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

[2025] SGHC 29

Originating Application No 1033 of 2024

Between

(1) DLV
(2) DLW

… *Claimants*

And

(1) DLX
(2) DLY
(3) DLZ
(4) DMA

… *Defendants*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside — Breach of natural justice]

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DLV and another
v
DLX and others

[2025] SGHC 29

General Division of the High Court — Originating Application No 1033 of 2024
Kristy Tan JC
17 January 2025

21 February 2025 Judgment reserved.

Kristy Tan JC:

Introduction

1 HC/OA 1033/2024 ("OA 1033") concerns an application for the setting aside of an arbitral award dated 5 July 2024 (the "Award") pursuant to s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") on the grounds that the arbitral tribunal (the "Tribunal") breached the fair hearing rule in two instances in the making of the Award. Having considered the parties' evidence and submissions, I dismiss OA 1033 for the reasons that follow.

Facts

The parties

2 The first and second claimants in OA 1033 were the second and third respondents in the underlying arbitration (the "Arbitration"). I shall refer to

them respectively as the "1st Promoter" and "2nd Promoter", and collectively as the "Promoters". They founded a company incorporated in India (the "Company").[1]

3 The first to fourth defendants in OA 1033 were the first to fourth claimants in the Arbitration. They are private equity funds.[2] I shall refer to them respectively as the "1st Investor", "2nd and 3rd Investors" and "4th Investor", and collectively as the "Investors".

Background to the dispute

4 On 10 October 2014, the Company, the Promoters, the Investors and two other parties executed a Share Acquisition & Shareholders' Agreement (the "SASHA").[3]

5 Clause 19 of the SASHA set out the exit framework for the Investors in the event that a "Qualified IPO" (defined in cl 1.1) did not occur on or prior to the Cut-Off Date (defined in cl 1.1 as 31 March 2016).[4] Among other things:

(a) Clause 19.1 provided that any of the Investors could deliver a "Secondary Sale Initiation Notice" (defined in cl 19.1) to the Company and the Promoters to inform them of that Investor's decision to require the Company and the Promoters to find a buyer for all or some of the

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1 Affidavit filed on behalf of the claimants in OA 1033 on 15 October 2024 ("Claimants' Affidavit") at para 9; Claimants' Affidavit at p 1280: Consolidated Statement of Claim in the Arbitration dated 28 November 2022 ("SOC") at para 13.

2 Claimants' Affidavit at p 2038: Claimants' Written Opening Submissions in the Arbitration dated 10 November 2023 at para 2.

3 Claimants' Affidavit at para 17; Claimants' Affidavit at pp 489–619: SASHA.

4 Claimants' Written Submissions in OA 1033 dated 10 January 2025 ("CWS") at para 15.

shares held by the Investor at a price equal to or higher than the "Exit Price" (defined in cl 19.1). This mode of exit was referred to as a "Secondary Sale" under cl 19.1.[5]

(b) Clause 19.2 provided for, *inter alia*, a buy-back of the Investors' shares by the Company if a Secondary Sale did not occur.[6]

(c) Clause 19.3 provided for an "IPO" (defined in cl 19.1) if the Company and the Promoters were unable to effect a Secondary Sale and/or cause a share buy-back.[7]

(d) Clause 19.6 provided for the consequences of a failure to provide an exit. If the Company was in "Material Breach" (defined in cl 24.4) under cl 19.6(b)(ii) or failed to provide an exit for the Investors under cl 19.6(b)(i), the Investors had the right to implement a "Strategic Sale", one definition of which (under cl 1.1) referred to the sale of 100% of the shares in the Company (including the shares held by the Promoters) to a third party.[8]

6 Clause 24.4(c) of the SASHA provided that a failure to provide an exit to the Investors under cl 19 was a Material Breach.[9] Clause 24.6 set out the Investors' rights in the event of a Material Breach, which included the right

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5 CWS at para 16(a).

6 CWS at para 16(b).

7 CWS at para 16(c).

8 CWS at para 16(d).

9 CWS at para 17.

under cl 24.6(b) to require the Company / Promoters to buy back the shares held by the Investors.[10]

7 On 1 April 2016, the 4th Investor issued a Secondary Sale Initiation Notice under cl 19.1 of the SASHA. On 26 April 2016, the 2nd and 3rd Investors also issued a Secondary Sale Initiation Notice under cl 19.1.[11] Notwithstanding that, there were delays in proceeding with a Secondary Sale, which did not take place.[12]

8 On 18 September 2020, the 2nd and 3rd Investors issued letters to the Company stating, *inter alia*, that a banker(s) should be appointed "for a secondary sale of [their] shareholding in the Company".[13] On 5 January 2021, the 1st Investor issued a letter to the Company and the Promoters to request for the "complet[ion] [of] the Secondary Sale of [its] shares", and in the alternative, the parallel initiation of a Qualified IPO.[14]

9 On 11 April 2022, the Investors issued notices of Material Breach of the SASHA to the Promoters and others. On 14 and 21 April 2022, the Investors variously commenced arbitrations which were, on 30 April 2022, consolidated and proceeded as the Arbitration.[15]

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10 CWS at para 18.

11 Claimants' Affidavit at para 23.

12 Claimants' Affidavit at p 148: Award at [394].

13 Claimants' Affidavit at pp 789–792.

14 Claimants' Affidavit at pp 929–930.

15 Claimants' Affidavit at paras 44–46.

The Arbitration

10 The Investors proceeded in the Arbitration against five respondents. The Company was the first respondent, and the Promoters were the second and third respondents. The claims in the Arbitration were principally brought against the Company and the Promoters. The fourth and fifth respondents in the Arbitration are parties to the SASHA; they were joined as nominal respondents and are not relevant in OA 1033.[16]

11 The Investors claimed, *inter alia*, that they had exercised their rights under cl 19.1 of the SASHA to require the Company and the Promoters to effect a Secondary Sale; cl 19.1 imposed an absolute obligation on the Company and the Promoters to effect a Secondary Sale; and cl 19.1 had been breached as no Secondary Sale had been effected. Consequently, the Investors claimed to be entitled to a Strategic Sale and damages amounting to the Exit Price.[17] The Investors prayed for damages, being the Exit Price as at 18 September 2020, to be ordered against the Company and the Promoters jointly and severally, with the amount of damages to be reduced to the extent of the net proceeds received by the Investors from a Strategic Sale.[18] The Investors also undertook to return their shares to the Company upon receipt of any damages awarded, to avoid any suggestion of double recovery.[19]

12 The Promoters responded, *inter alia*, that, for various reasons, cl 19.1 of the SASHA could not be construed as imposing an absolute obligation on the Company or the Promoters to guarantee a buyer for the Investors' shares; the

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16 CWS at para 11.

17 Claimants' Affidavit at para 49.

18 Claimants' Affidavit at p 1309: SOC at prayer F.

19 Claimants' Affidavit at p 1305: SOC at paras 150–151.

Investors' letters of 18 September 2020 and 5 January 2021 did not constitute Secondary Sale Initiation Notices; and the Investors had waived their rights under and/or were estopped from claiming a breach of cl 19.1 because they had agreed to pursue a split sale of the two principal businesses of the Company ("Split Sale").[20]

The Award

13 On 5 July 2024, the three-member Tribunal issued the Award.[21] The Tribunal held, *inter alia*, that cl 19.1 of the SASHA imposed an absolute obligation on the Company and the Promoters to find a buyer for the sale of the Investors' shares on terms that the Investors would receive the Exit Price (Award at [381]); and the Investors had given the requisite notice under cl 19.1 requiring a Secondary Sale (Award at [423]). The Tribunal ordered, *inter alia*, that the Company and the Promoters were jointly and severally to pay damages to the Investors being the Exit Price as at 18 September 2020, which amount would be reduced to the extent of any net proceeds received by the Investors from a Strategic Sale, with the Investors to surrender all their shares in the Company if the damages were paid (Award at [804(a)] and [804(b)]).

OA 1033

14 On 5 October 2024, the Promoters filed OA 1033, applying for the Award to be set aside under s 24(b) of the IAA on two grounds:

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20 Claimants' Affidavit at para 52.

21 Claimants' Affidavit at pp 61–234: Award.

(a) The Tribunal breached the fair hearing rule by failing to consider the Promoters' Waiver Defence (as defined in [17] below) ("Ground 1").[22]

(b) The Tribunal breached the fair hearing rule by failing to consider the Promoters' Buy-back Defence (as defined in [61]–[63] below) ("Ground 2").[23]

15 I will address each ground in turn.

Ground 1

The Waiver Defence

16 In the Arbitration, the Investors claimed that the Company and the Promoters breached cl 19.1 of the SASHA by failing to provide an exit to all the Investors via a Secondary Sale. The Investors alleged that they had invoked cl 19.1 by virtue of (a) the 2nd and 3rd Investors issuing their Secondary Sale Initiation Notices on 18 September 2020 (the "18 September 2020 notices"), (b) the 1st Investor issuing its Secondary Sale Initiation Notice on 5 January 2021, and (c) the 4th Investor having participated in the Secondary Sale.[24]

17 The Promoters pleaded in their Statement of Defence at para 127[25] that the Investors had waived or were estopped from asserting their rights to a Secondary Sale at the Exit Price and within the time limit stipulated under

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22 CWS at para 2(a).

