**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2018] SGHC 275**

HC/OS No 490 of 2016
(HC/SUM No 4497 of 2016)
(HC/SUM No 4499 of 2016)

Between

**BAZ**

… Plaintiffs

And

**(1) BBA**
**(2) BBB**
**(3) BBC**
**(4) BBD**
**(5) BBE**
**(6) BBF**
**(7) BBG**
**(8) BBH**
**(9) BBI**
**(10) BBJ**
**(11) BBK**
**(12) BBL**
**(13) BBM**
**(14) BBN**
**(15) BBO**
**(16) BBP**
**(17) BBQ**
**(18) BBR**
**(19) BBS**

Version No 2: 27 Oct 2020 (22:41 hrs)

**(20) BBT**

… Defendants

HC/OS No 784 of 2016

Between

**(1) BBA**
**(2) BBB**
**(3) BBC**
**(4) BBD**
**(5) BBF**
**(6) BBG**
**(7) BBH**
**(8) BBM**
**(9) BBN**
**(10) BBO**
**(11) BBP**
**(12) BBQ**
**(13) BBR**
**(14) BBS**
**(15) BBT**

… Plaintiffs

And

**BAZ**

… Defendants

HC/OS No 787 of 2016

Between

**(1) BBE**
**(2) BBI**
**(3) BBJ**
**(4) BBK**
**(5) BBL**

… Plaintiffs

And

**BAZ**

… Defendants

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# JUDGMENT

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[Arbitration] — [Award] — [Recourse against award] — [Setting aside]
[Arbitration] — [Enforcement] — [Foreign award]

## TABLE OF CONTENTS

**INTRODUCTION** ..... **1**

**THE ICC ARBITRATION AND THE AWARD** ..... **5**

**ENFORCEMENT PROCEEDINGS IN INDIA** ..... **9**

SUMMARY OF THE DHC JUDGMENT ..... 10

**GROUNDS OF SETTING ASIDE IN OS 784 AND OS 787** ..... **14**

**SUMMARY OF PARTIES' POSITIONS IN OS 784 AND OS 787** ..... **15**

**ISSUE 1: WHETHER THE DOCTRINE OF ISSUE ESTOPPEL ARISES FROM THE DHC JUDGMENT** ..... **16**

GENERAL PRINCIPLES OF ISSUE ESTOPPEL ..... 18

RECOGNITION OF ISSUE ESTOPPEL IN ARBITRATION ..... 20

THE APPROPRIATENESS OF APPLYING ISSUE ESTOPPEL IN THE RELEVANT SCENARIO ..... 22

**ISSUE 2: WHETHER THE EXTENDED DOCTRINE OF *RES JUDICATA* OR WAIVER ARE APPLICABLE** ..... **30**

THE EXTENDED DOCTRINE OF RES JUDICATA IN ARBITRATION ..... 33

THE APPLICATION OF THE DOCTRINE OF WAIVER IN THE CONTEXT OF PUBLIC POLICY OBJECTIONS ..... 37

**ISSUE 3: WHETHER THE MAJORITY HAD EXCEEDED THE POWERS CONFERRED ON THEM BY THE ARBITRATION AGREEMENT** ..... **38**

WHETHER THE MAJORITY AWARDED CONSEQUENTIAL DAMAGES ..... 38

*Parties' submissions* ..... *38*

*Decision on the consequential-loss argument* ..... *45*

WHETHER THE PRE-AWARD INTEREST IS AN AWARD OF MULTIPLE OR PUNITIVE DAMAGES ..... 66

**ISSUE 4: WHETHER TIME LIMITATION IS A JURISDICTIONAL ISSUE ..... 69**

**ISSUE 5: NATURAL JUSTICE ..... 77**

ALLEGED FAILURE TO CONSIDER THE SELLERS' CASE THAT A DISCOUNT RATE SHOULD NOT BE APPLIED ..... 79

ALLEGED FAILURE TO CONSIDER WHETHER TORTIOUS RELIEF COULD BE GRANTED ..... 82

WHETHER THE MAJORITY DEPRIVED THE SELLERS OF THEIR RIGHT TO BE HEARD ..... 86

**ISSUE 6: PUBLIC POLICY ..... 88**

PUBLIC POLICY IN RELATION TO THE NON-MANAGEMENT SELLERS IN OS 784 ..... 91

*Whether the Non-Management Sellers could be bound by the fraudulent misrepresentations ..... 91*

*Proportionality of Award against the Non-Management Sellers ..... 93*

PUBLIC POLICY IN RELATION TO THE MINORS IN OS 787 ..... 96

*Protection of minors ..... 96*

The Buyer's concessions before this court ..... 99

Substantive protection of minors ..... 100

*Proportionality of Award ..... 104*

Procedural protection of minors ..... 104

**CONCLUSION ..... 106**

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# BAZ
# v
# BBA and others and other matters

**[2018] SGHC 275**

High Court — Originating Summons No 490 of 2016 (Summons No 4497 of 2016) (Summons No 4499 of 2016); Originating Summons No 784 of 2016 and Originating Summons No 787 of 2016

Belinda Ang Saw Ean J
9–13 April 2018

21 December 2018 Judgment reserved.

**Belinda Ang Saw Ean J:**

## Introduction

1 The plaintiff in Originating Summons No 490 of 2016 ("OS 490") has obtained leave of Court to enforce an award of 29 April 2016 ("the Award"), which is in excess of S$720 million, as a judgment of the High Court. The *ex parte* leave order dated 18 May 2016, namely HC/ORC 3190/2016, was made pursuant to s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). In opposing the *ex parte* leave order, the defendants in OS 490 filed, amongst them, Summons No 4499 of 2016 and Summons No 4497 of 2016 to set aside HC/ORC 3190/2016. Amongst them, they also filed Originating Summons No 784 of 2016 ("OS 784") and Originating Summons No 787 of



Version No 2: 27 Oct 2020 (22:41 hrs)

2016 ("OS 787") to set aside the Award pursuant to s 24 of the IAA, Article 34(2)(*a*)(iii) and Article 34(2)(*b*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") as set out in the First Schedule to the IAA.

2 For convenience, the plaintiff in OS 490 is hereinafter referred to as the "Buyer". The 1st to 4th, 6th to 8th, 13th to 20th defendants in OS 490 are the plaintiffs in OS 784. The 5th, 9th to 12th defendants in OS 490 are the plaintiffs in OS 787. I will refer to all the defendants in OS 490 and the plaintiffs in OS 784 and OS 787 collectively as the "Sellers". As there are minors involved in these proceedings, whenever it is necessary to distinguish the minors, who are the plaintiffs in OS 787 and the 5th, 9th to 12th defendants in OS 490, the minors shall be collectively referred to as the "Minors" and the rest of the defendants in OS 490 shall be collectively referred to as the "OS 784 Sellers".

3 The OS 784 Sellers are represented by Mr Alvin Yeo SC ("Mr Yeo"). The Minors are represented by Mr Lee Eng Beng, SC ("Mr Lee"). Mr Suresh Divyanathan ("Mr Divyanathan") represents the Buyer. As for the several discrete issues on Indian law in the present case, Mr Harish Salve, SA ("Mr Salve") represents the OS 784 Sellers and the Minors, and Mr Gopal Subramanium ("Mr Subramanium") represents the Buyer.

4 The parties entered into a Share Purchase and Share Subscription Agreement dated 11 June 2008 ("the SPSSA") under which the Buyer purchased shares in an Indian company ("C") that were held by the Sellers in their respective sizes of shareholding (collectively referred to as the "Shares"). It is not disputed that Indian law governs the SPSSA. The SPSSA was completed on 7 November 2008 and the Buyer became the controlling



Version No 2: 27 Oct 2020 (22:41 hrs)

shareholder of C. The SPSSA contains an arbitration agreement (the "Arbitration Agreement"), which is clause 13.14.1 (reproduced at [71] *supra*).

5 In brief, the arbitration arose out of the Sellers' concealment of a September 2004 internal report called the Self-Assessment Report ("SAR") on the improper regulatory transgressions and practices involving false data for submissions to regulatory agencies in several countries. The Buyer said that the SAR was driving foreign government investigations into C's distribution and sales overseas, and there was concealment from the Buyer of the genesis, nature and severity of the investigations that were ongoing at the time of the acquisition of the Shares. The Buyer claimed that the concealment was perpetrated by the Sellers so as to induce the Buyer to buy the Shares at a price that did not reflect their true value.

6 The Award was a decision of a majority ("the Majority") of the three-member tribunal ("Tribunal"). The Majority decided that the Sellers are jointly and severally liable in damages for the harm suffered by the Buyer as a result of the concealment. The Sellers' jurisdictional challenges on the damages and pre-award interest ("Pre-Award Interest") are that the Majority exceeded the powers conferred on the Tribunal by the Arbitration Agreement. Specifically, clause 13.14.1 of the SPSSA provided that "[t]he arbitrators shall not award punitive, exemplary, multiple or consequential damages". Another jurisdictional challenge raised by the OS 784 Sellers pertains to the question of time limitation which is a jurisdictional issue under Indian law.

7 It is not disputed that the Award is a Singapore-seated award. As to the governing law of the Arbitration Agreement, there is no express choice of law governing the Arbitration Agreement. Mr Salve for the Sellers submits that Indian law is the governing law, being the law that has the closest and most real



Version No 2: 27 Oct 2020 (22:41 hrs)

connection with the underlying contract.[1] As Mr Yeo explains, regardless of whether the governing law of the Arbitration Agreement is Indian or Singapore law, the challenge to the Award would be based on Singapore law as the law of the seat of the arbitration. To this end, given that the proper law of the SPSSA is Indian law, this court accepts that the implied choice of law of the Arbitration Agreement is Indian law in the absence of any contrary intention of the parties, applying *BCY v BCZ* [2017] 3 SLR 357. The Indian law issues are, *inter alia*, premised on Indian law as the governing law of the Arbitration Agreement and relevant aspects of Indian law would have to be adduced in evidence as facts for this court's determination in the setting aside proceedings. This court agrees that the question as to whether HC/ORC 3190/2016 giving leave to enforce a Singapore award as a High Court judgment should be set aside or whether the Award should be set aside based on s 24 of the IAA and Article 34 of Model law is a matter of Singapore law as the law of the country where the Award was made.

8 Mr Lee for the Minors claim that although Indian law, being the substantive law of the SPSSA, should be used to construe the Arbitration Agreement, Singapore law might still have some relevance to the construction of the Arbitration Agreement because Indian law stipulates that the law of the seat should govern the interpretation of an arbitration agreement.[2] This proposition is curious since Mr Salve, also acting for the Minors, has accepted that Indian law is the governing law, without acknowledging the correctness of the proposition. The determination of the governing law of an arbitration agreement is a matter for Singapore law, being that of the curial court which is

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1 Notes of Evidence ("NE") Day 1 at p 122.

2 Plaintiffs' (Minors') Skeletal Submissions at para 29.



Version No 2: 27 Oct 2020 (22:41 hrs)

adjudicating the current setting aside proceedings (OS 784 and OS 787) and enforcement proceedings (OS 490).

9 I take the background facts largely from the Award.

**The ICC Arbitration and the Award**

10 The Award consists of 374 pages. I propose to summarise the details that illuminate the issues in the present applications. I start with the facts of the case and the findings of facts by the Majority that are not challenged. I will then touch on the Majority's decision that is the subject matter of the setting aside proceedings.

11 As stated, the underlying dispute between the parties concerns the SPSSA whereby the Buyer acquired a controlling stake in C. The warranties and representations given by the Sellers were limited. In the same vein, the sale price of the Shares reflected to a certain extent the ongoing investigations into C by regulators and authorities in the United States of America. Whilst it was agreed that the Buyer was aware of the investigations throughout the period of negotiations, signing and completion of the SPSSA, the parties disagreed as to the Buyer's knowledge of the source, extent and severity of the investigations that were being pursued in the USA at the time the Buyer entered into the SPSSA. The severity concerned the prospect of C facing criminal liability.[3] After the Buyer took over C, the Buyer settled with the regulator in the USA on 13 May 2013 by paying a sum of money ("the Settlement Sum"). Subsequently, the Buyer entered into a share exchange (the "Share Swap") with another company for its shares ("the Swapped Shares"), in the ratio of one C share for

[3] NE Day 4 at p 32.



Version No 2: 27 Oct 2020 (22:41 hrs)

0.8 of that company's share. This Share Swap transaction was announced on 6 April 2014 and was completed on 25 March 2015.

12 The Buyer commenced arbitration proceedings against the Sellers on 14 November 2012. The Buyer's primary claim in the arbitration was that the Sellers had concealed the SAR that was driving the investigations in the USA on the improper regulatory transgressions and practices involving false data for submissions to regulatory agencies in several countries, thereby fraudulently misrepresenting the level of risks posed by the investigations. The Buyer said that there was concealment from the Buyer of the genesis, nature and severity of the investigations. The Buyer claimed that the concealment was perpetrated by the Sellers so as to induce the Buyer to buy the Shares at a price that did not reflect their true value. It was averred that the concealment constituted fraud under the Indian Contract Act 1872 (Act No 9 of 1872) (India) ("Indian Contract Act") and that but for the fraud, the Buyer would not have entered into the SPSSA. The Buyer did not seek rescission of the SPSSA but relied on s 19 of the Indian Contract Act to seek damages that would put it in the same positon as if the representation had been true. The Buyer also sought pre-award and post-award interests.

13 The Majority found that the elements of s 17 of the Indian Contract Act had been satisfied and that the Sellers were liable for fraudulently misrepresenting or concealing from the Buyer the genesis, nature and severity of C's regulatory problems. The Majority held that the Buyer would not have bought the Shares had it known of the SAR, but also found that the Buyer did not seek to avoid the SPSSA, so the second limb of s 19 of the Indian Contract Act applied. Section 19 states:

> **19. Voidability of agreements without free consent:–** When consent to an agreement is caused by coercion, fraud or



Version No 2: 27 Oct 2020 (22:41 hrs)

> misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> *A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.*
>
> [emphasis added]

14 The Majority stated that it was "not disputed" that under Indian law, the measure of damages recoverable under the second limb of s 19 of the Indian Contract Act would be similar to those recoverable for fraudulent misrepresentation under general tort principles. In this regard, the Majority relied on the Gujarat High Court decision in *R C Thakkar v Gujarat Housing Board* AIR 1973 Guj 34 ("*RC Thakkar (HC)*") and the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 ("*Smith New Court*"). The Majority noted that both parties accepted the principles in *Smith New Court*, though they disagreed on how the principles applied to the facts. Finally, damages were directed at restoring the Buyer to its position pre-acquisition, in order to put the Buyer back in the monetary position it would have been had the wrong not been committed. That said the Majority, being mindful that damages awarded must not be contrary to the prohibition on "punitive, exemplary, multiple or consequential damages", benchmarked the sum awarded against alternative methods of calculation. Liability for damages was joint and several amongst all the Sellers, with no distinction made with respect to the Minors or the size of the respective shareholding of each seller.

15 The Sellers also advanced the argument before the Tribunal that the claim was time-barred. They submitted that the Buyer could have discovered the concealment of the SAR with reasonable diligence following multiple events spanning from October 2008 to April 2009, especially from the meeting



Version No 2: 27 Oct 2020 (22:41 hrs)

on 11 March 2009 during which a person in a senior leadership position in the Buyer[4] was informed that the USA authorities were in possession of the SAR. Thus, the commencement of arbitration was after the three-year limitation period provided for under the Indian Limitation Act 1963 (Act No 36 of 1963) (India) ("Indian Limitation Act"). On the other hand, the Buyer's case was that it only became aware of the concealment of the SAR on 19 November 2009, so the commencement of arbitration on 14 November 2012 was within the limitation period. The Majority made a finding of fact that notwithstanding the meeting on 11 March 2009, the Buyer had acted with reasonable diligence in the entire context and could not have discovered the SAR before 19 November 2009 without having to take exceptional measures which it could not reasonably have been expected to take.

16 For completeness, the dissenting member of the Tribunal held that the evidence fell short of establishing the allegation of fraud or fraudulent conduct or fraudulent concealment beyond reasonable doubt. The dissenting member also found the claim to be time-barred: the Buyer had concrete knowledge of the SAR latest by March 2009, and even otherwise, with reasonable diligence could have discovered the SAR by then. In any case, the Buyer could have instituted legal proceedings before the discovery of the SAR, when it realised that the problem faced by C was severe. The dissenting member further held that because the Buyer chose to continue with the execution and performance of the SPSSA, it ratified the contract thereby extinguishing its right to avoid the contract as well as to the consequential remedy to claim compensation or damages.

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4 Award at [307] and [729].



Version No 2: 27 Oct 2020 (22:41 hrs)

**Enforcement proceedings in India**

17 The Buyer commenced simultaneous proceedings for leave to enforce the Award as a court judgment in New Delhi and in Singapore on 17 May 2016. The Sellers opposed the Buyer's enforcement proceedings. In Singapore, the Sellers applied to set aside HC/ORC 3190/2016 on 15 September 2016. Both OS 784 and OS 787 to set aside the Award were filed on 3 August 2016.

18 As it transpired, the enforcement proceedings in India went ahead of the Singapore proceedings. Before the New Delhi High Court ("the DHC"), the parties on both sides stated that the pendency of the proceedings in Singapore would not in any manner prevent the DHC from adjudicating the enforcement proceedings in India. The DHC reserved judgment on 6 September 2017, and pronounced judgment on 31 January 2018 ("the DHC Judgment"). The DHC refused to enforce the Award against the Minors on the ground of public policy but allowed enforcement of the Award against the OS 784 Sellers. The OS 784 Sellers applied for leave to appeal against the DHC Judgment but the Supreme Court of India declined to interfere with the DHC Judgment and dismissed the Special Leave Petitions on 16 February 2018.

19 Even though the DHC has refused to enforce the Award against the Minors, their application in OS 787 is for this court to exercise its supervisory power to set aside the Award against them under Art 34(2)(*b*)(ii) of the Model Law. Logically speaking, if the Award is set aside on the jurisdictional challenges in OS 784, not only would OS 787 become moot, the Award against the Minors would fall away.



