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

[2023] SGHC 69

Originating Summons No 482 of 2021

Between

COT

… *Plaintiffs*

And

(1) COU
(2) COV
(3) COW

… *Defendants*

Originating Summons No 489 of 2021

Between

COV

… *Plaintiffs*

And

(1) COU
(2) COW
(3) COT

… *Defendants*

Originating Summons No 492 of 2021

Between

COW

… *Plaintiffs*

And

(1) COU
(2) COV
(3) COT

… *Defendants*

GROUNDS OF DECISION

[Arbitration — Award — Recourse against award — Setting aside — Jurisdiction — Validity of arbitration agreement — Whether validity of arbitration agreement depends on validity of contract]
[Arbitration — Award — Recourse against award — Setting aside — Whether tribunal breached natural justice by depriving party of reasonable opportunity to respond to case against it]
[Arbitration — Arbitral tribunal — Jurisdiction — Matters submitted to arbitration]
[Contract — Formation — Offer and acceptance]

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COT
v
COU and others and other matters

[2023] SGHC 69

General Division of the High Court — Originating Summonses Nos 482 of 2021, 489 of 2021 and 492 of 2021
Vinodh Coomaraswamy J
3 – 4, 25 February 2022

23 March 2023

Vinodh Coomaraswamy J:

Introduction

1 Before me are three applications to set aside an arbitration award. The award is in favour of the sole claimant in the arbitration and against all three respondents in the arbitration. Because of a divergence of interests between the respondents (see [14] below), each respondent was separately represented in the arbitration and has brought its own application to set aside the award.

2 To avoid confusion, and also to avoid revealing the parties' identities, I shall refer to all of the parties by their position in the arbitration and not by their position in the three applications before me or by their anonymised names in the title to these applications.

3 I have dismissed all three applications. Each respondent has appealed against my decision. I therefore now set out the grounds for my decision.

Anonymisation

4 Pursuant to a consent order made under ss 22 and 23 of the International Arbitration Act 1994 (2020 Rev Ed) ("the Act"),[1] I have preserved the parties' anonymity in these grounds of decision by taking five steps. First, I have not used the parties' real names, either in the title to or in the body of these grounds, as explained at [2] above. Second, I shall refer to the country in which the second and third respondents are incorporated as "Gondor" and the country in which the claimant is incorporated as "Arnor". Third, I have removed all information about the specific nature of the goods that are at the heart of this dispute. I shall refer to these goods simply as "Modules". Fourth, I have assigned pseudonyms to each of the employees or directors of the respondents who feature in these grounds. Finally, I have expressed all sums of money using the fictitious currency symbol "₴". For ease of exposition, all sums of money in these grounds have been rounded off to the nearest ₴10,000.

Background to the parties' dispute

5 I begin by introducing the parties and setting out the background to their dispute.

The parties in the arbitration

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[1] HC/ORC 5679/2021 dated 7 October 2021, extracted 13 October 2021.

6 The claimant is a company incorporated in Arnor. It produces and supplies Modules worldwide. The Modules are high technology and high value components essential for a certain class of large and big budget public infrastructure projects ("Infrastructure Projects").

7 At all material times until October 2016, all three respondents were members of the same multinational group of companies. I shall refer to this group as "the Rohan Group". Another member of the Rohan Group is a company which, for reasons I will explain (see [12] below), I shall refer to as "the Procurement Company". The Procurement Company was not a party to the arbitration and is therefore not a party to these applications. But the subject matter of the arbitration from which these applications arise is the respondents' alleged liability to the claimant for the debt which the Procurement Company owes to the claimant for Modules sold and delivered.

8 The Rohan Group comprises hundreds of companies around the world. The business of the Rohan Group is to develop, finance, install, own and operate Infrastructure Projects worldwide.[2]

9 The first respondent is a company incorporated in Singapore. It is the Rohan Group's holding company for its business interests in two regions.[3] Gondor is in one of those two regions.

10 The second respondent is a company incorporated in Gondor. It is an engineering, procurement and construction ("EPC") contractor. Its business is

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2 Boromir's 1st Affidavit at para 17 at ABD Tab 2 ("Boromir's 1st Affidavit").

3 Boromir's 1st Affidavit at para 32.

constructing and commissioning Infrastructure Projects for the Rohan Group in Gondor. The arbitration arose out of one such project ("the Project").

11 The third respondent is a company incorporated in Gondor. It is a special purpose vehicle. The first respondent and the Procurement Company incorporated the third respondent for the sole purpose of owning and operating the Project.

12 The Procurement Company is a company incorporated in Singapore. As its anonymised name suggests, the Procurement Company is the Rohan Group's centralised procurement arm. Its role is to procure goods for the Rohan Group from vendors around the world and to supply those goods to members of the group after applying an intragroup markup.[4]

13 Until October 2016, the first respondent held 99.99% of the shares in both the second and third respondents. Another member of the Rohan Group held the remaining 0.01% of the shares in the second respondent. The Procurement Company held the remaining 0.01% of the shares in the third respondent. In October 2016, the Rohan Group sold the third respondent to an unrelated group ("the Sauron Group"). In March 2017, the Rohan Group sold the second respondent to another unrelated group of companies.

14 From March 2017, therefore, each respondent has been under separate ownership: (a) the Rohan Group continues to own the first respondent; (b) another unrelated group has owned the second respondent since March

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[4] Boromir's 1st Affidavit, para 37.

2017; and (c) the Sauron Group has owned the third respondent since October 2016. This divergence of ownership, and therefore of interests, is why each respondent was separately represented in the arbitration and has brought a separate challenge to the award.

The contractual chain for supplying Modules to the Project

15 The Modules which the second respondent needed to complete the Project for the third respondent were supplied under a chain of contracts entered into in 2015 and 2016. Under this chain: (a) the claimant sold Modules to the Procurement Company; (b) the Procurement Company sold Modules to the second respondent; and (c) the second respondent sold Modules to the third respondent.

16 The contract between the claimant and the Procurement Company is called the "Module Supply Agreement" ("the MSA").[5] They entered into the MSA in August 2015. Under the MSA, the claimant agreed to sell Modules to the Procurement Company for use in the Rohan Group's Infrastructure Projects worldwide. This included, but was not limited to, the Project.[6]

17 It appears that there was no formal contract between the Procurement Company and the second respondent. But the Procurement Company invoiced the second respondent for the Modules which it supplied for all of the projects for which the second respondent was the EPC. The second respondent accepts

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5 Boromir's 1st Affidavit at para 35.

6 Boromir's 1st Affidavit at VB-2 at HB/D/9/167-176 at ABD Tab 2.

that it was contractually bound to pay these invoices to the Procurement Company.[7]

18 The contract between the second respondent and the third respondent is called the Equipment and Material Supply Contract ("the EMS Contract").[8] They entered into the EMS Contract in March 2016. Under the EMS Contract, the second respondent was obliged to procure Modules for the Project and to supply them to the third respondent.[9]

19 The invoicing chain for the Modules followed the contractual chain. Where the Modules were intended for the Project, the claimant delivered the Modules directly to the second respondent in Gondor.[10] The second respondent then used the Modules to perform its obligations to the third respondent under the EMS Contract.

The Procurement Company fails to pay the claimant

20 From August 2015 to March 2016, the claimant issued 13 invoices to the Procurement Company for Modules which the claimant had delivered or was due to deliver to the second respondent for the Project. The Procurement Company was obliged to pay the claimant under these invoices the total sum of ₴29.40m.

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7 Boromir's 1st Affidavit at para 37.

8 Boromir's 1st Affidavit at VB-2 at HB/D/32/345-434 at ABD Tab 2; Boromir's 1st Affidavit at VB-3 Tab 57, S/No. 6 at ABD Tab 2.

9 Boromir's 1st Affidavit at VB-2 at HB/D/32-34/345-573 at ABD Tab 2.

10 Award at para 47, Boromir's 1st Affidavit at p 224.

21 In March 2016, ₴16.72m out of this ₴29.40m was already due for payment.[11] A substantial part of this ₴16.72m was not just due but overdue for payment. The claimant therefore suspended delivery of Modules for the Project until the Procurement Company paid for all Modules already delivered for the Project, even if payment was not yet due.[12]

22 In an effort to persuade the claimant to resume delivering Modules for the Project, senior executives of the Rohan Group entities doing business in Gondor engaged in written and oral negotiations with the senior management of the claimant in March 2016. I describe these negotiations in more detail at [67]–[107] below.

23 On 18 March 2016, the claimant resumed delivering Modules for the Project.

24 In April 2016, the Rohan Group's ultimate holding company sought protection from creditors in rehabilitation proceedings commenced under Chapter 11 of the United States Bankruptcy Code ("Chapter 11"). At the same time, the Procurement Company as well as certain other Rohan Group companies also sought protection under Chapter 11.[13]

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11 Boromir's 1st Affidavit at para 39 read with HB/D/16/287, HB/D/18/294, HB/D/20/299, HB/D/26/333, HB/D/27/335, HB/D/28/337, and HB/D/29/339 at ABD Tab 2.

12 Legolas's 3rd Affidavit at paras 13–14.

13 Boromir's 1st Affidavit at para 62.

25 As a result of certain transactions in April and May 2016 (see [106]–[107] below), the sum which the Procurement Company owed to the claimant was reduced to ₴7.35m.

26 In June 2016, it became publicly known that the Sauron Group was to acquire a portfolio of the Rohan Group's assets in Gondor. This portfolio included all the shares in the third respondent.[14]

27 Towards the end of October 2016, representatives of the Sauron Group entered into negotiations with the claimant in an effort to resolve the claimant's claim for ₴7.35m.[15] These negotiations failed to reach an agreement.[16] The result was a three-way standoff. The Sauron Group's position was that: (a) the second respondent's remaining liability for Modules was no more than ₴3.84m as set out in the second respondent's books; and (b) in any event, Gondor's foreign exchange laws obliged the second respondent to pay that sum to the Procurement Company (as the second respondent's contractual counterparty) and prohibited the second respondent from paying that sum directly to the claimant (with whom the second respondent had no contract of any kind). The Rohan Group's position was that no money whatsoever should be paid to the Procurement Company, as it was by then subject to the Chapter 11 proceedings.[17] The claimant's position was that it was a company under public ownership and therefore could not accept a mere part payment in the sum of

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14 Boromir's 1st Affidavit at para 67 and VB-3 Tab 34 at 95:10-95:17 at ABD Tab 2.

15 Boromir's 1st Affidavit at paras 78-83.

16 Boromir's 1st Affidavit at para 83.

17 COT's written submissions, para 70.

₴3.84m to discharge an indisputable claim for ₴7.35m for Modules sold and delivered.[18]

28 At the end of October 2016, the Rohan Group transferred its shares in the second respondent and the third respondent to the Sauron Group.

29 In November 2016, representatives of the Rohan Group again attempted to persuade the claimant to accept a part-payment of ₴3.84m from the Sauron Group in exchange for issuing the manufacturers' warranties for the Modules to the third respondent, on the basis that the claimant could reserve its right to recover the balance of the ₴7.35m from the Procurement Company. It was again the claimant's position that, as a company under public ownership, it could not accept part-payment for an undisputable claim.

30 The following facts are therefore not in dispute. The claimant sold and delivered Modules worth ₴7.35m to the Procurement Company who sold them on to the second respondent who in turn sold them on to the third respondent. The second respondent used the Modules to complete the Project for the third respondent. The Project is operational, and the third respondent is earning substantial revenue from it. The Procurement Company still owes the claimant ₴7.35m for the Modules. According to the second respondent, it owes the Procurement Company only ₴3.84m for the Modules. According to the third respondent, it has paid all sums due to the second respondent for the Modules.

The arbitration and the award

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[18] Boromir's 1st Affidavit at VB-2 at HB/D/84/1598 at ABD Tab 2, see also Boromir's 1st Affidavit at VB-3 Tab 57, S/No. 23 at ABD Tab 2

31 The claimant commenced the arbitration in April 2017.[19] The arbitration was administered by the Singapore International Arbitration Centre ("SIAC") but took place under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("the ICC Rules").[20] The tribunal was constituted in February 2019. The evidential hearings in the arbitration took place over two days in August 2020. The tribunal issued its final award in February 2021.

32 In its final award, the tribunal held that the respondents were liable jointly and severally to pay the claimant the principal sum of ₴7.35m as damages for breach of contract. In arriving at that decision, the tribunal made three sets of findings that are material for present purposes:

(a) First, the tribunal found that the claimant resumed delivering Modules to the second respondent on 18 March 2016 pursuant to a contract with the respondents. The tribunal referred to this contract as "the…Modules Delivery Agreement". For brevity, I shall refer to the contract found by the tribunal as "the MDA".

(b) Second, the tribunal found that it had jurisdiction to hear the claimant's claim against the respondents arising under the MDA.

(c) Third, the tribunal found that the respondents were in breach of the MDA.

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19 Boromir's 1st Affidavit at VB-2 at HB/A/1/ at ABD Tab 2, pp 4-27.

20 Award at para 11, Boromir's 1st Affidavit at p 158.

33 I now set out the details of each of these three sets of findings.

Findings about the MDA

34 The tribunal made the following findings on the MDA.

35 The claimant and all three respondents were parties to the MDA.[21] They concluded the MDA on 18 March 2016 (the precise date is significant).[22] Some of the terms of the MDA are oral; others are in writing.[23] The oral terms are found in discussions between the claimant and agents for each of the three respondents between 15 March 2016 and 18 March 2016.[24] The written terms are set out in a non-disposal undertaking dated 17 March 2016. I shall refer to this non-disposal undertaking as "NDU-3".[25]

36 Under the MDA, the respondents jointly and severally agreed to pay the claimant the sum of ₴7.35m. The respondents also agreed not to dispose of 24% of the equity in the third respondent until that sum of ₴7.35m had been paid to the claimant.[26]

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21 Award at para 234(a), Boromir's 1st Affidavit at p 279; Award at para 131, Boromir's 1st Affidavit at pp 258-259; Award at para 164, Boromir's 1st Affidavit at p 264.

22 Award at para 97, Boromir's 1st Affidavit at p 249.

23 Award at para 98, Boromir's 1st Affidavit at p 249.

24 Award at paras 98–126; Boromir's 1st Affidavit at p 249–257.

25 Award at paras 114–116, Boromir's 1st Affidavit at p 253; Award at paras 163–164, Boromir's 1st Affidavit at p 264; Award at para 174, Boromir's 1st Affidavit at p 267.

26 Award at para 163, Boromir's 1st Affidavit at p 264.

37 The consideration for the MDA was the claimant's resumption of delivery of Modules to the second respondent.[27] The respondents entered into the MDA because the second respondent needed the Modules urgently to complete the Project for the third respondent and to avoid the substantial loss that the Rohan Group would suffer if there was any delay.[28]

Findings on jurisdiction

38 The tribunal made the following findings on jurisdiction.

39 The tribunal had jurisdiction to determine the claimant's claims for breach of the MDA as against all three respondents.[29] All three respondents were parties to the MDA. All three respondents were also therefore parties to an arbitration agreement contained in NDU-3.[30] The respondents were thereby bound to submit disputes arising under the MDA to arbitration.[31]

Findings as to breach of the MDA

40 The tribunal made the following findings on breach.

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27 Award at para 97, Boromir's 1st Affidavit at p 249; Award at para 163, Boromir's 1st Affidavit at p 264.

