindu undivided joint family under the laws of India; Mr Sunil Kumar Sharma, an Indian citizen; Katra Holding Private Limited, a company incorporated under the laws of India ("KHPL"); and Mr Ramesh Vangal, a resident of Singapore ("Mr Vangal"), were defined as the "Promoter Group".[3]

7 In the Arbitration, Nine Rivers, as claimant, made each Promoter and each member of the Promoter Group a respondent. However, substantive relief was only sought against the Promoters, Katra Finance and Mr Patnaik, in their

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2 Gokul's 1st Affidavit at pp 37 and 136.

3 Gokul's 1st Affidavit at pp 37 and 130.

role as Promoters, among other things. No relief was sought against the members of the Promoter Group other than in respect of costs.

8 Section 20 of the SSSA provided for the Parties agreeing to undertake to commit themselves to all actions necessary to cause an initial public offering of the "Equity Shares" of GAPL or to seek a "Strategic Sale", *viz* sale to any third party to change control of GAPL, satisfying each of various specified conditions. This was defined in the SSSA as a "Qualified Exit". One of the conditions for the Qualified Exit was that the minimum value should be INR 4,000,000,000.[4]

9 Section 16.5 of the SSSA provided that, in the event that the Qualified Exit was not accomplished by 31 March 2014, Nine Rivers, as Investor, would have the right to:[5]

> (a) sell all, or a portion, of its securities to any Third Party purchaser of its choosing without the Right of First Refusal to the Promoter(s); and/or
>
> (b) by service of a Notice in the specified form, to drag along all or a portion of the securities held by the Promoter(s) to offer the same to the Third Party purchaser, provided that the securities of the Promoter(s) that are dragged along should be sold to any Third Party purchaser on the same terms and conditions as those of the Investor ("Drag Along Right").

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4 Gokul's 1st Affidavit at pp 135, 140, and 180.

5 Gokul's 1st Affidavit at p 175.

10 Section 16.5.3 of the SSSA provides that, within 21 days of the receipt of a Drag Along Notice, the Promoters had the right to make an unconditional and nonbinding first offer to purchase the Investor Securities ("the ROFO"). If the Promoters chose to exercise the ROFO, they were to notify the Investor of the offer price and provide information related thereto in a form set out in the SSSA.[6]

11 There was, in fact, no Qualified Exit by 31 March 2014 and, according to Nine Rivers, it exercised its Drag Along Right and Katra Finance elected to exercise its ROFO. This process was then encapsulated within an agreement ("the 2014 SPA") under which Katra Finance agreed to purchase the "Sale Securities" from Nine Rivers at a "Purchase Consideration" of INR 302,500,000, plus various other amounts.

12 The Sale Securities were defined in the 2014 SPA as being:[7]

> … collectively (i) the Equity Shares, the Seller CCPS and any other Company Equity Securities subscribed to or purchased by the Seller, (ii) any Equity Shares received by the Seller upon Conversion of any Seller CCPS; and (iii) any Company Equity Securities received by the Seller as a result of any Adjustment Event;

13 The 2014 SPA was signed by Katra Finance, by GAPL and by Mr Patnaik on his own behalf, on behalf of Gokul Patnaik (HUF) and on behalf of the same Promoter Group as defined in the 2014 SPA. Under the 2014 SPA, the Promoters were defined as being only Katra Finance (who is also defined as the Purchaser) and Mr Patnaik and the Promoter Group appeared to play no role.

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6 Gokul's 1st Affidavit at p 176.

7 Gokul's 1st Affidavit at p 109.

14 In the event, Katra Finance did not purchase the Sale Securities from Nine Rivers in accordance with the 2014 SPA and there was a subsequent negotiation which resulted in variations to the payment mechanism and the time for payment. This led to amendments to the 2014 SPA which were recorded in the Addendum Agreement dated 4 December 2015 ("the 2015 Amendment"), which was signed by Mr Vangal on his own behalf and on behalf of Katra Finance and by Mr Patnaik on behalf of GAPL, himself as a Promoter and on behalf of the Promoter Group, as defined in the 2015 Amendment. The Promoter Group in the 2015 Amendment was a smaller group than that contained in the SSSA and the 2014 SPA because Mr Vangal, who was previously part of the Promoter Group, became both a Purchaser and a Promoter for the purposes of the 2015 Amendment.

15 However, neither Mr Vangal nor Katra Finance completed the purchase of the Sale Securities in accordance with the 2014 SPA or the 2015 Amendment. Between June 2016 and September 2016, Nine Rivers negotiated via email with Mr Vangal and various others in an attempt to secure the sale of the Sale Securities but no sale transpired.

16 On 7 October 2016, Nine Rivers sent a Notice of Default ("the Notice of Default") to the respondents in the Arbitration, except for Gokul Patnaik Associates Private Limited, alleging that the "Promoter Group", as defined in the Notice of Default, had all agreed to purchase the Sale Securities but had defaulted. Nine Rivers called upon that Promoter Group to rectify the default and purchase the Sale Securities for the Purchase Consideration as defined in the 2014 SPA. Nine Rivers accepted that the Notice of Default should have identified only the "Purchasers", as defined in the 2015 Amendment, as having been obliged to purchase the Sale Securities.

17 On 16 December 2016, Nine Rivers sent Mr Patnaik, GAPL and Katra Finance a notice pursuant to section 17.2.2.1 of the SSSA ("the Put Option Notice") calling upon the Promoters to purchase the Investor Securities (as defined in the SSSA) pursuant to the Put Option contained in section 17.2.2.1 of the SSSA ("Investor Put Option"), in an amount of INR 1,329,000,000 ("the Put Option Amount").

18 Neither Katra Finance nor Mr Patnaik complied with the Put Option Notice and that led to the Arbitration in which Nine Rivers sought payment of the Put Option Amount, together with other relief.

19 Nine Rivers commenced the Arbitration on 5 May 2017 pursuant to the arbitration agreement contained in clause 11.12 of the 2014 SPA, as amended by the 2015 Amendment. That provided for arbitration under the Singapore International Arbitration Centre ("SIAC") Rules, the applicable edition being the SIAC Rules (6th edition), effective from l August 2016. The seat of the Arbitration was Singapore.[8]

20 By clause 11.9 of the 2014 SPA, it was agreed that:

> This Agreement shall be governed and interpreted by, and construed in accordance with, the laws of India and subject to clause 9.12 (Arbitration) [*sic*], the courts of Mumbai shall have the exclusive jurisdiction in respect of any dispute arising under or in relation to this Agreement.

21 Mr Charles Peter Manzoni QC, SC was appointed as the sole arbitrator ("the Arbitrator") by the Vice President of the Court of Arbitration of SIAC on 26 February 2018. Directions were given and a hearing was held in Singapore

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8 Gokul's 1st Affidavit at p 120.

from 11 to 13 February 2019, followed by written closing submissions. The Arbitrator made his award on 24 June 2019 ("the Award").

22 In the Award, the Arbitrator found that:[9]

> 1. The First Respondent, Mr Patnaik, and the Second Respondent, Katra Finance are jointly and severally required to purchase the Investor Securities, as defined in the SSSA, held by the Claimant Nine Rivers pursuant to the Put Option contained in Section 17.2.2.1 of the SSSA for a total consideration of INR 1,329,000,000 (in words one billion three hundred and twenty nine million Indian Rupees).
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> 2. All other claims are dismissed.
>
> 3. Each party is to bear its own costs incurred in this arbitration.
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> 4. Each of the First Respondent, Mr Patnaik, the Second Respondent Katra Finance and the Claimant, Nine Rivers are to pay one third of the costs of the arbitration as determined by the Registrar in the sum of Singapore Dollars 254,797.22 (in words, two hundred and fifty four thousand , seven hundred and ninety seven Singapore Dollars and twenty two cents).

These proceedings

23 On 24 September 2019, Mr Patnaik commenced these proceedings by Originating Summons HC/OS 1191/2019 to make an application to set aside the Award ("the Application"). The Application was supported by the First Affidavit of Mr Patnaik.

24 On 9 December 2019, the cause papers were served on Nine Rivers who appointed solicitors on 2 January 2020.

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9 Gokul's 1st Affidavit at p 98.

25 On 24 January 2020, Mr Patnaik filed evidence on Indian law in Justice Patnaik's Affidavit. Justice Ananga Kumar Patnaik is now retired and was a former Judge in the Supreme Court of India and is not related to Mr Patnaik.

26 On 21 February 2020, Nine Rivers filed the Second Affidavit of Jageshwar Juggernauth in reply to the Application.

27 Also, on 21 February 2020, Nine Rivers filed an application to strike out, HC/SUM 830/2020 ("the Strike Out Application"), seeking to strike out Justice Patnaik's Affidavit, supported by the First Affidavit of Jageshwar Juggernauth.

28 On 19 March 2020, Mr Patnaik filed a Third Affidavit in reply to the Strike Out Application and on 2 April 2020 Nine Rivers filed the Third Affidavit of Jageshwar Juggernauth in response to that affidavit.

29 Also, on 2 April 2020, the matter was transferred to the SICC as SIC/OS 4/2020.

30 On 1 May 2020, Mr Patnaik filed a Fourth Affidavit in response to Nine Rivers' reply affidavit and on 18 May 2020 Nine Rivers filed the Fourth Affidavit of Jageshwar Juggernauth in reply to that affidavit.

31 On 10 June 2020, I held a Case Management Conference at which I gave directions for the Application to be dealt with on 25 and 26 June 2020. In relation to the Strike Out Application, in dealing with the issues on the Application, I would also deal with issues on the Strike Out Application. I said that, soon after the hearing on 25 and 26 June 2020, I would inform the parties of my decision on whether Justice Patnaik's Affidavit could be relied on in these proceedings. Nine Rivers indicated that, in the event that I decided that Justice

Patnaik's Affidavit could be relied on, it would wish to apply to serve evidence on Indian law. I therefore directed that 23 and 24 July 2020 should also be held in reserve as hearing dates, in the event that a further hearing was required to deal with evidence of Indian Law.

32 On 2 July 2020, having considered the submissions of the parties and for the reasons set out in this judgment, the court informed the parties that I had decided that no reliance could be placed on Justice Patnaik's Affidavit in relation to the application under Art 34(2)(*b*)(ii) of the Model Law. On that basis, there was no need for any application by Nine Rivers to file evidence on Indian law and the hearing on 23 and 24 July 2020 was vacated.

The application

33 In the Application, Mr Patnaik seeks to set aside the Award pursuant to s 24 of the IAA and Articles 34(2)(*a*)(iii) and 34(2)(*b*)(ii) of the Model Law set out in the First Schedule of the IAA.

34 Mr Patnaik seeks to set aside the Award on the following grounds.

(a) The Award contained decisions on matters beyond the scope of the submissions to the Arbitration, as the disputes in the Arbitration are not arbitrable under the 2014 SPA and are beyond the jurisdiction of the Arbitrator.

(b) There was a breach of the rules of natural justice occurring in connection with the making the Award, as the Arbitrator did not allow an application to amend the Statement of Defence to incorporate submissions which would have placed the burden of proof on Nine Rivers to prove its entitlement to the reliefs granted in the Award.

(c) The Award is in conflict with the public policy of India because the awarded relief is in contravention with Indian Law and it would be a breach of international comity and thus against Singapore public policy to allow the Award to stand.

35 As set out above, Nine Rivers filed the Strike Out Application seeking to strike out Justice Patnaik's Affidavit on the grounds that:

(a) the affidavit, which deals with issues of Indian law and public policy, is irrelevant to the Setting Aside Application as, under the IAA and Article 34(2)(*b*)(ii) of the Model Law, the Award may only be set aside by the court if the court finds that the Award is in conflict with the public policy of Singapore;

(b) the affidavit amounts to fresh evidence that was not brought up in the Arbitration; and

(c) Mr Patnaik's reliance on Justice Patnaik's Affidavit is an attempt to revive issues that have already been determined by the Arbitrator in the Arbitration.

36 I will deal with each ground of the Application, in turn.

Application under Article 34(2)(*a*)(iii) of the Model Law

37 Article 34(2)(*a*)(iii) of the Model Law provides as follows:

> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> …
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or

> contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; …

Mr Patnaik's submissions

38 On behalf of Mr Patnaik, it is submitted that the Arbitration was commenced pursuant to clause 11.12 of the 2014 SPA in which he was identified as a "Promoter". He refers to the SSSA which contained a different arbitration clause at section 26 of the SSSA. That provided that any dispute would be referred to and finally resolved by arbitration in New Delhi and would be governed by the Indian Rules of the Arbitration and Conciliation Act 1996. That arbitration would be determined by a tribunal of three arbitrators and the SSSA was governed by the Laws of India.[10]

39 Mr Patnaik says that, in the Arbitration, Nine Rivers' basis for contending that the Arbitrator had jurisdiction over the SSSA, which is that section 17.2.2 of the SSSA (the Investor Put Option) was incorporated into the 2014 SPA by virtue of clause 8 of the 2014 SPA, was not accepted by the Arbitrator. Rather, the Arbitrator held that he had jurisdiction pursuant to the arbitration agreement in the 2014 SPA which was widely drawn and "covers a dispute" which "arises out of or in relation to or in connection with the interpretation or implementation of this Agreement …".