Version No 2: 27 Oct 2020 (22:41 hrs)

***Summary of the DHC Judgment***

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

21 After hearing the parties' submissions, Nath J allowed the enforcement of the Award against the Sellers, except for the Minors, and held the following:

> (a) With regard to issue (a), the enforcement of a foreign award could only be refused under s 48(2)(b) of the Arbitration and Conciliation Act 1996 (No 26 of 1996) (India) ("Indian Arbitration Act") if such enforcement was found to be contrary to (a) fundamental policy of India law; (b) the interests of India; and (c) justice or morality. Fundamental policy of Indian law did not mean provisions of statute but substratal principles on which Indian law was founded. The damages awarded was within the ambit of section 19, and thus did not shock the conscience of the court.
>
> > (i) The Majority was entitled to rely on the Supreme Court decision in *Trojan & Co v Nagappa Chettiar* 1953 AIR 235 ("*Trojan*") which held that pursuant to s 19, in the case where a contract was not avoided, it has to be determined whether the goods handed over to the plaintiff were an equivalent for the money paid or to what extent they fell short of being the



Version No 2: 27 Oct 2020 (22:41 hrs)

equivalent. Based on *Trojan*, *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, and *Smith New Court*, a court while awarding damages under the second limb of s 19 would have to take care to award reasonable compensation to ensure that the plaintiff was put in the position he would have been if the representation had been true, *ie*, to put the Buyer in the same position as in 2008 when it bought the Shares, had there been no SAR in existence (at [62]). The loss awarded must be a natural and direct consequence of the illegal acts done by the defendant. Remote damages suffered cannot be awarded. The plaintiff would have a duty to mitigate the damages.

(ii) The Majority relied on *RC Thakkar (HC)* in finding that the damages recoverable by a party defrauded under s 19 of the Indian Contract Act would be similar to those recoverable for fraudulent misrepresentation under general tort principles. *RC Thakkar (HC)* was contrary to the judgment in *Gaurav Monga v Premier Inn India Pvt Ltd & Ors* (2017) 237 DLT 67 where it was held that a case seeking damages on fraud and misrepresentations would be covered by s 19 of the Indian Contract Act and no claim for damages can be maintained under the law of torts. *RC Thakkar (HC)* was overruled only on the findings of facts that fraud had been committed. This controversy is irrelevant because the Majority stated that the Buyer was entitled to be put back in the position it would have been, had the wrong not been committed, *ie*, if the representations were true. This means that the Majority had kept in mind s 19 of the Indian Contract Act (at [50]).



Version No 2: 27 Oct 2020 (22:41 hrs)

(iii) With regard to the calculation of the damages, the various factors that would have to be taken into account, which was necessarily a fact-based enquiry, and whether damages should be computed by using one or another formula would be within the domain of the arbitral tribunal (*McDermott International Inc. v Burn Standard Co. Ltd and Ors* (2006) 11 SCC 181) (at [64] and [65]).

(iv) A simple mathematical calculation between what the Buyer paid for the Shares and what it received as benefits showed that it did not suffer a loss. However, the Majority rejected this, pointing out that there are other aspects including reputational issues, the opportunity cost of six years of the Buyer not entering into other business opportunities, diminution in C's dividends, and the onerous costs faced by C in addressing the USA investigations including the settlement money paid (at [61]).

(v) The various factors to be taken into account on the facts and circumstances, and the method of calculation are within the domain of the Tribunal. It was not possible to come to a conclusion that the computation done by the Majority was in complete breach of statutory provision or was contrary to the fundamental policy of Indian law (at [70]).

(vi) Keeping in mind the legal position that the Buyer had to be put in the position had there been no SAR in existence, the Majority concluded that using the Share Swap transaction was more workable than the approach suggested by the Sellers and quantified the damages by discounting the amount received from



Version No 2: 27 Oct 2020 (22:41 hrs)

the Share Swap by the Buyer's weighted average cost of capital ("WACC") rate of 4.44% (at [62] and [63]).

(b) On issue (b), Nath J rejected the Sellers' objection that the Award granted consequential damages which were beyond the jurisdiction of the Tribunal (see [79] below).

(c) On issue (c), the enforcement of the Award could not be refused on the basis that the Buyer's claim was barred by limitation (at [99]–[101]) (see [123] below).

(d) On issue (d), the award of interests was neither outside the Tribunal's jurisdiction nor in violation of the public policy of India.

(i) Clause 13.14.4 in the SPSSA provided for the award of interest from the date of the breach at such rate as specified by the Tribunal.

(ii) Having awarded the Pre-Award Interest as per the SPSSA, the Award could not be held contrary to the public policy of India.

(iii) It could not be said to be a case of multiple damages by awarding interest from the date of the breach to the Award, relying on *Hyder Counsulting (UK) Ltd v Governor, State of Orissa* (2015) 2 SCC 189 and *Renusagar Company Limited v General Electric Company* 1994 Supp 1 SCC 644.

(e) Finally, the Award as against the Minors could not be enforced because it was against the public policy of India (see [172] below).



Version No 2: 27 Oct 2020 (22:41 hrs)

**Grounds of setting aside in OS 784 and OS 787**

22 The Sellers seek to set aside the Award on the following grounds:

(a) the award of damages, in itself and/or collectively with the grant of Pre-Award Interest, is beyond the scope of the jurisdiction of the Tribunal, so the Award should be set aside pursuant to Art 34(2)(*a*)(iii) of the Model Law;

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

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

(d) the Award against BBB, BBD, BBG, BBH and BBM in OS 784 ("the Non-Management Sellers") is against the public policy of Singapore because they should not be bound by the fraudulent misrepresentation of BBA, and the Award is disproportionate to their respective sizes of shareholding in C, so it should be set aside as against them pursuant to Art 34(2)(*b*)(ii) of the Model Law; and

(e) the Award against the Minors is against the public policy of Singapore because it is against the interests and welfare of the Minors



Version No 2: 27 Oct 2020 (22:41 hrs)

and is disproportionate, so it should be set aside as against them pursuant to Art 34(2)(*b*)(ii) of the Model Law.

23 The outcome of OS 784 and OS 787 will effectively dispose of Summons No 4497 of 2016 and Summons No 4499 of 2016 filed in OS 490.

**Summary of parties' positions in OS 784 and OS 787**

24 The Buyer's case is as follows:

(a) the Sellers are precluded on the basis of issue estoppel from litigating the jurisdictional challenges against the damages and Pre-Award Interest because they have already been canvassed before the DHC and decided by the DHC;

(b) the Sellers are precluded on the basis of the extended doctrine of *res judicata* and waiver from raising the jurisdictional challenges against the damages and Pre-Award Interest, as well as their challenge as to the Majority's reliance on *RC Thakkar (HC)* because the challenges should have been raised before the Tribunal;

(c) the damages and Pre-Award Interest are not outside the jurisdiction of the Tribunal;

(d) the Sellers cannot revisit the issue of time limitation because the merits of an Award cannot be reviewed;

(e) there is no breach of natural justice;

(f) the Award against the Non-Management Sellers does not violate the public policy of Singapore; and



Version No 2: 27 Oct 2020 (22:41 hrs)

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

25 The OS 784 Sellers' counter arguments in broad terms are as follows: (a) they are not estopped from arguing that the Majority exceeded their jurisdiction in relation to the award of consequential damages and Pre-Award Interest; (b) the extended doctrine of *res judicata* does not preclude the them from raising the jurisdictional challenges; and (c) the allegation of waiver of the right to raise the jurisdictional challenges is misconceived. The Sellers reiterated that there is a breach of natural justice as the Majority did not apply their minds to the fact that the Sellers disputed the application of a discount rate to the benefit received by the Buyer, that time limitation is a jurisdictional issue under Indian law, and that the Award should be set aside on the ground of public policy. The Minors raised the same counter argument that they were not issue estopped by virtue of the DHC Judgment to bring the jurisdictional challenge, and also emphasised that the Award should be set aside as against them on the ground of public policy.

**Issue 1: Whether the doctrine of issue estoppel arises from the DHC Judgment**

26 As stated, in response to Nath J's query, both parties said that the pendency of the proceedings in Singapore would not in any manner prevent the DHC from adjudicating the enforcement proceedings (see [18] *supra*), so the DHC went ahead with the proceedings and issued a decision before the Singapore proceedings were heard. For the OS 784 Sellers, this creates the situation where a foreign judgment enforcing an award is obtained before the seat court can decide on whether to set aside the award.



Version No 2: 27 Oct 2020 (22:41 hrs)

27 This sets the context of the Buyer's submission on issue estoppel – the Buyer argues that the DHC Judgment should give rise to issue estoppel against the same issues brought by the Sellers before this court, as the DHC Judgment is a final and conclusive judgment of a competent court. Issue estoppel should apply to preclude the following issues which have been decided by the DHC and are before this court: whether the damages awarded are consequential damages and whether the Pre-Award Interest awarded constitutes multiple or punitive damages, both of which would be beyond the Tribunal's jurisdiction.[5] Mr Subramanium points out that what is being argued before this court has been argued *verbatim* before the DHC and dealt with by the DHC.[6]

28 Disagreeing with the Buyer, the Sellers' position is that the doctrine of issue estoppel has no place in an arbitration framework where the seat court has primacy in the review of an award. Their fall-back position is that even if a ruling of an enforcement court may be the subject of issue estoppel, the legal requirements of issue estoppel are not satisfied in the present case because there is no identity of issues between those decided in the DHC Judgment and those before this court.

29 During oral closing submissions, Mr Subramanium qualifies the Buyer's position in stating that the DHC Judgment and the dismissal by the Supreme Court of India do not give rise to "res judicata in the traditional sense", but have "persuasive influence".[7] He agrees that it would be inappropriate for the Buyer to argue that the DHC Judgment is binding on the court of the seat to preclude scrutiny.[8] This seems to amount to a concession on the Buyer's behalf that issue

[5] Buyer's Reply Skeletal Arguments dated 5 April 2018, paras 21.4 and 23.

[6] NE Day 4 at p 122.

[7] NE Day 4 at p 121.

[8] NE Day 3 at p 47.



Version No 2: 27 Oct 2020 (22:41 hrs)

estoppel does not apply. In addition, it may be of some significance that both parties agreed for the Indian proceedings to go ahead regardless of the pendency of the proceedings before the seat court. But since parties did not raise this point, I say no more about it. On the other hand, it is unclear whether there has been a concession because it is uncertain what Mr Subramanium means by "res judicata in the traditional sense". Moreover, Mr Subramanium is before this court to submit on Indian law, so it is unclear whether his concession, if any, would bind the Buyer on this issue which is to be determined by Singapore law, when Mr Divyanathan, who is the Buyer's Singapore counsel, has submitted for the application of issue estoppel both in writing and orally.

***General principles of issue estoppel***

30 To establish issue estoppel, the following four conditions must be satisfied (*Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 at [14] and [15]; *The Sennar (No 2)* [1985] 1 WLR 490 at 499):

(a) There is a final and conclusive judgment on the merits;

(b) The judgment has to be by a court of competent jurisdiction;

(c) There has to be identity between the parties to the two actions that are being compared; and

(d) There must be identity of subject matter in the two proceedings.

31 The English Court of Appeal in *The Good Challeng*e [2004] 1 Lloyd's Rep 67 in reviewing the authorities held that there are four further considerations in the approach of the English courts to issue estoppel (at [54]):



Version No 2: 27 Oct 2020 (22:41 hrs)

(a) It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.

(b) The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.

(c) The decision of the court must be necessary for its decision.

(d) The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice.

32 Underlying the principle is that litigants should not be twice vexed in the same matter, and that the public interest requires finality in litigation (*The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [98] and [100]).

33 Although the application of issue estoppel to foreign judgments is clear under Singapore law, the application of issue estoppel to re-litigation of identical issues in different fora in the context of arbitration is less than clear. The present case concerns proceedings before a seat court in which issue estoppel arising from a judgment of a foreign enforcement court is argued ("the Relevant Scenario"). I will confine my discussion to this scenario.

34 In Singapore, international arbitration is governed by the IAA, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the Model Law. Taken



Version No 2: 27 Oct 2020 (22:41 hrs)

together, they govern judicial control over Singapore-seated arbitrations, the setting aside of Singapore-seated awards, and the recognition and enforcement of all international arbitration awards. In this context, I will first examine whether application of issue estoppel is recognised under the IAA, the New York Convention and the Model Law, and whether its application in the Relevant Scenario is coherent with the principles underpinning the IAA, the New York Convention and the Model Law.

### *Recognition of issue estoppel in arbitration*

35 There is no article under the New York Convention or the Model Law, and no section under the IAA that provides for the application of the doctrine. Under the New York Convention, the only provision that suggests the possibility of applying the doctrine of issue estoppel is Art V(1)(*e*). It states:

> *Article V*
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that –
>
> …
>
> (*e*) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

36 Although Art V(1)(*e*) is phrased in permissive language (the word "may" is used) and does not dictate the application of issue estoppel, the article does refer the enforcement court applying Art V to the decision of the seat court in setting aside the award. Arguably because of the reference the article makes to a foreign judgment, it contemplates the application of issue estoppel.



Version No 2: 27 Oct 2020 (22:41 hrs)

37 The doctrine may be applied as part of the residual domestic law applicable in setting aside or enforcement proceedings. It has been recognised in the *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (United Nations, 2016) ("*2016 New York Convention Guide*") at para 8 that the New York Convention does not operate in isolation – in some circumstances, "other international treaties, or the domestic law of the country where enforcement is sought, will also apply to the question of whether a foreign arbitral award should be recognized and enforced". Although Art 5 of the Model Law stipulates that "[i]n matters governed by [the Model Law], no court shall intervene except where so provided in this Law", in the interpretation of Art 5, "what was not governed by it must be governed by the other rules of domestic law" since no text for the unification of law was complete in every respect (*Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session* (A/40/17, 3–21 June 1985) (*"1985 UN Commission Report"*) at para 61). Neither the New York Convention nor the Model Law dictates how a court goes about deciding whether a ground under Art V or Art 36 has been established. There is no article on the preclusion of claims arising from a prior enforcement proceeding. With regard to Art 34, there is also no indication of such a matter being addressed in the preparatory materials (see *1985 UN Commission Report* or the *Summary Records for meetings on the UNCITRAL Model Law on International Commercial Arbitration* reproduced in the Yearbook of the United Nations Commission on International Trade Law, 1985, vol XVI at pp 399–510 (A/CN.9/SR.317–319, 324, 330–331, 333)). Thus, the domestic law on the area of preclusion arising from a prior enforcement judgment, on which the New York Convention and the Model Law are silent, could apply to supplement these instruments.



Version No 2: 27 Oct 2020 (22:41 hrs)

***The appropriateness of applying issue estoppel in the Relevant Scenario***

38 There are differing views on whether issue estoppel should be applicable in setting aside proceedings to preclude a party from re-litigating issues already decided in a prior foreign enforcement proceeding, and the law in this area is underdeveloped and remains unsettled.

39 The cases and commentaries cited by parties are all on the converse situation of issue estoppel arising from the judgment of a seat court. One example is *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ("*Dallah*"). In the English Court of Appeal decision ([2009] EWCA Civ 755), Moore-Bick LJ was of the view that "a decision of the supervisory court may finally determine such questions and thereby itself create an estoppel by record" (at [56]). In the same judgment, Rix LJ stated that a successful challenge in the seat court is not only in itself a potential defence under the New York Convention or the UK statutes, but "likely also to raise an issue estoppel". An issue estoppel may also arise similarly from an unsuccessful challenge (at [90]). Where an award was improperly set aside in the seat court, Rix LJ thought that the improper circumstances would have to be brought home to the court asked to enforce in such a way as either to destroy the defence based on Art V(1)(*e*), or to prevent an issue estoppel arising out of the judgment of the seat court (at [91]). In the Supreme Court judgment in *Dallah*, Lord Collins held that "in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought" (at [98]). The *dicta* by Rix LJ and Lord Collins have been referred to by the Singapore Court of Appeal decision in *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 ("*Astro*") at [75]. The Singapore Court of Appeal



Version No 2: 27 Oct 2020 (22:41 hrs)

stated that it saw no reason to regard the Model Law as any different, in so far as these *dicta* accurately describe the New York Convention.

40 Another such decision is the Australian Federal Court case, *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, as cited by Mr Lee for the Minors. In that case, the seat court (the English court) has decided that there was no breach of natural justice in that the parties had been given a reasonable opportunity to present their case at the arbitration. Before the Australian court, the party resisting enforcement raised the same natural justice point again. The other party argued issue estoppel arose from the English decision. The Australian court found that there was no breach of natural justice, so it was strictly unnecessary to deal with issue estoppel, and it did not propose to attempt a resolution of the issue. Nevertheless, the court commented that Foster J, who was the primary judge in the court below, at the very least "was correct to hold that it will generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration" (at [65]).

41 The Buyer relies on *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR(R) 1 ("*Newspeed*") to show the stance against double attempts in litigation taken by the Singapore High Court. In that case, the High Court held that a party could either apply to the seat court to set aside the award or resist enforcement in a foreign enforcement court, and that these two remedies were alternatives, and not cumulative (at [28]). The correctness of this decision is in doubt given the ruling of the Court of Appeal in *Astro* that the Model Law provides for a system of "double-control" (at [75]). Although the holding in *Newspeed* is doubtful, the decision was driven by the notion that a party should not have two bites at the cherry (at [26]). In any case, the Singapore court was



Version No 2: 27 Oct 2020 (22:41 hrs)

an enforcement court considering the effect of the prior decision of the seat court. The case thus provides little support as to whether issue estoppel should be applicable in the Relevant Scenario.

42 In response, the Sellers cited Gary Born, *International Commercial Arbitration* vol 3 (Kluwer Law International, 2nd Ed, 2014) for the position that issue estoppel should not apply. However, it is not clear that Gary Born has taken a conclusive stance. In his commentary, Gary Born recognises that there is "a substantial argument that, where the parties have litigated the applicability of these exceptions in one national court, they should be bound by the results in other recognition forums" (at para 27.02[D]). On the other hand, "there is also a substantial argument that the [New York] Convention imposes independent international obligations on Contracting States to recognize awards in accordance with the Convention's terms, regardless whether other national courts have failed to do so. If the courts of one Contracting State refuse to recognize an award, based upon an incorrect application of the Convention, that does not justify or excuse other Contracting State's wrongful non-recognition of the same award." He justifies the latter position on the basis of the "summary character of recognition proceedings, which makes the expenditure of judicial and other resources acceptable". These opinions are in the context of recognition and enforcement proceedings, and may not apply to the Relevant Scenario.

43 I make brief mention of the English case of *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm) ("*Diag*") where issue estoppel was unequivocally applied. It was likewise not a case falling within the Relevant Scenario – it involved proceedings before an enforcement court where issue estoppel was held to arise from a prior judgment of a foreign enforcement court (at [59]). Chief Justice Sundaresh Menon speaking extra-judicially in a speech



Version No 2: 27 Oct 2020 (22:41 hrs)

delivered at the Chartered Institute of Arbitrators Centenary Conference on 2 July 2015, expressed approval of *Diag*, and said that recognising issue estoppel arising from a foreign enforcement judgment "seems eminently sensible, both from the perspective of harmonising the treatment of awards and perhaps even more importantly, the overarching public policy of finality". I note that *Diag* does not concern the Relevant Scenario.

44 There is one judicial commentary on the application of issue estoppel in the Relevant Scenario, and that is the *obiter dicta* by Lord Mance in *Dallah*, who remarked that whilst the question whether an arbitral award is binding in France, the seat court, could only be decided by the French courts, "an English judgment holding that the award was not valid could prove significant in relation to such proceedings, if the French courts recognise any principle similar to the English principle of issue estoppel" (at [29]).