28 Award at para 99, Boromir's 1st Affidavit at p 249.

29 Award at para 251(a), Boromir's 1st affidavit at p 284.

30 Award at para 150, Boromir's 1st Affidavit at p 262.

31 Award at paras 234(b) and 234(c), Boromir's 1st Affidavit at p 27

41 All three respondents were in breach of the MDA.[32] That breach had caused the claimant to suffer loss and damage in the sum of ₴7.35m.[33] The respondents were therefore jointly and severally liable to pay ₴7.35m to the claimant as damages for breach of contract.[34]

The grounds for setting aside the award

42 The respondents have applied to have the award set aside on three broad grounds:

(a) First, the award should be set aside under Art 34(2)(*a*)(i) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") as it has been enacted in Singapore by s 3(1) of the Act. None of the respondents concluded any contract whatsoever with the claimant at any time, whether by way of the MDA (as the tribunal found) or otherwise. There was therefore no valid arbitration agreement between the parties within the meaning of the second limb of Art 34(2)(*a*)(i).[35]

(b) Second, the award should be set aside under Art 34(2)(*a*)(iii) of the Model Law. The tribunal acted either *ultra petita*, alternatively *infra petita*:

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32 Award at para 216, Boromir's 1st affidavit at p 276.

33 Award at para 222, Boromir's 1st Affidavit at p 276.

34 Award at paras 234(h), 234(i) and 251(b), Boromir's 1st Affidavit at pp 279 and 284.

35 COT's written submissions, paras 2 and 4(a).

(i) The dispute which the parties submitted to arbitration was whether they had concluded a contract in writing on 17 March 2016 in NDU-3 ("the NDU-3 Agreement"), not whether they had concluded the MDA consisting of oral and written terms on 18 March 2016.[36] By finding that the parties had concluded the partly-oral, partly-written MDA on 18 March 2016, the tribunal had therefore acted *ultra petita*: it had either dealt with a dispute not falling within the terms of the submission to arbitration or had decided a matter beyond the scope of the submission to arbitration within the meaning of Art 34(2)(*a*)(iii).

(ii) Alternatively, the dispute which the parties submitted to arbitration comprised a number of important matters raised by the respondents which went directly to the fundamental issue of whether the claimant had concluded any contract whatsoever with the respondents at any time. The tribunal acted *infra petita* in relation to these matters: it either failed to decide these matters or failed to exercise the authority that the parties had granted to the tribunal by not deciding these matters. This failure caused substantial prejudice to the respondents. The award is therefore within the scope of Art 34(2)(*a*)(iii) of the Model Law when that provision is read with *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [34].[37]

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36 COT's written submissions, paras 164 and 165.

37 COT's written submissions at para 276.

(c) Third, the award should be set aside under s 24(*b*) of the Act or Art 34(2)(*a*)(ii) of the Model Law. The claimant fundamentally changed its case in the arbitration by advancing the argument that the contract which the parties had concluded was the MDA rather than the NDU-3 Agreement.[38] Further, the claimant made this fundamental change at a very late stage. The tribunal accepted the claimant's changed case in its award without allowing the respondents an opportunity to adduce further evidence or to make further submissions to address the change.[39] The tribunal thereby either breached the rules of natural justice within the meaning of s 24(*b*) of the Act or rendered the respondents unable to present their case on the MDA within the meaning of Art 34(2)(*a*)(ii) of the Model Law.

Issues

43 The four questions I must answer to determine the respondents' application to set aside the award track the grounds on which the respondents rely to challenge the award. Those four questions are:

(a) Does an arbitration agreement exist between the claimant on the one hand and any one or more of the three respondents on the other?

(b) Did the tribunal act *ultra petita*, *ie*, did it deal with a dispute not falling within the terms of the submission to arbitration when it held that the claimant and the respondents concluded the MDA?

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[38] COT's written submissions at para 245.

[39] COT's written submissions, para 3.

(c) Did the tribunal act *infra petita*, *ie*, did it either: (a) fail to decide a number of important matters raised by the respondents which went directly to the fundamental issue of whether the claimant had concluded any contract whatsoever with the respondents at any time; or (b) fail to exercise the authority that the parties had granted to the tribunal by not deciding those matters?

(d) Did the tribunal breach the rules of natural justice when it found that the contract between the claimant and the respondents was the MDA concluded on 18 March 2016 rather than the NDU-3 Agreement concluded on 17 March 2016?

44 I can deal with the *infra petita* ground briefly. This ground was, in my judgment, nothing more than a disguised attempt to challenge the merits of the tribunal's decision. I therefore need not consider it further.

45 I take the remaining three questions in turn.

The arbitration agreement

The law

46 The respondents' first challenge to the award is under the second limb of Art 34(2)(*a*)(i) of the Model Law. That limb provides that "[a]n arbitral award may be set aside … if the party making the application furnishes proof that … the arbitration agreement … is not valid under the law to which the parties have subjected it …".

47 On its face, the second limb of Art 34(2)(*a*)(i) appears to be premised on an arbitration agreement that has been formed between the parties (as indicated

by the use of the definite article in the phrase "*the* arbitration agreement" in Art 34(2)(*a*)(i)) but which is subject to some internal or external factor which vitiates it or renders it unenforceable (as indicated by the words "is *not valid*" in Art 34(2)(*a*)(i)). The second limb does not, on its face, appear apt to cover an argument that no arbitration agreement has ever existed between the parties.

48 This appears especially to be the case when the language of the second limb of Art 34(2)(*a*)(i) is contrasted with the language of Art 16(1) of the Model Law. Article 16(1) empowers the tribunal to decide whether an arbitration agreement *exists* or is valid. The second limb of Art 34(2)(*a*)(i), on the other hand, allows the court to set aside an award only if the arbitration agreement "is not valid". The Model Law thereby appears to recognise a distinction between existence and validity as concepts and appears to have taken a conscious decision to rest the second limb of Art 34(2)(*a*)(i) only on the concept of validity.

49 It is nevertheless well established that the second limb of Art 34(2)(*a*)(i) extends to a challenge to an award on the grounds that no arbitration agreement between has ever existed between the parties (*PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media TBK*") at [156]; *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd* [2016] 4 SLR 1336 ("*Jiangsu Overseas*") at [46]).

50 It is equally well-established that a court hearing a challenge under the second limb of Art 34(2)(*a*)(i) is not only entitled but obliged to determine for itself, on the merits, whether an arbitration agreement exists and is valid. That is ultimately because arbitration is consensual. A tribunal can exercise no

jurisdiction over any person unless that person has consented to the tribunal doing so. That consent is not subjective consent but is instead consent given in accordance with the law of contract, *ie*, the law in the applicable legal system that governs obligations voluntarily undertaken. Consent give in this way will bind the person giving it in accordance with that law. The arbitration agreement must also satisfy the statutory requirements of s 2A of the Act and Art 7 of the Model Law in order for it to come within the Act.

51 A court hearing a challenge under the second limb of Art 34(2)(*a*)(i) must therefore determine for itself *de novo* whether an arbitration agreement exists between the parties and is valid (*PT First Media TBK* at [163]). Both the parties and the court are therefore free of any and all constraints arising from the manner in which the parties and the tribunal dealt with the same issue in the arbitration, whether any such constraint is said to arise from the arguments presented or not presented to the tribunal, from the evidence that the parties placed or did not place before the tribunal, or from the findings of fact and holdings of law that the tribunal made or did not make in arriving at its conclusions on this issue and on the ultimate issue of its own jurisdiction (*Jiangsu Overseas* at [48]).

52 The court approaches a challenge under the second limb of Art 34(2)(*a*)(i) *de novo* because it is properly the court's role to determine whether an arbitration agreement exists and is valid. It is true that the Act and the Model Law give the tribunal jurisdiction to decide this issue (s 10(2) of the Act and Art 16(1) of the Model Law). And it is also true that a court will allow the tribunal to have the first opportunity to decide this issue even if only a *prima facie* case is made out on this issue (*Tomolugen Holdings Ltd and another v Silica Investors Ltd and another appeal* [2016] 1 SLR 373 at [67]).

That is the doctrine of *kompetenz-kompetenz* as enacted under s 10(2) of the Act and as applied in Singapore.

53 But the doctrine of *kompetenz-kompetenz* rests on a legal fiction: that a tribunal whose jurisdiction rests on consent can itself determine whether that consent exists. The unalterable logical reality is that a tribunal cannot pull itself up by its own bootstraps. A determination whether that consent exists can only be made by the national courts of a state. Only those courts exercise a mandatory jurisdiction over the parties, *ie*, a jurisdiction that does not rest on consent but instead on the coercive powers of the state.

54 The law adopts and applies the legal fiction of *kompetenz-kompetenz* for policy reasons, in order to advance arbitration as an alternative dispute resolution method. This legal fiction favours the risk of a false positive over a false negative. It is better for a tribunal to decide the issue of jurisdiction even if the tribunal does not in fact have jurisdiction than it is for the court to decide the issue when a tribunal does in fact have jurisdiction. This approach amounts in substance to a presumption in favour of existence and validity which arises upon establishing a *prima facie* case on that issue. This presumption serves to foster the adoption and growth of arbitration as a mode of alternative dispute resolution.

55 The fact remains, however, that the doctrine of *kompetenz-kompetenz* does not remove and vest in a tribunal the court's original civil jurisdiction to decide with finality whether an arbitration agreement exists between the parties and is valid. The doctrine merely postpones the exercise of the court's original civil jurisdiction to determine that issue in order to allow a tribunal the first opportunity to do so.

56 When a party fails before a tribunal on this issue and places it before a court *via* a permissible avenue (s 10(3) of the Act and Art 34(2)(*a*)(i) of the Model Law), the court therefore determines that issue in the exercise of its original civil jurisdiction. That is why a court does not approach an application under either of these avenues as a setting aside application or even as an appeal from the tribunal's decision. In so far as the heading to s 10 of the Act suggests that an application under s 10(3) is an appeal, in my view it goes too far.

57 What I have described thus far is the court's conceptual approach to determining whether an arbitration exists and is valid. This must be kept separate from the court's procedural approach to any such determination. The court determining a jurisdictional challenge *de novo* remains free to exercise its procedural discretion in the usual way. That discretion extends to what evidence it will receive, whether it is content to rely on the evidence presented to the tribunal or wishes to receive evidence anew and whether it receives the evidence on affidavit alone or *viva voce*, with or without cross-examination. Thus, the fact that the court's conceptual approach to this issue is to treat the application as a hearing *de novo* does not give a party a right to insist on the court undertaking a full rehearing of the evidence led before the tribunal (*AQZ v ARA* [2015] 2 SLR 972 at [57]).

58 In the exercise of this procedural discretion, I allowed each respondent, despite the claimant's objections,[40] to adduce affidavit evidence on these applications which the respondents could have but did not adduce before the

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[40] HC/SUM 2859/2021, HC/SUM 2857/2021 and HC/SUM 2858/2021, all filed on 17 June 2021.

tribunal. Thus, for example, I allowed the third respondent to adduce and rely on a substantial affidavit from a witness even though that witness did not give evidence in the arbitration. The affidavit goes into great detail into parties' negotiations in March 2016 and the intentions of the parties during those negotiations. The fact that the respondents could have but did not place this evidence before the tribunal was no bar in itself to the respondents seeking to adduce that evidence on an application under the second limb of Art 34(2)(*a*)(i) of the Model Law. In the exercise of my discretion, I considered that this evidence was of some conceivable relevance, would not delay the hearing of the substantive application and would not cause the claimant any prejudice for which it could not be compensated by costs. I therefore allowed the respondents to adduce this evidence despite the claimant's objections.

The law on contract formation

59 The claimant's submission on jurisdiction is that a contract arose out of negotiations in March 2016 that incorporated a term obliging the claimant and the respondents to resolve disputes arising from that contract by arbitration. The principles of law which I must apply to analyse that submission are well-established and are not in dispute. I therefore begin by setting out those principles:

(a) A contract is formed when there is an identifiable agreement that is complete and certain, supported by consideration, and made between parties who intend to create legal relations (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [46]).

(b) The inquiry into whether a contract has been formed is an objective one (*R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") at [51]). The court ascertains the parties' objective intention as disclosed by their correspondence and interactions seen in the light of the relevant background. This background includes the industry the parties are in, the character of the documents alleged to constitute the contract as well as the course of dealings between the parties.

(c) In conducting this objective exercise, the court will consider the whole course of the parties' negotiations to ascertain whether an agreement was reached at any given point in time (*Gay Choon Ing* at [53]; *China Coal Solution (Singapore) Pte Ltd v Avra Commodities Pte Ltd* [2020] 2 SLR 984 at [26]).

(d) In accordance with the objective approach, once both parties have, to all outward appearances, manifested their agreement on the same terms on the same subject-matter, one party generally cannot rely on some unexpressed qualification or reservation which it continued to hold to show that he did not in fact agree to the terms to which he appeared to agree. The subjective reservations of one party cannot prevent the formation of a contract (*Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 at [66], citing *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440 at [30]).

(e) There is an identifiable agreement when the parties have reached a *consensus ad idem*. This *consensus* is usually identified by reference to an offer made by the offeror which is then accepted by the offeree.

(i) An offer must consist of a definite promise to be bound, provided that certain specified terms are accepted (*Gay Choon Ing* at [47], citing M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) at p 40).

(ii) An acceptance is a final and unqualified expression of assent to the terms of an offer (*Gay Choon Ing* at [47], citing Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 2-015). Even if an offeree does not communicate express acceptance of the offer, the offeree's positive, negative or even neutral conduct is capable of evincing an intention to accept the offer (*CIMB Bank Bhd v Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd* [2021] 4 SLR 883 at [20], citing *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [50] and [52]).

(f) The parties' subsequent conduct can be considered in determining whether a contract has been formed (*Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [78]).

(g) It is possible for parties to form a contract on a set of essential terms at a given point in time, even if negotiations continue past that point on other terms of the contract which are non-essential. The fact that the non-essential terms are not agreed "does not prevent the contract based on the essential core terms from coming into existence" at the

earlier point in time (*R1 International* at [52]). The crucial question is whether the parties, by their words and conduct, objectively ascertained, demonstrated that they intended to be bound by the essential terms from that point in time even though their negotiations on the non-essential terms continued (*Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd* [2013] 4 SLR 1023 at [27]). If so, the contract is formed at that time and binds the parties, unless the continued negotiations show that the parties agreed to revoke the agreement (*Gay Choon Ing* at [53]).

(h) Finally, and as an overarching point, a court does not analyse contract formation in a rigidly mechanical or dogmatic manner. Although the correct approach remains to examine the whole course of the parties' negotiations to isolate and identify offer and acceptance, this must be done while having regard to the entire background and context (*Gay Choon Ing* at [63]).

60 I now turn to examine the negotiations in March 2016 to determine whether the claimant can establish its submission that a contract arose out of negotiations in March 2016 that incorporated a term obliging the claimant and the respondents to resolve disputes arising from that contract by arbitration (see [59] above).

The negotiations in March 2016

61 The negotiations in March 2016 involved a number of executives from the claimant and from the respondents. It is useful at this stage to identify these executives by their anonymised names.

The executives who participated in the negotiations

62 Two executives from the claimant participated in the March 2016 negotiations:

(a) Legolas was the claimant's Chief Executive Officer and General Manager.

(b) Gimli was the claimant's sales operation manager.[41]

63 Five senior executives of the Rohan Group entities that were responsible for its business in Gondor participated in the March 2016 negotiations:

(a) Gandalf was the President, Chief Executive Officer and a director of the Rohan Group's ultimate holding company.[42]

(b) Aragon was a director of the first respondent from June 2011 to April 2017.[43]

(c) Boromir was a director of both the first respondent and the third respondent from March 2016 to October 2016.[44] He was also the General Counsel for the Rohan Group's business in Gondor from June 2010 to October 2016.[45]

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41 Boromir's 1st Affidavit at para 42.