40 The Arbitrator found at paragraphs 225 to 230 of the Award that Mr Patnaik was not liable under the 2014 SPA as an Indemnifier. Mr Patnaik says that he was not therefore liable under clause 8 of the 2014 SPA, as pleaded by

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[10] Bundle of cause papers at p 194.

Nine Rivers. However, Mr Patnaik says that, despite this, the Arbitrator made an Award against him in his capacity as Promoter under section 17.2.2.1 of the SSSA.

41 Mr Patnaik submits that the Arbitrator granted Nine Rivers a remedy against him under the SSSA which the Arbitrator was not entitled to do under the 2014 SPA. He says that the remedy granted by the Arbitrator pursuant to the SSSA was, *prima facie*, one which the Arbitrator did not have jurisdiction to do as he had no jurisdiction over the SSSA. Rather Mr Patnaik submits that the SSSA was a separate and live contract and disputes arising under it were to be determined in an arbitration seated in India, with a tribunal consisting of three arbitrators.[11]

42 Furthermore, Mr Patnaik submits that the Arbitrator had dismissed the basis on which Nine Rivers had contended that it had jurisdiction and instead founded his jurisdiction on the purportedly "widely drawn" arbitration clause under which he did not have jurisdiction.

43 Mr Patnaik referred to the decision in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 ("*Persero v CRW*") at [28] where it was stated that:

> … an arbitration clause defines the scope of the dispute that may be referred to arbitration including the powers of the arbitrators. Whether a dispute falls within an arbitration clause in a contract must depend on first, what the dispute is about and second, the kinds of disputes which the arbitration clause covers …

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11 Applicant's written opening submissions dated 22 June 2020 ("AWS") at [65].

44 He also refers to *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*"), where the Court held at [33]:

> The role of pleadings in arbitration proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication.

45 Finally, he refers to *AUF v AUG* [2016] 1 SLR 859, at [92] where it was stated:

> … the [a]rbitrator was confined to reaching a decision on the issues identified between the parties by the pleadings filed between them.

46 Notwithstanding the fact that the SSSA was arbitrable under a separate arbitration agreement, with arbitration before a tribunal of three arbitrators in New Delhi, the Arbitrator determined that the SSSA had been incorporated pursuant to the widely drawn 2014 SPA arbitration agreement which purportedly "covered" the dispute but which was not as pleaded by Nine Rivers.[12]

47 Mr Patnaik submits that the Arbitrator should have confined himself to reaching a decision on the issues identified between the parties by the pleadings filed between them. However, he submits that the Arbitrator made the Award which contained a decision on matters which had not been submitted to arbitration and the Arbitrator's interpretation and self-direction of its jurisdiction was outside the scope of the disputes placed before him.[13]

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12 AWS at [69]–[72].

13 AWS at [73]–[74].

Nine Rivers' submissions

48 On behalf of Nine Rivers, it is submitted that, in assessing whether an arbitration award should be set aside under the jurisdiction grounds, the court should adopt a two-stage enquiry, as set out by V K Rajah JA, delivering the judgement of the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW v Persero*") at [30], where he stated that:

> In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, this court held (at [44]) that the court had to adopt a two-stage enquiry in assessing whether an arbitral award ought to be set aside under Art 34(2)(*a*)(iii) of the Model Law. Specifically, it had to determine:
>
> > (a) first, what matters were within the scope of submission to the arbitral tribunal; and
> >
> > (b) second, whether the arbitral award involved such matters, or whether it involved "a new difference … outside the scope of the submission to arbitration and accordingly … *irrelevant to the issues requiring determination*" [emphasis in original] (at [40]).

49 In determining what matters were within the scope of submission to arbitration, Nine Rivers submits that the court considers two matters. First, the Court looks at the scope of the arbitration clause under which the dispute was adjudicated and it refers to the Court of Appeal decision in *BBA and others v BAZ and another appeal* [2020] 2 SLR 453 ("*BBA v BAZ*"), where the Court stated at [39]:

> An arbitral tribunal exceeds its jurisdiction if it decides on issues that are beyond the scope of the arbitration clause, on a proper construction of the clause …

50 Secondly, Nine Rivers submits that the Court will look at the pleadings in the arbitral proceedings to determine the scope of the dispute submitted to

arbitration and it refers to the Court of Appeal decision in *Kempinski* ([44] *supra*), where the Court stated at [33]:

> The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication.

51 Applying those principles to this case, Nine Rivers submits that it is clear that the dispute adjudicated by the Arbitrator fell within the scope of the parties' submission to arbitration. It refers to the arbitration clause at clause 11.12 of the 2014 SPA which provides relevantly that: "In the event a dispute arises out of or in relation to or in connection with the interpretation or implementation of this Agreement, the Parties…may…refer the dispute to binding arbitration…"[14]

52 It also submits that the Arbitrator took into account the arbitration agreement in the 2014 SPA when finding that he had jurisdiction to determine the claims in the Arbitration and made the following points at paragraphs 87 to 90 of the Award.[15]

(a) The Arbitration Agreement in the 2014 SPA is widely drawn and covers disputes which arise out of the 2014 SPA.

(b) The ultimate dispute in the Arbitration arose because Katra Finance did not purchase Nine Rivers' shares in GAPL in the manner it was required to under the 2014 SPA.

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14 Gokul's 1st Affidavit at p 120; Defendant's written opening submissions dated 22 June 2020 ("DWS") at [11]–[16].

15 DWS at [19].

(c) Clause 8 of the 2014 SPA provided for what would happen in the event that there was a failure to purchase shares in accordance with the 2014 SPA. Under that provision, Nine Rivers was allowed to exercise any other rights and remedies that it had, including its right to the Investor Put Option under section 17.2.2 of the SSSA.

(d) Following the failure to purchase the Respondent's shares in GAPL, Nine Rivers exercised the rights that the 2014 SPA preserved, by the service of the Put Option Notice.

(e) The fact that the rights being exercised are rights which were originally contained in the SSSA does not mean that the dispute must inevitably be arbitrated under the terms of the SSSA arbitration clause.

53 Nine Rivers also refers to paragraphs 185 to 192 of the Award, where the Arbitrator set out the primary contractual obligations under the 2014 SPA which were breached. It submits that this underscores that the dispute that gave rise to the SIAC Arbitration arose out of the 2014 SPA and the breaches of that agreement. It therefore submits that Mr Patnaik is wrong to contend that the disputes pertained to rights and obligations flowing exclusively from the SSSA, or that the reliefs sought and granted in the Award arose solely from the provisions of the SSSA, so that the arbitration clause under the SSSA should have been followed.[16]

54 Nine Rivers submits that the right to the Investor Put Option and the relief granted by the Arbitrator arose from the 2014 SPA. The "Default" which resulted in it exercising the Investor Put Option was a "Default" under the 2014

16 DWS at [20]–[25].

SPA. As defined in clause 8 of the 2014 SPA, as amended by clause 2.11 of the 2015 Amendment, a Default would occur if the purchasers, that is Katra Finance and Mr Vangal, "fail to purchase the relevant tranche or all of the Sale Securities (as applicable) by paying the relevant Purchase Consideration to the Seller by the Long Stop Date in accordance with this Agreement".[17] As Katra Finance and Mr Vangal failed to complete even a single tranche of purchase under the 2014 SPA, there was a breach under the 2014 SPA, as amended, pursuant to which Nine Rivers sent a Notice of Default. That Notice of Default stated that "parties, have jointly and severally, committed a default of their obligations under the SPA. An Event of Default (as such term is defined under the SPA) has occurred."[18]

55 Whilst Mr Patnaik asserts that the "Event of Default" as pleaded in Nine Rivers' Statement of Claim was defined only in section 17.1 of the SSSA, Nine Rivers says that the term "Event of Default" was defined at page 6 of the 2014 SPA and arose as a result of the breach of the 2014 SPA.[19]

56 Nine Rivers refers to clause 8.1 of the 2014 SPA and clause 2.11 of the 2015 Amendment under which, in the event of a default as defined in the 2014 SPA, it had the right to:

> … exercise any other rights and remedies under law, equity and/or the SSSA; and/or sell (whether through the Drag Along Right, the Investor Put Option or otherwise) any or all of the Sale Securities to any Person (including a competitor).

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17 Jageshwar Juggernauth's 2nd affidavit dated 19 February 2020 ("Jageshwar's 2nd Affidavit") at p 270.

18 Jageshwar's 2nd Affidavit at p 277; DWS at [26].

19 DWS at [29]–[31].

57 Nine Rivers also refers to the Put Option Notice which states: "Please note that in terms of section 8.1.1 of the [2014] SPA and section 8.1(a) of the 2015 Amendment, that provides the right to Nine Rivers to 'exercise any other right and remedies under law, equity and/or the [SSSA], we Nine Rivers hereby exercise the right available to us under Section 17.2.2.1 of the [SSSA]".

58 Nine Rivers submits that the Arbitrator correctly noted at paragraph 87 of the Award:[20]

> … the fact that the rights being exercised are rights which are originally contained within the SSSA does not mean that the dispute must inevitably be arbitrated under the terms of the SSSA Arbitration Agreement.

59 In relation to Mr Patnaik's contention that relief should not have been given against him as he was merely a Promoter under the SSSA and not an identified Purchaser under the 2014 SPA, Nine Rivers says that the arbitration agreement in the 2014 SPA binds "the Parties", which includes Mr Patnaik, and there is nothing in the arbitration agreement or the 2014 SPA which prevents the Arbitrator from making an award that may affect him. On the contrary, Nine Rivers submits that the 2014 SPA contains specific provisions under which Mr Patnaik is liable in the event of a breach. This includes clause 9 of the 2014 SPA, which expressly provides that he may be made to indemnify Nine Rivers against liabilities arising from a breach by Katra Finance and/or Mr Vangal under the 2014 SPA. Given that and his agreement under the terms of the 2014 SPA read with the SSSA to purchase Nine Rivers' shares in GAPL in the event Nine Rivers chose to exercise its Investor Put Option right, Nine Rivers submits

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[20] DWS at [41].

that Mr Patnaik cannot now claim that no relief should be given against him as he was not a Purchaser under the 2014 SPA.[21]

60 Whilst Mr Patnaik refers to the fact that KHPL issued a Notice of Arbitration under the SSSA on 29 May 2019 and filed an application for appointment of an arbitration before the Supreme Court of India on 21 September 2019, Nine Rivers submits that this does not assist him. Nine Rivers says that the Notice of Arbitration is devoid of merit and it refers to its Reply to the Notice of Arbitration dated 25 June 2019. First, Nine Rivers says that KHPL's assertion that there is a dispute between Nine Rivers and KHPL because Nine Rivers issued the Put Option Notice against KHPL is incorrect, as the Put Option Notice did not require anything of KHPL. Secondly, KHPL also incorrectly states that certain relief was granted against KHPL in the Award. The Arbitrator did not make any substantive award against KHPL or find that KHPL should pay any of the costs of the Arbitration.[22]

61 Even if the Arbitrator had erred by considering the SSSA when issuing relief under the 2014 SPA, Nine Rivers submits that this is insufficient to set aside the Award and it refers to the decision in *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2020] SGHC 113 ("*Bloomberry*"). In that case, it was said that the arbitral tribunal granted a remedy which affected the rights of non-parties and was beyond that tribunal's remit and the court said at [43]:

> … the reality is that its contention has to do with the erroneous exercise by the Tribunal of an available power (*ie*, constituting a mere error of law or even fact) as opposed to the Tribunal's exercise of a power that it did not possess. In the

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21 DWS at [33]–[35].

22 DWS at [36]–[39].

> circumstances, there is no excess of power to ground an application under Art 34(2)(*a*)(iii): see *Persero* at [33].

62 Nine Rivers therefore submits that Mr Patnaik's application to set aside the Award under Article 34(2)(*a*)(iii) of the Model Law fails.

Discussion

63 As set out in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi Jasa*") at [44] and *CRW v Persero* ([48] *supra*) at [30], there is a two-stage enquiry in assessing whether an arbitral award ought to be set aside under Art 34(2)(*a*)(iii) of the Model Law. Specifically, I have to determine, first, what matters were within the scope of submission to the arbitral tribunal and, second, whether the arbitral award involved such matters or whether it involved a matter outside the scope of the submission to arbitration.