23 CWS at para 2(b).

24 CWS at para 33.

25 Claimants' Affidavit at p 1397: Statement of Defence on behalf of Respondent Nos. 2 & 3 in the Arbitration dated 21 March 2023 ("Defence") at para 127.

cl 19.1 of the SASHA because the Investors had agreed to pursue a Split Sale, *ie*, a split sale of the two principal businesses of the Company (the "Waiver Defence").[26]

The Promoters' case

18 In OA 1033, the Promoters submit that the Waiver Defence was an essential and live issue in the Arbitration.[27] However, the Tribunal failed to consider the Waiver Defence:[28]

(a) The Tribunal correctly identified and summarised the Waiver Defence in the Award at [322]–[323] and [384], but did not analyse or make any findings on the Waiver Defence.[29]

(b) The Tribunal failed to consider whether specific events after the issuance of the 18 September 2020 notices, which the Promoters had canvassed in their pleadings and evidence in the Arbitration, supported the Waiver Defence.[30]

(c) The Tribunal broke down the main issue of whether the Company and the Promoters had breached cl 19.1 of the SASHA into two sub-issues: (i) whether cl 19.1 imposed an absolute obligation on the Company and the Promoters to find a buyer for the sale of the Investors' shares; and (ii) whether and which of the Investors had issued valid notices initiating a Secondary Sale and had validly invoked their

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26 CWS at paras 34–35.

27 CWS at para 31(a) and section IV.A.

28 CWS at paras 31(b)–31(c) and sections IV.B–IV.C.

29 CWS at paras 39–40 and 43.

30 CWS at paras 41–42.

cl 19.1 rights. The Waiver Defence was clearly a sub-issue under this main issue of breach but was not identified as such by the Tribunal. This shows that the Tribunal had missed the Waiver Defence.[31]

(d) The Tribunal did not implicitly or indirectly consider the Waiver Defence when considering whether the Investors had validly invoked their rights under cl 19.1.[32] These issues concerned separate arguments; even if valid notice had been given by the Investors, the Tribunal still had to go on to consider whether any of the events after such notice established the Waiver Defence.[33]

(e) The Tribunal's findings on the validity of the Investors' notice had nothing to do with the question of whether the Investors had waived and/or were estopped from asserting their Secondary Sale rights:[34]

(i) The Tribunal found that the 18 September 2020 notices constituted valid notices under cl 19.1 (Award at [391]).[35] The Tribunal then examined the parties' conduct after the issuance of the 18 September 2020 notices. The Tribunal did so because it had to answer the question of which Investor was participating in the Secondary Sale. It was common ground that the 4th Investor did not issue its own notice to initiate a Secondary Sale. The Tribunal thus had to examine the parties' conduct to determine if all the Investors, including the 4th Investor, could

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31 CWS at paras 45–47.

32 CWS at paras 31(c) and 44 and section IV.C.

33 CWS at paras 48–51.

34 CWS at para 63.

35 CWS at paras 53–54.

be said to have participated in the Secondary Sale.[36] Against this backdrop, the Tribunal found that "the conduct of all the parties, in particular, the Company and the Promoters after the 18 September 2020 notices was to work towards facilitating a Secondary Sale for **all the Investors**" [emphasis in original] (Award at [406]).[37] Properly understood, the Tribunal's finding that all parties were working towards a Secondary Sale for all the Investors was really to address the question of whether all the Investors had invoked their rights to a Secondary Sale under cl 19.1; it was not an answer to the Waiver Defence.[38]

(ii) This analysis is fortified by the Tribunal's reference to the test for the validity of a contractual notice (Award at [389]–[390]) when considering the implication of the 1st Promoter's confirmation that he was fully committed to providing an exit to the Investors (Award at [413]): the Tribunal was making the point that the fact that all parties (including the 1st Promoter) were working towards bringing about a Secondary Sale could only mean that the 18 September 2020 notices must be construed as an invocation of the Investors' rights under cl 19.1, which goes towards the validity of the notices.[39]

(iii) Further, the Tribunal addressed the effect of the 1st Investor's letter of 5 January 2021 and the implication of the 4th Investor not having given its own notice in 2020 for a Secondary

36 CWS at para 55.

37 CWS at para 56.

38 CWS at paras 57 and 59.

39 CWS at para 60.

Sale (Award at [414]–[420]). The Tribunal's finding that all parties had acted towards furthering a Secondary Sale was to lead to the conclusion that the 4th Investor participated in the Secondary Sale, notwithstanding that it had given no specific notice.[40]

(iv) In the Award at [423], the Tribunal explicitly drew a link between its finding that "the parties all understood that the Investors were seeking an exit and were exploring a Secondary Sale for all the Investors" with the conclusion that "the requisite notice under Clause 19.1 to require a Secondary Sale has been given by the [Investors]". This shows that the Tribunal's findings on the parties' conduct and common understanding that the Investors were exploring a Secondary Sale were directed at the issue of whether all the Investors had given the requisite contractual notice under cl 19.1.[41]

(v) In the Award at [398], the Tribunal held that: "Besides, Clause 29.5 of the SASHA expressly provides that no forbearance, indulgence or relaxation of a party to require performance with the SASHA can be considered waiver of any right – unless so waived in writing". The context is that the 2nd, 3rd and 4th Investors had given notices for a Secondary Sale in April 2016 but there had been delays in proceeding with any such sale (Award at [394]). In the Award at [398], the Tribunal was making the point that conduct from 2016 to September 2020 could not be taken to waive the Investors' rights to a Secondary

40 CWS at para 61.

41 CWS at para 62.

Sale. The Tribunal continued to state in the Award at [399] that the function of the 18 September 2020 notices was to cut through everything that had transpired previously and require a Secondary Sale to proceed without further delay.[42]

(vi) Neither the word "waiver" nor "estoppel" was discussed by the Tribunal in this section of the Award. Had the Tribunal intended to deal with the Waiver Defence, one would expect the Tribunal to set out the relevant legal tests for waiver and estoppel and apply them to the facts before drawing its conclusions on whether the Waiver Defence was established.[43]

(f) Although the Tribunal found that Credit Suisse was appointed to further a Secondary Sale and that its presentation involved exploration of how a Secondary Sale for all Investors might be brought about (Award at [407], [410], [412] and [420]), the Tribunal did not consider the precise manner in which the Secondary Sale was to be effected. This was critical to the Waiver Defence. The Promoters' case was that Credit Suisse had proposed and the Investors had agreed to a Split Sale.[44]

(g) The Tribunal did not find that it was unnecessary to deal with the Waiver Defence. The fact that the Investors were found to have validly invoked their Secondary Sale rights did not render the Waiver Defence academic.[45]

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42 Notes of Argument of the hearing of OA 1033 on 17 January 2025 ("NOA") at pp 5:31–6:24.

43 CWS at para 64.

44 CWS at para 58.

45 CWS at paras 65–67.

19 The Promoters further submit that the Tribunal's failure to consider the Waiver Defence caused them actual or real prejudice because the Waiver Defence could have afforded a complete defence to the Investors' claim that the Promoters had breached cl 19.1 of the SASHA.[46] This is especially since the Tribunal never considered if the events subsequent to 18 September 2020, where the Investors agreed to a Split Sale and allowed it to be pursued to fruition, meant that they had waived or were estopped from insisting on a Secondary Sale.[47]

The Investors' case

20 The Investors accept that the Waiver Defence was raised by the Promoters and addressed by the parties in the Arbitration.[48]

21 The Investors submit, however, that the Tribunal considered and expressly or implicitly rejected the Waiver Defence, citing the following.[49]

22 First, the Tribunal noted the Promoters' submissions on the Waiver Defence (Award at [322]–[323]) as well as the Investors' submissions on the Waiver Defence (Award at [244(c)], [245] and [246]).[50]

23 Second, the Tribunal rejected the Waiver Defence as seen from the following findings:

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46 CWS at paras 68–70.