42 Boromir's 1st Affidavit at para 137.

43 Award at para 48(1), Boromir's 1st Affidavit at p 224.

44 Boromir's 1st affidavit at paras 2 and 44.

45 Boromir's 1st Affidavit at para 2.

(d) Frodo was a director of the second respondent from February 2015 to April 2017. He was also an employee of the second respondent.[46]

(e) Samwise was an employee of the Procurement Company and a senior director at a wholly owned subsidiary of the Procurement Company in Arnor.[47]

64 Of these seven executives on both sides, the tribunal heard evidence in the arbitration only from Legolas, Gimli and Samwise. Legolas and Gimli gave evidence, quite obviously, for the claimant. Unusually, Samwise also gave evidence for the claimant, even though he had been involved in the March 2016 negotiations as an employee of the Rohan Group.

65 Each respondent called only one witness in the arbitration. None of the respondents called any of the witnesses I have listed at [63] above. As a result, all three of the respondents' witnesses in the arbitration had no involvement in these negotiations and therefore had no personal knowledge of the March 2016 negotiations.[48]

66 I now describe those negotiations.

Aragon drafts NDU-1

67 The Procurement Company's failure in March 2016 to pay the claimant's invoices as they fell due was the result of serious cash flow

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46 Boromir's 1st Affidavit at para 31; COT's written submissions, para 29.

47 Boromir's 1st Affidavit at para 31; COT's written submissions, para 29.

48 Award at paras 72, 76 and 80.

difficulties affecting the Rohan Group as a whole at that time. The Rohan Group feared that these difficulties would cause suppliers to stop supplying the goods which the group needed to complete its Infrastructure Projects around the world.[49]

68 The Rohan Group's fear was entirely justified, as demonstrated by the claimant's subsequent decision to stop delivering Modules. The senior executives of the Rohan Group entities responsible for its business in Gondor therefore initiated a process of engaging essential suppliers in negotiations to offer them assurances in order to maintain continuity of supply for the Project.

69 As a first step in this process, Boromir – together with members of his in-house legal team – drafted a template non-disposal undertaking ("NDU-1").[50] The intent was to offer an agreement in the terms set out in NDU-1 to each essential supplier as a reassurance to that supplier that it would be paid if it continued to supply goods to the Rohan Group entities.[51]

70 NDU-1 was drafted as an undertaking given by the first respondent in favour of a "Contractor" not to dispose of the first respondent's shares in the third respondent.[52] The term "Contractor" is left blank, to be filled in as necessary once negotiations with a particular supplier concluded in an agreement.

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49 Boromir's 1st Affidavit at para 40.

50 Boromir's 1st Affidavit at para 40.

51 Boromir's 1st Affidavit at para 40.

52 Boromir's 1st Affidavit at VB-2 at HB/D/35/611 at ABD Tab 2.

71 NDU-1 defines a number of material terms. The plural term "Parties" is defined as both the first respondent and the Contractor collectively; with the singular term "Party" defined as either one of them individually. The term "Company" is defined as the third respondent. The term "Payment Obligations" is defined as the second respondent's payment obligations to the Contractor pursuant to unpaid invoices to be listed in an annex to NDU-1. The term "Invoices" is defined to mean the unpaid invoices listed in the annex. The term "Security Interest" is defined as a security interest of any kind over the shares in the third respondent.

72 The recitals to NDU-1 record the following as the factual background leading up to it:

(a) the third respondent is in the process of constructing the Project in Gondor.

(b) the first respondent holds 99.99% of the shares in the third respondent.

(c) the third respondent engaged the second respondent as its contractor for the Project; and the second respondent had "sub-contracted a part of the supply" for the Project to the Contractor.

(d) The Invoices were pending payment from the second respondent.

Notably, the recitals do not even mention the Rohan Group's desire to maintain continuity of supply as part of the factual background to NDU-1, let alone impose it as an obligation on the Contractor.

73 The contractual heart of NDU-1 is found in cll 2.1 to 2.3. These three clauses set out the first respondent's undertaking to the Contractor to retain 24% of the shares in the third respondent until either the first respondent or the second respondent pays the sums due to the Contractor on the Invoices, subject only to the first respondent's power to create a future Security Interest in favour of lenders to raise financing for the Project. Clause 2.1 provides as follows:

> 2.1 Save for as set out herein or specifically permitted by the Contractor, [the first respondent] shall until the complete discharge of the Payment Obligations by [the second respondent], continue to legally and beneficially hold and retain at least 24% (Twenty Four per cent) of the equity in [the third respondent]… ("**NDU Shares**") free of any Security Interest, and shall not, without prior approval from the Contractor, until the full and complete discharge of the Payment Obligations, sell, transfer, assign, dispose of, pledge, charge or create any Security Interest on the NDU Shares in favour of any person…".

The reason NDU-1 covered only 24% of the shares in the third respondent was that, at the time Boromir drafted it, the first respondent had already pledged 76% of the shares in the third respondent to a consortium of lenders to secure project finance.

74 Clause 2.2 of NDU-1 provides as follows:

> 2.2 Provided that the limitation set out in this Clause 2 shall not prevent [the first respondent] or shall require [the first respondent] from obtaining any consent from the Contractor for creating any Security Interest over all or part of the NDU Shares in favour of project finance lender(s), and upon such creation, the undertaking set out herein shall automatically get subordinated to the newly created Security Interest in favour of the project finance lenders.

75 Clause 2.3 provides as follows:

> 2.3 All obligations under this Undertaking shall automatically terminate upon payment of the Invoices by [the second respondent] or [the first respondent].

76 In the course of the negotiations, the respondents referred to NDU-1 as creating a "pledge". That is obviously not correct. NDU-1 did not create a pledge of the first respondent's shares in the claimant in favour of the Contractor in any sense of the word. It did not even claim to do so. NDU-1 was merely the first respondent's undertaking not to dispose of 24% of the shares in the third respondent until the second respondent paid the Contractor in full all sums due on the Invoices.

77 Clause 8 of NDU-1 provides that it is to be governed by and construed in accordance with the laws of Gondor. Clause 9 provides that disputes under NDU-1 which cannot be resolved amicably are to be submitted to arbitration in Gondor.

78 The signature block of NDU-1 records that Boromir is to execute it as a deed for and on behalf of the first respondent. Notably, NDU-1 makes no provision whatsoever for the Contractor to execute it. That is no doubt because the contractual content of NDU-1 is entirely unilateral. NDU-1 does not even attempt to impose any obligation of any kind on the Contractor.

13 March 2016 – the claimant suspends delivery of Modules

79 On or around 13 March 2016, Legolas asked Samwise to convey to Aragon that the claimant would suspend all further deliveries of Modules for the Project until the claimant received payment for Modules already delivered.[53]

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[53] Gimli's 3rd Affidavit at para 14.

80 This created a significant risk that the Project could not achieve commercial operation by 30 March 2016. That would expose the third respondent – and therefore both of its shareholders, the first respondent and the second respondent and the Rohan Group as a whole – to a significant risk of substantial financial loss. That risk led to the March 2016 negotiations.

15 March 2016 – phone call

81 The negotiations began on 15 March 2016. On that day, Aragon spoke to Legolas by telephone to try and persuade him to resume deliveries of Modules to the second respondent.[54] On the call with Aragon and Legolas were Frodo and Samwise.

82 Aragon's overarching point to Legolas was that the Rohan Group would not "run away" and fail to pay the claimant.[55] Aragon explained that the Modules were urgently required to complete the Project. He assured Legolas that the Rohan Group was committed to paying the sums due to the claimant for Modules delivered for the Project and that the Project was on track to achieve commercial operation if the remaining Modules were delivered without further delay. Achieving commercial operation would release the bank financing which the Rohan Group had already secured. Out of that financing, the claimant would be paid in full for all Modules sold and delivered.

83 Legolas would not relent. Aragon then offered to "pledge" part of the first respondent's shares in the third respondent as security for the debt due to

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54 Gimli's 3rd Affidavit at para 14.

55 Legolas's 1st Affidavit at para 29(3).

the claimant.[56] Legolas responded that he would consider resuming delivery of Modules for the Project if, in addition to this "pledge", the claimant received at least a part payment of the sum outstanding. Legolas also asked Aragon to send him details of his proposal.

15 March 2016 – NDU-1

84 After the call, but also on 15 March 2016, Aragon sent an email to Legolas, copied to Frodo and Samwise.[57] In an effort to persuade Legolas that the claimant would get paid upon completion of the Project, Aragon attached four documents to his email:

(a) Evidence of the terms on which the third respondent had contracted to sell the output of the Project to a publicly owned entity in Gondor upon completion.[58]

(b) Evidence that the price at which the third respondent could sell the output of the Project to the publicly owned entity would fall drastically if the Project had not achieved commercial operation by 30 March 2016.[59]

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56 Legolas's 1st Affidavit at para 29(3).

57 Boromir's 1st Affidavit at VB-2 at HB/D/35/575 at ABD Tab 2.

58 Boromir's 1st Affidavit at VB-2 at HB/D/35/576 at ABD Tab 2.

59 Boromir's 1st Affidavit at VB-2 at HB/D/35/589 at ABD Tab 2.

(c) Evidence that the third respondent had secured a term loan that it could draw down upon once the Project achieved commercial operation.[60]

(d) A copy of NDU-1.[61]

85 The copy of NDU-1 attached to this email had not been customised to apply to the claimant. Thus, the annex to NDU-1 was left blank with no Invoices listed. More importantly, the language of NDU-1 had not been modified to cater for the actual contractual chain for the supply of Modules for the Project. NDU-1 as drafted proceeded on the premise that the second respondent owed Payment Obligations to the Contractor under a contract between them.

86 The actual position, however, was that the Rohan Group had assigned the task of procuring Modules for the Project to the Procurement Company under the MSA. As a result, the invoices which remained unpaid – and which had led the claimant to suspend delivery of Modules to the second respondent – were invoices which the claimant had issued to the Procurement Company, not to the second respondent. When applied to the claimant, therefore, the definition of "Payment Obligations" in NDU-1 and the third and fourth recitals in NDU-1 were factually wrong.

16 March 2016 – Legolas replies

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60 Boromir's 1st Affidavit at VB-2 at HB/D/35/601 at ABD Tab 2.

61 Boromir's 1st Affidavit at VB-2 at HB/D/35/610 at ABD Tab 2.

87 Legolas replied to Aragon's email on 16 March 2016,[62] making three points. First, he told Aragon that the claimant would review the documents attached to Aragon's email. Second, he said that the claimant would require NDU-1 to be executed before it agreed to release a first shipment of Modules. Third, he said that the claimant would require the Modules already delivered to be paid for before it agreed to release a second shipment.

17 March 2016 – NDU-2

88 On 17 March 2016, Legolas followed up on his 16 March 2016 email. He insisted that 57% of the shares in the third respondent should be subject to the non-disposal undertaking, because the claimant had delivered 57% of the Modules for the Project but had not yet received payment for any of them.[63]

89 Attached to Legolas's email was a copy of NDU-1 marked up with the amendments which the claimant required. I shall refer to this markup as "NDU-2". The claimant required six material amendments to be made:[64]

(a) The third recital was to be amended to make express reference to the Procurement Company and the purchase orders that it had placed with the claimant under the MSA. This was no doubt intended to address the issue I have identified at [85]–[86] above.

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62 Boromir's 1st Affidavit at VB-2 at HB/D/36/621 at ABD Tab 2.

63 Boromir's 1st Affidavit at VB-2 at HB/D/37/623 at ABD Tab 2.

64 Boromir's 1st Affidavit at para 51.

(b) Clause 2.1 was to be amended by increasing the percentage of the first respondent's shares in the third respondent which were to be subject to the non-disposal undertaking from 24% to 57%.

(c) Clause 2.2 to be amended to give the claimant priority of payment out of any funds which the first respondent raised from project finance lenders by granting a Security Interest to the lenders over the first respondent's shares in the third respondent.

(d) Clause 2.3 was to be amended to provide that NDU-2 would terminate once the claimant had received complete payment of the sums arising from the purchase orders that the Procurement Company had placed with the claimant under the MSA. This too was no doubt intended to address the issue I have identified at [85]–[86] above.

(e) The governing law of NDU-2 was to be Singapore law rather than Gondorian law.

(f) Disputes were to be resolved by arbitration at the SIAC in Singapore rather than by arbitration in Gondor.

90 Frodo replied to Legolas within seven minutes, informing him that the Rohan Group's Gondorian legal team would review NDU-2.[65] He also offered Legolas an opportunity to resolve any open items on a conference call. Legolas responded just over a half-hour later telling Frodo to go through the changes so that the parties could move forward.[66]

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65 Boromir's 1st Affidavit at VB-2 at HB/D/38/635 at ABD Tab 2.

66 Boromir's 1st Affidavit at VB-2 at HB/D/39/637 at ABD Tab 2.

91 Later that day, Samwise called Gimli to explain that the first respondent could not subject more than 24% of the shares in the third respondent to the non-disposal undertaking because all of the remaining shares were already subject to a Security Interest. Samwise confirmed this in a follow-up email to Gimli sent in the afternoon of 17 March 2016.[67]

92 Gimli replied to Samwise's email agreeing that NDU-2 could subject only 24% of the shares in the third respondent to the non-disposal undertaking, but insisting that all of the other amendments be accepted:[68]

> We agree to keep 24% NDU shares but the rest of the revise [*sic*] shall be accepted.
>
> Please send us the signed & sealed NDU in digital version and the original one by post. Just inform the tracking number once it is sent off.

17 March 2016 – NDU-3

93 At 10.05 pm on 17 March 2016, Frodo sent the following email to Gimli:[69]

> Further to your discussions with [Samwise] earlier today, pls find attached executed version of the NDU by our legal team.
>
> Thanks for your support.
>
> [Another employee] will send the original by post and send you the tracking number tomorrow.

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67 Boromir's 1st Affidavit at VB-2 at HB/D/40/639 at ABD Tab 2.

68 Boromir's 1st Affidavit at VB-2 at HB/D/41/641 at ABD Tab 2.

69 Boromir's 1st Affidavit at VB-2 at HB/D/42/643 at ABD Tab 2.

94 Attached to this email was the third version of the non-disposal undertaking. I shall refer to this version as "NDU-3". NDU-3 differed from NDU-2 in the following respects:

(a) It had the claimant's name inserted in place of a blank both on the cover page and in the definition of "Contractor" in the body of the agreement.

(b) It was signed by Boromir.[70]

(c) As agreed by Gimli, the claimant's amendment to cl 2.1 in NDU-2 (see [89(b)] above) was deleted and 24% was reinstated as the proportion of the first respondent's shares in the third respondent which were subject to the non-disposal undertaking.

(d) The claimant's amendment to cl 2.2 in NDU-2 (see [89(c)] above) was deleted and the original cl 2.2 from NDU-1 (see [74] above) was reinstated. The effect was that the claimant would not get any priority of payment out of any funds raised from project finance lenders against a Security Interest over the first respondent's shares in the third respondent.

(e) The claimant's amendment to cl 2.3 in NDU-2 (see [89(d)] above) was deleted and the original cl 2.3 from NDU-1 (see [75] above) was reinstated.

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[70] Boromir's 1st Affidavit at VB-2 at HB/D/42/644-653 at ABD Tab 2.