45 I begin with the supervisory powers of the seat court and the seat court's primacy in reviewing an award. This primacy forms the basis for Art V(1)(*e*) and Art VI of the New York Convention, and s 31(5) of the IAA. Art V(1)(*e*) of the New York Convention (see [35] *supra*) provides that recognition or enforcement of an award may be refused where it has been set aside by the seat court. Article VI complements Art V(1)(*e*), by allowing the authority, before which enforcement of an award is sought, to adjourn the decision on the enforcement if an application for the setting aside or suspension of the award has been made to the seat court. A similar mechanism exists under the IAA, as provided for by s 31(5). In contrast, there is no similar provision directing a seat court to consider a judgment from a foreign enforcement court. Thus, Art V(1)(*e*) and Art VI of the New York Convention, along with s 31(5) of the IAA, show that a certain level of primacy is given to the judgment of the seat court. The judicial opinions in support of the application of issue estoppel in the



Version No 2: 27 Oct 2020 (22:41 hrs)

converse situation of an enforcement court considering a judgment of the seat court (at [39] and [40] *supra*) also support the primacy accorded to the seat court.

46 There is no indication in the preparatory materials that issue estoppel arising from a prior foreign enforcement judgment should apply in the setting aside proceeding before a seat court. The commentary on Art VI in the *2016 New York Convention Guide* (at p 264) explains that in the context of parallel proceedings, Art VI "achieves a compromise between the two equally legitimate concerns of promoting the enforceability of foreign arbitral awards and preserving judicial oversight over awards by granting courts of Contracting States the freedom to decide whether or not to adjourn enforcement proceedings". Further, "the drafters of the [New York] Convention sought to ensure that a party wishing to frustrate the enforcement of an award could not circumvent the Convention by simply initiating proceedings to set aside or suspend the award, while at the same time limiting the risk that an enforced award would be subsequently set aside in the country in which it was made". Art VI recognises the judicial oversight of each enforcement state by giving it the discretion to decide whether to grant a stay in favour of setting aside proceedings before the seat court. In pointing out the risk of an enforced award being subsequently set aside, the *2016 New York Convention Guide* did not envision the application of issue estoppel arising from the enforcement judgment in the subsequent setting aside proceeding.

47 On the other hand, it could be said that the doctrine of issue estoppel promotes finality in litigation between the parties. The importance of finality is reflected in resolution 40/72 giving rise to the Model Law, in which the General Assembly recognized "the value of arbitration as a method of settling disputes arising in international commercial relations" in a manner that contributes to



Version No 2: 27 Oct 2020 (22:41 hrs)

"harmonious international economic relations" (*Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law* (A/RES/40/72, 11 December 1985) at preamble). On one view, finality is important in achieving efficiency and harmonious relations: the enforcement of an award could be sought in multiple jurisdictions, and if each jurisdiction chooses to look at each issue argued by the parties anew, there could be continuous prolonged litigations, at the expense of arbitration being an efficient dispute resolution mechanism and facilitating harmonious economic relations. However, this consideration of finality does not feature as strongly in the Relevant Scenario, because the seat court is the only court that has the power to set aside an award. The consideration of finality applies more strongly where the seat court has decided whether to set the award aside.

48 Another possible point in favour of the application of issue estoppel is the conscious decision to align the grounds under Art 34 with those for refusing enforcement or recognition under Art 36 and under the New York Convention. The inference may be that the seat court and the enforcement courts are equally qualified in examining the grounds. Although various amendment proposals to Art 34 were discussed, the substance of the grounds was not altered (Sundaresh Menon, *Arbitration in Singapore A Practical Guide* (Sweet & Maxwell, 2014) at para 14.014). This was driven by the consideration that the alignment would facilitate international commercial arbitration by enhancing predictability and expeditiousness and would go a long way towards establishing a harmonised system of limited recourse against awards and their enforcement (*Report of the Working Group on International Contract Practices on the Work of its Fifth Session* (A/CN.9/233, 22 February–4 March 1983) at para 187). The Secretariat commented that the alignment was desirable in reducing the impact of the place of arbitration, and it gives recognition to the fact that both provisions (Art 34



Version No 2: 27 Oct 2020 (22:41 hrs)

and Art 36) form part of the alternative defence system which provides a party with the option of attacking the award or invoking the grounds when recognition or enforcement is sought. The Secretariat further opined that the alignment avoids the problem of having awards which are void in the country of origin but valid and enforceable abroad (*Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/264, 25 March 1985) ("*Analytical Commentary*") at pp 72 and 73). The alignment of grounds calls for the uniformity of judgments across all jurisdictions, but in my view, this does not translate to a need for the application of issue estoppel to achieve uniformity.

49 Despite the alignment of the grounds, the New York Convention and the Model Law still provide for a certain level of primacy to be accorded to the seat court as explained above at [45]. The instruments provide a mechanism for the seat court to decide whether to set aside an award first, and direct the enforcement court to give regard to the judgment of the seat court in setting aside an award. The primacy and the judicial oversight of the seat court is not entirely taken away by the alignment of the grounds. This is even more so, given that there may be differences in the applications of the grounds in the seat court and in an enforcement court. This has been acknowledged by the Secretariat, which stated, for example, that the application of the grounds under Art 34(2)(*a*)(i), Art 34(2)(*a*)(iv) and possibly Art 34(2)(*a*)(iii) may be limited by virtue of an application of an implied waiver pursuant to Art 4 of the Model Law (*Analytical Commentary* at p 73).

50 It is plain that issue estoppel would not arise with regard to the grounds of arbitrability and public policy under Art 34(2)(*b*)(i) and Art 34(2)(*b*)(ii) of the Model Law respectively, because the public policy and the test for arbitrability are unique to each state. Therefore, there would be no identity of



Version No 2: 27 Oct 2020 (22:41 hrs)

subject matter even if the ground of arbitrability or public policy has been raised before a different court.

51 Besides arbitrability and public policy grounds, I am of the view that where the ground of challenge attracts a *de novo* review from the seat court, the determination by the seat court should be given primacy, and the seat court would be slow to recognise the determination of a foreign enforcement court as giving rise to issue estoppel. A *de novo* review calls upon the seat court to examine the award and the evidence in detail with a view to setting aside the award if the challenge succeeds.

52 The present case concerns a *de novo* review of the award in the face of jurisdictional challenges to the powers of the Tribunal. Given the essence of the challenges, I am of the view that issue estoppel should not feature. Nevertheless, the decision of the Indian enforcement court may have persuasive effect, especially because the proper law of the Arbitration Agreement is Indian law. Mr Yeo clarifies that his position is not to deny this court from looking at the DHC Judgment,[9] and Mr Salve agrees that it may be persuasive.[10] I will refer to the relevant portions of the DHC Judgment where necessary when addressing the different claims made. This approach would not erode the primacy and judicial supervision of the seat court over the arbitral award.

53 I pause here to note Mr Lee's submission for the Minors that Indian law takes the law of the seat court to be the law applicable to the construction of arbitration agreements (see [8] *supra*). This may be significant to the question of issue estoppel – if the governing law of the Arbitration Agreement is different under Singapore law and Indian law then the factors considered would be

9 NE Day 3 at p 47.

10 NE Day 3 at p 50.



Version No 2: 27 Oct 2020 (22:41 hrs)

different and there would no issue estoppel arising from the DHC Judgment in the first place. However, no argument has been advanced on this point by any party and I say no more about it.

**Issue 2: Whether the extended doctrine of *res judicata* or waiver are applicable**

54 The Buyer submits that the Sellers should be precluded from raising arguments that could and should have been raised in the arbitration based on the extended doctrine of *res judicata*. The Buyer also alleges that the Sellers have waived their rights to raise any jurisdictional challenge on the basis of Art 16(2) of the Model Law. Reliance is also placed on Art 6(3) of the International Chamber of Commerce Rules of Arbitration 2012 ("ICC Rules 2012"), pursuant to which the parties agreed to conduct the arbitration, which provides that "any question of jurisdiction … shall be decided directly by the arbitral tribunal". This reliance on Art 6(3) is misplaced, because the provision does not govern the issue of waiver or preclusion to begin with.

55 The Buyer claims that the Sellers could and should have raised the following points in the arbitration but failed to do so:[11]

> (a) The objection that the methodology used by the Majority in assessing and computing damages resulted in an award of consequential damages that was in excess of the Tribunal's jurisdiction should have been raised in the arbitration. Instead, in the arbitration, counsel for the Sellers agreed that the principle in *Smith New Court* applied to the assessment of damages and made submissions on the applicability of a discount rate to the benefits received by the Buyer. The use of the

[11] Buyer's closing submissions at para 86.



Version No 2: 27 Oct 2020 (22:41 hrs)

Buyer's WACC rate as the discount rate was suggested by the Sellers' expert.

(b) The objection that the Pre-Award Interest awarded resulted in an award of punitive, exemplary, multiple or consequential damages that was in excess of the Tribunal's jurisdiction should have been raised. Instead, the Sellers acknowledged during the arbitration that the Tribunal had the discretion to award interests.

(c) The objection that the Majority should not have relied on *RC Thakkar (HC)* when it was overruled by the Supreme Court of India should have been raised.

56 The Buyer also submits that the Minors have waived their public policy objection that the Award is against their interests or welfare because they did not raise the concern during the arbitration though they could have done so. In so arguing, the Buyer relies on Art 16(2) of the Model Law and Art 6(3) and Art 39 of the ICC Rules 2012.[12] The Buyer also argues that the public policy objection should not be entertained, based on *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC v BLB*") (at [53]), because the Minors had never raised the objection before the Tribunal.[13] Here, the reliance on Art 6(3) is similarly misplaced (see [54] *supra*).

57 Separately, the Buyer submits that the Minors have waived their public policy objection that a litigation representative should have been appointed to represent them in the arbitration, based on Art 4 of the Model Law and Art 39 of the ICC Rules 2012.[14]

12 Buyer's submissions for OS 787 at paras 99–104.

13 Buyer's submissions for OS 787 at paras 116 and 117.

14 Buyer's submissions for OS 787 at para 144.



Version No 2: 27 Oct 2020 (22:41 hrs)

58 Pausing here, the reliance on Art 4 of the Model Law is misconceived. Art 4 of the Model Law, which deals with requirements under the arbitration agreement and non-mandatory provisions under the Model Law, does not apply. The Minors' objection before the setting aside court that there was no litigation representative during the arbitration does not concern a requirement under the Arbitration Agreement, nor a non-mandatory provision under the Model Law. Additionally, the reliance on Art 39 of the ICC Rules 2012 is unclear. Article 39 states that a party "which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object". Mr Divyanathan did not explain how any of the elements in Art 39 applies to the Minors' litigation representative argument.

59 On the Buyer's reliance on Art 16(2) with respect to the Sellers' jurisdictional objections, waiver by a party under Art 16(2) only applies if the objection was clear to the party and the party knew of the objection. On the facts, I find that the Sellers have not waived their objections. I will elaborate on this at [80]–[82] and [114] below.

60 I will examine the applicability of the extended doctrine of *res judicata* in arbitration, and the applicability of waiver in the context of public policy objections.

### *The extended doctrine of* res judicata *in arbitration*

61 In submitting that the extended doctrine of *res judicata* applies in the present case, the Buyer relied on *AKN and another v ALC and others and other*



Version No 2: 27 Oct 2020 (22:41 hrs)

*appeals* [2016] 1 SLR 966 ("*AKN v ALC 2016*"). At [57]–[59] of the judgment, the Court of Appeal stated that "courts will typically not rehear matters that have already been determined in arbitration", "the court may disallow a party to raise certain points in court which it could and should have raised in arbitration" and "there is strong support for the view that barring special circumstances, the 'extended' doctrine of *res judicata* operates to preclude the reopening of matters that (a) are covered by an arbitration agreement, (b) are arbitrable, and (c) could and should have been raised by one of the parties in an earlier set of proceedings that had already been concluded". I agree with the Sellers that *AKN v ALC 2016* concerns a different context. In that case, the arbitration award has been partially set aside on the ground of breach of natural justice, and the issue was whether the extended doctrine of *res judicata* applied to preclude the reopening of certain matters in a fresh arbitration. The principles pronounced on the applicability of the extended doctrine of *res judicata* do not apply to the present case, which is concerned with the review of an arbitration award.

62 The Sellers argue that the application of the extended doctrine of *res judicata* would be contrary to the *de novo* standard of review applied by the court when reviewing a tribunal's jurisdiction in setting aside or enforcement proceedings. The *de novo* standard of review in such a situation is well established in Singapore law: *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC 2015*") at [112]; *Astro* at [163]. In my view, the standard of review and the extended doctrine of *res judicata* operate on two different planes, for the standard of review does not govern whether a party would be estopped. The operation of preclusion is an issue anterior to the question of the standard of review: where an argument is not precluded on the basis of the extended doctrine of *res judicata*, the review is conducted on a *de*



Version No 2: 27 Oct 2020 (22:41 hrs)

*novo* standard, and where an argument is precluded, the issue of the standard of review is not engaged.

63 More importantly, in my view, the concept of the extended doctrine of *res judicata* is wholly inapplicable to a court's review of an arbitral award. Strictly speaking, the doctrine applies to preclude points in a second set of litigation proceedings on the merits of the dispute between the same parties where the points could have been brought in the earlier proceedings on the same dispute. In contrast, an enforcement proceeding or a setting aside proceeding of an arbitral award involves the *review of the outcome* of the arbitration proceedings. The court would not be concerned with the merits of the substantive claims between the parties. The points brought before the court would address the grounds for refusal to enforce or grounds for setting aside, instead of the merits of the dispute. Thus, the concept of the extended of doctrine of *res judicata*, which encourages parties to settle all their claims on their merits in one single litigation to prevent a party from being vexed by subsequent litigation, is extraneous to the role of the court in reviewing arbitral awards.

64 Without the extended doctrine of *res judicata*, a court can, in a proper case, dismiss an objection in a setting aside proceeding or an enforcement proceeding on the basis that the party had plainly made a decision not to raise it before the tribunal when it ought to have done so. One such case is *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and others* [2000] 1 QB 288 ("*Westacre Investments*"), a case involving enforcement proceedings of an arbitral award. The English Court of Appeal upheld the lower court's decision to disallow the application seeking leave to amend the defence to allege that the arbitral award was obtained by fraud because a number of witnesses called at the arbitration had given perjured evidence. In giving the reasoning on this point, with which Mantell LJ and Hirst LJ agreed, Waller LJ held that a party



Version No 2: 27 Oct 2020 (22:41 hrs)

would not usually be allowed to adduce additional evidence to make good such a claim unless the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators and where perjury is the fraud alleged, the evidence was so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result (at 309). The evidence of perjury was available during the arbitration and should have been raised then, to alert the tribunal to the untruth of the evidence presented to it before coming to a decision on the merits. The evidence of perjury would have had a material impact on the decision-making of the tribunal, going towards the merits of the claim.

65 The extended doctrine of *res judicata* has not been necessary in setting aside proceedings because of the court's minimal curial intervention in arbitral proceedings (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(c)]). The court would not allow a re-characterisation of an issue raised before the arbitration or an introduction of an issue material to the merits of the dispute not raised during the arbitration in an attempt to set aside an award. In *BLC v BLB*, the Court of Appeal considered that the party attempting to set aside the award was blatantly attempting to rely on a re-characterised case, and seeking to put forward the case they wished to put forward before the arbitrator and not the case that was actually run in the arbitral proceedings themselves (at [84]). This was in relation to the party's argument that the counterparty's list of issues submitted in the arbitration was wrong and misleading in failing to characterise a counterclaim as a stand-alone issue. However, this was exactly what its own list of issues in the arbitration suggested. The party also sought to rely on provisions in two joint venture agreements as the contractual basis of a counterclaim in the setting aside proceedings even though the provisions did not appear at all in the arbitral



Version No 2: 27 Oct 2020 (22:41 hrs)

proceedings. The Court of Appeal found against the party in respect of these submissions. The rejection of a re-characterised claim and a new issue material to the merits of the dispute is rooted in the principle that there is no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact, for it means *a fortiori* that the courts should guard against attempts by a disgruntled party to fault an arbitrator for failing to consider arguments or points which were never before him. Setting aside proceedings are not to be abused by parties who, with the benefit of hindsight, wished they had pleaded or presented their cases in a different way before the arbitrator (at [53]). No reliance on the extended doctrine of *res judicata* is needed.

66 As regard to objection (c) at [55(c)] above, *RC Thakkar (HC)* is raised by the Sellers to support their allegation that the Majority did not apply its mind to whether tortious damages are permitted under s 19 and whether the parties actually did not dispute this proposition. The Sellers do not object to *RC Thakkar (HC)* merely on the basis that it was overruled; they argue that because *RC Thakkar (HC)* does not support the Majority's observation, it shows that the Majority have failed to apply their minds to the issue. To this objection, neither Art 4 nor Art 16(2) would apply in the first place, because it is not an objection on the non-compliance with a non-mandatory provision under the Model Law or a requirement under the Arbitration Agreement, or the jurisdiction of the Tribunal.

***The application of the doctrine of waiver in the context of public policy objections***

67 With regard to the use of the doctrine of waiver to preclude a public policy objection, this is a serious contention. The importance of ensuring that an award does not offend the most basic notion of morality and justice outweighs the principle of finality in arbitration that the doctrine of waiver seeks



Version No 2: 27 Oct 2020 (22:41 hrs)

to achieve. Thus, a genuine claim on the ground that an award would offend the public policy of the state cannot be easily waived.

68 Support for this position can be found in the preparatory materials to the Model Law. The *Analytical Commentary* notes that certain defects such as violation of public policy and non-arbitrability "cannot be cured" by submission to the arbitral proceedings and a failure to raise objections during the proceedings (at p 40). In the same vein, the *1985 Commission Report* states that it was recognised that "the failure to raise [a plea as to jurisdiction pursuant to Art 16(2) of the Model Law] could not have the effect of a waiver in all circumstances, especially where the plea under subparagraph (2)(b) was that the dispute was non-arbitrable or that the award was in conflict with public policy" (at para 288). The rationale for the position is that public policy and arbitrability are fundamental to the forum, so an award that falls foul of the public policy or the arbitrability criteria of the state should not be enforced even if parties waived their objection. I observe that the commentaries above are in the context of jurisdictional challenges under Art 16(2) based on public policy and arbitrability reasons.

69 In any case, it is worth bearing in mind that the Minors' objection is against the substantive Award on the basis that it is against their interests or welfare, rather than an objection targeted at the jurisdiction of the Tribunal. Therefore in this context, Art 16(2) of the Model Law does not apply.