64 In the present case, it is necessary, first, to understand the relief claimed and granted and which Mr Patnaik contends is outside the jurisdiction of an arbitrator under clause 11.12 of the 2014 SPA.

65 In its Statement of Claim served in the Arbitration, Nine Rivers set out the relief claimed at section 7 as follows:[23]

> (i) Direct Respondent No. 1 (Patnaik), Respondent No. 2 (KFL) and Respondent No. 3 (Vangal), to jointly and severally pay the Claimant (Nine Rivers) the USD equivalent (calculated at an exchange rate of INR 62 to 1 USD in accordance with the terms of the SPA) of the Put Option Amount of INR 1,329,000,000 (Indian Rupees One Billion and Three Hundred Twenty Nine Million Only) together with simple interest @18% per annum from the date of exercise of the Investor Put Option (*i.e.* December 16, 2016) till such time the aforesaid amount of INR

[23] Jageshwar's 2nd Affidavit at pp 335–336.

> 1,329,000,000 is paid (collectively, the "Claim Amount") against transfer of the Sale Securities;
>
> (ii) Alternatively, an award for damages against Respondent No. 1 (Patnaik), Respondent No. 2 (KFL) and Respondent No. 3 (Vangal), for breach of their obligations under the SPA in an amount equal to the Claim Amount to be paid by them jointly and severally to the Claimant (Nine Rivers);…

66 The basis for those claims was pleaded in section 6.1 of the Statement of Claim as follows:[24]

> 6.1.4. Clause 8.1 of the SPA provides for the rights and remedies of Nine Rivers in the event of a default by Vangal and KFL to meet their obligations under the SPA. These rights include, among others, the Investor Put Option. As a result of the default by Vangal and KFL, Nine Rivers exercised its Investor Put Option calling Patnaik, Vangal and KFL to jointly and severally (within a period of 90 days), pay a total put option amount of INR 1,329,000,000 (Indian Rupees One Billion and Three Hundred Twenty Nine Million Only). The Put Option Amount was calculated in accordance with the provisions of Section 17.2.2.1 of the SSSA. To date, neither have Patnaik, Vangal and KFL replied to the said Notice, nor have they paid any amount due under the Put Option Notice, whether in response to the notice or otherwise. As such, Patnaik, Vangal and KFL have failed to pay the Put Option Amount, and have not done so since then, which failure constitutes a breach of Clause 8.1 the SPA.

67 At section 6.4 of the Statement of Claim, there was also a claim against Mr Patnaik under clause 9 of the 2014 SPA to indemnify Nine Rivers against the liability of Mr Vangal and KFL.[25]

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24 Jageshwar's 2nd Affidavit at p 330.

25 Jageshwar's 2nd Affidavit at p 334.

68 The Arbitrator dealt with these claims in the Award. At paragraphs 188 to 191 of the Award, he dealt with liability for the claim under the Investor Put Option and section 17.2.2.1 of the SSSA and found that:[26]

> 188. Katra Finance was obliged to purchase the Sale Securities under the 2014 SPA for a consideration of INR 302,500,000 plus other sums as defined. It failed to do so and is in breach of the 2014 SPA in that respect.
>
> 189. The 2014 SPA was amended by the 2015 Amendment to provide for a different timetable for the purchase of the Sale Securities and to require Mr Vangal, as well as Katra Finance, to purchase them at a consideration for INR 302,500,000 plus other sums as defined. Both Mr Vangal and Katra Finance failed to purchase in accordance with the 2015 Amendment, and both are in breach of the 2015 Amendment and the 2014 SPA in that respect.
>
> 190. An Event of Default under section 17.2.2.1 of the SSSA has occurred as a result of the failure to consummate the sales anticipated by the 2014 SPA and 2015 Amendment. As a result, Nine Rivers was entitled to, and did, validly serve a Put Option Notice.
>
> 191. Katra Finance and Mr Patnaik, as Promoters under the SSSA, were required to purchase the Investor Securities pursuant to the Put Option Notice. They have failed to do so and are in breach of contract in that respect.

69 He then dealt with the claim for an indemnity and concluded at paragraph 207 of the Award that:[27]

> Therefore, I find that Mr Patnaik is also liable to indemnify Nine Rivers in respect of the breach by each of Katra Finance and Mr Vangal in failing to purchase the Sale Securities for INR 302,500,000 (plus other sums as defined) under the 2014 SPA as amended by the 2015 Amendment.

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26 Gokul's 1st Affidavit at p 78.

27 Gokul's 1st Affidavit at p 84.

70 In respect of liability, the Arbitrator set out the position in paragraph 211 of the Award:[28]

> 211. In the light of my findings above, Mr Patnaik is:
>
> 211.1. Liable as a Promoter to purchase the Investor Securities under the Put Option at a [*sic*] the Put Option Amount of INR 1,329,000,000. He has failed to do so and is in breach of contract; and
>
> 211.2. Liable as an Indemnifier in respect of the failure by Katra Finance and Mr Vangal to purchase the Sale Securities under the 2014 SPA (as amended).

71 In terms of the relief for the liability under the Investor Put Option, the Arbitrator said this at paragraph 212 of the Award:[29]

> In respect of his liability as Promoter, the obvious proposition is that he should be liable for the sum that Nine Rivers would have obtained had he not been in breach. Therefore, the obvious proposition is that he is liable for INR 1,329,000,000, albeit that such an amount should only be paid as against transfer of the Investor Securities. That is effectively the relief claimed.

72 For the reasons set out in paragraphs 220 to 229 of the Award, essentially a failure to prove damages, the Arbitrator then went on to conclude at paragraph 230 of the Award: "I am therefore unable to make any award against Mr Patnaik in respect of his liability as Indemnifier."[30]

73 He then set out at paragraph 231 of the Award:[31]

> But that does not ultimately matter, because the course of action which Nine Rivers took when Katra Finance and Mr Vangal failed to purchase the shares was not to seek damages or to seek specific performance of the 2014 SPA, but was to

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28 Gokul's 1st Affidavit at p 86.

29 Gokul's 1st Affidavit at p 86.

30 Gokul's 1st Affidavit at p 90.

31 Gokul's 1st Affidavit at p 90.

> exercise its right to put the shares under section 17.2.2.1 of the SSSA. Having made that election, and thereby entitled itself to recovery of a far greater consideration in respect of the transfer of its shares, it does not seem to me that it is entitled to claim damages in respect of the original breach of the 2014 SPA in addition.

74 On that basis, the relief awarded by the Arbitrator was set out in the dispositive section of the Award at paragraph 1 as:[32]

> The First Respondent, Mr Patnaik, and the Second Respondent, Katra Finance are jointly and severally required to purchase the Investor Securities, as defined in the SSSA, held by the Claimant Nine Rivers pursuant to the Put Option contained in Section 17.2.2.1 of the SSSA for a total consideration of INR 1,329,000,000 (in words one billion three hundred and twenty nine million Indian Rupees).

75 Therefore, I can summarise the position as follows. Based on the pleadings, Nine Rivers claimed and the Arbitrator found that:

(a) Mr Vangal and Katra Finance had failed to meet their obligations under the 2014 SPA, as amended;

(b) the failure of Mr Vangal and Katra Finance to meet their obligations under the 2014 SPA amounted to a Default under clause 8.1 of the 2014 SPA, as amended;

(c) on a Default, Nine Rivers was entitled by the express terms of clause 8.1 of the 2014 SPA to exercise any other rights and remedies under the Principal Investment Agreement, that is the SSSA;

(d) the rights and remedies under the SSSA included the right to exercise the Investor Put Option under section 17.2.2.1 of the SSSA; and

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32 Gokul's 1st Affidavit at p 98.

(e) Nine Rivers had exercised its Investor Put Option Rights under section 17.2.2.1 of the SSSA and was entitled to relief under that provision.

76 I can now turn to consider whether, on that basis, the claim and relief came within the jurisdiction of the Arbitrator, as agreed by the parties in clause 11.12 of the 2014 SPA.

77 In doing so, Mr Patnaik raises an issue about the way in which the Arbitrator came to the conclusion that he had jurisdiction to determine the claim made by Nine Rivers and to grant the relief as he did in the Award.

78 Mr Patnaik raised the contention in his Statement of Defence that the Arbitrator had no jurisdiction to deal with a claim under section 17.2.2.1 of the SSSA. He contended that this claim had to be dealt with under the arbitration clause in section 26 of the SSSA.

79 In its Statement of Reply at paragraphs 2.11 and 2.12, Nine Rivers pleaded as follows:[33]

> 2.11 Nine Rivers denies that the put option has been exercised by Nine Rivers in pursuance of Section 17.2.2.1 of the SSSA. The Investor Put Option right has been granted to Nine Rivers under Clause 8.1 of the SPA and was incorporated into the SPA by means of reference. Since the Investor Put Option has been incorporated by means of reference instead of being reproduced verbatim, it is but natural for Nine Rivers to refer to Section 17.2.2.1 of the SSSA to be able to exercise its rights under Clause 8.1 of the SPA. Hence, by mere reference to Section 17.2.2.1 of the SSSA in the exercise of its rights under Clause 8.1 of the SPA cannot, by any logic or explanation, be construed to mean that the default on the part of the Respondents or the

[33] Jageshwar's 2nd Affidavit at p 376.

> dispute or even the right to seek relief for the default has arisen under the SSSA.
>
> 2.12 Without prejudice to the above submissions, Nine Rivers submits that the Answering Respondents do not urge a case that there exists no arbitration agreement between the parties. The Answering Respondents clearly admit the existence of the arbitration clause contained in Clause 11.12 of the SPA. Further, the arbitration Clause 11.12 of the SPA, in no ambiguous terms, provides that "*In the event a dispute arises out of or in relation to or in connection with the interpretation or implementation of this Agreement*" the parties shall attempt to resolve the dispute through good faith consultation, failing which, the dispute was to be referred to this Hon'ble Tribunal. ***Since, the cause of action resulting in the present dispute has arisen under the SPA, Nine Rivers submits that such dispute can only be arbitrated under Clause 11.12 of the SPA***.
>
> [emphasis in original in italics; emphasis added in bold italics]

80 The Arbitrator dealt with the issue of jurisdiction at paragraphs 87 to 93 of the Award which I set out in full:[34]

> 87. I am satisfied that I do have jurisdiction to determine the claims in this arbitration. The ultimate dispute arises because Katra Finance has not purchased the Sale Securities in the manner in which it was required to under the 2014 SPA. One of the entitlements which Nine Rivers has in that event is to exercise its rights to put the Investor Securities under clause 17.2.2 of the SSSA. But the fact that the rights being exercised are rights which are originally contained within the SSSA does not mean that the dispute must inevitably be arbitrated under the terms of the SSSA Arbitration Agreement.
>
> 88. The Arbitration Agreement in the 2014 SPA is widely drawn. It covers a dispute which:
>
> > "*.. arises out of or in relation to or in connection with the interpretation or implementation of this Agreement …*"
>
> The clause covers disputes which arise out of the 2014 SPA, and therefore not only disputes as to the operation, or meaning, or breach of the 2014 SPA.

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34 Gokul's 1st Affidavit at pp 52–53.

> 89. In my view there can be no doubt that this dispute arises out of the 2014 SPA. That agreement provided for the purchase of the Sale Securities by the Purchasers (as defined in that Agreement) pursuant to a deemed exercise of a Drag Along Right contained in the SSSA. Clause 8 of the 2014 SPA provided for what was to happen in the event that there was a failure to purchase the Sale Securities in accordance with the 2014 SPA, and it allowed Nine Rivers to exercise any other rights and remedies that it had, including any such remedies under the SSSA.
>
> 90. That is in fact what happened, in that following the failure to purchase the Sale Securities in accordance with the 2014 SPA, Nine Rivers purported to exercise the rights that the 2014 SPA preserved, by the service of the Put Option Notice. But its entitlement to do so arose out of the failure by the Purchasers (as defined in the 2014 SPA, and as amended in the 2015 Amendment) to purchase the Sale Securities in accordance with the terms of the 2014 SPA. Therefore, it follows that the dispute in this case, including as to whether the Respondents have any obligations under the Put Option Notice, arise[s] out of the 2014 SPA.
>
> 91. As a result, I am satisfied that I have jurisdiction to hear and determine this case.
>
> 92. Nine Rivers contended that Section 17.2.2 of the SSSA was incorporated into the 2014 SPA by virtue of clause 8 of the 2014 SPA, and that this was why I had jurisdiction.
>
> 93. I do not think that is correct. I do not think that the entitlements under the SSSA (and in particular Section 17.2.2) have been incorporated by reference. Clause 8 of the 2014 SPA simply preserved any entitlements to exercise the rights that existed under the SSSA, and that is different to incorporation. However, given the wide wording of the Arbitration Agreement in the 2014 SPA, it remains the case that despite the fact that Section 17.2.2 of the SSSA is not incorporated by reference, the current dispute is capable of being referred to arbitration under clause 11.12 of the 2014 SPA, because the dispute arose out of the implementation of the 2014 SPA, and the breach of that agreement, namely the failure to purchase the Sale Securities in accordance with its terms. Hence my jurisdiction is established.