(f) Four invoices totalling ₴29.43m issued by the claimant to the Procurement Company for Modules delivered to the second respondent were listed in the annex.

95 NDU-3 accepted the following amendments which the claimant had made in NDU-2:

(a) The reference to the Procurement Company and the MSA in the third recital (see [89(a)] above).

(b) The governing law being Singapore law (see [89(e)] above).

(c) Arbitration being at the SIAC in Singapore (see [89(f)] above).

18 March 2016 – NDU-4

96 On 18 March 2016, Gimli sent an email to Samwise objecting to the changes to NDU-2 which were introduced in NDU-3:[71]

> Your returned NDU is NOT what we both agreed on the phone today.

97 Gimli went on to ask Samwise to make three amendments be made to NDU-3 "so as to reach a fair agreement":

(a) Clause 2.2 should reinstate the language from NDU-2 (see [89(c)] above) giving the claimant priority of payment out of any funds raised from project finance lenders against a Security Interest to over the first respondent's shares in the third respondent.

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[71] Boromir's 1st Affidavit at VB-2 at HB/D/44/666 at ABD Tab 2.

(b) Clause 2.3 should at least provide that the non-disposal undertaking terminates when the claimant receives full payment of the Invoices listed in the annex to NDU-3. This was no doubt intended to go further to address the issue I have identified at [85]–[86] above than the amendments to the third recital (see [89(a)] above) which had been accepted (see [95(a)] above).

(c) Three further invoices totalling ₴7.29m should be listed in the annex. The claimant had issued these invoices to the Procurement Company only in March 2016. The time for the Procurement Company to pay these invoices had therefore not yet expired. These further invoices were due but not yet overdue.

98 Gimli followed up with a second email to Samwise attaching a fourth version of the non-disposal undertaking document incorporating the claimant's amendments to NDU-3. I shall call this version "NDU-4".[72]

99 NDU-4 amended cl 2.3 of NDU-3[73] as Gimli had required (see [97(b)] above) and included the three March 2016 invoices in the annex[74] (see [97(c)] above). Notably, NDU-4 did not include the amendment to cl 2.2[75] which gave the claimant priority of payment out of any funds raised from project finance lenders against a Security Interest over the first respondent's shares in the third respondent (see [89(c)]) as the claimant had required (see [97(a)] above).

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72 Boromir's 1st Affidavit at VB-2 at HB/D/46/670 at ABD Tab 2.

73 Boromir's 1st Affidavit at VB-2 at HB/D/46/673 at ABD Tab 2.

74 Boromir's 1st Affidavit at VB-2 at HB/D/46/678 at ABD Tab 2.

75 Boromir's 1st Affidavit at VB-2 at HB/D/46/673 at ABD Tab 2.

100 Gimli's email to which NDU-4 was attached reads as follows:

> Kindly find the final version of NDU per we discussed [*sic*] just now.
>
> Please have this signed and sealed ASAP.

Legolas releases the Modules

101 It was at this point that Gandalf intervened personally in the negotiations.

102 On 18 March 2016, Gandalf asked Samwise to convey to Legolas Gandalf's personal promise to Legolas that all of the claimant's invoices would be settled. Samwise duly conveyed the promise to Legolas.

103 Samwise also told Legolas that the changes that Gimli had asked for in NDU-4 were unnecessary because NDU-3's language made sufficiently clear that the claimant's invoices to the Procurement Company would be paid in full, and that the claimant would be entitled to the benefit of the non-disposal undertaking over 24% of the shares in the third respondent until the claimant received full payment.

104 Legolas agreed to leave NDU-3 unamended.

105 On the same day, Legolas authorised the release of the undelivered Modules.[76]

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[76] Samwise's Witness Statement at para 41, at Boromir's 1st Affidavit at VB-2 at HB/C/3/64 at ABD Tab 2; Legolas's Witness Statement at para 54. At Boromir's 1st Affidavit at VB-2 at HB/C/1/22 at ABD Tab 2.

106 On 22 March 2016, the second respondent paid ₴5.06m to the Procurement Company under the EMS. On 25 March 2016, the Procurement Company paid ₴5.06m to the claimant under the MSA.[77] This reduced the sum due from the Procurement Company to the claimant by ₴5.06m, *ie*, from ₴16.72m[78] (see [19] above) to ₴11.66m.

107 In May 2016, the claimant agreed that the Procurement Company could return Modules worth ₴4.31m to the claimant. This reduced the sum due from the Procurement Company to the claimant by ₴4.31m, *ie*, from ₴11.66m (see [22] above) to ₴7.35m. This sum of ₴7.35m remains due from the Procurement Company to the claimant for Modules which the claimant had sold and delivered for the Project.

What the claimant must establish

108 NDU-3 contains the arbitration clause that the claimant relied on to commence the arbitration. The burden lies on the claimant to establish that this arbitration clause binds each respondent. All of the respondents accept that, if I find that the March 2016 negotiations gave rise to a contract, the arbitration clause in NDU-3 is a term of that contract.

109 To succeed on the first issue, therefore, the claimant must establish two points. The first point is that the March 2016 negotiations gave rise to a contract. The second point is that each respondent is a party to the contract. To establish

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77 Boromir's 1st Affidavit at VB-3 Tab 57, S/No. 12 at ABD Tab 2.

78 Boromir's 1st Affidavit at para 39.

the second point, the claimant must show that a servant or agent of each respondent bound it to the contract said to have arisen from the March 2016.

110 It is more convenient to deal with contract formation before authority. In dealing with contract formation, I will assume that each respondent is a party to the contract that I have found the March 2016 negotiations gave rise to, before explaining why I have found that each respondent is indeed a party to that contract.

A contract was formed on basic or essential terms on 17 March 2016

111 The claimant's submissions on contract formation are as follows. The claimant formed a contract with the respondents by words and conduct on "basic or essential terms" on 17 March 2016 and then on full terms on 18 March 2016.[79] 17 March 2016 was when Frodo sent Gimli a copy of NDU-3 signed by Boromir (see [93] above).[80] 18 March 2016 was when Gimli released the Modules after Gandalf had spoken to Legolas (see [96] to [104] above). Legolas agreed to resume delivery of the Modules because he accepted Gandalf's personal request not to require any of the changes to NDU-3 that Gimli had proposed in NDU-4 as a condition for resuming delivery. These communications on 18 March 2016 gave rise to a full terms contract.

112 For the reasons which follow, I accept that a holistic assessment of the March 2016 negotiations shows that the parties did indeed conclude a contract

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79 COT's written submissions, para 65.

80 COT's written submissions, paras 14 and 65.

on "basic or essential terms" on 17 March 2016 and a contract on full terms on 18 March 2016.

Two observations

113 In arriving at this conclusion, I bear in mind the following two observations about contract formation.

114 First, whether a contract has been formed is a question of law. And this question of law is to be determined on the usual objective approach applicable in the law of contract. A party's subjective belief about contract formation is of no legal effect if that belief is not made manifest at the time. So too, a party's subjective belief about whether a particular communication is an offer, a counteroffer, an acceptance of an offer or a rejection of an offer is of no legal effect if it is not made manifest at the time. Thus, it is perfectly possible for parties to have satisfied all the requirements to conclude a contract as a matter of law without realising it when it happens. They are nevertheless bound by that contract. That is so even if both parties have a subjective and privately held belief that they have not concluded a contract and therefore conduct themselves after that point in time as though they are continuing to negotiate a contract yet to be formed. The parties' subjective and privately held beliefs cannot override the legal effect of their conduct in satisfying the requirements for contract formation at the earlier point in time.

115 There is therefore a need for extreme caution when receiving evidence as to the negotiating parties' subjective and privately held beliefs during their negotiations. That is so when the evidence is contemporaneous, *eg* communications while the negotiations are taking place, but which are internal to one party. That is especially so when the evidence is given after a dispute has

arisen. Evidence of the former type is immaterial. Evidence of the latter type will be tainted by the inevitable conscious and subconscious incentives to give evidence of past beliefs self-servingly, with the benefit of hindsight and to fit neatly within the legal requirements of each party's case.

116 Second, although it is true that contract formation is an event rather than a process, it is not always easy to say exactly when that event occurs in a fast-paced commercial negotiation involving multiple participants (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40]). It is often the case that commercial entities continue their negotiations even after agreeing what they consider to be the essential terms of the contract.

Analysis of the parties' negotiations

117 I start my analysis of the March 2016 negotiations by concentrating on the negotiations from 15 March 2016 to 17 March 2016 (see [81]–[95] above). I will then consider the negotiations on 18 March 2016.

118 In my view, Aragon's phone call (see [81] above) and follow up email (see [84] above) on 15 March 2015 amounted to an offer by the respondents to the claimant. The terms of this offer were as follows: in exchange for the claimant resuming delivery of the Modules, the respondents would give the claimant an undertaking in the form of NDU-1 and assure the claimant that full payment for all Modules would be made upon the Project achieving commercial operation.

119 Legolas did not accept this offer. But he did not reject it either. He clearly saw Aragon's offer as a starting point for further negotiation. Legolas therefore said, as an initial indication, that he would need "the executed

undertaking document for releasing the first shipment of modules … [and] the full payment for the current two shipments [of the Modules]".[81] He then followed up on 17 March 2016 by sending NDU-2 to Frodo (see [89] above).

120 NDU-2 was the claimant's counteroffer. The respondents accepted the claimant's counteroffer save only for one term. That term was Legolas's request to increase the shares in the third respondent which were to be subject to the first respondent's non-disposal undertaking from 24% to 57%. But Gimli withdrew this request after Samwise explained to him why it could not be accepted (see [91] above). The claimant's position was that all other terms of the counteroffer should be accepted.

121 I find that, at this point and on the objective approach, there was an agreement on the basic or essential terms of the contract.

122 The respondents submit that the parties reached no agreement whatsoever, not even on basic or essential terms, on 17 March 2016. The respondents' submission proceed as follows. The respondent's conduct in sending NDU-3 to the claimant on 17 March 2016 (see [94] above) and the claimant's conduct in sending NDU-4 to the respondents on 18 March 2016 (see [98] above) shows that no agreement had been reached even on basic or essential terms on 18 March 2016, let alone on 17 March 2016. Further, even on 18 March 2016, the claimant's email sending NDU-4 to the respondents amounts to a rejection of the respondents' offer by way of NDU-3 on 17 March

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[81] Boromir's 1st Affidavit at VB-2 at HB/D/36/621 at ABD Tab 2.

2016. It destroyed the respondent's offer and rendered it incapable of acceptance.

123 I do not accept the respondents' submissions for the following reasons.

124 First, as I have said (see [59(b)] above), whether a contract has been formed is determined on the objective approach. The respondent's considered response to the claimant's counteroffer of 17 March 2016 was to reject only the increase in the shares to be subject to the non-disposal undertaking from 24% to 57%. Implicit in this is the respondents' acceptance of all of the other terms of the claimant's counteroffer. The claimant agreed to withdraw that single term from its counteroffer on 17 March 2016. In doing so, the claimant insisted that the respondents must accept all the other terms of its counteroffer. In response, the respondents did not qualify in any way their earlier acceptance of those other terms of the claimant's counteroffer.

125 At the moment of Gimli's email to Samwise on 17 March 2016, therefore, the parties had, on the objective approach, reached *consensus ad idem* on the basic or essential terms of their contract (*Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2019] SGHC 68 at [103]). Even if the respondents at that time had already formed an intention to resile from the acceptance or to alter other terms of the claimant's counteroffer – as they arguably did the next day in NDU-3 – that does not detract from my finding. When the claimant sent its email on 17 March 2016, any such intention on the respondents' part would at best relate only to a subjective and privately held qualification or reservation. That cannot affect my finding, on the objective approach, that a contract was formed.

126 Second, I do not accept the respondents' submission that they resiled from their acceptance of the claimant's counteroffer by sending NDU-3 to the claimant. On my findings, the respondents could not resile from their acceptance because they were already bound by a contract on basic or essential terms. That is so even if they subjectively believed at that time that no contract had been formed and that they were continuing to negotiate a contract yet to be formed.

127 Further, NDU-3 did not in fact qualify the basic or essential terms agreed. The law recognises (see [59(g)] above) that parties may agree a set of basic or essential terms, thereby forming a contract at the moment of that agreement. The fact that the parties go on to agree other terms after that moment does not dissolve the contract which was formed when the basic or essential terms were agreed. If they wish to dissolve that contract, they must do so in accordance with the law of contract. It is not suggested that the emails which the parties exchanged on 18 March 2016 amount to any such dissolution of the contract on basic or essential terms already formed.

128 Third, I find that none of the terms from NDU-2 which the respondents failed to incorporate into NDU-3 relate to the basic or essential terms agreed on 17 March 2016. I examine first Gimli's email of 18 March 2016. It is true that Gimli protests that NDU-3 "is NOT what we both agreed on the phone". But the email is not framed as a dissolution of a contract already formed. It is not even framed as a non-contractual disavowal of everything that has gone before it. Instead, Gimli makes clear that his complaint is confined to two amendments in NDU-2 which the respondents failed to carry through into NDU-3: the amendments to cll 2.2 and 2.3.

129 Neither cl 2.2 nor cl 2.3, as amended by the claimant, is a basic or essential term.

130 The amended cl 2.2 is not a basic or essential term. The effect of the claimant's amendment to cl 2.2 was to give the claimant priority of payment out of any funds which the first respondent may raise from project finance lenders. It is true that this amendment changed the substantive content of an existing obligation in NDU-2. It is also true that Gimli initially insisted on the amended cl 2.2 being incorporated into the parties' agreement. But the claimant's own conduct thereafter demonstrates that this amendment was not a basic or essential term. When the claimant sent NDU-4 to the respondents later that day, the claimant itself abandoned the amendment and reinstated cl 2.2 to the version found in NDU-2. I therefore accept the claimant's submission that Gimli's decision not to insist on the amended cl 2.2 in NDU-4 establishes that this term was not a basic or essential term to either party.

131 The amended cl 2.3 is also not a basic or essential term. Clause 2.3 governs when the obligations under the non-disposal undertaking come to an end. I accept the claimant's submission that its proposed amendment to clause 2.3 goes only to the form in which this contractual obligation is recorded and not to the substance of this obligation. In both NDU-2 and NDU-3, the parties' obligations under the non-disposal undertaking terminate when the claimant receives full payment for its unpaid invoices from the first respondent or the second respondent. The substance of this obligation is therefore unchanged from NDU-2 to NDU-3.

132 The claimant's amendment in NDU-4 to include three invoices additional to those listed in the annex to NDU-3 is also not a basic or essential

term. As with the amended cl 2.3, the inclusion of these invoices is a matter of form rather than substance, purely for the avoidance of doubt. The inclusion merely clarified that the scope of the assurance of payment to the claimant covered these invoices. Even without this amendment, all of the invoices issued by the claimant to the Procurement Company came within the substantive obligations in NDU-3 as they fell due for payment. That is so whether or not they were expressly listed in the annex to NDU-3. Including these three invoices does not in any way affect the substance of the basic or essential terms agreed.

133 Finally, I accept that the claimant's conduct in releasing the Modules for the Project on 18 March 2016 was causally connected to the contract which the parties had reached on basic or essential terms. Indeed, I go further and find that the release amount to both performance of the contract and the consideration for the contract.