47 CWS at para 71.

48 Defendants' Written Submissions in OA 1033 dated 10 January 2025 ("DWS") at paras 17–21.

49 DWS at section III.B.

50 DWS at paras 23–24.

(a) The Promoters had argued that the 2020 and 2021 letters from the Investors "could not be (and could not reasonably be understood to be) [Secondary Sale] Notices" given that it was agreed in September 2020 that the Company would be sold in two separate business segments.[51] However, the Tribunal rejected this argument and found that the 18 September 2020 notices "do require the Secondary Sale process to be proceeded with without delay and do constitute valid notice under Clause 19.1" (Award at [391]) and that the 1st Investor's letter of 5 January 2021 gave notice that the 1st Investor required a Secondary Sale (Award at [414]). In so finding, the Tribunal considered, among other things, that the Promoters, on their own case, "took steps towards providing the [Investors] with an exit" and such process "was on-going since 2016" (Award at [394]–[396]).[52]

(b) The Promoters had alleged that they were "led to believe that the [Investors] were not insisting that they concurrently pursue a secondary sale, which would have been inconsistent with the [split] sale process being undertaken".[53] However, the Tribunal found the opposite, *viz*, that "the parties all understood that the Investors were seeking an exit and were exploring a Secondary Sale for all the Investors, having proceeded on the basis of [the 2nd and 3rd Investors'] Secondary Sale Notices issued on 18 September 2020" (Award at [423]).[54]

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51 Claimants' Affidavit at pp 2199–2200: Post-hearing Written Submissions on behalf of the 2nd and 3rd Respondents in the Arbitration dated 19 January 2024 ("Promoters' Closing Submissions") at para 21.

52 DWS at para 25(a).

53 Claimants' Affidavit at pp 1523–1524: Rejoinder to the Claimants' Reply to the 2nd and 3rd Respondents' Statement of Defence in the Arbitration dated 19 October 2023 at para 32.

54 DWS at para 25(b).

(c) The Promoters had claimed that "[i]n all communications from September 2020 onwards including with Credit Suisse, it was clear and evident to all parties that the exit process [was] being run on a divided business segment basis" and "would not attract the provisions of Clause 19.1".[55] However, the Tribunal found to the contrary that "the parties acted in accordance with Clause 19.1(c) where [the Investors] as well as the Company and the Promoters all acted towards furthering a Secondary Sale, no less with finalising the appointment of Credit Suisse as bankers to initiate and continue the process of the Secondary Sale" (Award at [422]).[56]

24 These findings – that the Investors had given valid notice requiring a Secondary Sale under cl 19.1 of the SASHA and that all parties were working towards a Secondary Sale – were in substance a finding that the Investors did not waive their rights under cl 19.1. It was a direct and express rejection and/or negation of the Waiver Defence.[57]

25 Third, the Tribunal agreed with the Investors' argument (in their Reply at para 43[58]) that cl 29.5 of the SASHA expressly provided that no forbearance, indulgence or relaxation of a party to require performance with the SASHA can be considered waiver of any right, unless so waived in writing (Award at [398]). Given that the Promoters did not assert any written waiver but relied solely on the Investors' conduct, this finding clearly amounted to a rejection of the Waiver

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55 Claimants' Affidavit at p 1397: Defence at para 127.

56 DWS at para 25(c).

57 DWS at para 26.

58 Claimants' Affidavit at p 1465: Consolidated Reply on behalf of the Claimants to the 2nd and 3rd Respondents' Statement of Defence in the Arbitration dated 23 August 2023 at para 43.

Defence. There would have been no need for the Tribunal to cite cl 29.5 except to address the Waiver Defence.[59]

26 Fourth, even if the Tribunal did not explicitly reject the Waiver Defence, the findings highlighted at [23]–[25] above must logically amount to an implicit rejection of the Waiver Defence.[60]

27 The Investors also submit that the essential issues in respect of the Investors' claim for damages for breach of cl 19.1 of the SASHA were whether the Investors validly invoked their exit rights under cl 19.1; whether cl 19.1 imposed an obligation on the Company and/or the Promoters to find a buyer for the sale of the Investors' shares on terms that the Investors receive at least the Exit Price and to effect a Secondary Sale; whether the Company and/or the Promoters breached their obligations under cl 19.1; and whether the Investors were entitled to damages for the Company and/or the Promoters' breaches.[61] The Tribunal considered and determined these issues, concluding that all Investors had given the requisite notice under cl 19.1 and all parties were working towards a Secondary Sale (see [23]–[24] above); cl 19.1 imposed an absolute obligation on the Company and the Promoters to find a buyer for the sale of the Investors' shares on terms that the Investors receive at least the Exit Price (Award at [381]); the Company and the Investors breached cl 19.1 and the Investors were entitled to receive damages, being the Exit Price as at 18 September 2020 (Award at [476] and [479]); and a party who could show breach of cl 19.1 was entitled to claim damages for the breach (Award at

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59 DWS at para 27.

60 DWS at para 28.

61 DWS at para 33.

[683]).[62] These findings "foreclosed any arguments dependent on waiver or estoppel" and "it was not necessary for the Tribunal to deal with each argument raised by the parties, for every issue".[63]

28 Further, the Investors submit that even if the Tribunal did not explicitly deal with the Waiver Argument (which they do not accept), this may have been because (a) the Promoters "failed to develop" the Waiver Defence "[b]eyond making the point in a perfunctory fashion"; and/or (b) the Waiver Defence was "so unconvincing that analysis of it was unnecessary". It is not a clear and virtually inescapable inference that the Tribunal failed to consider the Waiver Defence.[64]

29 Finally, the Investors submit that even if the Tribunal did not apply its mind to the Waiver Defence, the Promoters are not prejudiced. Given the findings highlighted at [23]–[25] above, in particular, the finding that cl 29.5 of the SASHA required any waiver to be in writing, the Waiver Defence would not reasonably have made any difference to the Tribunal's deliberations and would have been summarily rejected if considered.[65]

Decision

30 It is not disputed that the Waiver Defence was a live issue in the Arbitration (see [18] and [20] above). I also accept the Promoters' submission that it was an essential issue to which the Tribunal had to apply its mind. It is unclear if the Investors contend otherwise (see [27] above), but to the extent that

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62 DWS at para 34.

63 DWS at para 35.

64 DWS at paras 36–38.

65 DWS at para 39.

they do, I disagree. The Waiver Defence was a standalone defence to the Investors' claim that the Promoters had breached cl 19.1 of the SASHA, and the Tribunal had to reach a view on whether the Investors had waived their rights under cl 19.1 before it could properly conclude whether the Promoters were liable for a breach of cl 19.1.

31 However, the Tribunal was not required to *expressly* address or articulate its decision on the Waiver Defence. An issue need not be resolved expressly in an arbitral award; it may be resolved implicitly: *ASG v ASH* [2016] 5 SLR 54 ("*ASG*") at [59(e)], citing *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [77]. It is also not a breach of natural justice if an arbitral tribunal chooses not to address an issue because the tribunal thinks it unnecessary to do so: *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [46]. The fact that an award fails to address a party's case expressly does not, without more, mean that the tribunal failed to apply its mind to the same as there may be a valid alternative explanation for the failure: *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZW*") at [60(a)], citing *ASG* at [92]. An award will therefore not be set aside on the ground that the tribunal failed to apply its mind to an essential issue unless such failure is a clear and virtually inescapable inference from the award: *BZW* at [60(a)], citing *AKN* at [46]. In the present case, for the reasons I elaborate below, I find that certain factual findings made by the Tribunal implicitly resolved the Waiver Defence in the Investors' favour, and it is more likely than not that the Tribunal thus considered it unnecessary to expressly address and reject the Waiver Defence. The Tribunal did therefore consider and apply its mind to the Waiver Defence, and there was no breach of the fair hearing rule.

32 I also find that even if the Tribunal failed to consider the Waiver Defence, the Promoters have not established, as required in a challenge based on a breach of natural justice, that such a breach prejudiced its rights (see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [48(d)]). The question is whether the Promoters' arguments on the Waiver Defence could reasonably have made a difference to the Award: *L W Infrastructure* at [54]. In my view, the answer is no, as I elaborate below.

There was no breach of the fair hearing rule

33 In my view, the Tribunal did not expressly address and reject the Waiver Defence because the Tribunal considered it unnecessary to do so in the light of other findings and views that the Tribunal had already reached in the Award. I explain why I infer this to be the case.

34 First, the Tribunal made certain findings of fact that effectively negated the Promoters' alleged factual basis for the Waiver Defence. While I accept the Promoters' general point that the Award at [382]–[423] expressly sought to address the issue of whether and which of the Investors had validly invoked the Secondary Sale rights under cl 19.1 of the SASHA, the Tribunal's factual findings in this regard nevertheless could and did have a bearing on the validity of the Waiver Defence.