81 Mr Patnaik submits that the Arbitrator dismissed the basis on which Nine Rivers said that he had jurisdiction and founded the basis of his jurisdiction

on the "widely drawn" arbitration clause which, in oral submissions, he said was not pleaded by Nine Rivers.

82 In fact, as set out at [79] above, Nine Rivers, in the alternative, sought to rely on the terms of the arbitration agreement in clause 11.12 of the 2014 SPA in paragraph 2.11 of its Statement of Reply, so the basis for jurisdiction was properly pleaded.

83 That arbitration agreement was, as the Arbitrator found, widely drawn. It provided that:[35]

> In the event a dispute arises out of or in relation to or in connection with the interpretation or implementation of this Agreement, the Parties … may … refer the dispute to binding arbitration …

84 Taking the way in which the claim was pleaded and the findings in the Award, it is evident that the arbitration agreement covered all the matters forming the claim which formed the findings against Mr Patnaik in the Award. It is clear that the Arbitrator could determine whether Mr Vangal and Katra Finance had failed to meet their obligations under the 2014 SPA, as amended, and whether that amounted to a Default under clause 8.1 of the 2014 SPA. Equally, the Arbitrator could decide whether Nine Rivers was entitled, by the express terms of clause 8.1 of the 2014 SPA, to exercise rights and remedies under the SSSA and that those rights included the Investor Put Option under section 17.2.2.1 of the SSSA.

85 On that basis, it is evident that the issues of whether Nine Rivers had exercised its Investor Put Option Rights under section 17.2.2.1 of the SSSA and

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35 Jageshwar's 2nd Affidavit at p 258.

was entitled to relief under that provision arose "out of or in relation to or in connection with the implementation of" the 2014 SPA.

86 Mr Patnaik wrongly sought to limit the jurisdiction of the Arbitrator to a claim for an indemnity under clause 9 of the 2014 SPA. The jurisdiction of the Arbitrator was much wider and included the grant of relief which was expressly referred to under clause 8.1 of the 2014 SPA and included relief against Mr Patnaik as a Promoter under the SSSA.

87 Accordingly, for the reasons set out above, which reflect the reasons of the Arbitrator, the Arbitrator had jurisdiction to deal with the claim made by Nine Rivers as awarded in the Award. It follows that the application to set aside the Award under Article 34(2)(*a*)(iii) of the Model Law fails.

Application under s 24(*b*) of the IAA

88 Section 24(*b*) of the IAA provides as follows:

> 24. Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> …
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

Mr Patnaik's submissions

89 On behalf of Mr Patnaik, it is submitted that the Arbitrator's refusal to allow Mr Patnaik's application to amend his Statement of Defence was a breach of the rules of natural justice which prejudiced his rights.

90 Mr Patnaik says that he made an application to amend his pleading to plead as follows but this was refused:[36]

> a. None of the parties in the SPA had satisfied the conditions precedent set out in Clause 5.1 of the SPA. Therefore, there could not have been any Closing of the SPA under Clause 4. Consequently, there was no default under Clause 8 of the SPA.
>
> b. The representations, warranties and covenants contained in Clause 7 of the SPA are ineffective without a certification of such representations, warranties and covenants in terms of Clause 5.1.2 of the SPA, as per the format specified in Schedule B of the SPA.

91 Mr Patnaik submits that the Arbitrator should have allowed the amendment. He says that the arbitration hearing was to be held over a period of four days but was concluded on the third day with one day in reserve, so the Arbitrator had the time to consider the application to amend.[37]

92 If the Arbitrator had allowed the amendment, Mr Patnaik says that the burden of proof would have been placed on Nine Rivers to prove its entitlement to the reliefs granted and the Arbitrator may have decided that there could not have been any closing of the 2014 SPA under clause 4 and therefore there was no default under clause 8 of the 2014 SPA, and that the representations, warranties and covenants contained in clause 7 of the 2014 SPA were ineffective as they had not been certified in the format specified in Schedule B of the 2014 SPA.[38]

93 Mr Patnaik refers to the decision in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695, where the Court

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36 Gokul's 1st Affidavit at [19].

37 AWS at [78].

38 AWS at [79].

of Appeal distilled the following principles in respect of a court setting aside a decision on the grounds of breach of natural justice at [86]:

> The general principles regarding the setting aside of an arbitral award for breach of natural justice under s 24(*b*) of the IAA are well-established. 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 …

94 The Court of Appeal also set out the following key principles at [104]:

> (a) The parties' right to be heard in arbitral proceedings finds expression in Art 18 of the Model Law, which provides that each party shall have a "full opportunity" of presenting its case. An award obtained in proceedings conducted in breach of Art 18 is susceptible to annulment under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA.
>
> (b) The Art 18 right to a "full opportunity" of presenting one's case is not an unlimited one. It is impliedly limited by considerations of reasonableness and fairness.
>
> (c) What constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.
>
> (d) In undertaking this exercise, the court must put itself in the shoes of the tribunal. This means that (i) the tribunal's decisions can only be assessed by reference to what was known to the tribunal at the time, and it follows from this that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in matters of procedure and will not intervene simply because it might have done things differently.

95 At [98]–[99], the Court held as follows:

> In our judgment, in determining whether a party had been denied his right to a fair hearing by the tribunal's conduct of the proceedings, the proper approach a court should take is to

> ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. This inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances of each case (*Triulzi Cesare* at [65]). This has two consequences.
>
> First, the tribunal's conduct and decisions should only be assessed *by reference to what was known to the tribunal at the material time*. A tribunal cannot be criticised as having acted unfairly for failing to consider or address considerations or concerns which the parties never brought to its attention.
>
> [emphasis in original]

96 At [102], the Court set out the practical result of the above principles:

> In practical terms, what this means is that the alleged unfairness upon which the complaining party seeks to found its claim of breach of natural justice must have been brought to the attention of the tribunal … The fundamental point is that, in the context of a challenge directed at the exercise of a tribunal's procedural discretion, there can be no non-compliance to speak of if the complaining party had not informed the tribunal of what, in its view, such compliance required.

97 Mr Patnaik also refers to Rule 20.5 of the SIAC Rules which provides:

> A party may amend its claim, counterclaim or other submissions unless the Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances …

98 Mr Patnaik says that the Arbitrator had time to consider the amendment application on the first day of the hearing and did consider it but decided that the amendments could not be introduced because they were factual issues which could and should have been raised at the time of the Statement of Defence and, if allowed at that stage of proceedings, would cause prejudice to Nine Rivers

because it would have been unable to adduce evidence to rebut the arguments, or alternatively would cause an unnecessary adjournment to the proceedings.[39]

99 On that basis, Mr Patnaik submits that the Arbitrator breached the rules of natural justice in refusing the amendments and by not requiring Nine Rivers to prove a fundamental point of its claim, being that the 2014 SPA and the representations, warranties and covenants therein were invalid because they were ineffective. If Nine Rivers had been required, and failed, to satisfy the burden of proof that the 2014 SPA was valid, and that it was therefore entitled to the reliefs claimed, Mr Patnaik submits that the Arbitrator would not have been able to proceed with the Arbitration, because he did not have any jurisdiction under the SSSA. The Arbitrator would therefore not have made the Award against him.[40]

100 Mr Patnaik refers to *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*"), in which the Court of Appeal held at [38] that "the parties to an arbitration … only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process".

101 It was also stated in *AKN v ALC* at [46]:

> To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem* …

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39 AWS at [86].

40 AWS at [88]–[89].

102 Mr Patnaik also refers to *BLB and another v BLC and others* [2013] 4 SLR 1169 at [75] where it was stated:

> … the duty most closely engaged is the duty to deal with all essential issues in the arbitration … an arbitral tribunal is not obliged as a matter of practicality to deal with every argument canvassed by the parties, but it must ensure that all *essential* issues are dealt with. In determining what is considered "essential", tribunals should be given a fair amount of latitude and should be entitled to take the view that the dispute may be disposed of without further consideration of certain issues. Moreover, an issue need not be addressed expressly in an award but may be *implicitly* resolved. Nevertheless, it remains incumbent on the tribunal to address its mind to the various critical issues in the proceedings. [emphasis in original]

103 Mr Patnaik submits that the issue of whether the 2014 SPA was valid is an essential issue to the Arbitrator's jurisdiction. He says that the burden of proof falls on the party alleging and he refers to s 108 of the Evidence Act (Cap 97, 1997 Rev Ed).[41]

104 He also refers to *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [86] where it was stated:

> It is necessary to prove that the breach, if any, had caused actual or real prejudice to the party seeking to set aside an award. It may well be that though a breach has preceded the making of an award, the same result could ensue even if the arbitrator had acted properly.

105 Mr Patnaik submits that, if the Arbitrator had allowed the amendments, he would have determined that Nine Rivers had failed to prove that there had been any closing of the 2014 SPA under clause 4, and that there was no default under clause 8 of the 2014 SPA. Furthermore, without the certification of representations, warranties and covenants in the format specified in Schedule B

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41 AWS at [93]–[94].

of the 2014 SPA, the representations, warranties and covenants contained in Clause 7 of the 2014 SPA were ineffective.[42]

106 On this basis, Mr Patnaik submits that Nine Rivers would not have been entitled to the relief sought, as they had not proven, on the facts, that they were entitled to the reliefs claimed. The determination of the application to amend was fundamental and essential to Nine Rivers' case. Without having proven that they were contractually entitled to the relief claimed, the Arbitrator should not have granted Nine Rivers that relief.[43]

Nine Rivers' submissions

107 Nine Rivers refers to Mr Patnaik's assertion that there was a breach of the rules of natural justice as a result of the Arbitrator disallowing certain of its amendments which were sought to be made on the first day of the final hearing. Nine Rivers submits that there was no breach of the rules of natural justice.

108 Nine Rivers refers to the following chronology.[44]

(a) By the Arbitrator's Procedural Order No. 1 issued on 14 April 2018, it was directed that the hearing of the evidentiary hearing of the SIAC Arbitration was to be from 11 to 14 February 2019.

(b) On 3 July 2018, Mr Patnaik, together with other respondents in the Arbitration, submitted their Statement of Defence.

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42 AWS at [96].

43 AWS at [97]–[98].

44 DWS at [44].

(c) On 5 February 2019, six days before the hearing, those respondents submitted their Opening Statement in the Arbitration containing several new submissions that had not been in any prior pleading, evidence or document.

(d) On 7 February 2019, Nine Rivers' solicitors in the Arbitration wrote to the Arbitrator objecting to those new submissions.

(e) On 8 February 2019, the Arbitrator informed the parties that he would address Nine Rivers' objections on the first day of hearing, 11 February 2019.

(f) On 8 February 2019, those respondents' solicitors sent an email asserting, *inter alia*, that its submissions arose from the interpretation and construction of the SSSA and the 2014 SPA.

(g) On 11 February 2019, the first day of the hearing, the Arbitrator heard full arguments in respect of the six submissions of those respondents in their Opening Submissions and the objections to those six submissions by Nine Rivers.

(h) After hearing both parties, the Arbitrator ruled that he would allow those respondents to make three of the six submissions that were objected to, but declined to allow them to make the remaining submissions on the basis that they had not been pleaded. Nine Rivers says that counsel for those respondents accepted that those submissions had not been pleaded.

(i) Those respondents then submitted the amendment application, to include the three submissions that had not previously been pleaded.

(j) The Arbitrator fully dealt with the amendment application and allowed those respondents to amend their Statement of Defence to include one submission. However, the Arbitrator disallowed the other two submissions on the basis that those submissions were factual issues which could and should have been raised at the time of the Statement of Defence, and, if allowed at that stage of the proceedings, would cause prejudice to Nine Rivers because it was unable to adduce evidence to rebut the arguments, or alternatively it would cause an unnecessary adjournment to the proceedings.

(k) Despite the amendments having been disallowed, those respondents sought to make the same submissions in their closing arguments.

(l) The Arbitrator, however, held at paragraphs 149 to 152 of the Award that he would not permit them to make those submissions, given that the amendment application had been disallowed.