134 I do not accept the respondents' submission that the release of the Modules was unconnected to the March 2016 negotiations and was merely the result of a commercial decision by the claimant to deepen its relationship with the Rohan Group in anticipation of future business. This submission is not supported by any contemporaneous evidence. This submission also runs counter to the inherent probabilities and the commercial expectations. If the claimant decided on 13 March 2016 to withhold delivery of Modules for the Project to reduce its exposure to the risk of the Procurement Company defaulting on its payment obligations under the MSA, it makes no commercial sense for the claimant to do an about-face just five days later and increase its exposure to the Rohan Group by delivering more Modules without having obtained any payment for invoices already due and overdue and without any assurance of

payment in the future. It makes even less sense for the claimant to do this unilaterally, without asking for or securing any benefit in return.

135 I therefore accept that the claimant released the Modules on 18 March 2016 in performance of its obligations under and as consideration for the contract concluded on basic or essential terms on 17 March 2016.

136 For the foregoing reasons, I accept the claimant's submission that the parties concluded a basic and essential terms contract on 17 March 2016 and then on full terms on 18 March 2016. This conclusion means that there is a valid arbitration agreement between the parties. The contract I have found incorporates NDU-3. Clause 9 of NDU-3 contains an agreement to arbitrate disputes.

137 Although this was not put in issue by the respondents, I also accept that this arbitration agreement fulfils the formalities set out in s 2A of the Act:

(a) The arbitration agreement is in writing. It appears in cl 9 of NDU-3, the written component of the contract (see ss 2A(3) and 2A(4) of the Act). The fact that the MDA is partly in words and partly by conduct is therefore not to the point.

(b) Further, since the MDA incorporates NDU-3, cl 9 is part of the MDA (see s 2A(7) of the Act).

138 The claimant's alternative submission is that, even if no contract was formed on 17 March 2016, NDU-3 was the respondents' offer to the claimant in the terms set out in NDU-3 and Legolas accepted this offer on 18 March 2016.

Given my finding in favour of the claimant on its primary submission, I need not consider its alternative submission.

The parties to the contract

139 I come now to the second point which the claimant must establish in order to show that there is an arbitration agreement between itself and each respondent. This is the point as to the parties to the contract that I have found was concluded on 17 March 2016. This point turns on the authority of each of the participants in the March 2016 negotiations to bind the respondents.

140 The claimant does not have to establish this second point as against the first respondent.[82] That is because it is common ground that Boromir had the first respondent's authority to participate in the March 2016 negotiations and to bind the first respondent to any contract that may arise as a result. Boromir also signed NDU-3 expressly for and on behalf of the first respondent. The first respondent therefore accepts that, if I find that the March 2016 negotiations did give rise to a contract, as I have, the first respondent is a party to that contract.

141 The second and third respondents, on the other hand, each submit that no person who participated in the March 2016 negotiations had any authority whatsoever to negotiate with the claimant on each of their behalf or to bind either of them to any contract that may have arisen as a result.

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[82] COV's Defence at para 31, at Boromir's 1st Affidavit at VB-2 at HB/A/6/158 at ABD Tab 2.

142 It is clear on the face of NDU-3, of course, that neither the second respondent nor the third respondent are signatories to NDU-3. But I consider that feature to be a point of form rather than a point of substance. It is true that a person who signs a contract containing an arbitration agreement is, *prima facie* at least, a party to the arbitration agreement (Gary B Born, *International Commercial Arbitration* (Wolters Kluwer 2nd Ed, 2014) at pp 1521–1522). That is merely the application of a general point of contract law to the specific case of an arbitration agreement. But it does not follow that a party who has *not* signed a contract containing an arbitration agreement is *not* a party to an arbitration agreement incorporated into that contract: "[t]he sterile formality of a signature is not always necessary in law to breathe life into contractual undertakings" (*Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [55]). More importantly, given my findings on the parties' contract, only part of the contract is found in NDU-3. Accordingly, the fact that the second and third respondents are not signatories to NDU-3 is not conclusive as to whether they are parties to the contract of which NDU-3 forms a part.

143 Indeed, in the course of oral submissions before me, counsel for the third respondent candidly conceded that if I were to find that Aragon had the authority, actual or apparent, to represent the third respondent in the March 2016 negotiations with the claimant, and to find that a contract arose out of those negotiations, then the third respondent would be bound by the contract despite not being a signatory to NDU-3. This must be correct in principle. Although counsel for the second respondent did not expressly make the same concession, it must be equally correct for the second respondent.

144 Everything therefore turns on the issue of authority. I begin by briefly restating the law on actual authority. In *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 ("*Hely-Hutchinson*"), Lord Denning MR (at 583) said:

> [A]ctual authority may be express or implied. It is *express* where it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their numbers to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office.
>
> [emphasis added]

145 In other words, there are two varieties of actual authority. The first variety is express actual authority. This arises where the principal has expressly conferred authority on the agent either orally or in writing (Tan Cheng Han SC, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) ("*The Law of Agency*") at para 03.014). The second variety is implied actual authority. Implied actual authority may arise from the parties' conduct and the circumstances of a particular case (*Alphire Group Pte Ltd v Law Chau Loon and another matter* [2020] SGCA 50 at [7]).

146 In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788, Belinda Ang J (as she then was) endorsed the following (at [42]):

> Professor Reynolds in *Bowstead and Reynolds* on Agency (Sweet & Maxwell, 18th Ed, 2006) ("*Bowstead*") describes, usual authority (*ie*, implied actual authority) at para 3-024 in the following manner:
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> > An agent who is authorised to conduct a particular trade or business or generally to act for his principal in matters of a particular nature, or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such trade or

> business, or of matters of that nature, or is within the scope of that class of acts, and whatever is necessary for the proper and effective performance of his duties; but not to do anything that is outside the ordinary scope of his employment and duties.

147 While implied actual authority may arise where it is necessary for, or ordinarily incidental to, the agent's express authority, it may also arise where the circumstances clearly show that the agent is intended to have the implied actual authority necessary to fulfil his responsibilities despite the lack of express actual authority to do so (*The Law of Agency* at paras 03.031, 03.033 and 03.036).

148 Hence, in *Biggerstaffe v Rowatt's Wharf, Limited* [1896] 2 Ch 93, the managing director of a company caused it to borrow money and to grant security to the lender over its assets for the loan. The validity of the security was challenged on the basis that the managing director did not have the authority to grant security for loans to the company. The company's articles of association authorised its directors to delegate all their powers to a managing director. But there was no evidence of any such delegation for this transaction. Despite this, the court held that the managing director did have implied authority to grant the security because, in granting security, he was doing something reasonably incidental to his office as managing director.

149 Returning to the facts of this case, I accept that Boromir and Frodo had implied actual authority from the second respondent and the third respondent respectively to participate in the March 2016 negotiations and to bind those companies to the contract. Boromir was a director of the third respondent in

March 2016 in addition to being a director of the first respondent.[83] Further, Frodo was a director of the second respondent in March 2016. He was also a senior employee of the second respondent.[84]

150 I also find that Aragon also had authority to bind the second respondent and the third respondent, even though he was not a director of either company in March 2016. The second respondent and the third respondent argue that Aragon lacked any authority to bind either the second respondent or the third respondent because neither company had passed a directors' resolution specifically authorising Aragon to represent it in the March 2016 negotiations. I do not accept this submission. The lack of a directors' resolution establishes only that Aragon did not have actual express authority from either the second respondent or the third respondent to participate in the March 2016 negotiations on their behalf and to bind them to the contract which resulted.

151 The absence of a directors' resolution conferring express actual authority on Aragon does not address Aragon's implied actual authority. I find that Aragon had implied actual authority to participate in the March 2016 negotiations on behalf of the second respondent and the third respondent and to bind each of them to the contract it gave rise to. I say this for two reasons. First, Boromir and Frodo, as directors of the second respondent and the third respondent respectively, participated in the March 2016 negotiations and remained silent while Aragon took the lead in these negotiations speaking for both the second respondent and the third respondent. Second, Aragon held a

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83 Boromir's 1st Affidavit at paras 2 and 44.

84 Boromir's 1st Affidavit at para 31; COT's written submissions, para 29.

senior position in the Rohan Group as a result of which both the second respondent and the third respondent conferred implied authority on Aragon.

152 The starting point in the analysis is to appreciate Aragon's position within the Rohan Group. His position is telling as to the ambit of his authority. He was hired to establish the Rohan Group's business operations in Gondor and was given the title of "President" of the Rohan Group's operations in Gondor.[85] His senior managerial role meant that Aragon had overall responsibility for supervising the Rohan Group's activities in Gondor. This extended to overall responsibility for the second respondent and the third respondent. Indeed, a member of the Rohan Group's in-house legal team accepts in his affidavit that Aragon was a "senior leader" who was "near the top of the chain of command". Aragon was therefore the person to whom most employees in the Rohan Group's business in Gondor reported by virtue of his position.[86]

153 Aragon's role and designation in the Rohan Group's operations in Gondor also meant that he had overall responsibility for the Project. Indeed, this was something which Aragon himself pointed out to Legolas when they spoke on 15 March 2016. That was when Aragon assured Legolas that the second respondent would pay the claimant once the third respondent managed to draw down the loans from the project financers (see [84(c)] above). The successful completion of the Project, on time and within budget, was Aragon's responsibility. This must extend to resolving difficulties standing in the way of completing the Project on time and within budget, such as the claimant's

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85 Boromir's 1st Affidavit at para 26.

86 DR's 1st Affidavit at para 30.

suspension of delivery of Modules for the Project. I am satisfied that the second respondent and the third respondent gave Aragon their implied express authority to move each of them in directions that he thought were in the best interests of the Rohan Group in order to complete the Project on time and within budget.[87] I therefore conclude that Aragon had the implied actual authority to participate in the March 2016 negotiations on behalf of the second respondent and the third respondent, and to bind them to the contract which resulted.

154 Having reached this conclusion, it is not necessary for me to consider the parties' submissions on apparent authority.

Conclusion on the validity of the arbitration agreement

155 For all these reasons, I find that there is a valid arbitration agreement between the claimant and each of the respondents. The tribunal accordingly had jurisdiction over the dispute which the claimant referred to arbitration. The respondents' challenge to the award on this ground fails.

156 I turn to deal with the respondents' next ground for setting aside the award.

Excess of its jurisdiction

157 The respondents next submit that the award should be set aside under Art 34(2)(*a*)(iii) of the Model Law on the grounds that the award either deals with a matter not falling within the terms of the submission to arbitration or

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[87] Boromir's 1st Affidavit at VB-3 Tab 35 at pp 1548–1549, Transcript, 6 August 2020, page 47 line 18 to page 48 line 13 at ABD Tab 2.

contains decisions on matters beyond the scope of the submission to arbitration, *ie*, that the tribunal had acted *ultra petita*.

The law

158 Article 34(2)(*a*)(iii) of the Model Law was most recently considered by the Court of Appeal in *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 ("*Bloomberry Resorts*"). The Court of Appeal made the following observations about the fundamental principle underlying Art 34(2)(*a*)(iii) in respect of allegations that an arbitral tribunal had acted *ultra petita* (at [68]):

> 68 Article 34(2)(*a*)(iii) of the Model Law is a reflection of the fundamental principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [37]). This is wholly in line with the notion of arbitration as a voluntary form of dispute resolution. Moreover, "where an arbitral award had been made on issues that had been submitted for arbitration, one party could not be allowed to introduce a new dispute which was not within the scope of submission to arbitration" (*PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*") at [31], citing *London and North Western and Great Western Joint Railway Co v J H Billington, Ltd* [1899] AC 79 at 81). That said, a practical view has to be taken regarding the substance of the dispute which has been referred to arbitration (*Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [58]).

159 The Court of Appeal in *Bloomberry Resorts* endorsed the following framework for determining a challenge brought under Art 34(2)(*a*)(iii) of the Model Law (at [69]):

> 69 In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, this court laid out several guidelines to help determine whether an arbitral award had been made in excess of an arbitral tribunal's jurisdiction:

> (a) the court adopts a two-stage enquiry: (i) first, to determine what matters are within the scope of submission to the arbitral tribunal; and (ii) second, to determine whether the arbitral award involved such matters or whether it involved a new difference outside the scope of the submission to arbitration and that was, accordingly, irrelevant to the issues requiring determination (at [30]);
>
> (b) Art 34(2)(*a*)(iii) of the Model Law is not concerned with the situation where a tribunal did not have jurisdiction to deal with a dispute that it purported to determine, but applies where the tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it (at [31]); and
>
> (c) mere errors of law or even fact are not sufficient to warrant setting aside an award under Art 34(2)(*a*)(iii) of the Model Law as a distinction has to be drawn between the erroneous exercise by an arbitral tribunal of an available power vested in it and the purported exercise by the tribunal of a power which it did not possess (at [33]).

160 If I find that the award deals with matters not falling within the terms of the submission to arbitration, the respondents need not show that they suffered real or actual prejudice (*GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 at [60]). On the other hand, if I find that the award deals only with matters falling within the terms of the submission, that is the end of any challenge on grounds of jurisdiction.

161 I also accept that I have a residual discretion to refuse to set aside an award where an excess of jurisdiction has been demonstrated but the applicant has sustained no prejudice. I am mindful however that this discretion should be exercised only sparingly (*Bloomberry Resorts* at [72]).

162 I now turn to consider the parties' submissions. I begin by considering the matters falling within the terms of the submission to arbitration.

The respondents' case

163 The respondents' case proceeds as follows.

164 The tribunal's finding that the parties' contract was a partly written, partly oral "Modules Delivery Agreement, of which NDU-3 was an appendage"[88] does not fall within the terms of the submission to arbitration, whether in the notice of arbitration, in the claimant's pleadings, in the terms of reference or in the list of issues. Instead, the case which the claimant submitted to arbitration was that the contract between the parties *was* NDU-3, a contract *in writing* concluded on *17* March 2016. The claimant submitted this dispute to arbitration in all of the claimant's filings in the arbitration right up to and including the evidential hearing.

165 It was only *after* the evidential hearing on 7 August 2020, that the claimant changed its case. This was when the claimant circulated its draft of the agreed list of issues as directed by the tribunal. This was the first time the claimant advanced a case that the parties had concluded a contract including *but not limited* to NDU-3 by words *and conduct* between 15 March 2016 and *18 March 2016*. Then, in its closing submissions, the claimant advanced a case based on a contract on full terms concluded by words or conduct on or by 18 March 2016.

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[88] Award at para 163, Boromir's 1st Affidavit at p 264.

166 The claimant changed its case in this fundamental way without ever seeking leave to amend its pleaded case. The tribunal's finding in favour of the claimant on this changed case was beyond its jurisdiction.

The matters submitted to arbitration

167 The starting point in determining whether an arbitral tribunal has decided a matter not falling within the terms of the submission to arbitration or a matter that that goes beyond the scope of submission to arbitration is, quite obviously, to ascertain the scope of the submission to arbitration. I therefore begin the analysis with the notice of arbitration and then turn to consider the terms of reference, the parties' pleadings which include the statement of claim, the statement of defence and the reply, the list of issues and the parties' closing submissions.

168 Before moving to consider each source in turn, I make four observations.

169 The first observation I make is on the relationship between a challenge on grounds of jurisdiction under Art 34(2)(*a*)(iii) of the Model Law and a challenge on the grounds of inability to present a case under Art 34(2)(*a*)(ii) or a breach of natural justice under s 24(*b*) of the Act. The former type of challenge raises a fundamental issue. It engages at a general level the scope of the parties' agreement to arbitrate and at a more specific level the scope of the individual submission to arbitration. Although the tribunal has the power to determine its own jurisdiction, it has no power (absent the parties' agreement) to cure a lack of jurisdiction. In other words, a tribunal cannot expand its jurisdiction, *ie* take jurisdiction over a matter if it has found that matter to be outside its jurisdiction. The latter type of challenge, in contrast, raises a purely a procedural issue. It relates only to the manner in which the tribunal has conducted the arbitration.