70 The caution of the Court of Appeal in *BLB v BLC* also does not apply to the Minors' objection. The caution against the re-characterisation of an issue raised before an arbitration or an introduction of a new issue not raised before an arbitration but material to the merits of the dispute in the arbitration stems from the principle that there is no recourse where there is an error of law or fact



Version No 2: 27 Oct 2020 (22:41 hrs)

made by an arbitrator. The Minors' objection is that the outcome of the arbitration violates the public policy of Singapore; it is not related to the finding of fact or holding of law by the Majority.

**Issue 3: Whether the Majority had exceeded the powers conferred on them by the Arbitration Agreement**

***Whether the Majority awarded consequential damages***

*Parties' submissions*

71 The Sellers' application to set aside the Award pursuant to Article 34(2)(*a*)(iii) of the Model Law is on the basis that the Majority had awarded punitive, multiple and/or consequential damages which were expressly prohibited by clause 13.14.1, and accordingly beyond the authority granted to the Tribunal by the Arbitration Agreement (see *CRW Joint Operation v PT Perusahaan Gas Negara* (*Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [31]). The central question on excess of jurisdiction relates to the scope of clause 13.14.1 of the SPSSA, which states as follows:

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



Version No 2: 27 Oct 2020 (22:41 hrs)

[emphasis added in italics and bold italics]

72 It is not disputed that an error of law or fact does not amount to an excess of power within the meaning of Article 34(2)(*a*)(iii) of the Model Law. The main thrust of the Sellers' case is that the damages awarded of INR 25,627,847,918.31, either by itself or together with the Pre-Award Interest, amounted to consequential damages (whether under Indian law or Singapore law) in the nature of "hypothetical lost profits" that exceeded the Tribunal's power in clause 13.14.1 of the SPSSA ("the consequential-loss argument"). The Sellers agree that the damages should represent the difference in value between the price paid for the Shares and their actual value, which would be direct losses, but this is not what the Majority actually awarded. According to Mr Salve, the Majority awarded damages for hypothetical lost profits, which is consequential loss under Indian law. This award of hypothetical lost profits results from applying a discount rate based on the average of the Buyer's WACC rate to the proceeds of the sale from the Share Swap and the dividends received. In support of his argument, the Sellers rely, first, on the fact that the WACC rate was used, and second, on the Majority's reasoning as to the use of the WACC rate in the Award.

73 On the first factor, Mr Yeo explains, picking up from Mr Salve's submissions on consequential loss, that the WACC rate represents the average rate of return that the Buyer would seek to make from all its investments, and by using the WACC rate, the Majority was effectively compensating the Buyer for its loss of profits based on its average rate of return.[15] This would be the value that the Buyer should have received had the WACC rate been earned on the Shares and this is a loss for opportunity costs, which is plainly consequential loss.[16]

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15 NE Day 1 at pp 8 and 9.



Version No 2: 27 Oct 2020 (22:41 hrs)

74 On the second factor, the Sellers draw attention to the fact that in taking the WACC rate to be the discount rate, the Majority acknowledged the argument of Mr David John Saunders ("Mr Saunders"), who was the Sellers' expert in the arbitration, that the Buyer "intended to receive a return equal to the average return it receives on all its investments, as represented by its WACC" (at [1078]). The Sellers highlight that the Majority did not think that a simple subtraction between the purchase price and the sum received from the Share Swap transaction and the dividends – which would show that there was in fact a gain and not a loss – reflected the true loss of the Buyer because it would not account for, *inter alia*, the "opportunity cost" over the six years in which the Buyer could not use the sum used to acquire the Shares for other business opportunities (at [1062]). The Sellers also take great objection to the reasoning of the Majority (at [1079]) that:

> … the fairest way to allow for [the Buyer's] *loss of the opportunity to utilise the money* during the interim period [was] to apply [the Buyer's] average WACC for that period rather than the 7.5% rate used by Dr. Ball [*ie*, the Buyer's expert].
>
> [emphasis added]

75 The Sellers further argue that the Pre-Award Interest is also an award for lost profits, because it was calculated based on the average of the Buyer's WACC rather than the actual borrowing cost, which they claimed was 1%. The Majority held that borrowing from banks to fund the SPSSA transaction of itself meant that "costs of funds or loss of use of the funds would have been incurred", and that the Pre-Award Interest was to account for the fact that the Buyer "having borrowed money had committed its resources to this acquisition at the expense of others" (at [1121] and [1122]). In other words, the Sellers explain that the Pre-Award Interest was to account for the acquisition made at the expense of making other investments. It is also argued that the distinction the

[16] Sellers' submissions at paras 48–50.



Version No 2: 27 Oct 2020 (22:41 hrs)

Majority sought to draw between the application of the discount rate to quantify the Buyer's loss and the Pre-Award Interest is illusory. In both instances – the loss of opportunity to utilise the money and commitment of resources at the expense of making other investments – the Majority awarded sums that amounted to compensation for consequential losses, exceeding the power of the Tribunal.

76 The Sellers present their own calculation to show that the damages awarded were in fact damages for the loss of hypothetical profits. They calculated the hypothetical revenue the Buyer would have gained if it had used the purchase price in other businesses with returns at the WACC rate over the relevant period (*ie*, the date of acquisition to the date of Award). They then brought forward the value of the benefits the Buyer received from the Share Swap and the value of the dividends received to the date of the Award using the WACC rate. They obtained the difference between the hypothetical revenue and the total value of the benefits and dividends as at the date of the Award, and this, they claim, represents the hypothetical loss of profits. This figure is exactly the same as the damages awarded and the Pre-Award Interest combined. The Sellers submit that this shows that the damages awarded and the Pre-Award Interest combined are in fact an award for loss of hypothetical profits. The loss of hypothetical profits is a type of consequential damages (based on *The Forward Foundation, A Charitable Trust and others v State of Karnataka and others* MANU/GT/0075/2016 and *Union of India v The Steel Stock Holders Syndicate, Poona* (1976) 3 SCC 108).

77 The Buyer on the other hand denies that the Majority awarded consequential losses. The Buyer takes the position that the quantification is according to the second limb of s 19, which seeks to put a claimant in the position in which he would have been if the representation made had been true.



Version No 2: 27 Oct 2020 (22:41 hrs)

As Mr Subramanium explains, the WACC rate was simply used as "a tool to move the value of money in the [Share Swap] transaction back to the same point in time as the purchase of the [Shares]".[17]

78 The parties' Indian law experts take opposing positions. The Sellers' expert, Justice B N Srikrishna, opines that the Majority, in awarding opportunity cost to the Buyer even though the Buyer had already recovered more than the purchase price of the Shares, awarded damages tantamount to consequential damages under Indian law.[18] He takes the position that the time value of money as awarded by the Majority represents the consequential loss of opportunity cost, which is beyond the jurisdiction of the Tribunal. On the other hand, the Buyer's expert, Justice Vikramajit Sen, takes the view that the Majority did not purport nor did it in actuality grant any consequential damages. The Majority's approach is in consonance with *Trojan*, which set out the approach to quantifying damages under the second limb of s 19 of the Indian Contract Act.[19]

79 In the course of arguments, Mr Subramanium has referred to the decision of the DHC in support of the Buyer's position that the damages awarded are not consequential. This issue has been previously argued in the Indian proceedings and the DHC held that:

(a) The court has the power to look into and adjudicate on the Majority's decision on jurisdictional issues.

(b) However, relying on the second type of damages as set out in *Hadley v Baxendale* [1854] 9 Ex 341 ("*Hadley v Baxendale*") and Harvey McGregor, McGregor on Damages (Sweet & Maxwell, 19th Ed,

17 NE Day 3 at pp 55–56.

18 Affidavit of B N Srikrishna dated 6 September 2016, at p 17.

19 Affidavit of Vikramajit Sen dated 5 October 2016, at p 13.



Version No 2: 27 Oct 2020 (22:41 hrs)

2014), Nath J held that the damages awarded were not consequential damages, because they did not pertain to any special circumstances (at [86] and [87]).

(c) Even otherwise, the phrase "consequential damages" found in clause 13.14.1 of the SPSSA should be read co-jointly with the other phrases used in the clause, namely punitive, exemplary and multiple, based on the doctrine of *noscitur a sociis*.

(d) In any case, clause 13.14.1 could not have intended to oust or exclude damages as stated in s 19 of the Indian Contract Act. Since the damages were within the ambit of s 19, the Award was within the jurisdiction of the Tribunal (at [93]).

The first reasoning was based on the English decision of *Hadley v Baxendale*, which states at 354–355:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, *or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.* Now, if the *special circumstances* under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.
>
> [emphasis added]

80 Before examining the consequential-loss argument, the Buyer has raised an issue of waiver. It submits that the Sellers have waived their jurisdictional objection to the calculation of damages because it was not raised earlier during



Version No 2: 27 Oct 2020 (22:41 hrs)

the arbitration (see [55(a)] *supra*). In response, the Sellers claim that they did raise the objection during the arbitration to the Majority's methodology of calculating damages. However, they only cited a general statement in their Statement of Defence filed during the arbitration stating that the Buyer could not claim consequential losses under the SPSSA or Indian law.[20] This is a general statement and not a plea that the Majority would exceed its jurisdiction if they used using the WACC rate as the discount rate in calculating damages.

81 The facts are curious in that the Majority had actually adopted the suggestion of the Sellers' expert in using the WACC rate as the discount rate applicable (in the event that a discount rate applied, which was objected to), but the Sellers are now contending that the Majority calculated damages for the loss of opportunity precisely because the WACC rate was used. However, the Sellers' objection also hinges on the Majority's explanation in the Award that it was to account for "loss of the opportunity to utilise the money" to show that the Majority's true intention was to award consequential damages.[21] It is the use of the WACC rate coupled with the expressions used by the Majority in the Award that inspired the jurisdictional challenge.

82 This is a case where the jurisdictional objection only became clear after analysing the reasoning in the Award. The reasoning sheds light on the nature of the damages awarded, and allows parties to understand better whether jurisdiction has been exceeded. The jurisdictional challenge in the present case is not based on a construction of an arbitration agreement as to whether a tribunal has jurisdiction to even hear a dispute, but rather on an analysis of the nature of the damages awarded. In the former scenario, the parties could take a clear stance from the outset as to the tribunal's jurisdiction; however, in the

[20] Sellers' skeletal reply submissions at para 43.

[21] NE Day 5 at p 133.



Version No 2: 27 Oct 2020 (22:41 hrs)

present case, because the parties may only have a better understanding after analysing the reasoning of the Tribunal in the Award, it cannot be said that the Sellers have waived their right to bring the objection in the current proceedings.

*Decision on the consequential-loss argument*

83 I agree with the Sellers that if I find the damages and the Pre-Award Interest awarded to be consequential damages, they would be outside the power the Majority possessed by virtue of clause 13.14.1. The question is whether the Majority has awarded consequential damages, which they have no jurisdiction to award, for consequential damages have been excluded by clause 13.14.1. The purported exercise of the arbitral tribunal of a power which it did not possess would render an arbitral award liable to be set aside if the aggrieved party has suffered actual or real prejudice (*CRW* at [33]). The standard of review is *de novo*, because the ground on which the Award is challenged relates to the jurisdiction of the Tribunal (*AQZ v ARA* [2015] 2 SLR 972 at [49]). In the present case, the jurisdiction objection relates to the nature of the damages, so it is necessary to examine how the Majority arrived at the damages awarded in order to determine their nature.

84 The unfortunate use of certain expressions in contrast with other salient paragraphs in the Award may have caused confusion that led to the Sellers taking the jurisdictional objection before me. Their objection depends only upon the wording the Majority chose to use in its reasoning and the use of the WACC rate as the discount rate. For the reasons explained below, I find that the Majority *did not* grant consequential damages and that they were simply quantifying the loss suffered by the Buyer by taking the difference between the purchase price of the Shares and their actual value, which represents the



Version No 2: 27 Oct 2020 (22:41 hrs)

overpayment for the Shares, and accounting for the benefits the Buyer obtained.

85 First, the Sellers' consequential-loss argument does not accord with the method of calculation of damages used by the Majority. The Majority explained that in ascertaining whether the Buyer had suffered any loss, account must be taken of (Award, at [1074]):

> a. the value [the Buyer] recovered from the [Share Swap] transaction at the time the transaction was closed viz. 25 March 2015;
>
> b. the benefits [the Buyer] received by way of the dividends; and
>
> c. [the Buyer's] "present day value" of money during the period of 6 years when it was holding the [Shares].

Taking these into account, the Majority set out their calculation of the Buyer's loss as follows:

| | | |
|---|---|---|
| Amount paid to acquire the Shares (7 Nov 2008) | INR 198,040,245,051.00 | [A]=737.00*268,711,323 |
| Amount the Buyer expects to recover through the Share Swap transaction (23 Mar 2015) | INR 171,930,714,342.71 | [B]=844.00*268,711,323/ (1.0444)^6.3749… years |
| Total Dividends | INR | [C]=2.00*268,711,323/ |



Version No 2: 27 Oct 2020 (22:41 hrs)

| | | |
|---|---|---|
| (16 May 2011) | 481,682,789.98 | (1.0444)^2.52… years |
| Sum of the Share Swap transaction price and the dividends | INR 172,412,397,132.69 | [D]=[B]+[C] |
| Total Damages | INR 25,627,847,918.31 | [E]=[A]–[D] |

86 The calculations in the table above and the factors (a) to (c) taken into account by the Majority show that the application of the discount rate was to factor in the "present day value" of money. This is a concept that gives effect to the recognition that cash flows at different times cannot be compared meaningfully because the value of a sum of money is different at different times, as explained by the Buyer's expert, Dr Raymond J Ball ("Dr Ball"), during the arbitration. What the Majority was doing by using the discount rate was to bring all the cash flows to a single point in time, in order to calculate the actual loss by the Buyer meaningfully. Dr Ball explained that a discount rate normally consists of two components – the time value of money and a risk premium – but he ignored the risk premium for simplicity of calculation. Although Dr Ball suggested a rate of 7.5% for the time value of money (as representing the entire discount rate), the Majority took into account the evidence from the Sellers' expert, Mr Saunders, and adopted his valuation of the discount rate at the Buyer's WACC rate instead. Thus, the average of the Buyer's WACC rate (4.4%) was used as an approximate for the discount rate to bring all the cash flows to a single time point.



Version No 2: 27 Oct 2020 (22:41 hrs)

87 I accept that the WACC rate reflected the Buyer's average return it received from all its investments,[22] but the use of the rate as the discount rate does not necessarily lead to the conclusion the Majority was quantifying the Buyer's consequential loss. I agree with Mr Subramanium that the WACC rate was used as a tool for calculation, no more and no less.[23] I further agree with him that the Majority in awarding the damages followed the methodology set out in *Trojan*:[24] the damages awarded represented the difference between the purchase price paid and the real value of the Shares as estimated using the gain from the Share Swap transaction. The Supreme Court of India held in *Trojan* that the measure of damages is the difference between the purchase price paid and the price which would have been received if the goods had been resold on the market forthwith after the purchase (at [15]). In *Trojan*, the plaintiff was induced to purchase shares from the defendant by the defendant's fraud. The Supreme Court of India explained that ordinarily the market rate of the shares on the date when the fraud was practised would represent their real price (at [16]), but:

> if there is no market or there is no satisfactory evidence of a market rate for some time which may safely be taken as the real value, then if the representee sold the shares, although not bound to do so, and if the resale has taken place within a reasonable time and on reasonable terms and has not been unnecessarily delayed, then the price fetched at the resale may well be taken into consideration in determining retrospectively the true market value of the shares on the crucial date. *If there is no market at all or if the market rate cannot, for reasons referred to above, be taken as the real or fair value of the thing and the representee has not sold the things, then in ascertaining the real or fair value of the thing on the date when deceit was practiced subsequent events may be taken into account,* provided such subsequent events are not attributable to

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22 Joint Expert Report at ABOD vol 15 p 424.

23 NE Day 3 at pp 113 and 119.

24 NE Day 3 at p 107.



Version No 2: 27 Oct 2020 (22:41 hrs)

> extraneous circumstances which supervened on account of the retaining of the thing.
>
> [emphasis added]

88 The Share Swap transaction was used as a figure to determine what would have been the actual value of the Shares, and the Majority decided to bring back the value of the Share Swap transaction back to 2008 when the Shares were purchased. The Majority then took the difference between this and the purchase price paid, and accounted for the dividends received, in order to compensate the Buyer so as to place it back in the position had the representation been true pursuant to s 19 of the Indian Contract Act. The phrase "loss of the opportunity to utilise the money" can be understood as referring to the time value of money, which is the component in the discount rate that was taken into account in the calculations. The Majority in applying the discount rate has referred to it as accounting for the "'present day value' of money".

89 A close analysis of the entire Award shows that the Majority was seeking to determine the overpayment for the Shares. The Majority explained (at [974] and [975]) that in most cases, the measure of damages recoverable under general tort principles for fraudulent misrepresentation would effectively result in the same quantification as the contractual measure of damages, because the same evidence would be used in both instances. Ordinarily, the amount of damages is the difference between the price paid and the true market price: the aggrieved party could be made whole by selling the shares at the market price and then recover the difference between the acquiring price and the market price. However, taking the market price at the date of the transaction may not result in the aggrieved party being made whole in certain situations, as held in *Smith New Court*. The Majority found that on the facts, the Shares at the time of acquisition were "pregnant with disaster" and neither the market nor the Buyer had the requisite knowledge to price the Shares fairly at that point in time.



Version No 2: 27 Oct 2020 (22:41 hrs)

Until the SAR became public knowledge, the market price of the Shares in the open market would not be reflective of the value the Buyer received through its acquisition. Moreover, the Buyer was in a locked-in position and before the SAR became public knowledge, it could not reasonably have arranged for a sale of the Shares without disclosing information on the investigations conducted. When the SAR first became public, the Buyer also could not simply dispose of the Shares in the open market because it would exacerbate the price decline. Therefore, the real value of the Shares could not be ascertained at the date of transaction (at [1003]–[1005]). Notably, this description of the method of quantifying damages is the same as that set out by the Supreme Court of India in *Trojan*. The Majority continued to explain that the starting position, drawing from *Smith New Court*, was to consider the purchase price of the Shares, together with any other losses, and offset against that the net benefit gained by the Buyer as a result of it having acquired the Shares (at [1049] and [1050]). According to the Majority, the approach described was agreed between the parties, even though the application of it was not. The Sellers had indeed cited *Smith New Court* and its principles, but argued that the case was not applicable on the facts (see [146]–[146] below).