35 One, the Tribunal stated in the Award at [413]:

> Further, on 26 March 2021 at a further meeting of the Board of the Company, the [1st Promoter] confirmed that he was fully committed to providing a **100% exit to the existing shareholders** and will immediately initiate a fund raise process. Caution needs to be expressed when crossing a line and relying upon subjective understanding as it is clear that the *Mannai* test is an objective one. Nevertheless, *it is noticeable that there*

> *is not one single document contemporaneous with the 18 September 2020 letters that expressed anything other than a unified resolve on all sides to try to proceed towards bringing about a Secondary Sale so as to provide the contractual exit to all the Investors.* Indeed, this is the [Company's] positive pleaded case. *This is also apparent from the Board Meeting minutes and the presentations made by Credit Suisse.* Moreover, there is no response from the [Promoters] (or any other Respondent, for that matter) to the 18 September 2020 notices expressing that they did not understand what was being required. [emphasis in original in bold and underline; emphasis added in italics]

36 For context, the Tribunal had earlier held that the contractual validity of the 18 September 2020 notices was to be determined based on an objective construction of the notices (Award at [389], [390(b)] and [391]). In the Award at [413], however, the Tribunal decided to "[n]evertheless" look into the "subjective understanding" of the parties, presumably with a view to confirming the Tribunal's objective reading of the notices. And, in assessing the parties' subjective understanding, the Tribunal turned to review whether the parties' conduct after the issuance of the 18 September 2020 notices was consistent with the parties requiring a Secondary Sale under cl 19.1 of the SASHA to be effected.

37 In this regard, the Tribunal found in the Award at [413] that "there [was] not one single document contemporaneous with the 18 September 2020 letters that expressed anything other than a unified resolve on all sides to try to proceed towards bringing about a Secondary Sale so as to provide the contractual exit to all the Investors". As I have explained, I recognise that the Tribunal's finding was expressly directed towards the parties' subjective understanding that the 18 September 2020 notices did invoke and require the conduct of a Secondary Sale under cl 19.1 of the SASHA. At the same time, however, this finding also ineluctably expressed the Tribunal's view of the parties' contemporaneous conduct, including as "apparent from the Board Meeting minutes and the

presentations made by Credit Suisse", that "all sides" were trying to bring about a Secondary Sale that would be a "contractual exit" for the Investors, *viz*, a Secondary Sale under cl 19.1. The effect of this finding was to implicitly negate any notion that the Investors had, by participating in any Credit Suisse presentations on a Split Sale or otherwise, waived their requirement for a Secondary Sale under cl 19.1.

38 The Promoters argue that the Tribunal was mistaken in thinking that the parties were trying to proceed towards bringing about a Secondary Sale under cl 19.1 of the SASHA because in the 26 March 2021 board meeting referred to in the Award at [413], it was a Split Sale that had been discussed.[66] This, however, is a disagreement with the Tribunal's view of the evidence. Even if the Tribunal made a mistake in this regard, it would be an error of fact that does not constitute a breach of the fair hearing rule.

39 Two, the Tribunal stated in the Award at [417]:

> It is not exactly clear that the [Promoters] are suggesting that the [1st Investor] was out of time [in sending the requisite notice]. Nevertheless, any such argument would be hard to maintain because if any such issue arose, that would only have been the fault of the Company and/or the [Promoters] in not sending the requisite notice under Clause 19.1(b) to the other Investors. In any event, as explained by the Tribunal above, *the documents show that the Investors, the Company and the Promoters all shared the understanding that the [Investors] were all seeking a Secondary Sale,* and that the [1st Investor] was seeking a Secondary Sale even prior to its 5 January 2021 letter. The Tribunal considers that this shared understanding may also have been the reason why the Company and the Promoters had failed to intimate [the 1st and 4th Investors] of [the 2nd and 3rd Investors'] Secondary Sale Notices. [emphasis added]

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66 NOA at p 20:14–27.

40 Again, I recognise that the Tribunal's finding that "the documents show that the Investors, the Company and the Promoters all shared the understanding that the [Investors] were all seeking a Secondary Sale" was expressly directed towards substantiating the Tribunal's conclusion that the 1st Investor was understood to be seeking a Secondary Sale under cl 19.1 of the SASHA. At the same time, however, this finding again expressed the Tribunal's view of the parties' contemporaneous conduct after the issuance of the 18 September 2020 notices, and in the Tribunal's view, the Investors were seeking a Secondary Sale under cl 19.1. This factual finding effectively controverted the alleged factual basis for the Waiver Defence, thereby denuding the defence of merit.

41 Three, the Tribunal stated in the Award at [422]:

> It bears emphasis that the Company and the Promoters did not comply with Clause 19.1(b) to intimate the other Investors of such Secondary Sale Initiation Notice [from the 2nd and 3rd Investors] having been received in writing, and there was consequently no Participation Notice from the [4th Investor] (or the [1st Investor] for that matter, until its letter of 5 January 2021). That said, *the parties acted in accordance with Clause 19.1(c) where [the Investors] as well as the Company and the Promoters all acted towards furthering a Secondary Sale, no less with finalising the appointment of Credit Suisse as bankers to initiate and continue the process of the Secondary Sale*. The [Promoters] also admit that [the 4th and 1st Investors] were already participating in the Secondary Sale process to sell their entire stake, in arguing that the need to intimate other investors was obviated as the Investors' participation in the Secondary Sale was "*otherwise secured*". [footnote in original omitted; emphasis added]

42 I recognise that the Tribunal's focus in the Award at [422] was on explaining why the lack of a "Participation Notice" under cl 19.1(b) of the SASHA from the 4th Investor was not fatal to the 4th Investor's invocation of its contractual right to a Secondary Sale. However, by the Tribunal's finding that "the parties acted in accordance with Clause 19.1(c) where [the Investors] as well as the Company and the Promoters all acted towards furthering a

Secondary Sale, no less with finalising the appointment of Credit Suisse as bankers to initiate and continue the process of the Secondary Sale", the Tribunal essentially expressed its view that, following the 18 September 2020 notices, the Investors acted towards furthering a Secondary Sale under cl 19.1, including through their engagements and exchanges with Credit Suisse.

43 The Promoters counter that Credit Suisse had proposed a Split Sale, and not a Secondary Sale within the meaning of cl 19.1 of the SASHA (see [18(f)] above). However, this would mean, at most, that the Tribunal misunderstood Credit Suisse's remit and proposals. Such an error of fact would not constitute a breach of the fair hearing rule. Any misunderstanding by the Tribunal of the Investors' discussions with and the proposals by Credit Suisse does not change the fact that the Tribunal did apply its mind to the parties' interactions with Credit Suisse after the issuance of the 18 September 2020 notices. And, having thus applied its mind, the Tribunal reached the view that the parties' (*ie*, including the Investors') actions were consistent with the Investors' pursuit of their Secondary Sale rights under cl 19.1. The Tribunal's finding effectively nullified any notion that the exploration of a Split Sale under Credit Suisse's auspices following the 18 September 2020 notices amounted to a waiver of the Investors' Secondary Sale rights under cl 19.1.

44 Four, the Tribunal stated in the Award at [423]:

> *The Tribunal therefore considers that the parties all understood that the Investors were seeking an exit and were exploring a Secondary Sale for all the Investors, having proceeded on the basis of [the 2nd and 3rd Investors'] Secondary Sale Notices issued on 18 September 2020.* The Tribunal finds that the requisite notice under Clause 19.1 to require a Secondary Sale has been given by the [Investors]. [emphasis added]

45 I recognise that the Tribunal's finding that "the parties all understood that the Investors were seeking an exit and were exploring a Secondary Sale for all the Investors, having proceeded on the basis of [the 2nd and 3rd Investors'] Secondary Sale Notices issued on 18 September 2020" was expressly directed towards supporting its conclusion that the requisite notice under cl 19.1 of the SASHA had been given. However, this does not change the substance of the finding, which included the fact that the Investors' conduct following the issuance of the 18 September 2020 notices was consistent with them seeking a Secondary Sale under cl 19.1. The effect of this finding was to implicitly repudiate the alleged factual basis for the Waiver Defence, thereby rendering the defence untenable.

46 In the face of the abovementioned factual findings made by the Tribunal, the Promoters' argument – that the Investors had waived their Secondary Sale rights under cl 19.1 of the SASHA by agreeing to pursue a Split Sale after the issuance of the 18 September 2020 notices – did not have a leg on which to stand. In my view, the Tribunal likely realised that these findings implicitly resolved the Waiver Defence in the Investors' favour, and thus considered it unnecessary to expressly address and reject the Waiver Defence.