More importantly, until it is *functus*, it is entirely within the tribunal's power to cure the ground for this challenge. Until it is *functus*, the tribunal can extend any accommodation necessary to address the latter type of challenge, *eg*, by allowing an adjournment, reopening discovery of documents, reopening the evidential phase and recalling witnesses, allowing further oral or written submissions or awarding costs.

170 The second observation I make is that ascertaining the terms or scope of a submission to arbitration is a holistic exercise, not a narrow mechanical or technical exercise (*CJA v CIZ* [2022] 2 SLR 557 at [38]):

> … [T]he question of what matters were within the scope of the parties' submission to arbitration would be answerable by reference to five sources: the parties' pleadings, the list(s) of issues, opening statements, evidence adduced, and closing submissions at the arbitration. This was an elaboration of the principle that in considering whether the jurisdiction has been exceeded, *the court must look at matters in the round to determine whether the issues in question were live issues in the arbitration*. In doing so, *it does not apply an unduly narrow view of what the issues were: rather, it is to have regard to the totality of what was presented to the tribunal whether by way of evidence, submissions, pleadings or otherwise and consider whether, in the light of all that, these points were live*.

A court should therefore not take an "unduly narrow view" of the terms or the scope of the submission to arbitration. The answer is, in all cases, a matter of substance rather than form.

171 The third observation I make is that, when ascertaining the terms or the scope of a submission to arbitration, the parties' pleadings are a convenient reference point but are by no means conclusive. The true objective of the exercise is to ascertain the limits of the dispute referred to arbitration (*Prometheus Marine Pte Ltd v King, Ann Rita and another* [2018] 1 SLR 1 (at [58])):

> 58 Furthermore, while pleadings in arbitral proceedings can provide a convenient reference point to determine the scope of an arbitrator's jurisdiction, that jurisdiction is by no means limited by the pleadings because a practical view has to be taken regarding the substance of the dispute being referred to arbitration.

172 Counsel for the third respondent cites the case of *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro*"), an earlier decision of mine. In that case, I considered the role of pleadings in civil litigation with reference to, amongst others, the *dictum* of Lord Phillips of Worth Matravers MR in *Loveridge, Loveridge v Healey* [2004] EWCA Civ 173 (at [23]):

> It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.

173 While I generally endorsed these principles as being equally applicable to arbitration, I did qualify my observations by adding that "the approach in arbitration to the rules of procedure, and in particular to the rules of pleading, is a pragmatic approach which looks to substance over form and fairness over technicality" (*JVL Agro* at [177]). Indeed, and as I shall elaborate below, this is a point which I find to be especially important when dealing with the respondents' submissions on this ground for setting aside this award.

174 The final observation I make is that, although ascertaining the terms and scope of a reference to arbitration is a holistic exercise which strives to elevate substance over form, it is not a free for all. Purely as an analytical tool or a practical aid, it can be conceptualised as being governed by a series of four concentric circles of decreasing diameter.

175 First and foremost, a tribunal's jurisdiction is determined by the scope of the parties' arbitration agreement on its proper construction. Any attempt by the parties to submit to arbitration a dispute which does not fall within the scope of the arbitration agreement must *ipso facto* fail. A dispute falling outside the scope of the arbitration agreement cannot, by definition, be within the terms or scope of a reference to arbitration under that agreement or within the jurisdiction of a tribunal constituted under that agreement. This circle usually poses no practical difficulty, at least in the modern context, for two reasons. First, the modern practitioners' approach to arbitration agreements is to draft them very broadly so as to capture all classes of disputes which may arise under or be related to the contract in which the arbitration agreement is found. Second, the modern judicial approach to arbitration agreements is to interpret them like any other contractual term, and not to interpret them technically or with suspicion. They are now interpreted so as to uphold commercial expectations that arbitration is a one-stop mode of alternative dispute resolution (see *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 4 All ER 951 at [27]).

176 The second concentric circle is the notice of arbitration or the request for arbitration. It is in this document that the party commencing the arbitration identifies and describes the specific dispute between the parties which it is referring to arbitration for resolution. A notice of arbitration is also framed

broadly. That is because it is drawn up at an early stage, without full knowledge of the facts or a full opportunity to examine the law, sometimes in circumstances of urgency, and without any means of foreseeing where the vagaries of dispute resolution will take the arbitration. While a notice of arbitration does serve to give the opposing party notice of the case it will have to meet in the arbitration, that is not its primary purpose. Its primary purpose, as I have said, is to identify and describe the dispute being referred to arbitration.

177 The third concentric circle comprises the parties' pleadings. This includes a statement of claim, a statement of case or a complaint as well as the statement of defence and a reply, and the equivalent of each of these pleadings for any counterclaim. It is in the pleadings that each party states with specificity and particularity the facts necessary to establish the case which it advances in the arbitration, whether by way of claim, defence or counterclaim. While the parties' pleadings play a role in delineating the tribunal's jurisdiction, that is not the primary purpose of pleadings. The primary purpose of the pleadings is to give the opposing party reasonable notice of the case it will have to meet in the arbitration. Thus, if a matter falls outside the scope of the pleadings, that is some indication – although by no means conclusive – that it may be outside the scope of the tribunal's jurisdiction. Whether it is in fact outside the scope of the tribunal's jurisdiction will be determined by whether it comes within the scope of the arbitration agreement and the notice of arbitration.

178 The fourth concentric circle comprises the other documents in the arbitration which set out what the tribunal must decide. Some of these documents are required by the applicable arbitration rules, such as the terms of reference in an ICC arbitration. Others are documents that the parties choose to

file merely to assist the tribunal, such as opening statements, agreed or party lists of issues, closing submissions and post-hearing briefs.

179 I have used the analogy of concentric circles of decreasing diameter because each circle is constrained by the one before it. A notice of arbitration cannot refer to arbitration a dispute which falls outside the arbitration agreement. A statement of claim should not plead a claim which falls outside the scope of the notice of arbitration. A closing submission should not generally (see [181] below) advance a case which falls outside the pleadings. This was in fact a point noted by the Court of Appeal in *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 ("*CAJ*") (at [50]):

> The appellants … argue that the dominant consideration in assessing the scope of the submission to arbitration is whether the parties had joined issue or directly clashed on the issue in question. … In our view, this argument was wholly misguided. … the five sources [*ie*, the parties' pleadings, agreed list of issues, opening statements, evidence adduced, and closing submissions] … *are not discrete or independent sources*. It would not suffice for the purposes of determining the tribunal's jurisdiction that the issue in question had been raised in any one of the five sources. *Instead, the overriding consideration is to determine whether the relevant issues had been properly pleaded before the tribunal.*
>
> [emphasis]

180 It is, of course, true that all of these documents play a role in ascertaining the scope of a tribunal's jurisdiction. But it is the case that, strictly speaking, a tribunal's jurisdiction is determined principally by the arbitration agreement and the notice of arbitration. It is the arbitration agreement which delineates the disputes that can be submitted to arbitration under it. If a dispute is outside that class, no tribunal can be constituted under that arbitration agreement to resolve it. It is the notice of arbitration which delineates the scope of the specific dispute which a claimant now refers to arbitration. If a dispute is outside the scope of

the notice of arbitration, it will be outside the terms and scope of the reference to arbitration before a tribunal constituted as a result of that notice. Of course, it remains open to a claimant to refer that dispute to arbitration by a separate notice of arbitration.

181 There is, however, an important distinction between the last two circles and the first two circles. The last two circles, *ie*, the parties' pleadings and other documents filed in the arbitration, are within the control of the parties and the tribunal (once constituted). If a list of issues or a closing submission goes beyond the scope of a party's pleading, it is open to that party to seek to amend the pleadings, and it is within the power of the tribunal to allow the application to amend, even if the opposing party withholds its consent. The first two circles, *ie*, the arbitration agreement and the notice of arbitration, are entirely outside the control of either the parties or the tribunal. If a notice of arbitration includes a claim which goes beyond the scope of the arbitration agreement, there is nothing that can be done. So too, if a pleading contains a claim which goes outside the scope of the notice of arbitration, there is nothing that the tribunal or the parties can do. All of this is, of course, subject to the universal solvent in arbitration which is bilateral consent.

182 Thus, the mere fact that an issue appears, for example, in a party's closing submission but does not appear in that party's pleadings does not necessarily mean that the tribunal has exceeded its jurisdiction if it determines that issue. The litmus test for whether an issue falls outside the terms or scope of a submission to arbitration is to ask whether the tribunal has the power to allow that party to amend its pleadings to incorporate the issue in the exercise of its procedural discretion (see *CAJ* at [40]). That in turn will require a consideration of the first two concentric circles. If the answer is yes, it cannot

be said that the issue falls outside the terms or scope of the submission to arbitration.

183 I now turn to consider the terms and scope of this reference to arbitration.

184 There is no suggestion that the claimant's case on the MDA which the tribunal accepted falls outside the scope of the arbitration agreement in cl 9 of NDU-3.

185 I therefore begin by assessing the scope of the notice of arbitration.

The notice of arbitration

186 The notice of arbitration is dated 11 April 2017. A summary of its contents is as follows:[89]

(a) At paragraph 1, the claimant asserts that its claim *arises from or is connected with* legal obligations assumed by the respondents, and that these obligations are "contained in or evidenced by" an NDU dated 17 March 2016, *ie*, NDU-3.

(b) At paragraph 2, the claimant sets out the obligations undertaken by each of the respondents under NDU-3.

(c) At paragraph 3, the claimant asserts that the respondents' conduct amounts to breaches of each of their obligations under NDU-3.

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[89] Boromir's 1st Affidavit at VB-2 at HB/A/1/5-9 at ABD Tab 2.

(d) At paragraph 7, the claimant claims as its primary relief the sum of ₴7.35m from the second respondent. In the alternative, the claimant also claims, damages in the sum of ₴7.35m jointly and severally from the respondents.

187 I make two observations. First, the notice of arbitration was drawn widely. It referred to arbitration a claim *arising from or connected with* a contract contained in or evidenced by NDU-3.[90] The dispute which the claimant referred to arbitration was not said to arise only out of NDU-3 as a contract, but also out of a contract *evidenced by* NDU-3. Further, the dispute which the claimant referred to arbitration does not only arise from NDU-3 but is also connected to NDU-3.

188 In my view, the claimant framed the dispute which it referred to arbitration by its notice of arbitration sufficiently widely to encompass a partly oral and partly written contract arising out of the March 2016 negotiations and connected to or evidenced by NDU-3.

The terms of reference

189 I turn next to the terms of reference. In an arbitration under the ICC Rules such as this arbitration, the terms of reference is a contractual instrument signed by the parties and the tribunal after the tribunal has been constituted. It assists the tribunal by allowing the tribunal to state, in clear terms, the scope of the dispute which the parties have referred to it for resolution. Given that it is the tribunal who drafts the terms of reference, albeit with the input of the parties,

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[90] Boromir's 1st Affidavit at VB-2 at HB/A/1/5 at ABD Tab 2.

it is an accurate and detailed reflection of what the tribunal conceives as the issues which the parties have referred to it for determination.

190 The requirements for the terms of reference are prescribed by the ICC Rules. Article 23(1) of the ICC Rules states that an "arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its terms of reference". Articles 23(1)(c) and (d) of the ICC Rules require the terms of reference to contain "a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims" and "a list of issues to be determined" unless the tribunal considers it inappropriate. Of particular importance is Art 23(4) of the ICC Rules:

> 4) After the terms of reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the terms of reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

191 In other words, once the tribunal has drawn up the terms of reference, the parties are contractually bound not to raise new issues in the arbitration without the tribunal's authorisation.

192 The terms of reference in this arbitration are dated 10 April 2019. A summary of its contents is as follows:[91]

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[91] Boromir's 1st Affidavit at VB-2 at HB/B/14/110-128 at ABD Tab 2.

(a) Paragraphs 9 to 14 list the jurisdictional objections raised by the respondents. These include the objection based on the non-existence of an arbitration agreement and the argument that, even if one exists, the second respondent and the third respondent are not parties to it.

(b) Paragraph 33 provides that the claim summaries are not intended to be a comprehensive or exact statement of all matters that will be particularised in the parties' pleadings and their submissions in due course and that the tribunal reserves the right to admit whatever contentions and claims the interests of justice require.

(c) Paragraphs 37 to 39 record the claimant's case. They state that the parties entered into negotiations to resolve the claimant's refusal to deliver the Modules, and that the parties "eventually reached an agreement, and pursuant to that agreement, [NDU-3] was issued in favour of [the claimant]". In reliance on this agreement, the claimant released the Modules.

(d) Paragraph 46 lists the relief which the claimant seeks. In particular, it notes that the claimant claims damages against the respondents for breach of their obligations "contained in and/or evidenced by" NDU-3, tracking the language of the notice of arbitration.

(e) Paragraphs 47 to 66 record the respondents' defences, in particular, their argument that no contract whatsoever exists with the claimant and, even if it does, that the second respondent and the third respondent are not parties to that agreement.

193 The terms of reference record the claimant's position that the obligations which it claims the respondents breached are "evidenced by" NDU-3. This is

broad enough to encompass a case that the obligations arose before the respondents sent NDU-3 to the claimant. In fact, this line of reasoning is reflected in paragraphs 37 to 39 of the terms of reference, which describe how the parties entered into negotiations and reached "*an agreement*", and that "*pursuant to* that agreement", NDU-3 was issued in the claimant's favour. Read this way, it becomes apparent that the terms of reference encompass a case, not only that the claimant's contract with the respondents *was* NDU-3, but also that the parties' contract may have been partly oral and concluded *before* the respondents sent NDU-3 to the claimant, albeit evidenced by NDU-3.

The parties' pleadings

194 The claimant's pleaded case in its statement of claim dated 1 July 2019 was consistent with its notice of arbitration and the terms of reference:[92]

> (a) At paragraph 104, the claimant pleads that a contract on basic or essential terms was concluded by 17 March 2016 by words or conduct, and that NDU-3 was issued pursuant to that contract. The claimant pleads the exact terms of this contract at paragraph 105. While most of the terms pleaded are drawn from the text of NDU-3, the claimant also pleads at paragraph 105(5) a term that the claimant would deliver the remaining Modules to the respondents. This term is found nowhere in the text of NDU-3. This again is consistent with the claimant's case in the notice of arbitration and as recorded in the terms of reference that the parties' contract was concluded by words and conduct.

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[92] Boromir's 1st Affidavit at VB-2 at HB/A/5/52-140 at ABD Tab 2.

(b) At paragraph 106 of the statement of claim, the claimant pleads that the email correspondence on 17 March 2016 which culminated in NDU-3 "evidences the conclusion of a contract" between the parties. Thus, the claimant maintains the point that the contract it relies on is the result of the course of the parties' negotiations on 17 March 2016 and was merely evidenced by, rather than consisted of, NDU-3.

(c) At paragraph 117, the claimant pleads that the parties were unable to reach any further agreement on the non-essential terms, and that no agreement was reached about further changes to the contract, which in any event was concluded.

(d) At paragraphs 142 to 146, the claimant pleads how each respondent breached its obligations under the contract.

(e) At paragraphs 150 to 152, the claimant pleads the heads of loss and damage that the respondents allegedly caused it to suffer.