109 In terms of the relevant legal principles relating to natural justice, Nine Rivers submits that Mr Patnaik bears the burden of proving the factors summarised in *CEB v CEC and another matter* [2020] 4 SLR 183 ("*CEB v CEC*") at [47] by Simon Thorley IJ, who said:

> In the Court of Appeal's decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29], the Court of Appeal, citing *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443, identified the following four factors as having to be established by a party challenging an arbitral award on the basis of a breach of natural justice:
>
> (a) which rule of natural justice was breached;
>
> (b) how it was breached;

> (c) in what way the breach was connected to the making of the award; and
>
> (d) how the breach prejudiced its rights.

110 Nine Rivers submits that Mr Patnaik has not established any of these factors. First, it says that it is unclear which rule of natural justice was allegedly breached and it refers to the following paragraphs from the High Court judgment by Belinda Ang Saw Ean J in *Persero v CRW* ([43] *supra*) at [41]–[42]:

> The principles regarding the setting aside of an arbitral award on the basis of a breach of the rules of natural justice were extensively considered in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, and I shall not endeavor to repeat them here. An allegation of a breach of the rules of natural justice is serious and should not be taken lightly. Borrowing Justice Lax's words in the Canadian case of *Corporacion Transnacional de Inversiones SA de CV v STET International SpA*, 1999 Carswell Ont 2988 at [33], to establish a breach of the rules of natural justice under Art 18 of the Model Law, "the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of justice and morality".
>
> PGN was not very clear in its allegations on exactly which rule of natural justice was contravened. From its submission, PGN seemed to be attacking the Majority Award on the basis that the Majority Tribunal did not give it a proper hearing. However, as just mentioned, it was not clear whether this was indeed PGN's submission. Such a vague allegation was tantamount to PGN taking a shot in the dark, and must be discouraged …

111 Nine Rivers submits that Mr Patnaik has not stated, in any of his affidavits, which is the rule of natural justice that was allegedly breached. He has merely described the parts of his amendment application that were submitted during the hearing and rejected by the Arbitrator. Mr Patnaik then relies on the fact that some parts of the amendment application were disallowed,

to make the "vague allegation" that there was a breach of the rules of natural justice so that the Award should be set aside.[45]

112 Rather, Nine Rivers submits that Mr Patnaik is trying to re-litigate the parts of the Amendment Application that were heard and disallowed under the guise of a breach of natural justice.[46]

113 In any case, Mr Patnaik is unable to show any breach of the rules of natural justice. Nine Rivers submits that, first, the court has assess the "real nature of the complaint" and it refers to the Court of Appeal decision in *AKN v ALC* ([100] *supra*) where Sundaresh Menon CJ cautioned as follows at [37]–[39]:

> 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 (see *BLC v BLB* [2014] 4 SLR 79 ("*BLC*") at [51]–[53]).
>
> In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, the parties to an arbitration do not have a right to a "correct" decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is

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45 DWS at [50]–[51].

46 DWS at [52].

> within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.
>
> In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the *real* nature of the complaint. Among the arguments commonly raised in support of breach of natural justice challenges are these:
>
> > (a) that the arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party;
> >
> > (b) that the arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider the latter's actual case; and
> >
> > (c) that the arbitral tribunal must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the latter's case.
>
> Although such arguments may be commonly raised, more often than not, they do not, in fact, amount to breaches of natural justice.
>
> [emphasis in original]

114 In the present proceedings, Nine Rivers submits that Mr Patnaik's grievance is not with regards to whether the amendment application was heard or how the Arbitrator heard his submissions on that application. Instead, the real nature of his complaint is that the Arbitrator wrongly decided on his submissions in the amendment application, after hearing those submissions. Nine Rivers notes that Mr Patnaik does not deny that the Arbitrator heard his submissions on the amendment application and says that it was fully heard in spite of it being presented on the first day of the hearing and was partly allowed by the Arbitrator. Nine Rivers also points out that it is not alleged that there was some form of impropriety in the way that his submissions were heard by the Arbitrator. Mr Patnaik's grievance is that the Arbitrator failed to agree with his

submissions and allow the amendments and there is no evidence of a breach of the right to a fair hearing.[47]

115 In relation to Mr Patnaik's reliance on Rule 20.5 of the SIAC Rules, Nine Rivers submits that the Arbitrator, in refusing to allow the amendment application after hearing submissions, was clearly acting within the confines of his powers under those Rules. It refers to *AKN v ALC* at [74], where the Court of Appeal emphasised that, when dealing with an amendment application, "it would, of course, also have been open to the Tribunal not to permit the amendment if it thought it inappropriate".[48]

116 Nine Rivers refers to the Arbitrator's reasons why it would be inappropriate to allow the amendment application in the Award at paragraphs 150 to 152:[49]

> 150. This argument was the subject of the amendment application that was made on the first day of the hearing. For the reasons that I gave at that time (which essentially related to the point being raised too late, thereby creating a situation where necessary evidence would be lacking and Nine Rivers would have no opportunity to rebut the case with evidence), I rejected the application by the Answering Respondents to amend their defence to plead both that there was no satisfaction of the conditions precedent under clause 5 of the SPA, and that there was no certification of the representations and warranties as was required by clause 5.1.2 of the 2014 SPA.
>
> 151. Having had their application to amend rejected, the Answering Respondents have sought to resurrect the arguments in their final submissions by contending that Nine Rivers has a burden of proof to prove such compliance and has failed to satisfy that burden of proof. I note that the burden of proof point was expressly raised by the Answering Respondents

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47 DWS at [56]–[64].

48 DWS at [66].

49 Gokul's 1st Affidavit at p 69.

> in paragraphs B(ix) and C(iv) of their written application to amend.
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> 152. In the circumstances, I do not allow the Answering Respondents to raise and rely upon this point. They have already attempted to raise it and I have rejected their entitlement to do so as being too late. I will not therefore allow it to come back by way of an allegation of a burden of proof.

117 In summary, Nine Rivers submits the Award should not be set aside for a breach of natural justice and it says that it is unclear which rule has been breached; the real nature of Mr Patnaik's complaint does not constitute a breach of the rules of natural justice and the Arbitrator was entitled, under the SIAC Rules, to refuse the Amendment Application since he considered it to be inappropriate.[50]

Discussion

118 In dealing with this application, I follow the guidance summarised in *CEB v CEC* ([109] *supra*), derived from *Soh Beng Tee* ([104] supra) and *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443. In an application under s 24(*b*) of the IAA, there are four factors that have to be established by a party challenging an arbitral award on the basis of a breach of natural justice:

(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

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50 DWS at [68].

(d) how the breach prejudiced its rights.

119 As submitted by Nine Rivers, the problem with Mr Patnaik's contention that there has been a breach of the rules of natural justice is that he has found it difficult to articulate a case as to the rule of natural justice which is engaged in his application under s 24 of the IAA. In paragraphs 6(b) and 20 of Mr Patnaik's First Affidavit and paragraph 41 of his Fourth Affidavit, the breach of the rules of natural justice was explained as being the fact that the Arbitrator had not allowed the application to amend the Statement of Defence. The most that was said was that the application was refused on the erroneous premise that the argument could and should have been raised at the time of defence, and that it would prejudice Nine Rivers if it was allowed to be raised as it would be unable to adduce the evidence necessary.

120 At the hearing, in oral submissions, the natural justice case was put on the basis that Mr Patnaik had been deprived of the right to a fair hearing. It was said that Mr Patnaik was denied a fair hearing because those key pleadings were not allowed to be brought into the proceedings via the amendment application. It was submitted that, if the pleadings had been allowed and Nine Rivers was not able to prove that the lack of issuance of the relevant notices did not affect the validity of the 2014 SPA, then it might have affected the outcome of the Award.

121 However, this ground is essentially a challenge to the Arbitrator's decision not to allow the amendment. It is not a challenge to the fairness of the hearing of the application to amend. Given the fact that Mr Patnaik raised these points in opening written submissions just before the hearing; the Arbitrator found that the points had not been pleaded; the Arbitrator allowed Mr Patnaik to make an application to amend and allowed one amendment but not the

amendments raised in this ground, it is impossible to say that the Arbitrator did not give Mr Patnaik a fair hearing on the question of whether he should be allowed to amend his pleadings shortly before the hearing. The parties were allowed to ventilate their submissions on the amendments fully, both in writing and orally. In the circumstances, there was clearly no breach of the rules of natural justice in relation to the issue of whether Mr Patnaik was given a fair hearing on his late application to amend his pleadings.

122 The two amendments related to the issue of whether conditions precedent set out in clause 5.1 of the 2014 SPA had been satisfied and whether certification of representations, warranties and covenants in clause 7 of the 2014 SPA had taken place in terms of clause 5.1.2 of the 2014 SPA.

123 In dealing with the application, the Arbitrator allowed one amendment but disallowed these two on the basis that the points should have been raised in the Statement of Defence but were being raised late and would cause prejudice to Nine Rivers if they were raised at that stage. That prejudice would either be because Nine Rivers was unable to adduce the evidence which was necessary in order to rebut such an argument, if there is evidence, or alternatively it would cause an unnecessary adjournment to those proceedings. At one stage there was a suggestion by Mr Patnaik on this application that the Arbitrator had misdirected himself because Nine Rivers could not have adduced evidence but that was withdrawn because it was incorrect.

124 On the basis of the facts in this case, the decision which the Arbitrator made was evidently a case management matter well within his discretion and cannot be challenged.

125 Mr Patnaik's submission, as developed in oral submissions, is that this decision not to allow the amendments meant that Nine Rivers did not have the burden of showing that the rights under the 2014 SPA were valid and enforceable. He says that this was an "important and essential issue" and the fact that he was deprived of the opportunity to rely on this issue meant that there was not a fair hearing.

126 That is not a question of a breach of natural justice. It is a failure by him to plead those issues at the correct time. The points were raised late and slipped into opening submissions for the hearing. This led to Mr Patnaik having to make an application to amend which the Arbitrator disallowed. That decision cannot be challenged on natural justice grounds.

127 It follows that the application under s 24(*b*) of the IAA fails.

Application under Article 34(2)(*b*)(ii) of the Model Law

128 Article 34(2)(*b*)(ii) of the Model Law provides as follows:

> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (b) the court finds that:
>
> …
>
> (ii) the award is in conflict with the public policy of this State.

Mr Patnaik's submissions

129 It was submitted on behalf of Mr Patnaik in the Arbitration that the terms of the 2014 SPA requiring the purchase of the Sale Securities for consideration amounted to an assured return which was inconsistent with the Indian Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations ("FEMA Regulations"), as amended in 2013 ("the

FEMA Regulations 2013"). He therefore contended that the amendments to the FEMA Regulations in 2013 rendered section 17.2.2.1 of the SSSA void after the SSSA was entered into in 2010, and that the 2014 SPA and section 17.2.2.1 of the SSSA were therefore void *ab initio*. It was also contended that, if a contract was illegal, it was void under s 23 of the Contract Act 1872 (Act No 9 of 1872) (India).

130 The Arbitrator heard submissions from Indian counsel for the parties on those contentions and determined as follows in the Award.

(a) On Indian Contract Law, at paragraph 113:[51]

> … the 2014 SPA does not, in my view fall within s23. The object of the 2014 SPA is not forbidden by law, and the object is not such as would defeat the provisions of FEMA. Hence I do not believe that s23 has any application on the facts of this case.

(b) On the application of the FEMA Regulations, at paragraph 133:[52]

> … I also accept that the [Reserve Bank of India] can be asked for permission in respect of the Put Option, and that thus the question of whether Mr Patnaik is ultimately entitled, under FEMA and its regulations, to effect the transfer to which he has agreed under the SSSA, is more properly to be determined if and when enforcement of any award I may give is to be addressed. It is not something that makes the 2014 SPA, the 2015 Amendment or section 17.2.2.1 of the SSSA void ab initio.

131 Mr Patnaik submits that, based on Justice Patnaik's Affidavit, the Arbitrator erred in making these findings. Mr Patnaik submits that, on that basis, the Award is contrary to Singapore public policy and so should be set aside under Article 32(2)(*b*)(ii) of the Model Law. He submits that Singapore public policy has been breached because, as a matter of Singapore public policy,

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51 Gokul's 1st Affidavit at p 60.

52 Gokul's 1st Affidavit at p 65.

international comity will not allow a Singapore court to affirm an award the performance of which would be in breach or illegal pursuant to the laws of another friendly country.

132 Mr Patnaik refers to a number of authorities. First, he refers to *AJT v AJU* [2010] 4 SLR 649 ("*AJT v AJU*") which was relied on by Nine Rivers. He says that the concluding agreement in that case was not illegal at the time it was entered into ("Concluding Agreement"; see [145] below). The arbitral tribunal found that the Concluding Agreement was not illegal because it made a finding of fact that the Concluding Agreement did not require the appellant to do anything other than to receive evidence of the withdrawal and discontinuance of the criminal proceedings.