47 Second, it is likely that the Tribunal also considered it unnecessary to expressly address and reject the Waiver Defence given the view the Tribunal had already expressed on cl 29.5 of the SASHA. The Tribunal stated in the Award at [398]:

> Besides, Clause 29.5 of the SASHA expressly provides that no forbearance, indulgence or relaxation of a party to require performance with the SASHA can be considered waiver of any right – unless so waived in writing. [footnote in original omitted]

48 I accept the Promoters' submission (see [18(e)(v)] above) that, in the context of [394]–[399] of the Award, the Tribunal's point in [398] was that the delays in proceeding with a Secondary Sale from April 2016 (when the 2nd, 3rd and 4th Investors had previously given notices for a Secondary Sale: see [7] above) to 18 September 2020 did not amount to a waiver of the Investors' rights to a Secondary Sale under cl 19.1 of the SASHA, since cl 29.5 required any waiver to be in writing. However, the crux of the Tribunal's interpretation of cl 29.5, *viz*, that any waiver of a party's contractual right under the SASHA must be made in writing, would be of general application to any instance where a waiver of contractual rights under the SASHA was alleged.

49 By the Promoters' own admission, although "waiver" and "estoppel" were asserted under the Waiver Defence, the Promoters treated both concepts as being "one and the same defence" premised on the Investors' alleged representation, by their conduct of pursuing a Split Sale after the issuance of the 18 September 2020 notices, that they were not insisting on a Secondary Sale in the terms of cl 19.1 of the SASHA.[67] This is reminiscent of the position under Singapore law that a species of waiver is "waiver by estoppel", which is also referred to as the doctrine of promissory estoppel and requires (*inter alia*) an unequivocal representation by one party that he will not insist upon his legal rights against the other party: *Salaya Kalairani (legal representative of the estate of Tey Siew Choon, deceased) and another v Appangam Govindhasamy (legal representative of the estate of T Govindasamy, deceased) and others and another appeal* [2023] SGHC(A) 40 at [59]. The Promoters' confirmation that the "waiver" and "estoppel" they referred to were "one and the same defence"

67 NOA at pp 3:16–20 and 3:29–4:3.

suggests that they do not think the position under Indian law, which governed the parties' dispute, is any different.

50 Therefore, under the singular Waiver Defence, the Promoters were relying on the Investors' conduct, and not on any written representation, as constituting the Investors' alleged waiver of their legal rights under cl 19.1 of the SASHA. That being so, the application of cl 29.5, as interpreted by the Tribunal in the Award at [398], would be a complete answer to the Waiver Defence. In my view, the Tribunal likely realised that its view on cl 29.5 would equally apply to the Waiver Defence, and that, when thus applied, would lead to the rejection of the defence. The Tribunal thus considered it unnecessary to expressly address and reject the Waiver Defence.

51 Third, my views that the Tribunal did apply its mind to the Waiver Defence but considered it unnecessary to expressly address and reject the same are buttressed by the Tribunal's succinct and accurate summary of the parties' respective cases on the Waiver Defence, as set out in the Award at [244(c)]–[246], [322]–[323] and [384]. I first clarify that, in my view, the fact that an arbitral tribunal has set out the parties' arguments on an issue does not necessarily (and does not usually on its own) indicate that the tribunal did apply its mind to that issue. When inferring whether or not a tribunal applied its mind to an issue, the relevance of and weight to be placed on this factor must be assessed qualitatively and in the round with any other relevant features of the arbitral award and circumstances of the case. For example, a rote and wholesale reproduction of the parties' cases in the award may (especially when the analysis portion of the award is thin) merely be symptomatic of due process paranoia on the tribunal's part and shed little light on whether the tribunal had considered a particular issue. Conversely, an accurate summary of the parties' cases may suggest that the tribunal had synthesised the respective arguments

and appreciated the issue in play, undermining an inference that the tribunal had nevertheless subsequently failed to consider that issue.

52 In the present case, it seems to me unlikely that the Tribunal would have failed to apply its mind to the Waiver Defence after having taken pains to succinctly and accurately recapitulate the parties' respective cases in respect of the defence. Of particular note, the Tribunal's summary of the Promoters' submission that "the [Investors] cannot assert breach of Clause 19.1 when they agreed not to insist on a Secondary Sale and instead pursue a split sale of the business (selling [the two principal businesses] separately)" (Award at [384]) was contained *within* the section of the Award at [382]–[423] setting out the Tribunal's decision on the validity of the Investors' notices. This suggests that the Tribunal was cognisant that findings made by the Tribunal in connection with its decision on the validity of the notices would implicitly bear on the merits of the Waiver Defence. In contrast, the inference which the Promoters effectively invite me to draw is that the Tribunal was extremely obtuse in promptly ignoring or overlooking the Waiver Defence after describing it in some detail. I decline to draw such a conclusion given the valid alternative explanations, which I have outlined at [34]–[50] above, for the Tribunal not expressly addressing the Waiver Defence (see *BZW* at [60(a)]; *ASG* at [92]).

53 Fourth, the remaining objections raised by the Promoters do not detract from the foregoing analysis.

54 The Promoters argue that the Tribunal failed to consider the specific events after 18 September 2020 on which the Promoters had relied for the Waiver Defence (see [18(b)] above). However, the Tribunal was not required to address each event singly. In the Award at [413], [417], [422] and [423], the Tribunal essentially found that the Investors' conduct post-issuance of the

18 September 2020 notices, *assessed globally*, was consistent with them requiring a Secondary Sale under cl 19.1 of the SASHA (see [35]–[45] above). There is no compelling basis to suppose that, just because the Tribunal did not address a particular event(s) cited by the Promoters, the Tribunal had omitted to consider or had no good reason for disregarding that evidence. To the contrary, the Tribunal expressed its finding in the Award at [413] in wide terms suggesting a comprehensive review of the evidence, *viz*, that "not one single document contemporaneous with the 18 September 2020 letters" showed anything other than all parties aiming for the Investors' "contractual exit" by a Secondary Sale.

55 The Promoters also argue that the Tribunal's failure to (a) name the Waiver Defence as a specific sub-issue to be addressed and (b) refer to "waiver" or "estoppel" and the legal tests for the same in its decision, show that the Tribunal missed the defence (see [18(c)] and [18(e)(vi)] above). I do not think these arguments add anything to the Promoters' case, which already rests on the fact that the Waiver Defence was not expressly addressed in the Award. The question is why the Waiver Defence was not expressly addressed (be it by way of express identification as an issue or express findings on the defence). I have found that the Tribunal likely considered it unnecessary to expressly address and reject the Waiver Defence. This would extend to it being unnecessary to expressly name the defence as an issue for determination or to expressly articulate the legal tests for waiver and estoppel.

56 In closing the analysis on the Promoters' allegations of breach of natural justice, I emphasise that the burden lies on the Promoters to establish a clear and virtually inescapable inference from the Award that the Tribunal failed to apply its mind to the Waiver Defence (see *BZW* at [60(a)]; *AKN* at [46]). I find that they have not done so. The Tribunal found that the Investors' conduct

post-issuance of the 18 September 2020 notices showed that they required a Secondary Sale under cl 19.1 of the SASHA and that this was corroborative of the Investors having validly invoked their cl 19.1 rights. The effective corollary of these findings was that the Investors' said conduct (by pursuing a Split Sale or otherwise) did not amount to a waiver of their cl 19.1 rights. This is unsurprising as (a) the inquiry into whether all parties' conduct post-issuance of the 18 September 2020 notices reflected an understanding that the parties would proceed with a cl 19.1 Secondary Sale (such as to support a conclusion that the Investors had validly invoked their cl 19.1 rights) and (b) an inquiry into whether the Investors' conduct in pursuing a Split Sale post-issuance of the 18 September 2020 notices amounted to them waiving their rights to a cl 19.1 Secondary Sale, are in substance two sides of the same coin. The Waiver Defence was thus implicitly resolved in the Investors' favour by these findings. It is likely that for this reason (and also given the Tribunal's general view on the interpretation and effect of cl 29.5) the Tribunal considered it unnecessary to expressly address and reject the Waiver Defence. This means that the Tribunal did not fail to apply its mind to the Waiver Defence, and there was no breach of the fair hearing rule.

There is no prejudice to the Promoters

57 Further and in any event, even if the Tribunal had breached the fair hearing rule by failing to consider the Waiver Defence, the Promoters have not established that the Tribunal's consideration of the Waiver Defence could reasonably have made a difference to the Award. Specifically, the Promoters have not shown that there is a real as opposed to a fanciful chance (see *L W Infrastructure* at [54]) that the Tribunal's consideration of the Waiver Defence would have (a) led to a finding that the Waiver Defence succeeded and

(b) consequently, made a difference to the Tribunal's decision on the main issue that the Company and the Promoters had breached cl 19.1 of the SASHA.