90 From the Majority's descriptions of the parties' cases, it is evident that all parties were geared towards finding the difference between the purchase price and the true value of the Shares. The use of the methodology in *Trojan* is evident from the Majority's characterisation of the Buyer's claim (at [972]):

> The [Buyer] did not seek to avoid the SPSSA, but has instead elected to seek damages that would put in [*sic*] in the position in which it would have been if the representations made had been true. The [Buyer] measures this by reference to the purchase price it paid for the [Shares] *less the benefits received which include the "true market value" for the shares*, priced at a time when the market was aware of the fraud…
>
> [emphasis added]



Version No 2: 27 Oct 2020 (22:41 hrs)

91 Similarly, at [1013], the Majority described the Buyer's claim as follows:

> The [Buyer]'s case is that its damages are best represented by the difference between what it paid for its [Shares] … less the benefit it gained from having the [Shares]. According to the [Buyer's statement of claim], this benefit was to be measured by looking at *what the shares were actually worth at a point in time when much (though not all) of the information that [BBA] fraudulently misrepresented and concealed from the [Buyer] had become available to the market and "priced" by it.*
>
> [emphasis added]

92 After acknowledging that the original two methodologies set out in the Buyer's statement of claim (the "market-based" framework and the "discounted-cash-flow-based" framework) were overtaken by the Buyer entering into an actual market transaction (the Share Swap), the Majority described the methodology of the Buyer's expert as follows (at [1023]):

> Dr. Ball explained that the [Share Swap] transaction offered "an objective, reliable estimate of the value of [the Buyer's] controlling interest in [C] at a time when the fraud was sufficiently known and quantifiable, and that this obviated the need for corroborative methods such as the discounted cash flow" …

93 The Sellers' response as described by the Majority at [1035] and [1037] shows that they were likewise concerned with damages as the difference between purchase price and the actual value:

> 1035. … The [Buyer] is therefore required to prove evidence of the true market value of the transaction as at the date of the transaction… to succeed in its claim for damages, [the Buyer] must quantify the "*difference between the price he gave and the real value at the time he bought*" …
>
> 1037. [The Sellers] strongly objected to the use of the [Share Swap] transaction, which took place almost six years after the SPSSA since *the relevant crucial issue was the value of the [Shares]* at the time of the transaction.
>
> [emphasis added]



Version No 2: 27 Oct 2020 (22:41 hrs)

94 The Majority considered both Dr Ball's approach and Mr Saunder's approach. Dr Ball suggested that the Share Swap transaction provided a measure of the amount that the Buyer could recover through a disposition of its Shares at a time when the fraud was "sufficiently known and quantifiable", and valued the Shares with respect to the value of the Swapped Shares at the announcement of the Share Swap transaction.[25] Dr Ball first calculated the damages by taking the difference between the total of the benefit gained from the Share Swap transaction and the dividends, and the purchase price. He then explained that a discount rate needed to be applied to account for the fact that cash flows occurring at different points in time are not directly comparable to one another. He brought forward all the cash flows to the date of acquisition of Shares, *ie*, 7 November 2008, using the discount rate of 7.5%, which was the five-year Indian government bond.[26]

95 Mr Saunders criticised Dr Ball's methodology on the basis that it was based on a rescission of the SPSSA. If it was accepted that the SAR had an impact on the settlement negotiations, Mr Saunders suggested that the most appropriate method of assessing the impact was the discounted cash flow ("DCF") approach to assess the effect of the SAR on the valuation of the Shares. However, he could not perform a calculation based on the DCF because he did not have adequate information on the impact of the SAR.[27] As to the discount rate in Dr Ball's calculation, Mr Saunders suggested that if a discount rate was to be applied, the Buyer's WACC rate should be used.[28] At the expert conference during the arbitration, Mr Saunders proposed another methodology of quantifying damages. On the basis that the Buyer had been fraudulently induced

25 Dr Ball's Expert Report at pp 12–13.

26 Dr Ball's Expert Report at p 19

27 Mr Saunders' Expert Report at paras 5.1.5 and 5.1.6.

28 *ibid*, at para 3.6.3.



Version No 2: 27 Oct 2020 (22:41 hrs)

to enter into the SPSSA and the SAR had an impact on the settlement negotiations, "the estimated amount of the settlement that was related specifically to the existence of the SAR can be used to estimate damages by discounting the amount back to June 2008 to assess the effect this would have had on the purchase price". Based on the assumption that only US$100 million out of the US$500 million settlement sum was related to specifically to the SAR, Mr Saunders quantified the effect on the value of the Shares as of June 2008 to be INR 2.014 billion.[29]

96 After considering the experts' opinions, the Majority found that Dr Ball's approach was comparatively more workable than Mr Saunders' approaches and the most appropriate starting point (at [1073]). The Majority adopted the use of the Share Swap transaction because it had the advantage of providing a value for the actual benefit the Buyer realised. However, the Majority disagreed with Dr Ball and agreed with Mr Saunders that the date of the announcement of the Share Swap transaction was not the appropriate time at which to value the Shares. The Majority chose to value the Shares as at 25 March 2015, which was when the Share Swap transaction actually closed (at [1057]). This benefit obtained by the Buyer, according to the Majority, was the "true market value" for the shares, priced at a time when the market was aware of the fraud (at [1092]). This is in line with the Majority's finding that the Buyer was "in a locked-in position" and its "hands were effectively tied" as before the news of C became public, the Buyer could not reasonably arrange for a sale without disclosing sensitive information (at [1005]). The Majority acknowledged the gap of six years between the acquisition and the Share Swap, and that the effluxion of time made it difficult to assess whether the benefits and losses experienced by the Buyer from holding the Shares were properly those

[29] The Sellers' closing submissions in the arbitration at para 1587, found at p 301 of ABD vol 19.



Version No 2: 27 Oct 2020 (22:41 hrs)

flowing from the fraudulent actions of the Sellers (at [1061]). The Majority found in any event that there was limited evidence on any benefits and losses, and preferring to adopt the view that they had the effect of cancelling each other out (at [1062]). Even Mr Saunders agreed that the Share Swap transaction could be a "a proxy for the value of the [Buyer's] shareholding in [C]", even though he criticised Dr Ball for not considering other possible dates when the full extent of the SAR and its consequences were sufficiently known and quantifiable to value the Shares.[30] As Mr Subramanium explains, the Buyer's case was that it was strapped with the Shares, because it not only bought them, it also bought another 33% of the total number of shares in C from the public pursuant to the SPSSA (the Buyer was to make a public offer for a minimum of 20% of the issued share capital of C) at a premium. No one would buy over so many shares unless they had value.[31] I agree with Mr Subramanium that it is a finding of fact made by the Majority as to when a true price in the market could be determined.[32]

97 The Majority noted that it would be overly simplistic to suggest that the Buyer suffered no loss, because a simple subtraction of two values (*ie*, the total of the value obtained from the Share Swap transaction and the dividends, minus the purchase price) would not account for the Buyer's benefits and losses, including the opportunity cost over the six years in which the Buyer could not use the purchase price for other business opportunities, and the possible synergies to the Buyer as a result of the acquisition (see [74] *supra*). While this statement may suggest that the Majority was straying into consequential loss territory, the fact of the matter is that the Majority went on to conclude that it

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30 Mr Saunders' Supplemental Expert Report, found at p 255 of ABD vol 15, at paras 3.2.3 and 3.2.4.

31 NE Day 4 at pp 84 and 85.

32 NE Day 4 at p 79.



Version No 2: 27 Oct 2020 (22:41 hrs)

had limited evidence on any of the factors it spotted, and preferred to adopt the view that the factors cancelled each other out (at [1062] and [1063]).

98 There is no indication that the discount rate was to compensate for loss of opportunity as both experts were working on the basis that the discount rate was a mechanism to account for the different times at which the cash flows took place. It is notable in this regard that Mr Saunders "agree[d] that the question whether damages in this case should account for the time value of money is an issue for the Tribunal to decide" in the Joint Expert Report dated 17 September 2014.[33] As to the rate to be used, the Majority accepted Mr Saunders' criticism of Dr Ball's use of the Indian government bond rate of 7.5%, and agreed with Mr Saunders that the Buyer's WACC rate should be used. The Majority thus used the average of the Buyer's WACC rate as the discount rate. In writing their respective reports on the quantification of damages, both experts expressly stated that their reports did not address opportunity cost resulting from the fact that the Buyer was tied up with the SPSSA because this was not a claim put forward by the Buyer.[34] Dr Ball specifically stated that had he included opportunity cost in the damages analysis in his report, "it would have resulted in a commensurate increase in damages". To make the point clearer, Dr Ball stated opportunity cost to be the "failure to earn [the] returns" of "an alternative investment" because the Buyer "tied up its capital in [C]".

99 Given the experts' clear delineation in the difference between the concept of opportunity cost and the concept of discounting for time value of money, it is reasonable to infer that the Majority took this difference on board when it emphasised that it was conscious that it could not award consequential

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33 ABOD vol 15, at p 415, at pp 10 and 14 of Joint Expert Report.

34 Dr Ball's Reply Expert Report at paras 63 and 65, found at ABOD vol 15 at p 153; Mr Saunders' Reply Expert Report at paras 3.4.20 and 3.4.21.



Version No 2: 27 Oct 2020 (22:41 hrs)

damages under clause 13.14.1 (at [1081]). Significantly, the Majority also referred to Dr Ball's remark that the Buyer did not claim opportunity costs of the Buyer having purchased and held the Shares for the intervening six years' period in lieu of entering into other commercial deals (at [1029]). This provides further support for my view that the choice of expression used by the Majority – "loss of the opportunity to utilise the money" – is merely infelicitous.

100 All parties were *ad idem* that the loss calculated was the difference between the purchase price and the actual value of the Shares less any benefits received, and not hypothetical loss. During oral submissions before Tribunal, both parties were submitting on damages as the difference between the purchase price of the Shares and the real value of the Shares, and the debate was on which date to use to assess the real value of the Shares – the transaction date or when the Buyer resold the Shares through the Share Swap transaction.[35] Counsel for the Sellers in the arbitration stated that on damages, one had to ask "what is the difference between the price paid and the actual value".[36] The dispute was over how the actual value was to be computed. According to the Sellers, the Buyer did not produce evidence to show that the valuation with SAR would be lower than the valuation without it but with other risks known to the Buyer.[37] Counsel for the Sellers repeated that the Tribunal's aim was to find the "true value" of the Shares, and this "true value must be objectively ascertained based on what the market was prepared to pay for [them] at any time after the fraud was discovered", but there was "no evidence of that".[38] The dissenting member of

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35 Transcripts of arbitral proceedings on 13 February 2015, found at ABOD vol 19 p 515.

36 Transcripts of arbitral proceedings on 14 February 2015, found at ABOD vol 19 p 672.

37 Transcripts of arbitral proceedings on 14 February 2015, found at ABOD vol 19 p 682.

38 Transcripts of arbitral proceedings on 14 February 2015, found at ABOD vol 19 p 685.



Version No 2: 27 Oct 2020 (22:41 hrs)

the Tribunal, in addressing the issue of damages for completeness, disagreed with the Majority's quantum of damages. His disagreement was similarly phrased in the framework of finding the difference between the purchase price and the actual value of the Shares. He stated that the Buyer had not quantified the actual value of the Shares on the date the SPSSA was entered into, and agreed with the Sellers that there was "no evidence before the Tribunal of the difference in value between what the [Buyer] paid for the [Shares], and what they were actually worth to [the Buyer]" if all the risks were factored in. He further took issue with the use of the Share Swap transaction price because it was more than five years after the signing of the SPSSA.[39]

101 The concept of time value of money is not foreign in litigation. It has been taken into account in assessments of damages in litigations in courts, such as in *Experience Hendrix LLC and another v Times Newspapers Ltd* [2010] EWHC 1986 (Ch) ("*Experience Hendrix*") and *Sempra Metals Ltd v Her Majesty's Commissioners of Inland Revenue and another* [2007] UKHL 34 ("*Sempra Metals*"). In *Experience Hendrix*, the English High Court discounted the loss sustained by the claimants back to the date of the infringement by the defendant, to reflect the claimants' delayed receipt of that sum of money. The court opined that it was "necessary to discount to [the infringement date] the amount of [the] loss and then to add interest to the discounted figure to produce an overall award of damages to the date of judgement", and the discount rate would "reflect the impact of the time value of money" (at [228]). In *Sempra Metals*, the English House of Lords allowed a claim for the time value of the enrichment as a result of a premature payment of tax (at [7] and [66]). Although the case differs from the *Experience Hendrix* and the present case in that the

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[39] Dissenting award, at paras 114 and 118.



Version No 2: 27 Oct 2020 (22:41 hrs)

claim was in restitution for the time value of money as the principal sum, it shows that the concept of time value of money is not foreign in litigation.

102 In John A Trenor, *The Guide to Damages in International Arbitration* (Law Business Research Ltd, 2016) ("*The Guide to Damages*"), referred to by both the Sellers and the Buyer,[40] the author states at p 242 that the assessment of damages is "the difference between the money the claimant actually received and the money the claimant would have received in the but-for world", which is the world "that would have been expected to prevail but for" the respondent's act that rendered the claimant's asset less valuable. However, the author explains, "both in reality and in the but-for world, these amounts of money occur at different dates, and we need to allow for this". The author goes on to say (at pp 242 and 244):

> Typically, the damages figure is assessed as of the date of the bad act by bringing the cash flows from the asset back to date 0 [*ie*, the date of the respondent's act] (this is known as the 'present value' as of date 0). The difference in asset value at date 0 between the actual and but-for worlds is damages as of that date. This amount is then brought forward in time using the pre-award interest rate. …
>
> The rate used to bring actual or expected (but-for) cash flows backward in time is typically the cost of capital for the asset. This rate normally includes a risk premium reflecting the fact that the asset is a risky endeavour with uncertain cash flows. The rate used to bring the asset value forward in time to the award date, however, is a different rate – often a riskless rate…
>
> Cost of capital means a rate that reflects risk and combines the cost of borrowing with a required return on equity. The most common notion of cost of capital is the weighted average cost of capital (WACC). A company's WACC is a weighted average of its cost of debt and its cost of equity…

103 The approach taken by the Majority is in line with the explanation given above: the Majority took the value of the Share Swap transaction to be the actual

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[40] NE Day 5 at pp 138–142.



Version No 2: 27 Oct 2020 (22:41 hrs)

value of the Shares, and the purchase price to be the value in the but-for world, and assessed the difference in asset value of the Shares at 7 November 2008, which is date 0 on the facts. The dividends were also accounted for, so as not to over-compensate the Buyer. To bring the cash flows of the dividends and the Share Swap transaction backward in time to date 0, the Majority used the Buyer's WACC rate, which is the cost of capital – the rate typically used to bring cash flows backward in time according to Trenor.

104 As to the Sellers' calculations presented to this court (see [75] *supra*), just because the values are equivalent because of the use of the WACC rate does not mean that the Majority awarded damages for hypothetical loss. What the Majority did in its calculations was to find the difference between the purchase price and the benefits gained, including the actual value of the Shares, and bring all the values to a single point in time for a meaningful comparison. Furthermore, as pointed out by the Buyer, the Sellers' calculations in this regard may not be correct.[41] Although the value of the benefit obtained from the Share Swap was supposedly brought forward to the date of the Award, the exponent used (which is the length of time from the time of the benefit to the date of the Award) is 0.225679. 0.225679 is approximately 2 months 21 days, and it does not correspond to the length of time between the close of the Share Swap (25 March 2015) and the date of the Award (29 April 2016). The Sellers did not explain this discrepancy. Furthermore, I see force in the Buyer's argument that the Pre-Award Interest cannot be considered to be outside the Majority's jurisdiction because clause 13.14.4 of the SPSSA expressly provides that "[t]he Award shall include interest from the date of any breach or other violation of [the SPSSA] and the rate of such interest shall be specified by the arbitral

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41 Buyer's Reply Skeletal Arguments at para 19.



Version No 2: 27 Oct 2020 (22:41 hrs)

tribunal and shall be calculated from the date of any such breach or other violation to the date when the Award is paid in full".

105 I conclude that the Majority, in awarding the damages, was simply compensating for the difference between the purchase price paid and the actual value of the Shares, and taking into account the dividends received by the Buyer. This is not an award for loss of opportunity, and not an award for consequential damages. The Sellers acknowledged that they would not take issue if the Majority awarded for the difference in value between the purchase price and the actual value of the Shares.[42]

106 The Sellers raised three broad ancillary points in support of the consequential-loss argument. The first point relates to the decision of the Majority in not taking into account other benefits received by the Buyer. The Sellers took issue with the Majority for refusing to account for the additional benefits gained by the Buyer such as synergistic benefits to the Buyer's operations and tax benefits. The Majority took the view that the calculation showing no loss was overly simplistic because it did not take into account many factors, but at the same time, it held that it did not have to take into account the synergistic and tax benefits. The refusal to take into account the additional benefits, according to the Sellers, contradicts the application of a discount rate.[43] This submission does not advance the Sellers' jurisdictional objection. The Majority has considered the synergistic benefits and tax benefits in detail in the Award, and arrived at the conclusion that taking them into account would more likely distort rather than render more accurate the overall analysis. The Majority was convinced that the negative impact of the acquisition far outweighed any of the positive synergies, and in the absence of specific attribution, it was fairer to

42 NE Day 1 at pp 41–42.

43 Sellers' submissions at paras 38–43.



Version No 2: 27 Oct 2020 (22:41 hrs)

accept that the possible losses and benefits have equalised (Award at [1071] and [1072]). It is not open this court to reassess the decision of the Majority on the substantive merits. Any contradiction in the reasoning would be an error of law or fact that this court cannot review.

107 The second point relates to the meaning of "consequential" damages in clause 13.14.1. Indian law is applicable to the construction of clause 13.14.1 and although the DHC Judgment is not binding on this court, I find the DHC's holding that "consequential" refers to damages arising from special circumstances known and within the contemplation of the parties to be persuasive. Loss of profits is a type of damages falling within damages arising from special circumstances known and communicated and within the contemplation of the parties. That the loss of profits is a type of consequential loss is supported by Indian case law (see *The Forward Foundation, A Charitable Trust and others v State of Karnataka and others* MANU/GT/0075/2016 at [52]; *Union of India v The Steel Stock Holders Syndicate, Poona* (1976) 3 SCC 108 at [10]). Mr Yeo submits that because the DHC's reasoning is based on English law and not Indian law,[44] it should not be followed, since the DHC itself recognised that English authorities should not be imported unless a statute could not be understood without the aid of English law, and the distinction sought to be raised between normal damages and consequential damages did not follow from s 19 (DHC Judgment, at [83]). Even so, despite the reference to *Hadley v Baxendale*, the DHC Judgment is a decision of the Indian court on the meaning of "consequential" under Indian law.

108 Mr Yeo submits that the interpretation of "consequential" as the second limb *Hadley v Baxendale* is in fact a narrow approach which is only taken in

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44 Day 1 at p 107.