133 The case came before the court on an application under Article 34(2)(*b*) of the Model Law and one of the issues was the extent to which the Singapore courts could open up the findings which had been made by the arbitral tribunal. The Court of Appeal decided that it could not open up a finding of fact which was a finding as to the effect of certain acts upon the Concluding Agreement.

134 Mr Patnaik submits that this case is distinguishable on the basis that, in the present case, it is not an agreement which forms the illegality but the construction of a foreign statute which is an issue of law, not an issue of a finding of fact.

135 He submits that it was a finding of law which caused the illegality by way of statute and this breaches Indian public policy. On that basis, he accepts that as stated in *AJT v AJU* at [65]: "[t]his means that findings of fact made in an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating

factor". However, he submits that the decision that the learned Arbitrator made was a finding of law which is not binding on the parties and as such can be challenged on the basis that it is in breach of public policy.

136 He also refers to the decision in *Kempinski* ([44] *supra*) where the arbitrator issued a fourth interim award holding that any award of damages in favour of Kempinski for the intermediary period would be against the public policy of Indonesia and therefore unenforceable. He says that the Court of Appeal affirmed the arbitrator's decision and held that the arbitrator was correct in holding that he had no power to award any damages to Kempinski as doing so would have been contrary to the public policy of Indonesia.

137 He submits that that case is similar to the present case in that, in *Kempinski*, the parties entered into a management contract of a hotel in 1994 but, between 1996 and 2000, three decisions were issued by the Indonesian tourism industry making it illegal for a foreign entity to manage hotels in Indonesia, unless it sets up a company incorporated in Indonesia or enter into a joint venture with an Indonesian party. Kempinski was advised that it would not be acting in contravention of the new regulatory framework and therefore continued to manage the hotel without any objections from Prima. The business relationship between the parties ended and a notice of termination was issued by Prima to Kempinski. Kempinski then commenced arbitration alleging that the termination was wrongful and sought damages or specific performance. Prima then pleaded illegality in view of the requirements of the Indonesian tourism industry. The arbitrator issued four interim awards and in the fourth award held that any award of damages in favour of Kempinski would be against Indonesian public policy and unenforceable, and therefore Kempinski's claim for relief failed.

138 In the High Court, it was held that, as the third award had been set aside, then the fourth award should be set aside. The Court of Appeal held at [72] that the fact that public policy had not been pleaded did not affect the position and stated: "In our view, public policy is a question of law which an arbitrator must take cognisance of if he becomes aware of it in the course of hearing the evidence presented during arbitral proceedings". Mr Patnaik submits that public policy is a point of law and that this supports his case. In *Kempinski*, the contract became illegal after it was signed, and the Court of Appeal affirmed the arbitrator's decision to hold that he had no power to make an award which was contrary to public policy.

139 Mr Patnaik then refers to *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 ("*Peh Teck Quee*") at [45] where the Court of Appeal summarised the position, based on *Foster v Driscoll* [1929] 1 KB 470 ("*Foster v Driscoll*"), as such: "In other words, an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void".

140 Mr Patnaik therefore says that there is authority in Singapore following on from *Foster v Driscoll* that an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void.

141 Finally, Mr Patnaik refers to the Court of Appeal's decision in *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*"), where the court was asked to determine if the guarantees given by the appellant should not be enforced on the principle of international comity, because the giving of loans were contrary to Hong Kong laws. The court held

that the giving of loans was not contrary to Hong Kong laws, but again restated the principle of international comity as established in *Foster v Driscoll*.

142 Mr Patnaik therefore submits that Justice Patnaik's Affidavit on Indian law is highly relevant as it shows that, under the 2014 SPA, he would have been in breach of the FEMA Regulations and Indian law and in breach of Indian public policy. He submits that it would consequently be against Singapore public policy to affirm the Award based on a contract which endeavours to perform an illegal act in India.

Nine Rivers' submissions

143 Nine Rivers submits that the issue is whether, in the present proceedings, the Award should be set aside on public policy grounds on the basis that it contravenes the foreign exchange laws in India and, consequently, is in conflict with the public policy of India. It submits that the Award cannot be set aside on the basis that it is in conflict with the public policy of India as the relevant public policy is that of Singapore. It contends that evidence relating to the public policy of any country other than Singapore is irrelevant for determining whether the Award should be set aside on the public policy grounds.

144 Nine Rivers refers to Mr Patnaik's assertion that the Singapore courts have previously considered the public policy of another sovereign nation and set aside an arbitral award on the basis that it was against the public policy of that sovereign nation, and that the Singapore courts will treat any agreement whose object is a breach of international comity as being against public policy and void.

145 Nine Rivers refers to the decisions of the High Court in *AJT v AJU* ([132] *supra*) and the Court of Appeal in *AJU v AJT* [2011] 4 SLR 739 ("*AJU v AJT*").

In that case, AJT instituted arbitration proceedings against AJU, in relation to an agreement between P (a related company of AJT) and AJU. After commencement of the arbitration, AJU made a complaint of fraud, forgery, and the use of a forged document to the Thai police against O (AJT's sole director and shareholder), P, and Q (another related company of AJT). While the police investigations were ongoing, AJU and AJT entered the Concluding Agreement. In the Concluding Agreement, AJU agreed that it would withdraw the complaint; obtain evidence of termination of all criminal proceedings against O, P, and Q; and pay a sum to AJT. In exchange, AJT agreed that all existing claims between them were deemed as fully settled. The Concluding Agreement was governed by Singapore law.

146 After AJU withdrew the complaint and paid the sum to AJT, the Thai prosecution confirmed that a non-prosecution order was issued in respect of the charges against O, P, and Q. However, AJT claimed that AJU failed to comply with the Concluding Agreement and hence AJT refused to terminate the arbitration. AJU applied to the tribunal to terminate the arbitration, on the ground that the parties had reached full and final settlement of the claim in view of the Concluding Agreement.

147 AJT challenged the validity of the Concluding Agreement on the grounds of, *inter alia*, illegality, on the basis that the Concluding Agreement required AJT to take unlawful action to stop the criminal proceedings in Thailand.

148 The tribunal decided that, *inter alia*, the Concluding Agreement was not illegal. AJT then applied to set aside the tribunal's award on the grounds that, among other things, the award sought to enforce the Concluding Agreement which was illegal and unenforceable in Thailand.

149 The High Court stated, at [34] and [36] of *AJT v AJU* ([132] *supra*), that "the courts will treat a contract governed by its own law as void where the parties' intention and object contemplated thereby jeopardises relations between its government and another friendly government", and hence, "an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void".

150 The High Court stated at [40] that "if the Concluding Agreement was entered into by the parties in furtherance of an illegal purpose under the law of the place of performance, *ie*, Thai law, it will have to be set aside on the ground that it is contrary to the public policy of Singapore under Art 34(2)(*b*)(ii) of the Model Law."

151 Nine Rivers submits that the salient distinctions between *AJT v AJU* and the present case are that, first, the Concluding Agreement was governed by Singapore law. It was in this context that the High Court held at [34] that "the courts will treat a contract governed by its own law as void where the parties' intention and object contemplated thereby jeopardises relations between its government and another friendly government". In other words, this does not mean that the court will consider the public policy of another nation, where the underlying contract is governed by a foreign law.[53]

152 Nine Rivers refers to the Court of Appeal's decision in *AJU v AJT* ([145] *supra*) where, at [62], it clarified that the true question that was being considered was "whether, if a Singapore court disagrees with the Tribunal's finding that the Concluding Agreement is not illegal under Singapore law, the court's

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[53] DWS at [77].

supervisory power extends to correcting the Tribunal's decision on this issue of illegality". Hence, Nine Rivers submits that, where an underlying contract is governed by a foreign law such as in the present case where the 2014 SPA is governed by Indian law, there is nothing to suggest that the Singapore courts, in determining whether to set aside the Award on public policy grounds, will consider whether the contract is illegal under the foreign law.

153 Secondly, Nine Rivers refers to the fact that the present proceedings involve setting aside the Award and not enforcing the Award, which is a matter being currently dealt with in the High Court of Delhi, India. The principles in *AJT v AJU* ([132] *supra*) were derived from cases where the courts were being asked to enforce contracts that were governed by the court's domestic law and to be performed in another foreign nation. It submits that they do not automatically extend to situations where the court is being asked to set aside an international arbitration award arising from an underlying contract that was governed by a foreign law.

154 In this case, Nine Rivers submits that the Arbitrator also made clear, at paragraph 133 of the Award, that "the question of whether [Mr Patnaik] is ultimately entitled, under FEMA and its regulations, to effect the transfer to which he has agreed under the SSSA, is more properly to be determined if and when enforcement of any award I may give is to be addressed". As enforcement proceedings have already been commenced in India and Mauritius, Nine Rivers submits that the appropriate forum to determine the Indian law issues is in the enforcement proceedings rather than this application to set aside the Award.[54]

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54 DWS at [78]–[79].

155 Given that the Indian law issues will likely be determined by the court that is tasked with the enforcement proceedings, and such court may well be better equipped to deal with them than the Singapore courts, Nine Rivers submits that there is clearly nothing that would shock the conscience or violate Singapore's most basic notion of morality and justice, which, as this Court observed in *CEB v CEC* ([109] *supra*) at [49], will seldom be the case in commercial disputes such as the present case.[55]

156 Nine Rivers therefore submits that the Indian law issues are of no relevance to the public policy of Singapore and that Justice Patnaik's Affidavit could not assist in this challenge under the public policy grounds. In the circumstances, it submits that the challenge based solely on the Indian law issues should fail.[56]

157 Further, Nine Rivers submits that Mr Patnaik's arguments were dealt with at the Arbitration and allowing them to be re-heard at this stage would amount to an abuse of process. They were dismissed in the Award and should not be re-litigated on their merits in this application to set aside the Award.

158 Nine Rivers refers to *BTN and another v BTP and another* [2019] SGHC 212 at [78]–[80] and submits that the Award cannot be reviewed *de novo* by the courts in a setting aside action, save for jurisdictional decisions. Further, insofar as a setting aside action is brought on non-jurisdictional grounds, the parties are not allowed to adduce fresh evidence on those grounds and it refers to *Sinolanka*

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55 DWS at [80].

56 DWS at [81]–[82].

Hotels & Spa (Private Limited) v Interna Contract SpA [2018] SGHC 157 at [60].[57]

159 In the present case, Nine Rivers says that the Indian law issues were raised and submissions were made on them during the hearing from 11 to 13 February 2019 and the parties had agreed not to adduce expert evidence regarding the same. The Award was issued on 24 June 2019 and the Indian law issues were considered and decided upon in the Award, after hearing the parties' submissions.[58]

160 Nine Rivers submits that Justice Patnaik's Affidavit is fresh evidence that was only adduced in February 2020, more than three months after the Application was filed. That affidavit was not prepared and/or put in evidence before the Arbitrator, although it could have easily been obtained during the course of the arbitration proceedings and would have been available at the time of the Arbitration hearing. In this regard, Mr Patnaik has not shown why, at the time of the Arbitration, Justice Patnaik's Affidavit was not available and/or could not have been obtained with reasonable diligence. The parties had agreed at the Arbitration that they would not lead expert evidence on the Indian law issues but would simply address them by way of submissions by their respective Indian solicitors.[59]

161 Nine Rivers submits that, in raising the Indian law issues and attempting to rely on Justice Patnaik's Affidavit on the Application, Mr Patnaik is effectively seeking to re-hear the merits of the dispute and to re-present

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57 DWS at [84].

58 DWS at [85].

59 DWS at [86].

submissions that have already been made in the Arbitration. It submits that Mr Patnaik is trying to take a second bite at three arguments that were raised in the Arbitration and rejected by the Arbitrator in the Award: whether the Investor Put Option is an optionality clause with assured returns; whether the Reserve Bank of India ("RBI") can be asked for permission in respect of the Investor Put Option; and whether the 2014 SPA, the 2015 Amendment or section 17.2.2.1 of the SSSA is rendered void.[60]

162 In this regard, Nine Rivers refers to the Court of Appeal's decision in *BBA v BAZ* ([49] *supra*) at [41] where it was stated that "[t]he 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 in original removed].

163 Further, Nine Rivers submits that, even if the Arbitrator had made an error of fact or error of law in respect of his decision on the Indian law issues, that, in itself, would not permit the Award to be set aside on public policy grounds. It says that the high threshold for establishing public policy grounds was recently affirmed by the Court of Appeal in *BBA v BAZ*, in these terms at [101]–[102]:

> 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

60 DWS at [87]–[89].

> shareholder agreements with "drag-along" clauses and collective sale agreements. BAZ disagreed that public policy was engaged.
>
> 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*.