195 The claimant's statement of reply dated 13 September 2019 at paragraphs 21 to 23 reiterates its position that NDU-3 "evidences the contract and arbitration agreement concluded between the parties".[93] Again, the claimant's use of the phrase "evidences the contract" advances a claim that NDU-3 was not, in and of itself, the parties' contract.

196 In addition, a review of the statements of defence filed by each respondent makes clear that whether a contract was concluded, and if so its

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[93] Boromir's 1st Affidavit at VB-2 at HB/A/9/302-303 at ABD Tab 2.

terms, was very much within the scope of the submission to arbitration. In the first respondent's statement of defence dated 14 August 2019 at paragraphs 44 to 68, the first respondent pleads that the March 2016 negotiations did not lead to any contract being concluded. Further, even if a contract was concluded, it was solely in the form of an NDU.[94] As for the second respondent and the third respondent, their primary position in their statements of defence was that no contract was concluded in the form of an NDU.[95]

197 Finally, the second respondent's and the third respondent's statements of rejoinder, both dated 14 October 2019, are substantially similar. Both take issue with the claimant's case that a contract was concluded on basic or essential terms as evidenced by the "[p]arties interactions and dealings" during the material time.[96]

The list of issues

198 In its first draft of the list of issues sent on 11 August 2020, the claimant proposed including the following issue in the agreed list of issues for the tribunal:[97]

> 4. Was a contract on full terms concluded between the Claimant and the Respondents on or about 18 March 2016?

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94 Boromir's 1st Affidavit at VB-2 at HB/A/6/163-171 at ABD Tab 2.

95 Boromir's 1st Affidavit at VB-2 at HB/A/7/215-216 at ABD Tab 2; Boromir's 1st Affidavit at VB-2 at HB/A/8/263-264 at ABD Tab 2.

96 Boromir's 1st Affidavit at VB-2 at HB/A/11/335 at ABD Tab 2; Boromir's 1st Affidavit at VB-2 at HB/A/12/360 at ABD Tab 2.

97 Boromir's 1st Affidavit at VB-3 Tab 37 at p 1792; Boromir's 3rd Affidavit at para 201.

199 The respondents' case is that this is the first time that the claimant crystallised the main plank of its case as a contract on full terms between itself and the respondents concluded on or about 18 March 2016. The respondents resisted the claimant's attempt to include this issue. They replied on 15 August 2020 proposing that the draft list of issues be amended to be consistent with the claimant's pleaded case up to that point:[98]

> (a) Whether there was a valid, binding and enforceable contract on the terms of the NDU.

The respondents took the position that they had understood this to be the claimant's case throughout the arbitration proceedings thus far.

200 On 17 August 2020, the claimant sent an amended draft list of issues to the respondents, reiterating their original proposal on 11 August 2020.[99] In the covering email, the claimant clarified that it never regarded the agreement between the parties to be confined to the NDU. The claimant reiterated this position on 19 August 2020 in an email.[100]

201 As a result of this impasse, the parties could not agree a list of issues. The respondents proposed that each side submit its own list of issues.[101] The claimant agreed. In its own draft list of issues, the claimant set out the issue as follows:[102]

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98 Boromir's 1st Affidavit at VB-3 Tab 43 at p 1809.

99 Boromir's 1st Affidavit at VB-3 Tab 44 at pp 1828–1829.

100 Boromir's 1st Affidavit at VB-3 Tab 45 at pp 1846–1847.

101 Boromir's 1st Affidavit at VB-3 Tab 53 at pp 1930-1935.

102 Boromir's 1st Affidavit at VB-3 Tab 54 at pp 1948.

> (b) Whether a contract on full or basic/essential terms was concluded by words and conduct between [the claimant] and the Respondents (or any one or more of them) between 15 March 2016 and 18 March 2016.

202 Counsel for the third respondent informed the tribunal that it objected to the claimant including this issue on the basis that it did not fall within the terms of the parties' submission to arbitration or represented matters not within the scope of the submission to arbitration:[103]

> The respondents therefore take objection to issue (b) of the List of [the claimant's] Issues, as it implies that [the claimant's] case is that a contract had been concluded "between 15 March 2016 and 18 March 2016", when this is not how [the claimant] has run its case at all, whether in its pleadings or its witness statements. Issue (b) is, therefore, not an issue which is contemplated by, or falls within the terms of the submission to arbitration, nor does it represent matters within the scope of the submission to arbitration.

203 The claimant responded to say that it had always been its case that the parties concluded a contract by words or conduct through their discussion over the material period, and that the contract was evidenced by NDU-3.[104]

The parties' closing submissions

204 The claimant carried its position from its list of issues through to its closing submissions:[105]

> (a) the claimant submitted that, on or by 17 March 2016, the parties "had reached an agreement on all essential terms – which is for the

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103 Boromir's 1st Affidavit at VB-3 Tab 59 at p 1988.

104 Boromir's 1st Affidavit at VB-3 Tab 60 at pp 1990–1991.

105 Boromir's 1st Affidavit at VB-3 Tab 63 at pp 1997–2056, COT's closing submissions.

> Respondents to directly pay or arrange payment for the Modules it had ordered from [the claimant] and requested that [the claimant] deliver to them, secured by a charge over 24% of [the third respondent], in exchange for [the claimant's] release of the rest of the said Modules it had hitherto withheld delivery of".[106]
>
> (b) the claimant "regarded a contract on full terms to have been concluded by words or conduct on or by 18 March 2016".[107]

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

The tribunal's findings fell within the scope of terms and scope of the submission to arbitration

206 The documents canvassed above make it clear that, despite any differences in the form in which the claimant asserted its case in these documents, the central issue which the claimant submitted to the tribunal remained consistent from the notice of arbitration to the closing submissions,

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106 Boromir's 1st Affidavit at VB-3 Tab 63 at p 2028, COT's closing submissions at para 92.

107 Boromir's 1st Affidavit at VB-3 Tab 63 at pp 2021–2022, COT's closing submissions at para 72.

namely whether the March 2016 negotiations resulted in a concluded contract whose obligations are "contained in or evidenced by" NDU-3.

207 Although jurisdiction is a fundamental issue, a court hearing a jurisdictional challenge should not adopt an overly technical or formal approach to ascertaining the scope of the submission to arbitration (see [77] above). It appears to me that that is exactly what the respondents have done.

208 It is true that the claimant never set out in any of the documents I have canvassed the precise form of words which the tribunal adopted in its award: "Modules Delivery Agreement, of which NDU-3 was an appendage". But that is a mere issue of form, not substance. The tribunal did not use this term to signify some departure from the central matter which the claimant had submitted to arbitration. The tribunal used this term as a convenient label in deciding the very matter which the claimant had submitted to arbitration, *ie*, whether the parties had concluded a contract "contained in or evidenced by" NDU-3. The tribunal referred to the MDA as consisting of oral and written terms. NDU-3 contained the written terms, as an appendage. The oral terms, on the other hand arose from the March 2016 negotiations.

209 The tribunal's findings fell well within the terms and scope of the submission to arbitration, *ie*, whether a contract was formed between the parties, and if so, the terms of that contract. Indeed, if one refers to, for instance, the claimant's statement of claim, its pleaded case that the contract was concluded by "words and/or conduct" can be interpreted to mean that a contract was concluded from looking at the parties' correspondence and conduct throughout March 2016 negotiations.

Conclusion on excess of jurisdiction

210 For the foregoing reasons, I find that the tribunal's holding that the parties' concluded a contract called the "Modules Delivery Agreement, of which NDU-3 was an appendage"[108] was well within the terms and scope of the submission to the arbitration, *ie*, that the claimant has rights arising from or connected with legal obligations assumed by the respondents by words or conduct "contained in or evidenced by" NDU-3.

211 The tribunal did not act in excess of its jurisdiction in its award. Accordingly, I reject the respondents' submission that the award should be aside under Art 34(2)(*a*)(iii) of the Model Law.

Whether there was a breach of natural justice in connection with the making of the award

212 I now turn to the respondents' final ground, which is that the tribunal acted in breach of the rules of natural justice within the meaning of s 24(*b*) of the Act, or that the respondents were unable to present their case within the meaning of Art 34(2)(*a*)(ii) of the Model Law. On each of these provisions, it is the respondents' case that the tribunal breached the fair hearing rule.

The law

213 I set out the applicable principles relating to a challenge mounted under Art 34(2)(*a*)(ii) of the Model Law and section 24(*b*) of the Act in brief. Article 34(2)(*a*)(ii) of the Model Law is co-extensive in scope and effect with s 24(*b*)

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[108] Award at para 163, Boromir's 1st Affidavit at p 264.

of the Act. It is therefore convenient and appropriate to undertake together the analysis of a challenge relying on both provisions (*CEF and another v CEH* [2021] SGHC 114 ("*CEF*") at [98]).

214 In *CEF*, I summarised the principles relevant to a challenge on the grounds that the tribunal had breached the fair hearing rule under both provisions (at [99]):

> 99 The propositions of law relevant to a challenge on grounds of a breach of the fair hearing rule, whether under s 24(*b*) of the Act or under Art 34(2)(*a*)(ii) of the Model Law can be summarised as follows:
>
> (a) If an applicant was given an opportunity to present its case on a particular issue but did not avail itself of that opportunity, the award will not be set aside: *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [94].
>
> (b) The court will look at the pleadings and the proceedings in the arbitration holistically rather than technically in order to determine whether it ought to have been clear to the applicant that the point was in issue: *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*").
>
> (c) There must be a causal nexus between the breach of natural justice and the aspect of the award which the applicant seeks to set aside. If a tribunal reached its decision on a basis which is untainted by the breach of natural justice, then the necessary causal nexus will be absent: *ADG* at [127], [140]–[141].
>
> (d) The applicant must show that the breach of natural justice denied the tribunal the benefit of evidence or arguments that had a real, as opposed to a fanciful, chance of making a difference to its decision. An applicant will suffer prejudice so long as the evidence or arguments, if presented, could have made a difference to the tribunal's decision: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [54].

215 In addition to this, I examined more closely the principles applicable to a challenge for breach of the fair hearing rule in *CDX and another v CDZ and another* [2021] 5 SLR 405 (at [34] and [35]):

> 34 The principles of law which I must apply to ascertain whether a breach of natural justice has taken place are common ground. They can therefore be summarised in the following propositions without need for further development:
>
> (a) There are two pillars of natural justice: (i) the right to a disinterested and unbiased tribunal; and (ii) the right to be heard: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43]; *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [87].
>
> (b) Article 18 of the Model Law gives express effect to these two pillars by providing that every party to an arbitration has a right to be treated with equality and a right to a "full opportunity" of presenting its case: *China Machine* at [88], [90].
>
> (c) Despite what the word "full" in Art 18 of the Model Law might suggest, a party's right to an opportunity to present its case in an arbitration is not of unlimited scope. The right is "impliedly limited by considerations of reasonableness and fairness": *China Machine* at [97] and [104(b)].
>
> (d) A party's right to be heard in the arbitration comprises:
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> (i) a party's right to have reasonable and fair notice:
>
> (A) from the opposing party of the case it must meet on each issue of fact or law which the opposing party raises in the arbitration as an essential link in the chain of reasoning leading to the relief it seeks in the arbitration (see *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [147]); and
>
> …
>
> (ii) a party's right to a reasonable and fair opportunity:

(A) to present its case on all of those issues; and

(B) to respond to the case presented against it on those issues: *China Machine* at [87]; and

(iii) a party's right to have the tribunal make some attempt *bona fide* to understand, engage with and apply its mind to its case on those issues (*Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [35]; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") at [89]–[91] and [106]).

(e) Where a party complains that a tribunal deprived it of a reasonable and fair opportunity to be heard on an issue which the tribunal has incorporated as a link in its chain of reasoning, that party must show that a reasonable party could not have foreseen that the tribunal would incorporate that issue. That test will be satisfied, for example, where the tribunal's incorporation of that issue in its chain of reasoning is a dramatic departure from the parties' submissions: *Soh Beng Tee* at [65(d)].

(f) Where a party complains that a tribunal deprived it of a reasonable and fair opportunity to be heard because of the manner in which the tribunal exercised a discretion in its procedural management of the arbitration, "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 test is a fact-sensitive inquiry to be applied from the arbitrator's perspective: *China Machine* at [98] and [104(c)]–[104(d)].

(g) It is not a breach of natural justice, in itself, for a tribunal to fail to refer every issue which it incorporates as a link in its chain of reasoning to the parties for submission: *Soh Beng Tee* at [65(d)], citing at [58] *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 ("*Hochtief*").

(h) In particular, it is not a breach of natural justice:

(i) for a tribunal to adopt an issue as a link in its chain of reasoning even if the parties:

> (A) did not plead or include that issue in a formal list of issues, provided that the issue surfaced in the course of the arbitration and was known to all the parties: *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [47]; and
>
> …
>
> (iv) if a party fails to present evidence or submissions to a tribunal on an issue which is a link in the tribunal's chain of reasoning, either because the party fails to appreciate that the issue is before the tribunal through mistake or misunderstanding or because the party makes a conscious tactical choice not to engage the opposing party on that issue: *Triulzi* at [137].
>
> (i) Finally, and axiomatically, it is not a breach of natural justice for a tribunal simply to make an error in its award: *BLC v BLB* [2014] 4 SLR 79 at [53].
>
> 35 In addition to showing that a breach of natural justice has taken place, a party seeking to set aside an award under s 24(*b*) of the International Arbitration Act must also establish two additional factors: (a) that the breach of natural justice "occurred in connection with the making of the award", ie, that there is a causal nexus between the breach of natural justice and the aspect of the award with which the party is aggrieved (*Soh Beng Tee* at [73]); and (b) that the breach of natural justice caused actual or real prejudice to the party (*Soh Beng Tee* at [86]), though it need not show that the prejudice is substantial (*Soh Beng Tee* [91]).

216 Finally, the court in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") laid down several guiding principles in determining whether a tribunal's failure to consider an aspect of the parties' submissions in an award amounts to a violation of a party's right to be heard:

(a) The starting point is that an arbitral tribunal need not deal with every argument raised; all that is required is that the essential issues are dealt with (at [72]–[73]).

(b) In determining what constitutes an essential issue, courts must bear in mind that the arbitral tribunal has the prerogative to consider how the dispute should be disposed of without further consideration of certain issues, and should be given fair latitude in determining what is essential. Whereas a court may take a contrary view *ex post facto*, it should not be too ready to intervene (at [74]).

(c) As long as one argument resolves the issue, it is not necessary to insist that the arbitral tribunal go on to consider the other arguments which have been rendered academic. The rule of natural justice protects the right to be heard and not a right to receive responses to all the submissions or arguments presented (at [76]).

(d) Even if there was an inadequate provision of reasons by the tribunal, that is merely an error of law on the part of the tribunal. It is well recognised that the court normally does not intervene in an award under the Act on the basis of errors of law *per se,* and an allegation of inadequate reasons and explanations is therefore generally not capable of sustaining a challenge against an award (at [98]).

(e) In particular, the following guiding factors are relevant in determining the adequacy of the reasons provided by the tribunal (at [103]):

(i) The standard of explanation required in every case must correspond to the requirements of the case. Costs and delays are

relevant factors to consider when determining the extent to which reasons and explanations are to be set out in detail.

(ii) There should be a summary of all the key relevant evidence but not all the detailed evidence needs to be referred to.

(iii) The parties' opposing stance and the tribunal's findings of fact on the material issues should be set out. However, the tribunal does not have to make an explicit ruling on each and every factual issue.