58 First, as explained in [47]–[48] above, the crux of the Tribunal's interpretation of cl 29.5 of the SASHA in the Award at [398] is that any waiver of a party's contractual right under the SASHA must be made *in writing*. The application of cl 29.5 to the Waiver Defence, which is based on alleged representations *by conduct*, would thus logically result in the dismissal of the defence without any need to deal with each element of "factual substratum"[68] relied on by the Promoters for the defence. The Promoters do not contend that the Tribunal's interpretation of cl 29.5 was wrong. The Promoters also do not explain why there is a real chance that the Tribunal would not apply cl 29.5 to the Waiver Defence; or how, if the Tribunal did apply cl 29.5, there is a real chance that the Tribunal would nevertheless conclude that the Waiver Defence should succeed.

59 Second, even assuming that, notwithstanding cl 29.5 of the SASHA, it remained relevant to analyse the Investors' conduct with a view to ascertaining if that gave rise to waiver or estoppel, the Promoters have not shown that there is a real chance that the Tribunal would reach findings contrary to or inconsistent with those already made in the Award (*viz*, that the Investors' conduct post-issuance of the 18 September 2020 notices showed that they required a Secondary Sale under cl 19.1) much less conclude that the Investors' conduct gave rise to a waiver or an estoppel.

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[68] NOA at p 5:21–23.

Conclusion on Ground 1

60 I therefore conclude that there is no basis for the Award to be set aside under Ground 1.

Ground 2

The Buy-back Defence

61 The Promoters contend that there were two limbs to what they call the "Buy-back Defence".

62 The first limb of the Buy-back Defence pertained to the proper interpretation of cl 19.1 of the SASHA (the "Interpretation Limb"). In the Arbitration, the Investors' case was that cl 19.1 should be interpreted as imposing an absolute obligation on the Company and the Promoters to secure a Secondary Sale at a price equal to or higher than the Exit Price. The Promoters opposed this interpretation, arguing that (a) a breach of such an absolute obligation would result in the Company and the Promoters being liable for damages equivalent to the Exit Price, (b) which would essentially transform cl 19.1 into an obligation on the Company to buy back the shares held by the Investors, and (c) which in turn would render nugatory cl 19.2, which provided for the Investors' exit by way of the Company buying back the shares held by them.[69]

63 The second limb of the Buy-back Defence pertained to the relief sought by the Investors (the "Unenforceability Limb"). In their Statement of Claim ("SOC"), the Investors sought an award of damages equivalent to the Exit Price

[69] CWS at paras 6, 73(a) and 74–76; Claimants' Affidavit at p 1393: Defence at para 109(1).

for the breach of cl 19.1 of the SASHA, coupled with an undertaking to return their shares to the Company upon receipt of any damages awarded to them to avoid any suggestion of double recovery.[70] The Promoters argued in their Reply Closing Submissions that the way the Investors framed this relief would result in a buy-back by the Company of its own shares, which was impermissible under Indian law;[71] this was another reason cl 19.1 could not be construed as imposing an absolute obligation on the Company and the Promoters to find a buyer.[72]

The Promoters' case

64 In OA 1033, the Promoters submit that it is not seriously disputed that the first limb of the Buy-back Defence, *ie*, the Interpretation Limb, was a live issue in the Arbitration.[73]

65 According to the Promoters, the second limb of the Buy-back Defence, *ie*, the Unenforceability Limb, arose out of the Investors' clarification at the evidentiary hearing that, as pleaded in their SOC at para 151, the Investors would undertake to return their shares to the Company if damages were awarded and paid. It was only after this clarification that it became apparent to the Promoters that such relief would involve the Company buying back its own shares from the Investors. The Promoters thus raised the Unenforceability Limb

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70 Claimant's Affidavit at pp 1304–1305: SOC at paras 144–151.

71 CWS at paras 8 and 73(b); Claimants' Affidavit at p 2332: Post-Hearing Reply Submissions and Cost Submissions on behalf of the 2nd and 3rd Respondents in the Arbitration dated 9 February 2024 ("Promoters' Reply Closing Submissions") at paras 19(c)(i)–(ii).

72 CWS at para 84; Claimants' Affidavit at p 2332: Promoters' Reply Closing Submissions at para 19(c)(iii).

73 CWS at para 7.

arguments in their Reply Closing Submissions (see [63] above). It was common ground that, given the proportion of shares held by the Investors, it was impermissible under Indian law for the Company to buy back the shares held by the Investors. This was why the Investors clarified in their Closing Submissions that they were not seeking a share buy-back by the Company under cl 19.2.[74]

66 In the event, the Tribunal found in favour of the Investors' interpretation of cl 19.1 of the SASHA and ordered that (a) the Company and the Promoters were jointly and severally liable to pay the Investors damages being the Exit Price as at 18 September 2020 (which amount would be reduced to the extent of any net proceeds received by the Investors from a Strategic Sale) and (b) if the damages were paid, the Investors were to cooperate with the Arbitration-respondents to surrender all their shares in the Company (Award at [332], [804(a)] and [804(b)]).[75]

67 The Promoters' case is that the Tribunal failed to consider the Buy-back Defence, as evidenced by the following matters.

68 First, the Promoters submit that although the Tribunal found that cl 19.1 of the SASHA imposed an absolute obligation on the Company and the Promoters to find a buyer for the Investors' shares (Award at [332]), the Tribunal did not consider whether such an interpretation would turn cl 19.1 into a share buy-back by the Company.[76]

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74 CWS at paras 8 and 78–84.

75 CWS at para 86.

76 CWS at paras 95 and 96(a).

69 Second, the Promoters submit that there is not a single paragraph in the Award where the Tribunal considered whether the relief sought by the Investors, which the Tribunal awarded, amounted to a share buy-back by the Company and whether such buy-back was permissible under Indian law.[77]

70 Third, the Promoters submit that the following exchange between the Tribunal and the Promoters' counsel in the Arbitration, Mr Kelvin Poon *SC* ("Mr Poon"), at the evidentiary hearing does not demonstrate that (a) the Tribunal considered the Buy-back Defence or (b) the Promoters conceded that the relief sought by the Investors was different from a share buy-back:[78]

> [ARBITRATOR]: So leaving aside the "or" point, and I have got that on board. I'm just trying to work out in my mind, do you accept that what [the Investors' counsel's] clients are doing in their statement of claim and in their relief is effectively requiring you to buy their shares at this price, and that there would also be credit given for monies which are recouped by way of strategic sale? Do you say that there is a distinction between what he is seeking in his relief and [cl] 24.6(b).
>
> MR POON: Yes, simply they are different – it's quite different. Because [cl] 24.6(b) is a buy back.
>
> [ARBITRATOR]: Correct.
>
> MR POON: If I can't buy back, I can't buy back. You can order me – you can order specific performance of a buy back, but if for any reason the company or the promoters are unable to purchase the shares at those price, that's where it falls. It is not an obligation to pay the difference. It's a different remedy from damages.
>
> [ARBITRATOR]: But I thought [the Investors' counsel] read out a passage in his statement of claim, which is that the shares would be transferred over.

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77 CWS at paras 89–90, 96(b) and 97.

78 CWS at para 91; Claimants' Affidavit at pp 2528–2529: Transcript of the evidentiary hearing in the Arbitration on 22 November 2023 ("Transcript 22 November 2023") at pp 159:1–160:6.

> MR POON: That is a passage written in paragraph 151 of the statement of claim.
>
> [ARBITRATOR]: Yes, I was just looking for that now, a moment ago. Yes, 151. They undertake to return their shares to the company. I see. So they are not returning the shares – they are not handing over the shares to the promoter.
>
> MR POON: They are not.
>
> [ARBITRATOR]: I see. So it is different.
>
> MR POON: It is different. Substantively different.

71 For context, under cl 24.6(b) of the SASHA, the Investors were entitled to require a share buy-back in accordance with the procedure set out in cl 19.2 upon the occurrence of a "Material Breach", which included (under cl 24.4(c)) a failure to provide an exit to the Investors under cl 19.[79]

72 According to the Promoters, in the exchange quoted at [70] above, Mr Poon was making the point that the relief sought by the Investors differed from a share buy-back under cl 24.6(b) read with cl 19.2.[80] The difference was that:[81]

> (a) One, the Investors' claim for damages ought to be the difference between the Exit Price and the present value of the shares (which the Investors were still holding) because the Investors had only lost a chance to sell their shares at the Exit Price pursuant to a Secondary Sale.[82]
>
> (b) Two, the share buy-back under cl 24.6(b) extended to transferring the shares to the Promoters whereas the Investors'

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79 Claimants' Affidavit at pp 547–548: cll 24.4(c) and 24.6(b) of the SASHA.