164 In summary, Nine Rivers submits that Mr Patnaik's reliance on public policy grounds to set aside the Award is an abuse of process and should not be allowed, because the contention that the Award is in conflict with the public policy of India is irrelevant as the setting aside regime under the Model Law provides for the public policy of Singapore to be the basis on which an arbitral award may be set aside. The Indian law issues had already been submitted on and determined in the Award and any attempt to revive them at this stage is a clear abuse of process. Even if there was an error of fact or law in respect of the Arbitrator's decision on the Indian law issues, this is insufficient to set aside the Award on public policy grounds.[61]

Discussion

165 There are, essentially, two questions raised by this part of the Application. First, the extent to which the findings of fact and/or law of the Arbitrator should be taken to be final and binding on this court and whether the correctness of those findings can be challenged on the basis of evidence submitted for the purpose of the Application. Secondly, to the extent that the findings of fact and/or law are not final and binding and it were to be found that

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61 DWS at [94].

the Award was illegal in India, would this court set aside the Award on the grounds that it conflicted with the public policy of Singapore?

The effect of findings by the Arbitrator

166 In summary, Mr Patnaik submits that, based on Justice Patnaik's Affidavit, the Award is in conflict with the laws of India and consequently in conflict with the public policy of India as it is not enforceable against Mr Patnaik, who is an Indian resident. He submits that the court should therefore make its own finding on this question of law, even if it amounts to re-litigating an issue considered in the Arbitration and dealt with in the Award.

167 Nine Rivers, in summary, submits that Mr Patnaik cannot rely on Justice Patnaik's Affidavit because the issue of whether the 2014 SPA was an illegal agreement was an issue in the arbitration proceedings and cannot be re-litigated on the merits in an application to set aside the Award on the basis of Singapore public policy.

168 In the decision of the High Court in *AJT v AJU* ([132] *supra*) and of the Court of Appeal in *AJU v AJT* ([145] *supra*), there was an SIAC arbitration based on the Concluding Agreement governed by Singapore law. It was alleged that the Concluding Agreement was null and void on the grounds of duress, undue influence and illegality. The arbitral tribunal decided that the Concluding Agreement was valid and enforceable. The other party then applied to the High Court to set aside the award under Article 34(2)(*b*)(ii) of the Model Law on the basis that the award was contrary to Singapore public policy as it was an agreement to take steps to stifle a prosecution in Thailand and therefore illegal under Singapore law (the governing law) and Thai law (the place of performance).

169 The High Court judge reopened the findings of the arbitral tribunal and set aside the award, holding that the Concluding Agreement was an agreement to stifle the prosecution in Thailand and was contrary to public policy in Singapore. On appeal, the Court of Appeal dealt with two issues, the first being: whether the Judge was correct in going behind the award and reopening the tribunal's finding that the Concluding Agreement was valid and enforceable.

170 The Court of Appeal held that the Judge was not entitled to reject and substitute the tribunal's findings with his own findings. The Court of Appeal said that arbitration under the IAA was international arbitration and not domestic arbitration, and so s 19B(1) provided that an IAA award was final and binding on the parties, subject only to narrow grounds for curial intervention. This meant that findings of fact made in an IAA award were binding on the parties and could not be reopened except where there was fraud, breach of natural justice or some other recognised vitiating factor.

171 The Court of Appeal referred to *PT Asuransi Jasa* ([63] *supra*) at [53]–[57], where it was held that, even if an arbitral tribunal's findings of law and/or fact were wrong, such errors would not *per se* engage the public policy of Singapore. In that case, the public policy of Singapore was not engaged by the findings of fact of the tribunal.

172 In giving its judgment in *AJU v AJT* ([145] *supra*), the Court of Appeal made some important observations on the approach of a court faced with an application to set aside a contract on grounds of illegality. First, at [37], the court said that there was no difference between the enforcement regime in s 31(4)(*b*) of the IAA and the setting aside regime under Art 34(2)(*b*)(ii) of the Model Law as far as public policy is concerned, so that case law on the enforcement regime is relevant to the setting aside regime. As stated in [38], where enforcement was

resisted on public policy grounds, the public policy objection must involve either "exceptional circumstances…which would justify the court in refusing to enforce the award" or a violation of "the most basic notions of morality and justice".

173 Secondly, the Court of Appeal in *AJU v AJT* considered the issue of whether a court could reopen an arbitral tribunal's finding on the legality of the underlying contract and decide that issue for itself, as the High Court judge had done in that case. In coming to a conclusion on this aspect, the Court of Appeal considered two English authorities: first, the decision of Colman J and the English Court of Appeal in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740 ("*Westacre (HC)*") and [2000] 1 QB 288 ("*Westacre (CA)*") and, second, the English Court of Appeal's decision in *Soleimany v Soleimany* [1999] QB 785 ("*Soleimany*"). After analysing those authorities, the Court of Appeal at [59]–[61] analysed two divergent approaches to the circumstances in which the court may reopen an arbitral tribunal's decision that an underlying contract was legal. They considered that the approach taken in *Westacre (HC)* by Colman J and by the majority of the English Court of Appeal was to be preferred to the more liberal and "interventionist" approach taken in *Soleimany* and by Waller LJ in the minority in the Court of Appeal in *Westacre (CA)*. The Court of Appeal at [60] said that the preferred approach was "consonant with the legislative policy of the IAA of giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards (whether foreign arbitral awards or IAA awards)."

174 The approach taken by Colman J in *Westacre (HC)*, in the context of *AJU v AJT* and this case, was summarised in two principles at 767G–768A, cited in *AJU v AJT* at [42]:

> (v) If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award. (vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, *on the basis of facts not placed before the arbitrators*, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular. [emphasis in original]

175 On balance, Colman J held in *Westacre (HC)* at 773A–E that "the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption". At 769A, Colman J had observed that, since the parties had selected arbitration by an impressively competent international body (*viz*, the International Chamber of Commerce), the English courts would be entitled to assume that the arbitrators appointed were of undoubted competence and ability, and well able to understand and determine the particular issue of illegality arising in that case. In *AJU v AJT* at [61], the Court of Appeal said that this premise applied *a fortiori* in that case, given that: "(a) the parties selected arbitration by the SIAC (an equally competent international body); (b) the Tribunal consisted of experienced members of the local Bar; and (c) the Tribunal decided the issue of illegality according to Singapore law. For these reasons, a Singapore court would all the more be entitled to assume that the members of the Tribunal had adequate knowledge of Singapore law."

176 In *AJU v AJT* ([145] *supra*), the law to be applied in the arbitration was Singapore law and the Court of Appeal at [62] held that the judge was entitled to decide whether the Concluding Agreement was illegal and to set aside the award if it was tainted with illegality. It stated:

> Be that as it may, since the law applied by the Tribunal was Singapore law, the question that arises is whether, if a Singapore court disagrees with the Tribunal's finding that the Concluding Agreement is not illegal under Singapore law, the court's supervisory power extends to correcting the Tribunal's decision on this issue of illegality. In our view, the answer to this question must be in the affirmative as the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn, whether or not the Concluding Agreement is illegal (illegality and public policy being, as pointed out at [19] above, mirror concepts in this regard), however eminent the Tribunal's members may be. Accordingly, we agree with the Judge that the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality, just as in *Soleimany*, the English CA refused to enforce the Beth Din's award as it was tainted with illegality.

177 However, at [64], the Court of Appeal concluded that it was not an appropriate case for the judge to reopen the tribunal's finding that the Concluding Agreement was valid and enforceable. They found that the case was not a *Soleimany*-type case ([173] *supra*) involving an underlying contract tainted by illegality where the tribunal had ignored palpable and indisputable illegality, but a case more analogous to *Westacre (CA)* ([173] *supra*) or *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222, where the respective arbitral tribunals found that the underlying contracts in question did not involve the giving of bribes but lobbying of government officials, which was not contrary to English public policy.

178 The Court of Appeal in *AJU v AJT* held at [65] that the judge was not entitled to reject the tribunal's findings and substitute his own findings for them. It referred to s 19B(1) of the IAA which provides that: "[a]n award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction." The Court of Appeal stated

that this meant that "findings of fact made in an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor."

179 The Court of Appeal then referred to *PT Asuransi Jasa* ([63] *supra*) and said at [66]:

> In this connection, we would reiterate the point which this court made in *PT Asuransi Jasa* ([27] *supra*) at [53]–[57], *viz*, that even if an arbitral tribunal's findings of law and/or fact are wrong, such errors would not *per se* engage the public policy of Singapore. In particular, we would draw attention to the following passage from [57] of that judgment:
>
> > … [T]he [IAA] … gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the [IAA] is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the [IAA] and Art 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under s 19B of the [IAA], we are of the view that *the [IAA] will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact,* per se*, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law.* [emphasis added]
>
> This passage recognises the reality that where an arbitral tribunal has jurisdiction to decide any issue of fact and/or law, it may decide the issue correctly or incorrectly. Unless its decision or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not *per se* contrary to public policy.

180 However, the Court of Appeal said that, as an award could be challenged on public policy grounds, it was necessary to clarify the application of the

principle that "errors of law or fact, *per se*, do not engage the public policy of Singapore". At [67]–[68] they said:

> … since s 19B(4) of the IAA, read with Art 34(2)(b)(ii) of the Model Law, expressly provides that an arbitral award can be challenged on public policy grounds, it is necessary for us to clarify the application of the general principle laid down in *PT Asuransi Jasa* (at [57]) that "errors of law or fact, *per se*, do not engage the public policy of Singapore". It is a question of law what the public policy of Singapore is. An arbitral award can be set aside if the arbitral tribunal makes an error of *law* in this regard, as expressly provided by s 19B(4) of the IAA, read with Art 34(2)(b)(ii) of the Model Law. Thus, in the present case, if the Concluding Agreement had been governed by Thai law instead of Singapore law, and if the Tribunal had held that the agreement was indeed illegal under Thai law (as the Respondent alleged) *but could nonetheless be enforced in Singapore because it was not contrary to Singapore's public policy*, this finding – *viz*, that it was not against the public policy of Singapore to enforce an agreement which was illegal under its governing law – would be a finding of law which, if it were erroneous, could be set aside under Art 34(2)(b)(ii) of the Model Law (read with s 19B(4) of the IAA).
>
> In contrast, Art 34(2)(b)(ii) of the Model Law does not apply to errors of *fact*. As Colman J said in *Westacre (HC)* ([40] *supra* at 769E–F) *vis-à-vis* errors of fact in arbitral awards:
>
> > In so far as [the issue referred to arbitration] involves [the] determination of questions of fact, that is an everyday feature of international arbitration. *The opportunity for erroneous and uncorrectable findings of fact arises in all international arbitration*. [emphasis added]
>
> In a similar vein, Quentin Loh JC pointed out at [24] of *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 151 (which concerned an application under s 29(1) of the IAA for leave to enforce a Danish arbitral award in Singapore):
>
> > It is worth remembering that just as parties who have chosen arbitration must live with their arbitrator, 'good, bad or indifferent,' our courts may be called upon to enforce 'bad' awards from another jurisdiction.
>
> [emphasis in original]

181 At [69], the Court of Appeal summarised the position as follows:

> In our view, limiting the application of the public policy objection in Art 34(2)(b)(ii) of the Model Law to findings of *law* made by an arbitral tribunal – to the *exclusion* of findings of *fact* (save for the exceptions outlined at [65] above) – would be consistent with the legislative objective of the IAA that, as far as possible, the international arbitration regime should exist as an autonomous system of private dispute resolution to meet the needs of the international business community.

182 I now turn to consider the finding in this case that the 2014 SPA was not an illegal contract. The Arbitrator summarised the issue in paragraph 103 of the Award:[62]

> The Answering Respondents suggest that the terms of the 2014 SPA, which require the Sale Securities to be purchased for a consideration of INR 302,500,000 (plus the accrued preferred dividend up to 30 June, 2014) amounts to an assured return which is inconsistent with the FEMA Regulations 2000, as amended by the FEMA Regulations 2013, and therefore illegal. They therefore contend that the 2014 SPA is void ab initio.

183 The Arbitrator held that, contrary to Mr Patnaik's case, the consideration of INR 302,500,000 was not an assured return as it was an agreed consideration arrived at as an arms-length negotiation at the time of exit.

184 Mr Patnaik also contended, as set out in paragraph 116 of the Award, that "both the 2015 Amendment, and section 17.2.2.1 of the SSSA are also void, both being contrary to the FEMA Regulations 2000."[63] The Arbitrator rejected the submission in respect of the 2015 Amendment for the same reasons as in relation to the 2014 SPA. As Mr Patnaik is a resident of India, the Arbitrator held that the FEMA Regulations (as amended by the FEMA Regulations 2013) would apply to any transfer of the Investor Securities to him. As a result, he went on to analyse whether the SSSA might contravene the FEMA Regulations

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62 Gokul's 1st Affidavit at p 57.