Version No 2: 27 Oct 2020 (22:41 hrs)

interpreting exclusion clauses in cases such as *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 ("*Airtrust*"). Since clause 13.14.1 is not an exclusion clause but a limitation on the arbitrators' powers, it can be construed to carry a wider meaning. But Mr Yeo agrees that it matters not here, because the Majority awarded lost profits, which in any case fall within the second limb of *Hadley v Baxendale*.[45] This argument does not detain me, for I have found that the Majority did not award lost profits.

109 On the other hand, Mr Subramanium argues that "direct" damages have a different meaning in the context of fraud – the principle in the context of fraud has to be one of reparation which is based on fairness, justice and factors such as non-remoteness, causation and mitigation.[46] Loss of profits, according to him, would be a direct loss in the context of fraud. *Hadley v Baxendale* does not apply in cases of fraud at all, and only cases such as *Smith New Court* apply. He submits that the principles of tort of deceit are incorporated in ss 14, 17 and 19 of the Indian Contract Act,[47] and there is no qualification as to what can be awarded under the second limb of s 19 because it is reparatory in character.[48] With respect, I do not find this argument persuasive. First, while Lord Browne-Wilkinson stated in *Smith New Court* that the measure of damages is reparation for all the actual damage "directly flowing from" entering into the transaction, he also stated that damages recoverable can include "consequential loss" suffered by reason of having acquired the asset (at 265). This means that the head of damages known as "consequential loss" still exists in the context of fraud, and damages "directly flowing from" cannot be equated with direct

45 NE Day 5 at pp 41–42.

46 NE Day 4 at p 87.

47 NE Day 4 at p 69.

48 NE Day 4 at p 86.



Version No 2: 27 Oct 2020 (22:41 hrs)

damages. The head of "consequential loss" carries its own meaning that has to be determined. In any case, Mr Subramanium is not claiming that the Majority awarded loss of profits; instead, he argues that the Majority awarded based on the difference in value between the actual value of the Shares and purchase price.[49]

110 I note that there has been some confusion regarding the concepts of loss of profits and loss of opportunity. The Sellers only presented the Indian position on loss of profits (see [107] *supra*), but this is a different head of claim from loss of opportunity. A loss of opportunity arises where an aggrieved party was induced to choose one option due to the other party's misrepresentation over another option, which was the situation in *East and another v Maurer and another* [1991] 1 WLR 461 ("*East v Maurer*"). On the other hand, loss of profits is the loss of money that could be earned out of the very transaction the aggrieved party had entered into. The only authority relied upon by the Sellers in submitting that the loss of opportunity is a consequential loss is *Smith New Court*, where Lord Steyn, commenting on *East v Maurer*, opined that "the hypothetical profitable business in which the plaintiff would have engaged but for deceit" is "classic consequential loss" (at 282). No Indian authority has been cited. The Sellers also argue that loss of profits is a consequential loss in Singapore law based on *Airtrust*. Once again, the damages claimed in *Airtrust* were for lost profits from the rental of the product the aggrieved party could have collected if the product had been properly designed and manufactured, and the loss of profits from these lost profits. The Court of Appeal was not concerned with a claim for the *East v Maurer* type of loss of opportunity. The difference between the two distinct heads of damages has also been muddled by the use of the unclear expression "hypothetical lost profits" in the Sellers'

[49] NE Day 4 at p 134.



Version No 2: 27 Oct 2020 (22:41 hrs)

submission. This muddle is inconsequential, given my finding that the damages awarded were for the overpayment for the Shares, and neither for loss of opportunity nor loss of profits. It is unnecessary to decide whether loss of opportunity is a type of consequential damages under Indian law.

111 It is also unnecessary to determine whether the word "consequential" means punitive damages, as argued by Mr Subramanium, relying on the DHC Judgment.[50] I have found that even on the first construction by the DHC that consequential damages referred to damages falling under the second limb in *Hadley v Baxendale*, the damages awarded by the Majority are not consequential.

112 The third point concerns the permissibility of contracting out of the damages under s 19 of the Indian Contract Act. The Buyer argues that even if the award of damages constituted consequential damages, it would nevertheless be permissible because parties cannot contract out of the damages under s 19 of the Indian Contract Act. The Buyer draws support from the DHC Judgment, where it was decided that clause 13.14.1 could not have been intended to oust damages that could be awarded under s 19 (see [79] *supra*). This holding seems to be limited to the facts of the case and not a proposition of law. The Buyer's reliance on the Singapore case *Airtrust* for the position that parties cannot contract out of liability for fraud is irrelevant, for Indian law is the proper law of the SPSSA and the governing law of the Arbitration Agreement, and it has not been alleged that clause 13.14.1 offends Singapore public policy. There is force in the Sellers' argument that clause 13.14.1 is a clause that addresses the power of the Tribunal and not the liability of the parties, so the alleged legal proposition that parties cannot contract out of the damages under s 19 is

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50 NE Day 3 at p 127.



Version No 2: 27 Oct 2020 (22:41 hrs)

irrelevant to the consideration of clause 13.14.1. I do not need to come to a conclusion as to these issues given my decision on the consequential-loss argument above.

***Whether the Pre-Award Interest is an award of multiple or punitive damages***

113 The Sellers submit that in awarding both the damages and the Pre-Award Interest, the Majority has awarded multiple or punitive damages, which is outside its jurisdiction pursuant to clause 13.14.1. First, the Sellers argue that the damages and the Pre-Award Interest purport to compensate the Buyer for the loss of use of money over an overlapping period of time – the award of damages accounted for the loss of use of money for the period from the date of acquisition to the date of the Share Swap transaction, and the Pre-Award Interest accounted for the same from the date of the acquisition to the date of the Award. Second, both the discount rate for the "loss of the opportunity to utilise the money" and the Pre-Award Interest awarded the Buyer for the loss of opportunity to invest in other business opportunities, and they amount to a double recovery.[51]

114 The Buyer submits that the DHC has heard the same objection and held that based on Indian case law, awarding interest from the date of the breach to the Award could not constitute multiple damages. The Buyer also submits that the Sellers have waived their objection because they did not raise it during the arbitration. This latter submission is surprising because the Sellers did object during the arbitration (Sellers' closing submissions at paras 1583 and 1584):

> 1583. … the Tribunal would have noted that accounting for the time value of money and imposition of interest are in substance one and the same. Accounting for the time value of money received by [the Buyer] in the future is premised on the interest

[51] Sellers' closing submissions at paras 97 and 98.



Version No 2: 27 Oct 2020 (22:41 hrs)

> that could have been earned on the money if it had been received earlier (e.g. on 7 November 2008). The present value of a future payment, discounted to reflect the time value of money is, by definition, "interest": *Garret Paul Curran v HMRC* [2012] UKFTT 517 (TC) at [206].
>
> 1584. An account for the time value of money in the manner proposed by Dr Ball would therefore overlap with an award of pre-award interest. This would result in double recovery, which is impermissible. …

115 In the alternative, the Buyer supports the Majority's decision and submits that the damages and the Pre-Award Interest are two distinct matters: in applying the WACC rate to the damages analysis, the Majority was seeking to make an adjustment to determine the present value of money in 2008, while in awarding the Pre-Award Interest, the Majority was accounting for the fact that the Buyer having borrowed money had committed its resources to the acquisition at the expense of others.[52] The Buyer argues that the decision to award interest is in the hands of the Majority, and it has the discretion to decide on the rate of interest. The Majority could have used the Singapore court rate of 5.33%, but it chose a lower rate of 4.44%, which was the Buyer's WACC rate.[53]

116 I find that the Majority did not award multiple or punitive damages. The damages and the Pre-Award Interest do not constitute multiple damages because they compensate for different things. The aim of damages is to compensate for the difference in value of the claimant's asset caused by the defendant's wrong, *ie*, the overpayment. The application of the WACC rate in the calculation of the damages was to remove the differences in the values of money at different time periods so that cash flows could be compared more meaningfully. In contrast, the Pre-Award Interest was to compensate the Buyer for being kept out of pocket in relation to the amount of overpayment. In addition, mathematically

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52 Buyer's closing submissions at paras 161 and 181.3.

53 NE Day 3 at p 82.



Version No 2: 27 Oct 2020 (22:41 hrs)

speaking, the WACC rate was applied to different sums of monies in the quantification of damages and that of the Pre-Award Interest. In the former case, the WACC rate was applied to the value obtained from the Share Swap transaction and the dividends. In the latter case, the WACC rate was applied as the interest rate to the difference between the purchase price and the total sum of the discounted value from the Share Swap transaction and the dividends. To this difference in value, the WACC rate has never been applied prior to the calculation of the Pre-Award Interest. This means that the WACC rate has never been applied twice on any quantum of monies. The Pre-Award Interest is also not punitive because it seeks to compensate the Buyer for being kept out of the over-payment sum that it was entitled to, and does not seek to punish the Sellers.

117 I note that the Majority also stated explicitly that it was aware of the dangers of double-counting in using a discount rate to account for the present value of money and awarding interest from the date of acquisition. It held that the award of interest and accounting for the present value of money were two distinct matters: the application of the WACC rate to the damages quantification was to account for the present value of money, while the award of interest from the date of acquisition was to account for the fact that the Buyer having borrowed money had committed its resources to the acquisition of the Shares at the expense of others. I read the Majority as explaining that the Pre-Award Interest is to make good to the Buyer for the period of time it had overpaid for the Shares.

118 The approach of the Majority also gels with the approach described by Trenor in *The Guide to Damages*. As quoted above, after calculating the difference in asset value at date 0, the amount is then brought forward in time using the pre-award interest rate (see [102] *supra*). Although Trenor states that



Version No 2: 27 Oct 2020 (22:41 hrs)

the rate usually used for the pre-award interest is a riskless rate, this only goes to show that the Majority may have used a wrong rate for the Pre-Award Interest. This is an error this court cannot review, because the wrong rate used does not transform the Pre-Award Interest into an award of multiple or punitive damages which would be outside the Tribunal's jurisdiction.

**Issue 4: Whether time limitation is a jurisdictional issue**

119 Before this court, the Sellers argue that the Buyer's claim under the SPSSA was time-barred, and take issue with the finding of fact by the Majority that the Buyer only discovered the fraud on 19 November 2009 and could not have discovered it earlier with reasonable diligence. This issue of time limitation has been examined by the Majority in detail, spanning 567 paragraphs in the Award.

120 The issue of time limitation gives rise to the difficult problem of classification. Under Indian law, time limitation is said to go to the root of the matter; if a case is barred by limitation, a court or an adjudicating authority "has no jurisdiction, power or authority" to entertain the case and decide it on merits (*Noharlal Verma v District Co-operative Central Bank Limited* (2008) 14 SCC 445 at [27]; *Kamlesh Babu and others v Lajpat Rai Sharma and others* (2008) 12 SCC 577 at [22]). This is supported by s 3(1) of the Indian Limitation Act which states that every suit instituted, appeal preferred, and application made after the prescribed period "shall be dismissed although limitation has not been set up as a defence". On the other hand, limitation of action is viewed as a procedural bar under Singapore law. In contrast to s 3(1) of the Indian Limitation Act, s 4 of the Limitation Act (Cap 163, 1996 Rev Ed) states that nothing in the Act shall operate as a bar to an action unless the Act has been expressly pleaded as a defence. Under Singapore law, the issue of limitation is



Version No 2: 27 Oct 2020 (22:41 hrs)

not traditionally viewed as a jurisdictional issue. The difficult question is which law applies to govern the classification of the issue of limitation.

121 Mr Yeo submits that Indian law is applicable and limitation is a jurisdictional issue. He argues that this court is entitled on a *de novo* review to conclude that the Buyer has not discharged its burden in proving that it was not time barred, and hence the Award should be set aside.[54] The Sellers argue that the Buyer discovered or could have discovered the alleged fraud at any time from July 2008, when the USA authorities filed a public document that made serious allegations against C. For the Buyer, Mr Subramanium concedes that limitation of action is a jurisdictional issue under Indian law.[55] However, he explains that the Majority considered all the eight different points raised in defence that could start the period of limitation, and made a finding of fact that the Buyer only became aware of the SAR in a manifest form on 19 November 2009. Therefore, he submits, a finding of fact by the Majority based on appreciation of the evidence is not capable of *de novo* review.

122 Section 8A(1) of the IAA provides that the Foreign Limitation Periods Act (Cap 111A, 2013 Rev Ed) ("FLPA") shall apply to arbitral proceedings as it applies to proceedings before any court. Under the FLPA, s 3(1) provides:

> **Application of foreign limitation law**
>
> **3.**—(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in Singapore the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be applied in the determination of any matter —
>
> (*a*) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and

54 NE Day 1 at p 115; Day 5 at pp 170 and 171.

55 NE Day 5 at p 194.



Version No 2: 27 Oct 2020 (22:41 hrs)

(*b*) the law of Singapore relating to limitation shall not so apply.

The law of that other country refers to so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country, including the procedural and substantive law, apart from any rules of private international law (s 6 of the FLPA). Since Indian law is the governing law of the SPSSA, Indian law with respect to limitation, both its procedural and substantive law, is applicable.

123 Before the DHC, submissions on limitation being a jurisdictional issue and on the claim being barred by limitation have also been similarly canvassed by the Sellers. Nath J held that "it is [the] settled legal position that limitation is a mixed question of law and fact" (DHC Judgment, at [99]–[100]), citing *Panchanan Dhara and others v Monmatha Nath Maity (Dead) Through LRs and another* (2006) 5 SCC 340 at [20] and *Ramesh B Desai and others v Bipin Vadilal Mehta and others* AIR 2006 SC 3672 at [19]. Nath J further held that the court "cannot go into the finding of fact recorded by the Arbitral Tribunal" and therefore rejected the Sellers' submission that the claim was time barred (at [101]). Nath J did not decide on whether limitation is a jurisdictional issue.

124 What I have before me are two legal propositions in Indian law with regard to limitation: (a) it is a jurisdictional issue, and (b) it is a mixed question of law and fact. Nath J found that he could not review findings of fact by an arbitral tribunal under Indian law, and therefore rejected the Sellers' claim based on proposition (b). Under Singapore law, the courts are to conduct a *de novo* review of a jurisdictional issue; whether it is a question of fact or law is not relevant to the classification of the issue as jurisdictional falling under Art 34(2)(*a*)(iii) of the Model Law.



Version No 2: 27 Oct 2020 (22:41 hrs)

125 On the surface, it may seem that once the applicable foreign law classifies the issue of limitation as jurisdictional, this court would have to take a *de novo* review of the issue. This, however, is a red herring. This court, as the curial court, has to apply Singapore law with regard to the setting aside of arbitral awards. Under the IAA, the grounds for setting aside arbitral awards are found in s 24 of the IAA and Art 34(2) of the Model Law. It is well established that the court's power to set aside an arbitral award is limited to setting aside based on the grounds provided under those two provisions. In my view, a submission that the arbitral award should be set aside because the underlying claim is time-barred does not fall under any of the grounds. The ground that could possibly encompass the submission is Art 34(2)(*a*)(iii) of the Model Law. I have explained in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 (at [26]) that the provision contains two sub-grounds for challenging an arbitral award: the first contemplates the typical common situation where an award is made by a tribunal that had jurisdiction to deal with the dispute, but exceeded its powers by dealing with matters that had not been submitted to it; the second is where the dispute referred to the arbitrators is one that was not within the parties' arbitration agreement or that went beyond the scope of the agreement. The Court of Appeal in the same case, *CRW*, explained that "Art 34(2)(a)(iii) of the Model Law applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute" (at [33]). This means that the arbitral tribunal has to address, and only address, the issues within the parties' scope of submission. An arbitral tribunal would be acting outside its jurisdiction if it decides on issues that are beyond the scope of the arbitration clause, upon a proper construction of the clause (see *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation*



Version No 2: 27 Oct 2020 (22:41 hrs)

*in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 at [11]; *AKN v ALC 2015* at [106]). On the facts, time limitation does not fall under Art 34(2)(*a*)(iii). First, clause 13.14.1 of the SPSSA does not show that the issue of time limitation is outside its scope. The only reference to time stipulations in the clause is that the parties are to submit to arbitration their claims, disputes, questions or controversies arising out of or in connection with the SPSSA which "cannot be finally resolved by such Parties within 60 (sixty) calendar days of the arising of a Dispute by amicable negotiation and conciliation". This condition precedent was picked up by the Sellers in their Answer to the Request for Arbitration, in which they objected to the Tribunal's jurisdiction on the basis that the condition precedent was not fulfilled. Second, time limitation is not outside the parties' scope of submission to arbitration – the Sellers specifically pleaded that the Buyer's claim was time-barred and submitted the issue for determination by the Tribunal (see [93] of Award). This is also set out in their Answer to Request for Arbitration – in contrast to their jurisdictional objection on the basis of the condition precedent, the Sellers set out the time limitation issue as one of their defences under the Defence Case (see para 96).

126 The issue of time limitation also does not fall under Art 34(2)(*a*)(i) of the Model Law. That provision concerns the validity of the arbitration agreement, but the issue of time limitation does not go to the validity of the arbitration agreement. There is no dispute on the validity of clause 13.14.1; the real dispute is that the Buyer's claim is barred because the time limitation has lapsed.

127 This approach is in line with the policy of minimal curial intervention, which respects finality in the arbitral process and acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties



Version No 2: 27 Oct 2020 (22:41 hrs)

have expressly chosen (*CRW* at [25]). The approach is also consonant with commentaries on the topic and foreign cases. In his commentary, *International Commercial Arbitration* vol 1 (Kluwer Law International, 2nd Ed, 2014), Gary Born notes that arguments that a statute of limitations to the underlying claim terminates the arbitration agreement or renders it incapable of being performed have been rejected in most cases on the grounds that they are non-jurisdictional, and instead go to the substance of the dispute before the arbitrators (at p 912, para 5.06[C][15]). United States courts have generally decided that the question of statute of limitations is for the arbitrator to decide. As cited in the commentary, in *Martin Glass v Kidder Peabody & Co* 114 F.3d 446 (4th Circuit, 1997), at 456, the court decided that "questions of mere delay, laches, statute of limitations, and untimeliness raised to defeat the compelled arbitration are issues of procedural arbitrability exclusively reserved for resolution by the arbitrator. Similarly, in *Shearson Lehman Hutton, Inc v Walter Wagoner* 944 F.2d 114 (2nd Circuit, 1991), at 121, the court held that "any limitations defense … whether stemming from the arbitration agreement, arbitration association rule, or state statute … is an issue to be addressed by the arbitrators". In *Grandeur Electricity Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd* [2006] HKC 423, the Hong Kong Court of Appeal also decided the issue the same way. The case concerned an agreement between the parties to settle their disputes before a contract manager, whose decision was to be final and binding on the parties unless and until the decision was revised by an arbitrator. The parties had to refer the dispute onward to arbitration within 28 days of receipt of the contract manager's decision or his notice of inability to make a decision. The Court of Appeal of Hong Kong held that arbitration was mandatory and it would be for the arbitrator to decide whether or not an extension of time should be granted, given that the 28 days had lapsed (at [11] and [34]). Gary Born



Version No 2: 27 Oct 2020 (22:41 hrs)

argues that this approach is correct, and that the issues of limitation and laches are not for the courts to decide (at pp 912–913, para 5.06[C][15]).