80 CWS at para 93.

81 CWS at para 93.

82 Claimants' Affidavit at p 2208: Promoters' Closing Submissions at para 24.

undertaking as part of the reliefs sought was to return the shares to the Company.[83]

Mr Poon did not concede that the payment of damages by the Company, coupled with a surrender of shares by the Investors to the Company, was different from a share buy-back or that such an arrangement was not prohibited under Indian law.[84]

73 Fourth, the Promoters submit that the Tribunal did not find that a claim for damages for breach of cl 19.1 of the SASHA was distinct from a share buy-back under cl 24.6(b). In the Award at [683]–[684], the Tribunal simply found that a party was still entitled to claim damages at common law for breach of cl 19.1, notwithstanding the rights in cl 24.6. The Tribunal's finding that the remedies were alternative and not cumulative was no answer to whether the relief sought by the Investors was tantamount to a share buy-back by the Company and whether that was permissible under Indian law.[85]

74 It is also the Promoters' case that the Tribunal's failure to consider the Buy-back Defence caused prejudice to the Promoters. Had the Tribunal considered the Buy-back Defence, it could reasonably have made a difference to the outcome and the reliefs awarded in the Award.[86]

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83 Claimants' Affidavit at pp 2526–2527: Transcript 22 November 2023 at pp 157:13–158:6.

84 CWS at para 94.

85 CWS at paras 96(c)–96(d).

86 CWS at paras 98–100.

The Investors' case

75 The Investors accept that the Interpretation Limb of the Buy-back Defence was dealt with in the parties' pleadings.[87] However, the Unenforceability Limb was raised by the Promoters for the first time only in the Promoters' Reply Closing Submissions.[88]

76 The Investors' case is that the Tribunal had considered the Buy-back Defence, as evidenced by the following matters.

77 First, the Investors refer to the exchange at the evidentiary hearing between the Tribunal and Mr Poon, quoted at [70] above, and submit that this exchange shows that:

(a) A Tribunal member asked Mr Poon whether there was a distinction between the relief sought by the Investors (*ie*, damages for breach of cl 19.1 of the SASHA, with the Investors returning their shares to the Company upon payment of damages) and cl 24.6 (relating to the Company and the Promoters' obligation to buy back the Investors' shares). Mr Poon candidly and correctly stated that they were "substantively different".[89]

(b) The Tribunal did apply its mind to and consider the Buy-back Defence as the Tribunal attempted to engage with and understand the Interpretation Limb, which, if rejected, meant that the entire Buy-back Defence must be rejected.[90]

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87 DWS at paras 40 and 47.

88 DWS at paras 40–48.

89 DWS at paras 50(a) and 51.

90 DWS at paras 52

(c) Mr Poon had conceded the inherent problem with the Interpretation Limb, specifically, that the Investors' claim for damages was doctrinally distinct from a share buy-back. This wholly undermined the Buy-back Defence, and it would have been reasonable for the Tribunal to consider that the Buy-back Defence was dead in the water from that point.[91]

78 Second, the Investors submit that the Tribunal summarised the Promoters' case on the Buy-back Defence in the Award at [305] and [474(c)] and the Investors' case in the Award at [427], then outrightly rejected the Interpretation Limb by finding that cl 19.1 of the SASHA imposed an absolute obligation on the Company and the Promoters to find a buyer for the Investors' shares at the Exit Price and that the Investors' claim for damages for breach of cl 19.1 was distinct from a share buy-back (Award at [332], [381], [683], [684] and [702]). The rejection of the Interpretation Limb amounted to a rejection of the Buy-back Defence.[92]

79 Third, the Investors submit that, even if the Tribunal did not expressly reject the Buy-back Defence, there are various alternative explanations for this aside from a failure to consider the Buy-back Defence,[93] such as:

(a) The Tribunal's findings (see [78] above) amounted to at least an implicit rejection of the Buy-back Defence.[94]

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91 DWS at para 52.

92 DWS at paras 50(b), 53–57 and 62–63.

93 DWS at para 64.

94 DWS at para 58.

(b) It is plausible that the Tribunal found it unnecessary to make any further findings or deal with the Promoters' submissions on the Buy-back Defence given the apparent concession by Mr Poon which the Tribunal had accepted (see [77] above).[95]

(c) The Tribunal may have found the Buy-back Defence so plainly without merit that analysis of it was unnecessary. The Tribunal had only ordered the Investors' shares in the Company to be "surrender[ed]" (without specifying to whom[96]) if damages were paid (Award at [804(b)]). The Tribunal had ordered damages to be paid jointly and severally by the Company and the Promoters (Award at [804(a)]). If the Tribunal's award of damages was enforced only against the Promoters (and not the Company), there would be no question of the Company buying back its own shares.[97]

(d) The Tribunal could have declined to address the Buy-back Defence because the Unenforceability Limb was raised too late in the day.[98]

80 The Investors further argue that, even if the Tribunal had not addressed the Unenforceability Limb, the Tribunal "simply cannot be faulted in the circumstances". It would have been impermissible for the Tribunal to address the Unenforceability Limb because it was raised belatedly in the Promoters' Reply Closing Submissions and the Investors had no chance to adequately respond to it. The Investors appear to suggest that the Tribunal would have been

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95 DWS at para 65.

96 NOA at p 17:17–18.

97 DWS at para 66.

98 DWS at para 67.

acting in excess of jurisdiction and in breach of natural justice if the Tribunal had addressed the Unenforceability Limb.[99]

81 It is also the Investors' case that even if the Tribunal had not applied its mind to the Buy-back Defence, the Promoters are not prejudiced as the Tribunal would have rejected the Buy-back Defence if it was considered.[100]

Decision

The relationship between the Interpretation Limb and the Unenforceability Limb of the Buy-back Defence

82 At the outset, it is important to properly characterise, and understand the relationship between, the two limbs of the Buy-back Defence. In my view, the Unenforceability Limb of the Buy-back Defence is contingent on the prior successful establishment of the Interpretation Limb, such that, if the Interpretation Limb is rejected, there is no foundational premise for the Unenforceability Limb, and the Buy-back Defence as a whole fails. I explain.

83 As the Promoters acknowledge, what they now term the "Interpretation Limb" was pleaded in their Statement of Defence at para 109(1) as follows:[101]

> 109. A reading of Clause 19.1 as an absolute obligation would be inconsistent with the true nature of the provision, along with the remaining terms of Clause 19 and Clause 24. That is because:
>
> 1) Construing clause 19.1 as an absolute obligation would effectively distort the clause, which was meant for a third party sale, into a put-option or a provision for a buy-back. *If*

99 DWS at paras 60–61.

100 DWS at para 68.

101 CWS at para 76 and footnote 73 read with para 77; Claimants' Affidavit at p 1393: Defence at para 109(1).

> *Clause 19.1 is construed as an absolute obligation to find a buyer at the Exit Price such that in case of failure the Company and the Promoters become liable for the Exit Price, it effectively amounts to a buy-back obligation in context of the Company* and a put option in context of the Promoters. The buy-back mechanism set out in Clause 19.2 is therefore, rendered nugatory. There would further be no purpose of requiring the buy-back provision to be collectively exercised, as a single investor who triggered the Secondary Sale could force a buy-back.

[footnote in original omitted; emphasis added]

84 The Promoters' position in their Statement of Defence at para 109(1) was basically that if (a) the Company was liable for damages amounting to the Exit Price (for breach of cl 19.1 of the SASHA), this would "effectively amount" to (b) the Company being obliged to buy back the Investors' shares. That was apparently why the buy-back mechanism in cl 19.2 would be rendered nugatory.

85 The Promoters were vague about why, on their case, the Company's liability for damages to the Investors would "effectively amount" to the Company buying back the Investors' shares. In my view, the Promoters could have had only one reason in mind: they envisaged that, upon payment of damages by the Company, the Investors' shares would be returned to the Company. It was only because the Promoters implicitly expected the Investors to return or surrender their shares upon being paid damages that the Promoters argued that there was an equivalence between (a) awarding damages to the Investors in the amount of the Exit Price and (b) the Company buying back the Investors' shares. This was the real crux of the Interpretation Limb.

86 Turning to the Unenforceability Limb, its foundational premise was that awarding the Investors damages in the amount of the Exit Price with the Investors returning their shares upon receiving the damages (*per* the relief sought by the Investors) would amount to the Company buying back the Investors' shares (see [63] above). As is immediately apparent, the foundational premise of the Unenforceability Limb was simply the crux of the Interpretation Limb re-packaged. The only substantive difference between the Interpretation Limb and the Unenforceability Limb was that the latter entailed an additional argument that it would be legally impermissible for the Company to buy back the Investors' shares (which was another purported reason cl 19.1 of the SASHA could not be construed as imposing an absolute obligation on the Company and the Promoters to find a buyer). However, the question of the permissibility of the Company buying back the Investors' shares (and whether that might affect the interpretation of cl 19.1) would not even arise if an order for the Company to pay damages to the Investors (coupled with the Investors returning their shares to the Company upon receipt of such payment) does *not* "effectively amount" to the Company buying back the Investors' shares to begin with.