63 Gokul's 1st Affidavit at p 60.

(as amended by the FEMA Regulations 2013), and consequently whether it might be void.

185 The Arbitrator held at paragraph 132 of the Award that, contrary to Mr Patnaik's case, on a proper construction of both the 2014 SPA and the SSSA, the Investor Put Option was not an optionality clause with an assured return but it was contingent, entirely at the behest of the Purchaser, the Company and the Promoters, and no return was assured at all.

186 At paragraph 133, the Arbitrator also added that he accepted that "the RBI can be asked for permission in respect of the Investor Put Option, and that thus the question of whether Mr Patnaik is ultimately entitled, under FEMA and its regulations, to effect the transfer to which he has agreed under the SSSA, is more properly to be determined if and when enforcement of any award I may give is to be addressed. It is not something that makes the 2014 SPA, the 2015 Amendment or section 17.2.2.1 of the SSSA void ab initio".[64]

187 The foregoing findings of the Arbitrator involved findings of fact as to the nature of the transactions under the 2014 SPA, the 2015 Amendment and the SSSA. For the reasons set out in *AJU v AJT* ([145] *supra*), those findings of fact made by the Arbitrator are final and binding and in this case there is no vitiating factor such as fraud or breach of natural justice which allows them to be reopened in this court.

188 Further, even if the Arbitrator made findings of law, those would be findings of Indian law which he made after hearing submissions from Indian lawyers. The relevant agreements in this case, unlike the Concluding Agreement

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64 Gokul's 1st Affidavit at p 65.

in *AJU v AJT*, were governed by Indian law and not by Singapore law. So far as this Singapore court is concerned, findings of Indian law are findings of *fact* as to a foreign law. For this court, considering an application under the IAA, an issue of foreign law is a matter of fact which has to be proved by evidence. Therefore, the findings of the Arbitrator as to Indian law were findings of fact so far as this court is concerned.

189 On that basis and as explained in *AJU v AJT*, Art 34(2)(*b*)(ii) of the Model Law does not apply to errors of fact, and limiting the application of the public policy objection in Art 34(2)(*b*)(ii) of the Model Law to findings of Singapore law made by an arbitral tribunal is consistent with the legislative objective of the IAA.

190 The relevant issue of law in this case is the public policy of Singapore. As the observations of the Court of Appeal in *AJU v AJT* at [67] shows (see [180] above), if an arbitral tribunal decides that a contract is illegal but also decides that it was not against Singapore public policy to enforce that contract in Singapore, that finding would be a finding of law which, if it were erroneous, could be set aside under Art 34(2)(*b*)(ii) of the Model Law by a court in Singapore if the contract is governed by Singapore law.

191 However, if an arbitral tribunal decides that a contract is not illegal under a foreign law, as is the case here under Indian law, then there is no issue of Singapore law which is engaged and therefore no finding of law which a Singapore court could set aside under Art 34(2)(*b*)(ii) of the Model Law.

192 If, contrary to my finding, the decision of the Arbitrator on the meaning of the FEMA Regulations under Indian law was a matter which amounted to a finding of law which was open to challenge in this court, it is clear that the

parties selected arbitration by the SIAC (a competent international body) and the Arbitrator is an experienced arbitrator. Further, the Arbitrator decided the issue of Indian law based on the procedure which the parties agreed and Mr Patnaik now seeks to challenge the findings of the Arbitrator by adducing fresh evidence, not produced in the Arbitration. Using the phrase of Colman J in *Westacre (HC)* ([173] *supra*), even if it were open for me to consider the issue of Indian law afresh on an application under Art 34(2)(*b*)(ii) of the Model Law, I would not, on balance, do so. In my judgment, the public policy of sustaining international awards on the facts of the current case outweighs the public policy in discouraging international commercial transactions which breach a country's foreign exchange regulations, even if, contrary to the findings of the Arbitrator, that is what happened in this case.

Indian public policy and Singapore public policy

193 In the light of my decision, this issue does not arise. However, having heard full argument, I consider it appropriate to deal with it.

194 The parties agree that the relevant public policy to consider under Art 34(2)(*b*)(ii) of the Model Law is that of *Singapore*, not India.

195 Mr Patnaik submits that the Award is in breach of the public policy of India, as it affirmed a contract which necessitated parties joining in an endeavour to perform an act which was illegal by the laws of India in terms of acting contrary to the FEMA Regulations. Consequently, he says that the Award is in breach of Singapore public policy and should be set aside. I shall assume that, contrary to what I have said above, I had held that the SSSA and the 2014 SPA, as amended, were illegal contracts under the laws of India.

196 As outlined above, Mr Patnaik principally relies on three authorities: *Kempinski* ([44] *supra*), *Peh Teck Quee* ([139] supra), and *Sheagar* ([141] *supra*). The facts and holding of *Kempinski* have been outlined at [136]–[138] above.

197 In *Peh Teck Quee*, a German bank in Singapore extended foreign currency credit facilities to a Malaysian resident under a facility agreement governed by Singapore law. The bank commenced proceedings against the individual who contended that the proper law was Malaysian law and the facility agreement was illegal and void as it breached Exchange Control and Moneylenders statutes in Malaysia. The Court of Appeal held at [45] and [48] that the principle in *Foster v Driscoll* ([139] *supra*) did not apply on the facts of that case as the obligation sought to be enforced did not involve the doing of an act in Malaysia but in Singapore, and the parties had not intended or contemplated breaking the laws of Malaysia at the time of contracting.

198 The Court of Appeal also stated at [54], without further consideration of the exact scope of *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 ("*Ralli Bros*"), that there should not be an unequivocal merger between the principle in *Ralli Bros* – that a contract was invalid in so far as the performance of it was unlawful by the law of the country where it was to be performed – and that in *Foster v Driscoll*, where a contract whose object was a breach of international comity would be void for being against public policy.

199 In considering *Foster v Driscoll*, the Court of Appeal in *Peh Teck Quee* stated at [45]–[47]:

> The appellant also raised a related argument based on a principle of public policy formulated in the case of *Foster v Driscoll* ([19] supra). This principle states that the courts will treat a contract governed by its own law as void where the

parties' intention and object contemplated thereby jeopardises relations between its government and another friendly government. The case concerned a contract, governed by English law, for the supply and sale of whisky that was to be smuggled into the United States of America in contravention of the prohibition laws in force at the time. The actions were brought in relation to various disputes arising out of the contract. The Court of Appeal categorically stated that the courts would not enforce such a contract "made between the parties to further an adventure or break the laws of a foreign state". Sankey LJ added:

> … an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in certain events, alternative modes or places of performing which permit the contract to be performed legally.

In other words, an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void.

This principle was elaborated on in the case of *Regazzoni v K C Sethia (1944) Ltd* ([19] supra) which concerned a contract for the sale and delivery of jute bags. The parties to the contract contemplated that these bags should be shipped from India to Genoa for resale to South Africa. One party eventually repudiated the contract and the other party brought an action for damages for breach of contract. The proper law of the contract was English law. At the time, there was in force a prohibition on the export of goods to South Africa by the Indian Government. The Law Lords agreed with and applied *Foster v Driscoll*. Lord Keith said ([19] supra) at 327:

> … to recognise the contract between the appellant and the respondent as an enforceable contract would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognize.

In the same case, Lord Reid added at 323 that:

> The real question is one of public policy in English law: but in considering this question we must have in mind the background of international law and international relationships often referred to as the comity of nations. This is not a case of a contract being made in good faith

> but one party thereafter finding that he cannot perform his part of the contract without committing a breach of foreign law in the territory of the foreign country. If this contract is held to be unenforceable, it should, in my opinion, be because from the beginning the contract was tainted so that the courts of this country will not assist either party to enforce it.
>
> Based on this and the finding that the parties had intended to violate the laws of India, the House of Lords held that the contract was unenforceable since an English court would not enforce a contract or award damages for its breach, if its performance would involve doing an act in a foreign and friendly state which would violate the law of that state. This was based on the principle of public policy and the consequent desire for international comity.

200 In *Sheagar* ([141] *supra*) at [124], the Court of Appeal also referred to the principle in *Foster v Driscoll* and said:

> … The Appellant's pleaded case was based on the principle of international comity established in *Foster v Driscoll* … Sankey LJ explained the principle in the following terms (at 521–522):
>
> > [A]n English contract should and will be held invalid on account of illegality *if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country* notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally. [emphasis added]
>
> This principle was accepted by us in *Peh Teck Quee* … at [45].

201 It is evident that, on grounds of international comity, a court will not as a matter of public policy enforce a contract if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country an act which is illegal in that country. However, that is not what the court is dealing with here. As Colman J pointed out in *Westacre (HC)* ([173] *supra*) at 772–773:

> … an order of this court which *directly* enforced such an agreement would be in collision with the public policy of Kuwait. That, however, is not the order which the plaintiffs

> invite this court to make, for ***there is the additional dimension in this case that the issue of illegality has already been the subject of arbitration and of a valid award***. Although direct enforcement of the contract would clearly be offensive to comity, enforcement of any such award in England under the New York Convention must be very much less so, ***for enforcement does not substantially depend on the public policy of Kuwait but of this country***. [emphasis in original in italics; emphasis added in bold italics]

202 The important starting point is that, of the foregoing three cases highlighted by Mr Patnaik, *only Kempinski* ([44] *supra*) dealt with the setting aside of an arbitral award. In *Peh Teck Quee* ([139] supra) and *Sheagar*, a national court was considering the question of the *enforcement of a contract governed by its national law* in litigation proceedings before the court. In such a case, if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country, then the national court may refuse enforcement on the basis of public policy, as it would be a breach of international comity to do so. That does not mean that every illegal contract would always, as a matter of *Singapore* public policy, not be enforced or would be set aside on the basis that a contract was illegal in the place of performance.

203 In the present case, even if I had found that the SSSA and the 2014 SPA, as amended, were illegal under the laws of India, the grounds for a breach of international comity of the type set out in *Foster v Driscoll* ([139] *supra*) would not have been made out. *Kempinski* does not assist Mr Patnaik's case because the Court of Appeal in that case was *not* considering the issue of public policy under *Art 34(2)(b)(ii)* of the Model Law and whether it would indeed be in breach of *Singapore* public policy to enforce a contract that is illegal in a foreign state due to a breach of international comity. Rather, it was considering if an arbitral tribunal's consideration of an *unpleaded* public policy point would cause the tribunal to exceed its jurisdiction and thus give rise to a breach of *Art*

34(2)(a)(iii) of the Model Law. Mr Patnaik has thus not cited any authority for the proposition that a contract which is illegal in another foreign state *necessarily* leads to a breach of international comity, and thus *Singapore* public policy under Art 34(2)(*b*)(ii) of the Model Law, if the arbitral award contemplating the enforcement of that contract is not set aside.

204 The authorities demonstrate that the public policy ground under Art 34(2)(*b*)(ii) of the Model Law is a *narrow* ground, and the test is whether the upholding of the arbitral award would "shock the conscience"; is "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public"; or "where it violates the forum's most basic notion of morality and justice": *PT Asuransi Jasa* ([63] *supra*) at [59]. To succeed on a public policy argument, the party has to cross a "very high threshold" and demonstrate "egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice": *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [48]; *BAZ v BBA and others and other matters* [2018] SGHC 275 at [156]–[159].

205 The relevant question is whether the illegality in the foreign state would demonstrate sufficiently egregious circumstances that would "shock the conscience" or violate the most basic notions of morality and justice so as to amount to a breach of Singapore public policy.

206 In the present case, there is no reason why a breach of the FEMA Regulations or the laws of India, without more, would "shock the conscience" or violate the "most basic notions of morality and justice". If Mr Patnaik's submissions are taken to their logical conclusion, then *any* minor illegality or regulatory infringement by a contract in its place of performance would *ipso*

facto lead to the conclusion that international comity, and thus Singapore public policy, would be breached so that the arbitral award would have to be set aside. The public policy ground under Art 34(2)(*b*)(ii) of the Model Law is a narrow ground and does not lead to that conclusion. I therefore reject Mr Patnaik's submission that Art 34(2)(*b*)(ii) of the Model Law would have been satisfied, even if the SSSA and 2014 SPA, as amended, were found to be illegal because of a breach of the FEMA Regulations or the laws of India.

Conclusion

207 For the reasons set out above, I do not consider that the applicant, Mr Patnaik, has made out any of the grounds on which he seeks to set aside the Award and the Application is dismissed.

208 Given those findings, Justice Patnaik's Affidavit is not relevant to decide any issue on the Applications and, in respect of the Strike Out Application by the respondent, Nine Rivers, I order that Justice Patnaik's Affidavit be struck out.

Vivian Ramsey
International Judge

Ramachandran Doraisamy Raghunath and Josiah Fong Ren Jing
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