128 In determining what is considered a jurisdictional challenge under Art 34 of the Model Law, it is instructive to have regard to the difference between the concepts of jurisdiction of tribunal and admissibility of claim. The distinction is often considered in the context of investment treaty arbitration, but the concept of admissibility is found outside the International Centre for the Settlement of Investment Disputes Convention, and is relevant to non-investment treaty arbitrations as well (see Andrea Marco Steingruber, "Some remarks on Veijo Heiskanen's Note 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration'" (2014) ICSID Review vol 29 No 3 ("*Steingruber*") at p 675). In international law, the term "admissibility" is expressly mentioned in the Art 79(1) of the Rules of the International Court of Justice (1978).

129 The concepts of jurisdiction and admissibility has been recently considered by the Court of Appeal in *obiter* in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2018] SGCA 81 ("*Swissbourgh*"), at [207]. Citing the dissenting opinion of Keith Highet in *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/98/2, 8 May 2000, at [58], the Court of Appeal opined that jurisdiction is commonly defined to refer to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it". This view has been similarly expounded by various commentators. Writing on the concept of admissibility in the jurisprudence of the International Court of Justice, Gerald Fitzmaurice stated that an objection to the substantive admissibility of a claim is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits, while an objection to the jurisdiction of



Version No 2: 27 Oct 2020 (22:41 hrs)

the tribunal is a plea that the tribunal itself is incompetent to give any ruling *at all* whether as to the merits or as to the admissibility of the claim (Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications, 1986) at p 438). The main distinguishing point between the two concepts is whether the objecting party takes aim at the tribunal or at the claim (Jan Paulsson, "Jurisdiction and Admissibility" (2005) in *Global Reflections on International Law, Commerce and Dispute Resolution*, Liber Amicorum in honour of Robert Briner (Gerald Aksen *et al*, eds) (ICC Publishing, 2005) ("*Paulsson*") at p 616). The former situation would concern the jurisdiction of the tribunal while the latter, the admissibility of claim (*Paulsson* at p 616; see also Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) at p 148). Where a claim cannot be raised at all, the latter situation is engaged. The concept of jurisdiction is related to an arbitration agreement while admissibility is related to a specific claim or counterclaim (*Steinbruger* at p 681). In the context of admissibility of claims, a tribunal with jurisdiction has the obligation to deal with both admissible and inadmissible claims/counterclaims. In the case of an inadmissible claim/counterclaim, the tribunal will dismiss it due to inadmissibility without entering into the merits (*Steinbruger* at p 680).

130 The conceptual distinction carries significant practical import in arbitration (*Swissbourgh* at [208]). The different effect resulting from the two types of challenges is stated succinctly by Paulsson: decisions of tribunals which do not respect jurisdictional limits may be invalidated by a controlling authority, but if parties have consented to the jurisdiction of a given tribunal, its determinations as to the admissibility of claims should be *final* (*Paulsson* at p 601).



Version No 2: 27 Oct 2020 (22:41 hrs)

131 The commentators consider an objection based on time limitation to be an issue of admissibility of claim (*Paulsson* at pp 602 and 616; *Steingruber* at p 680; Hanno Wehland, "Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules" in *ICSID Convention after 50 Years: Unsettled Issues* (Crina Baltag gen ed) (Kluwer Law International, 2016) at para 8.05). I agree. An objection based on time limitation targets the claim, and not the tribunal. Where a claim is time-barred, the claim can no longer be decided on the merits. The determination of whether the claim is time-barred is for a tribunal to deal with.

132 For the reasons stated, the Sellers' characterisation of the limitation of action as a jurisdictional question is misplaced. The Majority's decision on time limitation does not fall under any ground in s 24 of the IAA or Art 34 of the Model Law.

**Issue 5: Natural justice**

133 It is well established that to succeed in a claim under s 24(*b*) of the IAA, the claimant needs to establish the following four elements (see *Soh Beng Tee* at [29]; *AKN v ALC 2015* at [48]): (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.

134 The failure to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him (*AKN v ALC 2015* at [46]). It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, this inference must be shown to be "clear



Version No 2: 27 Oct 2020 (22:41 hrs)

and virtually inescapable" (*AKN v ALC 2015* at [46]). The Court of Appeal cautioned against arguments dressed up to appear as breaches of natural justice: if the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary, then the inference that the arbitrator did not apply his mind at all to the dispute before him or to an important aspect of that dispute and so acted in breach of natural justice should not be drawn.

135 The Sellers submit that there were breaches of natural justice on the following grounds:

(a) the Majority failed to consider the Sellers' position that the Tribunal was not permitted to apply a discount rate in the calculation of damages;

(b) the Majority failed to consider whether it was correct to grant tortious relief in respect of a claim under s 19 of the Indian Contract Act; and

(c) the Majority prevented the Sellers from presenting further arguments on the actual profits made by the Buyer from selling the Swapped Shares.

136 The Sellers have raised other arguments in the affidavit of BBA, but they were not pursued in closing submissions. These include the argument that the Majority used the closing price of the Share Swap transaction when neither the closing date nor the price was put forward by any party, that the Majority failed to consider the Sellers' submissions that the Buyer was induced by representations made by its own deal team, that the Majority failed to consider



Version No 2: 27 Oct 2020 (22:41 hrs)

the Sellers' submissions that the misrepresentations were made by BBA in his capacity as the chief executive officer of C and not as a seller, that the Buyer suppressed documents relating to the Settlement, and that the Sellers were deprived of the opportunity to cross-examine Mr Sheldon Bradshaw as a factual witness, because he was admitted as an expert witness. I will not discuss them since these arguments were not pursued in the Sellers' closing submissions.

137 On the three grounds pursued by the Sellers, I find that they have failed to establish that there were breaches of natural justice. I will address each of these grounds in turn.

***Alleged failure to consider the Sellers' case that a discount rate should not be applied***

138 In support of this allegation, the Sellers refer to Mr Saunders' expert reports and their opening statement and closing submissions in the arbitration. In Mr Saunders' Expert Report dated 29 July 2014, it was stated that the Buyer's premise for quantifying damages was a matter of dispute, and the discussion on the discount rate to be used was prefaced with the assumption that the Tribunal accepted a discount rate should be applied.[56] In Mr Saunders' Supplemental Expert Report, the reply to Dr Ball's suggestion of a discount rate was similarly prefaced with the conditional phrase, "if it is appropriate to apply a discount rate".[57] In the opening statement, the Sellers stated that there was no legal basis for the Buyer to claim damages that accounted for the time value of money,[58] and in the closing submissions, the Sellers again repeated that accounting for the time value of money was wholly unsupported in law.[59] Based on these, the

56 ABOD vol 14, at pp 783 and 788.

57 ABOD vol 15, at p 285, at para 3.6.1.

58 ABOD vol 15, at p 753, at para 191.

59 ABOD vol 19, at p 297, para 1578.



Version No 2: 27 Oct 2020 (22:41 hrs)

Sellers argue that the Majority did not apply its mind at all to the question of whether it was permitted *in law* to apply a discount rate in calculating damages.

139 First, the premise for quantifying damages which Mr Saunders disputed was the rescission method used by Dr Ball. Mr Saunders did not dispute specifically the use of a discount rate in calculating damages. In the Joint Expert Report dated 17 September 2014,[60] Dr Ball commented that "accounting for the time value of money is an accepted and commonly used methodology that is appropriate in situations where amounts are measured at very different points in time", while Mr Saunders did not object to Dr Ball's comment and "agree[d] that the question whether damages in this case should account for the time value of money is an issue for the Tribunal to decide". In the Joint Expert Report, Mr Saunders also stated his position that "in making an investment, it is the [Buyer's] intention to receive a return equal to the average return it receives on all its investments, as represented by its WACC" and that since the Buyer's WACC rate was the average return on its global investments, there was little force in Dr Ball's rejection of the WACC rate on the basis that it was denominated in a different currency from that of the damages to be awarded. It can reasonably be said that the picture painted by all the expert reports in entirety is that Mr Saunders was amenable to the application of a discount rate, even though he disagreed with the value of the rate.

140 In the Award, the Majority rejected the Sellers' method of using the incremental effect of the SAR on the Settlement Sum because it did not reflect all the Buyer's direct losses flowing from the SPSSA fairly (Award, at [1083]). With regard to the Buyer's "present value" method calculation, the Majority

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60 ABOD vol 15, at p 415, at pp 10 and 14 of Joint Expert Report.



Version No 2: 27 Oct 2020 (22:41 hrs)

noted that Mr Saunders "did not disagree" that it was appropriate to account for the fact that the Buyer did not realise the benefit for more than six years after the acquisition of the Shares. The Majority noted that Mr Saunders did however disagree with the value of the discount rate to be used, and accepted the rate proposed by Mr Saunders.[61] In this regard, the word choice used by the Majority is important – the Majority noted that Mr Saunders "did not disagree", and not that there was no dispute as to the applicability of a discount rate. This is an accurate characterisation of Mr Saunders' evidence as set out at [139] above. Moreover, as the Buyer astutely pointed out in its closing submissions before this court, Mr Saunders in proposing his own method had also applied a discount rate to bring the incremental effect back to the date of acquisition of the Shares (Award at [1045]). The Majority had considered the appropriate methodology to assess the damages, and took into account the experts' evidence in deciding whether to apply a discount rate and the rate to be applied.

141 Although the Majority did not comment on the legal basis for the application of a discount rate, it does not mean that it did not consider the issue. A tribunal does not have to give responses on all submissions made (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [60]). It cannot be inferred on a reading of the Award that the Majority failed to consider that a discount rate should not be applied. The Majority referred to the parts of the Sellers' closing submissions where the Sellers objected to the application of a discount rate on the ground that there was a lack of legal basis, and noted the Sellers' position that the Buyer's calculation of damages was "speculative and wrong" (Award, at [1033]). Since the Sellers did not provide any authority to support their submission that the application of a discount rate was not permissible in law, it was open to the Majority to apply a discount rate. It is self-

[61] Award, at [1078] and [1079].



Version No 2: 27 Oct 2020 (22:41 hrs)

serving for the Sellers to now say that they would have put forth an authority if the Majority had stated expressly its consideration of the legality of the application of a discount rate.

***Alleged failure to consider whether tortious relief could be granted***

142 The Sellers submit that the Majority, instead of awarding damages under the second limb of s 19 of the Indian Contract Act, had reframed the Buyer's claim into a tortious one, to award damages which would place the Buyer in the position it was in before the SPSSA transaction occurred. According to the Sellers, the way the Majority framed the claim shows that the arbitrators had failed to apply their mind to the question of whether granting tortious damages under s 19 of the Indian Contract Act was permitted under Indian law. The Sellers explain that the Majority based its position on the alleged absence of dispute by the parties that the measure of damages recoverable under s 19 was similar to that for fraudulent misrepresentation under general tort principles. The Sellers submit that they disputed the application of tortious principles in the arbitration, and that none of the authorities and parties' submissions cited by the Majority actually support its position.

143 I find the Sellers' objection unwarranted. From the outset, the allegation that the Majority had reframed the Buyer's claim is not made out. From reading the Award, the Majority did not state that the measures of damages under tort and contract are the same as a proposition of law. Rather, the Majority observed that "[i]n most cases, the measure of damages [in tortious claims] will effectively result in the same quantification analysis as breach of contract claims" (Award, at [974]). This would be the practical outcome where the same evidence was used under both measures.



Version No 2: 27 Oct 2020 (22:41 hrs)

144 It cannot be inferred from the cases cited by the Majority that it failed to consider whether tortious damages were permissible. *RC Thakkar (HC)*, a case involving a claim under the second limb of s 19 of the Indian Contract Act cited by the Majority, contains a passage that could be read to endorse the observation that in effect, the quantification of damages under the tortious measure and the contractual measure would be similar (at [73]):

> … What [s 19] contemplates is to compensate the party defrauded by putting him in the same position in which he would have been if the representation which was made was true. … We find that *even if it is believed that the plaintiff should be compensated in the general principles of Torts it would not make any difference* because in Torts the plaintiff can claim a decree for the damages or loss which it has suffered on account of the misrepresentation in question. It is obvious that damages or loss which the law of Torts contemplates also includes the profit which the party acting on misrepresentation would have been able to obtain had there been no misrepresentation…
>
> [emphasis added]

145 The Sellers argue that *RC Thakkar (HC)* has been overruled on appeal; however, the effect of the overruling on the legal position stated in *RC Thakkar (HC)* was uncertain because it was overruled on the facts. Clarity as to the legal position was only achieved in *Gaurav Monga v Premier Inn India Pvt Ltd and others* 237 (2017) DLT 67 at [23], which held that tortious claims are precluded by s 19 of the Indian Contract Act. This later decision was only handed down after the Award was released. If anything, the Majority made an error of law on the quantification of damages in contractual claims, as there are existing Indian authorities at the time of the arbitration holding that tortious claims are precluded by s 19 of the Indian Act (see *Premchand v Ram Sahai and another* AIR 1932 Nagpur 148 at [11]).

146 The Sellers argue that they objected to the application of *Smith New Court*, but the Majority wrongly observed that there was no dispute that the



Version No 2: 27 Oct 2020 (22:41 hrs)

measures of damages under tort and contract would be similar. From this, it can be inferred that the Majority did not address the issue. The Sellers' argument is contradicted by their own closing submissions, which has been cited by the Majority in the Award. The paragraph in the closing submissions states:

> 1274. Damages will be assessed only if damage is proved. The purpose of assessment is to "*put the plaintiff into the position he would have been in if no false representation had been made*": see *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254.

This paragraph provides support for the Majority's statement that there was no dispute that the approach to quantification of damages under the tortious measure could be applied to the dispute between the parties.

147 Therefore, it is unsurprising that the Sellers attempt to explain away the paragraph in the closing submissions. Before this court, the Sellers submit that they had objected to the application of the principles in *Smith New Court* in their opening submissions, and their counsel had explained in oral closing submissions that the "but for" test in *Smith New Court* did not apply in all cases of fraud. Turning to the Sellers' opening statement, it was stated that *Smith New Court* was "distinguishable" from their case and did not apply, because the Buyer could not prove a "causal link" between the loss suffered and the fraud.[62] It was not stated that *Smith New Court* should not apply because the measure of damages in that case was tortious while the measure of damages in the dispute between the parties was contractual. Turning to the oral closing submissions, counsel submitted that the "but for" test in *Smith New Court* should not be applied to cases where the risk of loss or damage in a certain product or transaction was known to the representee. On this basis, the counsel distinguished *Smith New Court* from the case at hand; he submitted that in *Smith*

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62 ABOD vol 15, at pp 752 and 753.



Version No 2: 27 Oct 2020 (22:41 hrs)

*New Court*, the representee was not aware of any of the risks in the shares it bought, while in the case at hand, the Buyer had already known, at the time of the acquisition of the Shares, of certain risks that eventuated even though they were not factored into the price paid. This, according to counsel in the arbitration, would affect the price to be used in the calculation of damages. Counsel did not object to the application of the principles in *Smith New Court* on the basis that they were tortious in nature, but only objected on the basis that the case was distinguishable on the facts. The position taken by counsel in the arbitration is even more stark considering that immediately before his submission that the "but for" test did not apply in all cases, he had confirmed orally that "Indian law is not different from English law on this point, as I understand it. The English law is very well described and encapsulated within Smith New Court."[63]

148 The Sellers did not refer me to any pleading, written submission or oral submission made during the arbitration that raised the objection that s 19 of the Indian Contract Act does not allow for a quantification based on the tortious measure. As cautioned in *BLC v BLB*, the courts should guard against attempts by a disgruntled party to fault an arbitrator for failing to consider arguments or points which were never before him (at [53]). Here, there can be no clear and virtually inescapable inference that the Majority failed to consider a point pleaded by the Sellers.

149 A consideration of all the case citations and references to parties' submissions by the Majority shows that the Majority did apply its mind to the question of whether the tortious measure can be applied. There are other

63 Transcripts of Hearing on 14 February 2015 at p 88, found at ABOD vol 19 p 676.



Version No 2: 27 Oct 2020 (22:41 hrs)

inconsequential points raised by the Sellers and there is no need to discuss them at all.

***Whether the Majority deprived the Sellers of their right to be heard***

150 The Sellers wrote to the Tribunal on 1 September 2015 to inform that the Buyer had sold off all the Swapped Shares on the open market. The Sellers requested for an opportunity to make further submissions on the calculation of damages, and the Buyer objected to the same. The Tribunal refused the request to make submissions but accepted into evidence the materials submitted by the Sellers. The Sellers now argue before this court that the Tribunal infringed their right to be heard.

151 There is no merit in the allegation because it is within the prerogative of the Tribunal to decide whether further arguments were necessary. In response to the Sellers' request, the Tribunal replied that it would not require any further submissions because the positions of the parties on the issue of damages appeared clear.[64] This was repeated in the Award: "the Parties having made their respective positions on the issue whether or not the subsequent movement in the value of shares is relevant to the quantum of damages clear at the hearing, the Tribunal would not require any further submissions or expert reports in that regard" (Award at [61]).

152 The Tribunal was entitled to decide not to hear further arguments since there were already extensive submissions on the calculation of damages made by the Sellers and the Buyer. Even before the sale of the Swapped Shares, the Sellers' expert had suggested using the value at the time of the sale of the Swapped Shares to calculate damages. During the arbitration, the Sellers' expert

64 ABOD vol 2 Tab 12 at p 622.



Version No 2: 27 Oct 2020 (22:41 hrs)

argued that it would be "appropriate to consider the value of its shareholding in [the company with which the Share Swap was entered into] which it would likely receive when it will be permitted to sell its shares under the transaction agreement", the Buyer would "not finally crystallise any losses it [had] suffered from its acquisition of [C]" until it could sell off its Swapped Shares in January 2018.[65] The Majority considered the parties' positions and concluded that the realisation of the benefit was at the close of the Share Swap transaction on 25 March 2015, for the Buyer would become a shareholder in the company with which the Share Swap was entered into and be exposed to the movements in the prices of the company's shares.

153 In support of the Sellers' allegation, Mr Yeo relies on the opinion of the dissenting member of the Tribunal. The dissenting member stated that "there has not been any effective dialogue between the members of the Tribunal, as far as [he was] concerned" and that he was of the view that the Tribunal should have stated exactly what material it would take into evidence instead of merely stating that it would take into evidence the material submitted by the Sellers.[66] To my mind, this opinion does not in any way show that there was a breach of natural justice. The dissenting member was referring to a lack of effective dialogue among the arbitrators, and not between the Tribunal and the parties. The parties were also aware that the material taken into account was the sale of the Swapped Shares.