87 Once the true nature of and relationship between the two limbs of the Buy-back Defence is appreciated, it is evident that a rejection of the crux of the Interpretation Limb will denude the Unenforceability Limb of its foundational premise. If the Interpretation Limb fails, it follows that the Unenforceability Limb must necessarily fail as well. With this context, I proceed to address whether the Tribunal failed to apply its mind to the Buy-back Defence.

There was no breach of the fair hearing rule

88 I find that the Tribunal both expressly and implicitly rejected the Interpretation Limb of the Buy-back Defence, and in so doing, implicitly rejected the Buy-back Defence as a whole. It is likely that, for this reason, the Tribunal did not consider it necessary to expressly address the Unenforceability Limb of the Buy-back Defence. It therefore cannot be said that the Tribunal breached the fair hearing rule by failing to apply its mind to either limb of the Buy-back Defence or to the Buy-back Defence as a whole. I elaborate on why I reach these findings.

89 In the Award at [228], the Tribunal summarised the Investors' submission that cl 19.1 of the SASHA imposed an absolute obligation on the Company and the Promoters to find a buyer for the sale of the Investors' shares on terms that the Investors receive at least the Exit Price. The Tribunal also summarised the Investors' submission that they were entitled to and had sought damages for the breach of cl 19.1 (Award at [243] and [250]).

90 In the Award at [302] and [305], the Tribunal then summarised the Promoters' objections to the Investors' interpretation of cl 19.1 of the SASHA, with reference to the Promoters' Statement of Defence at para 109,[102] as follows:

> 302. Further, if the failure of the first step in Clause 19.1 (secondary sale) itself entitled the [Investors] to damages, then there would be no relevance of the remaining steps set out under Clause 19.2 and Clause 19.3.
>
> …
>
> 305. A reading of Clause 19.1 as an absolute obligation would be inconsistent with the true nature of the

[102] Claimants' Affidavit at pp 130–131: Award at [302] (footnote 385) and [305] (footnote 388).

> provision, along with the remaining terms of Clause 19 and Clause 24 of the SASHA, including that it renders the buy-back mechanism in Clause 19.2 nugatory as a single investor who triggered the Secondary sale could force a buy-back. …
>
> [footnotes in original omitted]

91 The Tribunal's summary and reference to Promoters' Statement of Defence at para 109, which includes para 109(1) (see [83] above), shows that the Tribunal registered the Interpretation Limb of the Buy-back Defence.

92 Turning to the Tribunal's decision on the interpretation of cl 19.1 of the SASHA, the Tribunal opened by holding in the Award at [332] that: "After considering the parties' extensive submissions on this issue, the Tribunal *prefers* the [Investors'] construction of the Clause 19 rights to that put forward by [the Company and the Promoters]" [emphasis added]. In my view, this expressly signalled a wholesale rejection by the Tribunal of the arguments that the Promoters had put forward on the interpretation of cl 19.1, including, minimally, the arguments which the Tribunal had summarised, such as the Interpretation Limb of the Buy-back Defence. The rejection of the Interpretation Limb means that the Tribunal did not accept that awarding the Investors damages in the amount of the Exit Price for the breach of cl 19.1 would in any way lead or amount to the Company buying back the shares held by the Investors; hence, the interpretation of cl 19.1 as an absolute obligation (the breach of which rendered the Company and the Promoters liable for damages) did not render cl 19.2 (which provided for the Investors' exit by way of the Company buying back their shares) nugatory.

93 Aside from the express holding set out in [92] above, the Tribunal also expressed its views that "each Investor who triggers Clause 19.1 and requires to be bought out has a secondary right to damages" (Award at [370]) and that

"Clauses 19.1, 19.2 and 19.3 are … a series of *alternative* options provided to the Investors" [emphasis added] (Award at [372]). By considering that the remedy of an award of damages under cl 19.1 of the SASHA was distinct from a share buy-back by the Company under cl 19.2, the Tribunal implicitly rejected the crux of the Interpretation Limb.

94 The Tribunal concluded this portion of its decision by reiterating, in the Award at [381], its overall preference for the Investors' arguments on the interpretation of cl 19.1 of the SASHA over the Promoters' arguments:

> Ultimately, the Tribunal finds that the [Investors'] construction accords with the language used and the [Promoters'] construction does not. Further, the commercial consequences of the [Promoters'] construction appear to be more commercially unrealistic than those of the [Investors]. Accordingly, the Tribunal finds that Clause 19.1 of the SASHA imposes an *absolute* obligation on the Company and the Promoters to find a buyer for the sale of the [Investors'] shares on such terms that the [Investors] receive at least the Exit Price. [emphasis in original]

95 The Promoters' present challenge appears to be a disguised attack on the merits of the Tribunal's view that holding the Company and the Promoters liable to pay the Investors damages in the amount of the Exit Price for breach of cl 19.1 of the SASHA would not "effectively amount" to the Company buying back the Investors' shares. However, any error of law and/or error of fact made by the Tribunal in taking this view would not constitute a ground for setting aside the Award (*BZW* at [60(a)]).

96 Having rejected the Interpretation Limb of the Buy-back Defence, it was open to the Tribunal to consider it unnecessary to address the Unenforceability Limb since the foundational premise of the Unenforceability Limb had already been disposed of (see [82]–[87] above). I infer from the following matters that

this is a likely reason the Tribunal did not expressly address the Unenforceability Limb in the Award.

97 As the exchange between the Tribunal and Mr Poon at the evidentiary hearing (see [70] above) shows, the Tribunal was cognisant that the Investors were seeking the relief of damages and that they undertook to return their shares to the Company upon their receipt of the damages awarded (see the SOC at paras 150–151[103]). In the Award at [474(c)], the Tribunal then summarised the Promoters' objection to such relief, in terms of the Unenforceability Limb of the Buy-back Defence, as follows:

> 474. The [Promoters] also submit that there are flaws in the [Investors'] argument that upon receipt of damages, they undertake to return their shares to the Company as:
>
> …
>
> c. The [Investors'] proposed approach effects a quasi-buy-back of the Company's shares while circumventing statutory pre-conditions including the prohibition of a buy-back of shares by the Company under section 67(1) of the Indian Companies Act 2013.
>
> [footnote in original omitted]

These matters show that the Unenforceability Limb was on the Tribunal's mind.

98 The Tribunal's award of reliefs ultimately included orders that the Company and the Promoters were jointly and severally liable to pay damages to the Investors being the Exit Price as at 18 September 2020, which amount would be reduced to the extent of any net proceeds received by the Investors from a Strategic Sale, with the Investors to surrender all their shares if damages were paid (Award at [804(a)] and [804(b)]).

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[103] Claimants' Affidavit at p 1305: SOC at paras 150–151.

99 I think it unlikely that, after recapitulating the Unenforceability Limb, the Tribunal would have omitted to consider it at all before granting the relief sought by the Investors. The Promoters certainly cannot show a clear and virtually inescapable inference from the Award that this was the case, especially when there is a valid alternative explanation that the Tribunal had considered it unnecessary to address the Unenforceability Limb after the Tribunal's rejection of the Interpretation Limb.

100 To avoid doubt, I place no greater weight on the cited exchange between the Tribunal and Mr Poon at the evidentiary hearing than what I have stated at [97] above. I do not think Mr Poon made the concessions asserted by the Investors and am more inclined to accept the Promoters' explanation of what Mr Poon may have had in mind during the cited exchange (see [72] above).

101 Given my finding that the Tribunal did apply its mind to the Buy-back Defence, I consider it unnecessary to address the Investors' suggestion that the Unenforceability Limb fell outside the scope of the submission to arbitration (see [80] above) or the issue of prejudice. On the former issue, I will confine myself to saying that I do not accept the Promoters' contention that the Unenforceability Limb could not have been raised earlier than in their Reply Closing Submissions. The Investors had already made clear in the SOC at paras 150–151 that they would return their shares to the Company if damages were awarded for the Promoters' breach of cl 19.1 of the SASHA and such damages were paid.[104] This position was then explicitly reiterated by the Investors' counsel at the evidentiary hearing.[105] The Promoters could and should

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104 Claimants' Affidavit at p 1305: SOC at paras 150–151.

105 Claimants' Affidavit at pp 2439–2440: Transcript 22 November 2023 at pp 70:6–10 and 71:1–15.

have raised the Unenforceability Limb in their Statement of Defence, or at the latest, in their Closing Submissions, but failed to do so.

Conclusion on Ground 2

102 I therefore conclude that there is no basis for the Award to be set aside under Ground 2.

Conclusion

103 As I have rejected the Promoters' grounds for setting aside the Award, OA 1033 is dismissed.

104 Unless the parties agree on costs, they should file their written submissions on costs, limited to three pages, within two weeks from the date of this judgment.

Kristy Tan
Judicial Commissioner

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