(f) Ultimately, the crux is whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues; there is no requirement for the arbitral tribunal to touch on "each and every point in dispute" in its grounds of decision (at [104] and [105])

The respondents' case

217 The respondents submit that the tribunal breached their right to a fair hearing and deprived them of a reasonable opportunity to be heard on three grounds.

218 The first ground relates to the tribunal's decision to accept what the respondents allege was the claimant's new case, without affording the respondents an opportunity to reopen the evidential inquiry and reorientate its focus according to that case ("the Notice Ground"). The respondents argue that by allowing the claimant to change its case at the eleventh hour *via* the list of issues, after the evidential phase and before closing submissions, the tribunal deprived the respondents of a reasonable opportunity to respond to that case.

The respondents argue that the tribunal failed to invite or allow the respondents to adduce evidence, to cross-examine the claimant's witnesses based on the new case, or at the very least, ask the respondents to respond to the claimant's new case in their closing submissions and reply closing submissions.

219 The respondents further argue that it was because of this failure that they made submissions only on the claimant's case that the parties had concluded a contract on 17 March 2016 in the form of NDU-3, rather than on the claimant's new case. This resulted in respondents being deprived of their right to be heard on an issue which was crucial to the tribunal's reasoning in the award. As a result, the award was based on a chain of reasoning that the respondents did not have a reasonable opportunity to address.

220 The second ground relates to the tribunal's fact-finding decision regarding the loss and damage suffered by the claimant ("the Loss and Damage Ground"). The respondents argue that the tribunal made a factual finding that the quantum of loss and damage suffered by the claimant amounted to ₴7.35m despite the claimant's failure to adduce specific evidence on the value of the first respondent's shares in the third respondent.

221 The tribunal's reasons for valuing the first respondent's shares in the third respondent which the first respondent had disposed of in breach of the MDA at ₴7.35m were as follows:

> 218. Further, [Legolas] also deposed paragraph 4 of his affidavit of 20 August 2016 that Exhibit 3R-6 (which was disclosed by [the third respondent]) refers to the SPA dated 26 September 2016 under which [the Procurement Company] and the non-Debtor owner/sellers agreed to transfer all the shares in the [Gondorian] entities to [the Sauron Group], and for [the Sauron Group] to pay about …[₴]38 million only to non-Debtor owner/sellers and (not [the Procurement Company]).

> 219. The Respondents have not denied [Legolas's] testimony on these figures as set out paragraph 83(b) of his Witness Statement or his affidavit when he was cross-examined
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> 220. It would appear from [Legolas's] two statements that the Project was sold between …[₴]32-38 million to [the Sauron Group]. Taking the lower figure, 24% of …[₴]32 million is …[₴]7,680.000, which already exceeds the amount of …[₴]7,348,403.10 claimed by [the claimant].

222 The respondents submit that the tribunal misinterpreted Legolas's evidence in his witness statements. They took him to be saying that the price for the third respondent alone was ₴32m to ₴38m, whereas he was actually saying that that was the price for a number of companies only one of which was the third respondent. The respondents also rely on a host of other factual and logical errors which the tribunal allegedly made in quantifying the value of the shares in the third respondent.

223 At a more fundamental level, the respondents complain that the tribunal failed to give them an opportunity to lead evidence or make submissions on the issue of loss and damage, including the value of the first respondent's shares in the third respondent. The respondents argue that there was evidence to show that Sauron Group paid only ₴1.09m for the first respondent's shares in the third respondent.[109]

224 The last ground is part of the respondents' broader submission that the tribunal failed to consider key arguments which could have had a material bearing on the tribunal's finding on whether the parties had concluded the MDA ("the Key Arguments Ground"). The respondents argue that it is apparent on the

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109 Boromir's 1st Affidavit at para 252(b).

face of the award that the tribunal failed to consider the following key arguments in the chain of reasoning it followed to conclude that the parties had concluded the MDA:

(a) That the second respondent would be in breach of Gondorian law if it were found to be a party to NDU-3.

(b) That Aragon, Frodo and Samwise were never specifically authorised by way of a resolution of the directors of the second respondent to negotiate and enter into any contract on behalf of the second respondent.

(c) That the second respondent had fully discharged its payment obligations to the Procurement Company.

(d) That the claimant's release of the Modules was a commercial decision that it made, rather than performance of a contractual obligation.

(e) That the claimant's conduct after the March 2016 was inconsistent with the parties having concluded any contract in March 2016. This conduct includes:

(i) Gimli's failure to ask for the hard copy of the signed NDU-3.

(ii) The absence of any documentary records consistent with the parties having concluded a contract.

(iii) the claimant's failure to raise the NDU in its discussions with the Sauron Group in October 2016 when attempting to

negotiate payment of the claimant's outstanding invoices (see [27] above).

(iv) the claimant's failure to raise the NDU to block the sale of the first respondent's shares in the third respondent to the Sauron Group.

(f) That the claimant has not shown how the alleged breach of the NDU caused it to suffer loss and damage.

(g) The fact that the Procurement Company' payment obligations under the MSA are expressly non-assignable.

(h) That the third respondent had fully discharged its payment obligations to the second respondent.

(i) That the third respondent could not be unjustly enriched because the claimant did not plead any unjust factor, and the unjust factors raised in its closing submissions were not made out.

(j) That the Modules supplied by the claimant did not result in the completion of the Project.

The Notice Ground

225 I have held that the tribunal did not go beyond the terms or scope of the submission to arbitration when it held that the parties had concluded the MDA. In explaining that holding, I have analysed the claimant's case and the respondents' response to it from the notice of arbitration to the reply closing submissions.

226 That analysis shows two things. First, that the issue which the claimant advanced in its list of issues was an issue which fell within the terms and scope of the submission to arbitration. It was therefore open to the claimant to pursue that issue and for the tribunal to determine it, subject only to the respondents' right to a reasonable opportunity to present their case on the issue.

227 It is perhaps true that the claimant did not plead this issue. But the claimant's list of issues did no more than to make patent what had until then been latent in the claimant's case. And the claimant's list of issues made that issue patent with complete clarity. From that point forward, the respondents could no longer claim not to have reasonable notice of the case they had to meet on this issue. Second, even at that late stage, it was possible for the respondents to engage with that issue. Instead, the respondents decided to take the all-or-nothing position that the issue fell outside the terms or scope of the submission to arbitration. Further, at no time did the respondents take the point that it would be a breach of their right to a fair hearing for the tribunal to entertain and decide the issue in its award. As a result, the respondents chose to stand or fall on this issue on the jurisdictional point. They chose not to ask the tribunal to grant them an accommodation in order to allow them a reasonable opportunity to deal with the issue, *eg*, by asking the tribunal to require the claimant to amend its formal pleadings, by asking the tribunal to reopen the evidential phase (if there was a basis to do so), by asking the tribunal to allow them more time for their written closing submissions (again, if there was a basis to do so) or by dealing with this aspect of the claimant's case in its closing submissions without prejudice to its jurisdictional objection.

228 What happened in this arbitration is not that the tribunal deprived the respondents of a reasonable opportunity to be heard on this issue. What

happened is that the respondents took a tactical decision to press on with their closing submissions without addressing this issue, despite having had sufficient and reasonable notice of it, hoping that the tribunal would uphold the jurisdictional objection. That is, of course, a tactical decision which was open to the respondents. Having made their tactical bed, however, they must now lie in it. The tribunal did not deprive the respondents of a reasonable right to be heard on this issue. The respondents renounced that right in favour of a jurisdictional objection. It therefore cannot be said that a reasonable and fair-minded tribunal would have notice of the respondents' grievance, and certainly cannot be faulted for not giving the respondents the opportunity to re-open the evidential inquiry.

229 I therefore do not accept that the Notice Ground establishes a breach of the rules of natural justice.

The Loss and Damage Ground

230 The grounds for setting aside an award must be construed and applied bearing in mind the very strong policy imperative from treaty, legislation and precedent of minimal curial intervention in arbitration (*Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(c)]). It is therefore axiomatic that a party cannot challenge an award on the ground that the tribunal made an error in its findings of fact or its holdings of law. The court does not sit as an appellate court to re-examine the tribunal's award on its merits (*TMM Division* at [2]). It follows that a party cannot dress up what is in substance a complaint that a tribunal made an error of fact or law as a complaint that the tribunal failed to give that party a reasonable opportunity to present its case.

231 Insofar as the respondents seek to set aside the award on the basis that the tribunal fell into error in its quantification of loss and damage, that is a non-starter. Indeed, I find that all of these arguments amount in substance to nothing more than an argument that the tribunal erred in its findings of fact. That is not a valid ground of challenge.

232 In any event, it is not open to the respondents to allege that it did not have a reasonable opportunity to address the reasoning which the tribunal ultimately adopted on the Loss and Damage Ground. It was obvious from the outset that there was a dispute as to quantum. The respondents do not say otherwise. There is a clear nexus between the value of the first respondent's shares in the third respondent and the quantification of the claimant's loss and damage. Those shares were, after all, the subject matter of the non-disposal undertaking. Any evidence that would assist the tribunal in valuing the first respondent's shares in the third respondent is therefore evidence which is relevant to the matters before the tribunal. Indeed, the third respondent itself admitted that there was evidence which was directly relevant to the issue of valuing the first respondent's shares in the third respondent. Yet it failed to bring this evidence to the tribunal's attention, or to adduce any material evidence that would have assisted the tribunal in this aspect. Indeed, the tribunal observed as much:[110]

> 219. The Respondents have not denied [Legolas's] testimony on these figures as set out [*sic*] paragraph 83(b) of his Witness Statement or his affidavit when he was cross-examined.
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> …

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110 Award at paras 219 and 221, Boromir's 1st Affidavit at p 276.

> 221. The sale price of its shares in [the third respondent] (or the [Project]) to [the Sauron Group] was known to [the first respondent]. So was the price. However, [the first respondent] has not disclosed the SPA. What it has disclosed is a copy of the Securities Transfer Form dated 27 October 2016 executed by [the first respondent] to transfer its 99.99% shares in [the third respondent]. Although the transfer form has two boxes for the consideration (sale price) to be stated in words and in figures, the copy disclosed omitted the consideration paid for the shares.

233 While the third respondent sought to rationalise its failure to do so on the basis that the claimant had not discharged its burden of proving that the wrongful disposal of the shares in the third respondent had caused loss and damage, and there was therefore no dispute, I find that to be a disingenuous invocation of parties' respective burdens of proof. The respondents seek to criticise the tribunal's conduct for something that they themselves have not seen fit to put before the tribunal for consideration. Having failed to bring to the tribunal's attention the existence of such evidence that could shed light on the quantification of the third respondent shares, it does not now lie in the respondents' mouth to say that the tribunal had not afforded them an opportunity to present their case.

234 Accordingly, I find that there is no breach of natural justice on the Loss and Damage Issue.

The Key Arguments Issue

235 Contrary to the respondents' submission that the tribunal failed to consider several of its arguments, I find that the tribunal demonstrated its attempts to engage with and apply its mind to the respondents' case on those issues. The tribunal recorded each of the respondents' submissions in the

relevant portions of the award concerning those issues, before moving on to give its reasons for its decision on that issue.

236 In my view, it is not necessary for a tribunal to decide every point raised by the respondents in resolving the dispute before it. What matters is that the award gives sufficient reasons to inform the parties as to the bases which the tribunal has reached its decision (*TMM Division* at [104] and [105]). To this end, it is sufficient that a court cannot infer that the tribunal has failed to consider an argument or issue where the tribunal has explicitly indicated in the award that it has considered that issue or argument (*CIX v CIY* [2021] SGHC 53 at [25]).

237 In any event, the tribunal expressly considered some of the respondents' submissions:

> (a) In relation to the submission that the claimant's decision to release the Modules was a commercial decision and not causally connected to a contract with the claimant, the tribunal expressly considered this argument. It found that it would have made "no commercial sense" for the claimant to have released the Modules without receiving any form of security.[111] Implicit in this reasoning is the tribunal's view that the respondents' characterisation of the claimant's decision to release the Modules as being contrary to inherent probabilities and the context of the transaction.

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111 Award at para 130, Boromir's 1st Affidavit at p 258.

(b) In relation to the submission that the claimant's conduct is inconsistent with having concluded a contract in that it failed to take follow-up action to confirm the contract, the tribunal found that the respondents were unable to produce any evidence that they "at all times *internally* considered NDU-3 to be invalid" [emphasis in original].[112] Moreover, the tribunal ascribed greater weight to the fact that the respondents denied the validity of NDU-3 only after the arbitration commenced. It was thus reasonable for the tribunal not to consider this submission in greater detail.

(c) In relation to the submission that Aragon, Boromir and Frodo were never specifically authorised by a directors' resolution to negotiate and execute a contract on behalf of the second respondent, the tribunal specifically considered and rejected the submission.[113]

(d) In relation to the submission that the claimant failed to prove its case that it had suffered loss and damage, the tribunal reasoned that the loss suffered by the claimant was its right to have the respondents make full payment for the outstanding invoices before procuring the claimant's consent to allow the sale of shares in the third respondent, and that the respondents' breach of the terms of NDU-3 had caused the claimant to "[lose] the protection it might have in the value of the [shares] if they had not been disposed of to [the Sauron Group]".[114]

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112 Award at para 129, Boromir's 1st Affidavit at pp 257–258.

113 Award at para 131, Boromir's 1st Affidavit at pp 258–259.

114 Award at paras 215–222, Boromir's 1st Affidavit at p 275–276.

(e) In relation to the submission on unjust enrichment, the respondents' complaints are in substance complaints about the merits of the tribunal's findings on the claimant's unjust enrichment claim.[115]

(f) In relation to the respondents' submission that the Modules supplied by the claimant did not result in the completion of the Project, the tribunal found in the award that "the Respondents were enriched by the use of the remaining [Modules] to complete the [Project]" and that "the capital value of the [Project] was increased by its timely completion …".[116] Implicit in the tribunal's analysis was that, regardless of whether the Project was completed, it remained the case that the respondents had benefited from the claimant's release of the Modules. The rejection of the respondents' submission on this point thus followed naturally from the tribunal's finding on the unjust enrichment point, regardless of whether that finding was correct.

238 For the foregoing reasons, I find that the respondents have not shown that the tribunal failed to consider their key submissions. In any event, the respondents have also not shown a causal nexus between the tribunal's failure to consider the key submissions and the outcome of the arbitration.

Conclusion on the breach of natural justice ground for setting aside

239 I find that the respondents have failed to establish even a single instance in which any respondent was unable to present its case or denied natural justice.

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115 Award at paras 191–198, Boromir's 1st Affidavit at p 271–272.

116 Award at para 191; Boromir's 1st Affidavit at p 271.

Conclusion

240 For the foregoing reasons, I find that none of the respondents has established any grounds for setting aside the award.

241 Accordingly, I have dismissed the respondents' applications with costs.

Vinodh Coomaraswamy
Judge of the High Court

Koh Swee Yen, SC, Zhuang Wen Xiong and Claire Lim (WongPartnership LLP) for the Plaintiff in OS 482;
Dawn Tan, Tristan Teo and Joshua Quek (ADT Law LLC) for the Plaintiff in OS 489;
Lok Vi Ming, SC, Joseph Lee, Law May Ning and Natalie Siow (LVM Law Chambers LLC) for the Plaintiff in OS 492;
Lawrence Teh, Melissa Thng, Kavitha Ganesan and Tan Cheng Xi (Dentons Rodyk & Davidson LLP) for the First Defendant in OS 482, OS 489 and OS 492.