**Issue 6: Public policy**

154 The Non-Management Sellers argue that the Award should be set aside as against them on the ground that it would offend the public policy of

[65] Award, at [1056]–[1057]; Saunders' Expert Report at para 4.7.4, found at ABOD vol 14 p 836.

[66] Sellers' submissions at paras 157 and 158.



Version No 2: 27 Oct 2020 (22:41 hrs)

Singapore, in that (a) the Award imposes liability on them, who are innocent principals, for an agent's fraudulent misrepresentation; and (b) the Award against them is disproportionate.

155 The Minors also argue that the Award should be set aside as against them on the ground that it would offend the public policy of Singapore because (a) their interests and welfare were not protected, and (b) the Award against them is disproportionate.

156 From the outset, it is important to reiterate that the public policy ground for setting aside or refusal of recognition/enforcement is very narrow in scope. The Court of Appeal has held that the ground should only succeed in cases where upholding or enforcing the arbitral award would "shock the conscience", or be "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public", or violate "the forum's most basic notion of morality and justice" (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [59]). In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ("*Sui Southern Gas*"), the High Court stated that to succeed on a public policy argument, the party "had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice" (at [48]). The *1985 UN Commission Report* states at para 297 that the term public policy "comprised the fundamental notions and principles of justice", and it was understood that the term "covered fundamental principles of law and justice in substantive as well as procedural respects". The *1985 UN Commission Report* further explains that Art 34(2)(*b*)(ii) of the Model Law "was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at".



Version No 2: 27 Oct 2020 (22:41 hrs)

157 It is clear that errors of law or fact, *per se*, do not engage the public policy of Singapore under Art 34(2)(*b*)(ii) of the Model Law when they cannot be set aside under Art 34(2)(*a*)(iii) of the Model Law (*PT Asuransi* at [57]), with the exception that the court's judicial power to decide what the public policy of Singapore is cannot be abrogated (*AJU v AJT* [2011] 4 SLR 739 ("*AJU v AJT*") at [62]). A possible breach of s 19B of the IAA, which embodies the principle of finality, in the context of a second arbitration being brought to examine the same issues in the first arbitration, is found not to be contrary to the public policy of Singapore under Art 34(2)(*b*)(ii) (*PT Asuransi* at [54]–[55]). Ambiguous contentions that an award was perverse or irrational could not, of itself, amount to a breach of public policy (*Sui Southern Gas* at [48]). On the other hand, the Court of Appeal in *AJU v AJT* seemed to approve that the position taken by the arbitral tribunal in that case that an agreement to stifle the prosecution of non-compoundable offences would be illegal and contrary to public policy (at [63]).

158 The general conceptual approach to considerations of public policy set out in the recent case of *UKM v Attorney-General* [2018] SGHCF 18 ("*UKM*") is helpful. The High Court set out the analytical framework in cases where the legal area concerned is mostly governed by statutory law and the public policy considerations involve socio-economic considerations (at [111] and [136]). The first step in the framework is to conduct a forensic exercise to identify whether the alleged public policy exists by examining the appropriate authoritative sources. The main criteria in determining the existence of the alleged public policy are authority, clarity and relevance. The authoritative materials from which a public policy can be identified include legislation as well as judicial decisions that express long-held values which concern a fundamental purpose for which the law exists and on which reasonable persons may be presumed to agree. The public policy must be clearly expressed in the source material and



Version No 2: 27 Oct 2020 (22:41 hrs)

should be consistently expressed across different sources. The alleged public policy in the precise manner it is formulated must be borne out in the source material. The second step is a balancing exercise between the public policy as identified and a claimed right provided by statute. The factors influencing the balancing exercise include the degree of rational connection between the public policy and the legal issue being decided, whether the public policy emanates from the applicable statutory regime, and the degree to which the public policy would be violated if the claimed right were to be given effect (at [162]).

159 The legal area concerning the enforcement and setting aside of awards is governed by statute, namely the Arbitration Act (Cap 10, 2002 Rev Ed) and the IAA. As such, the conceptual framework outlined in *UKM* can be helpful to navigate public policy considerations in arbitration, even though the subject matter of the public policies that can be raised under Art 34(2)(*b*)(ii) of the Model Law and Art V(2)(*b*) of the New York Convention may include both socio-economic policies and legal policies. When a challenge on the ground of public policy is brought, the outline draws attention to the importance of conducting a forensic exercise to identify whether the alleged public policy exists, and the criteria influencing the identification as explained in *UKM* are applicable. The balancing exercise in the context of arbitration is between the policy of enforcing arbitral awards – as encapsulated in s 19B(1) of the IAA which states that awards are "final and binding on the parties" and the judicial policy of minimal curial intervention – and the alleged public policy which the award purportedly violates. This balance is generally in favour of the policy of enforcing arbitral awards, and only tilts in favour of the countervailing public policy where the violation of that policy would "shock the conscience" or would be contrary to "the forum's most basic notion of morality and justice". In determining whether the balance tilts towards the countervailing public policy,



Version No 2: 27 Oct 2020 (22:41 hrs)

it is important to consider both the subject nature of the public policy, the degree of violation of that public policy and the consequences of the violation.

***Public policy in relation to the Non-Management Sellers in OS 784***

*Whether the Non-Management Sellers could be bound by the fraudulent misrepresentations*

160 The Non-Management Sellers argue that the Award against them offends the public policy of Singapore because it imposes liability on them, who are innocent principals, for an agent's fraudulent misrepresentation. I find that the Non-Management Sellers' claim is in actual fact an appeal against the factual finding of the Majority dressed up as a public policy challenge. The claim has no merit.

161 While the Non-Management Sellers acknowledge the general rule that an innocent principal is liable for an agent's misrepresentations if they fall within the general class of statements that the principal apparently authorised the agent to make, the Non-Management Sellers also submit that the principal must have done more than simply have trust in the agent to be held liable. The Non-Management Sellers argue that because they merely reposed trust in BBA, they should not be visited with liability. They left to BBA to do all that appeared necessary to conclude the SPSSA, including the process of negotiations, disclosing documents, conveying information, due diligence and the making representations (Award, at [395]). The Non-Management Sellers submit that there is no evidence that their agreement to sell their shares extended to allow BBA to do anything at all costs to conclude the SPSSA. They contended that they did not know about the actual negotiation of the SPSSA or the representations made by BBA, because to them, they held the shares as family assets. It would be against the public policy of Singapore, according to them, to



Version No 2: 27 Oct 2020 (22:41 hrs)

foist BBA's fraudulent conduct on them when they were clearly not involved in the affairs of C.

162 It is a finding of fact by the Majority that the fraudulent misrepresentations made by BBA, along with other agents of the Non-Management Sellers, were within their apparent authority, and therefore the Non-Management Sellers were liable. The Majority considered the issue of the extent of the agents' (including BBA's) authority to act for all the defendants, in particular whether such authority, whether actual, apparent, or ostensible, extended to making fraudulent misrepresentations which induced the Buyer into entering the SPSSA (Award at [386]). The Majority cited the law as follows: generally, an agent has no actual authority to commit fraud, but if the agent acting in the normal course of the work and within the scope of his authority acted fraudulently, the principal is bound by his fraudulent acts. The Majority found that all the acts by BBA and the other agents that were all part of the process of the negotiations leading to the conclusion of the SPSSA fell within the apparent scope of their authority. Therefore, the Majority concluded that the defendants, as principals, should be jointly and severally liable for any fraud committed by their agents in the course of entering into the SPSSA (Award at [401]).

163 The decision of the Majority in holding the Non-Management Sellers liable on the ground that the fraudulent misrepresentations made were within the apparent authority of their agents is in line with the position under Singapore law, and cannot be contrary to the public policy of Singapore. What the Non-Management Sellers are seeking to accomplish in fact is to reopen the Majority's finding that the fraudulent misrepresentations made by BBA and the other agents were within their apparent authority. The court is precluded from reviewing the finding of fact by the Majority. As stated in *PT Asuransi*, the IAA



Version No 2: 27 Oct 2020 (22:41 hrs)

would be "internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact" (at [57]).

*Proportionality of Award against the Non-Management Sellers*

164 The Non-Management Sellers argue that proportionality of damages is an integral part of Singapore public policy, and the Award should be set aside against them because it was disproportionate to hold them jointly and severally liable with the rest of the defendants in the arbitration when they only held 0.65% of the Shares. They cited *Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal* [2013] 4 SLR 629 ("*Freddie Koh*") and *Li Siu Lun v Looi Kok Poh and another* [2015] 4 SLR 667 ("*Li Siu Lun*") for their proposition. The Minors, in bringing the same objection based on the principle of proportionality (see [169] below), further rely on *A S Nordlandsbanken and another v Nederkoorn Robin Hoddle* [2000] 3 SLR(R) 918 ("*A S Nordlandsbanken*"), *AOD (a minor suing by his litigation representative) v AOE* [2016] 1 SLR 217 ("*AOD v AOE*") and *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd and others* [2010] 2 SLR 625 ("*John Ting*").

165 The Non-Management Sellers and the Minors have attempted to identify the alleged public policy in judicial decisions. However, I find that the cases do not elevate the principle of proportionality of damages in and of itself to a fundamental substratal legal principle that applies in all cases. *Freddie Koh* (at [74] and [76]) and *Li Siu Lun* (at [159]), which concerned domestic court proceedings, held that the principle of proportionality applies in determining the quantum of aggravated damages to be awarded, in comparison to the quantum of general damages awarded. The context in which the principle of



Version No 2: 27 Oct 2020 (22:41 hrs)

proportionality is held to apply is very specific. The High Court in *AOD v AOE* – also a case litigated in the domestic courts – opined that because there was no rule of law stipulating specific rates of discount, the court only had the principles of consistency, proportionality, and its own sense of fairness and justice to guide it in determining the appropriate multiplier (at [35]). These principles are cited as broad concepts to guide a court's exercise of discretion; *AOD v AOE* does not specify the application of the principle of proportionality in the relationship between the quantity of damages awarded and another factor, such as the gain obtained or the size of shareholding held by one defendant among many defendants, as in the present case. In *A S Nordlandsbanken*, the High Court stated that damages that are wholly disproportionate to the loss or damage will not be awarded (at [48]). This principle refers to the comparison between damages and the loss sustained by a claimant; it is not stated in the context of the proportionality of damages to the respective size of shareholdings or benefits obtained by each defendant. In *John Ting*, although Quentin Loh JC (as he then was) held that the arbitrator's fees were totally out of proportion and excessive to the amount of work he did, Loh JC emphasised that he was concerned with a domestic arbitration, and thus our courts would have the jurisdiction and interest in ensuring a proper level of fees and costs levied. Loh JC highlighted at [75] that different considerations applied from those in relation to international arbitrations, which were set out correctly in *VV and another v VW* [2008] 2 SLR(R) 929 ("*VV v VW*"). Loh JC's holdings were in relation to the arbitrator's application for his fees to be paid, and not in relation to a public policy challenge against an award.

166 In *VV v VW*, a party applied for the setting aside of an award on costs alleging that, since the amount was nearly three times as high as its claim, the



Version No 2: 27 Oct 2020 (22:41 hrs)

award violated the principle of proportionality which it considered to be part of Singapore public policy. Judith Prakash J held as follows (at [31]):

> … it is not part of the public policy of Singapore to ensure that the costs incurred by parties to private litigation outside the court system, *eg*, arbitration, whether the same is domestic or international, are assessed on the basis of any particular principle including the proportionality principle. That is not to say that arbitrators should not follow established legal principles when assessing costs payable by one party to another but simply that *there are no public policy implications connected with that procedure. There is no public interest involved in the legal costs of parties to one-off and private litigation.* Such litigation sets no precedents and binds no one apart from the immediate parties. … *I do not think that the amount of costs awarded by an arbitrator to a successful party in an arbitration proceeding could ever be considered to be injurious to the public good or shocking to the conscience no matter how unreasonable such an award may prove to be upon examination.* The courts adhere to the policy of party autonomy embodied in the Act and reflected by the limited grounds on which they may interfere in the arbitral process. *The prevailing public policy being that substantive arbitral awards are inviolable notwithstanding mistakes of fact or law*, it would be odd for the courts to be able to justify interfering with the quantum of costs awarded by an arbitrator by invoking public policy.
>
> [emphasis added]

167 The Non-Management Sellers are claiming that the principle of proportionality of damages is a stand-alone public policy but have failed to show its existence in the judicial decisions they have cited. The judicial decisions similarly do not support the existence of a public policy that damages against each defendant must be proportionate to the size of his shareholding. The cases cited address different underlying public policy considerations that attract the application of the principle of proportionality. In the present case, the Non-Management Sellers have also failed to identify any underlying public policy to engage the principle of proportionality in the relationship between the damages awarded and the size of the shareholding held by each defendant. In my view, the principle of proportionality is a tool to give effect to an underlying



Version No 2: 27 Oct 2020 (22:41 hrs)

policy consideration, and not a public policy in and of itself. For example, the policy against over-compensation and arbitrariness in awarding aggravated damages in defamation cases is the underlying the public policy consideration in *Freddie Koh*. As explained by the Court of Appeal in *Freddie Koh*, caution has to be exercised against double counting or otherwise over-compensating the plaintiff because of the distress, humiliation and injury to feelings, and aggravated damages cannot be an arbitrary top-up unrelated to compensating the plaintiff for the aggravation (at [75] and [77]).

168 Ultimately, the fact that the Non-Management Sellers were made jointly and severally liable despite the size of their shareholding smacks of an error made by the Majority that this court cannot review, rather than a public policy objection. The scope of setting aside or refusal of recognition/enforcement on the ground of public policy is very narrow, and courts have to be cautious of a back-door appeal on the merits through this ground.

***Public policy in relation to the Minors in OS 787***

*Protection of minors*

169 The Minors were between three and eight years old when the SPSSA was signed, and between eight and twelve years old during the arbitration. The SPSSA was entered into by BBA on behalf of BBE, being the father and natural guardian of BBE, and by BBF on behalf of BBI, BBJ, BBK and BBL, being the father and natural guardian of them.[67] The Majority held the Minors jointly and severally liable with the other defendants in the arbitration for the full extent of the damages, interest, and costs that have been awarded, and did not consider the positions of the Minors separately in its deliberations.

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67 Schedule 8.1.1 of the SPSSA.



Version No 2: 27 Oct 2020 (22:41 hrs)

170 In OS 787, the Minors are suing by their litigation representative and represented by a separate counsel. The Minors argue that enforcing the Award against them offends the public policy of Singapore, because (a) it fails to protect the welfare and best interests of minors and (b) it violates the principle of proportionality. On their first submission, the Minors present two sub-grounds: the first is that a litigation representative was not appointed by the Tribunal and no submissions as to the position of the Minors were requested by the Tribunal, and the second is that the substantive Award fails to protect their interests. On the principle of proportionality, they point out that they held only 0.0015% of the Shares collectively and yet they are jointly and severally liable for the entire Award. Their arguments on this ground are largely the same as those submitted by the Non-Management Sellers at [164] and [165] *supra*.

171 The challenges can be classified into two aspects: substantive protection of the Minors, and procedural protection of the Minors in the conduct of proceedings. These two aspects will be analysed in turn.

172 It was similarly argued before the DHC that the Award should not be enforced against the Minors because to do so would violate the public policy of India. Nath J allowed the claim, holding that the "protection of the minor is a fundamental policy of Indian law" and "a substratal principle on which Indian law is founded". He held further as follows:

> (a) The Minors alleged that the Buyer had to take steps to appoint a guardian *ad litem* to defend their interests pursuant to s 9(1)(i) of the Indian Arbitration Act and O 32 of the Code of Civil Procedure 1908 (Act No 5 of 1908) (India) ("Indian Civil Procedure Code"). Nath J held that he need not go into the provisions because the admitted fact was that in all the proceedings the Minors were specifically represented by



Version No 2: 27 Oct 2020 (22:41 hrs)

counsel, and their natural guardians, *ie*, BBA and BBF, had been taking steps to defend the litigation on their behalf (at [111]). Moreover, under Indian law, merely because the provisions were not complied with was not a ground to conclude that the Award could not be enforced – prejudice caused to the Minors had to be shown (at [113]).

(b) The Majority found that it was BBA who had fraudulently misrepresented. BBA was the natural guardian of BBE, and was at best acting in the capacity of an agent for the other Minors. However, pursuant to s 183 of the Indian Contract Act, a minor is incapable of employing an agent, and therefore is *incapable of committing a fraud through BBA* (at [118]). Under s 8 of the Hindu Minority and Guardianship Act 1956 (No 32 of 1956) (India), *a natural guardian is incapable of and has no power to carry out a fraud for and no behalf of a minor so as to jeopardize the estate of the minor*. Any such act done by the natural guardian cannot bind or fasten any damages or liability on the estate of the minor (at [124]). It is the fundamental policy of Indian law to protect a minor, as could be gathered from the various protections of minors' interests afforded by statutory provisions in the Indian Civil Procedure Code, the Indian Partnership Act 1932 (No 9 of 1932) (India), the Hindu Minority and Guardianship Act 1956 and the Constitution of India. Hence, a minor cannot be guilty of having perpetuated a fraud either himself or through an agent, and if a natural guardian committed the fraud, his act cannot bind the minor with any penalty or adverse consequences (at [134] and [135]).

(c) The Award against the Minors is also shockingly disproportionate because they only received about Rs. 14 lacs from the sale and only gained about four to five lacs of rupees through the fraud



Version No 2: 27 Oct 2020 (22:41 hrs)

> of BBA, and yet they are saddled with a liability of about Rs. 3,500 crores.

The Buyer's concessions before this court

173 Before this court, the Buyer made several concessions in the course of oral submissions. The concessions came very late, after Mr Lee has made his closing submissions.[68] Mr Subramanium conceded that the Minors cannot be made liable under Indian law, because it is settled that an infant's rights have to be protected.[69] In this regard, he submits that it is appropriate for the court to take a view that a minor cannot appoint a principal and cannot be bound by an *ultra virus* act of a principal. As such, the Award will not operate against the minors, but will operate against all others because they are adults:[70]

> … I am making a concession that even under the governing law of India I don't think [the Minors] should be visited with liability, apart from … proportionality, that is something which the judge mentioned in the passing, but even suppose it was a substantial sum, I wish to state it on principle they could not have been liable.

174 Mr Lee summarises the Buyer's other concessions as follows:

> (a) It is agreed that the Award gives no separate consideration to the special position of the Minors or issues affecting the Minors.
>
> (b) The joint and several liability imposed on the Minors under Indian law amounts to a fundamental error that is contrary to the public policy of India.

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68 Day 5 page 11

69 NE Day 4 at pp 73–75.

70 NE Day 4 at p 75; NE Day 5 at p 187.



Version No 2: 27 Oct 2020 (22:41 hrs)

(c) Under Indian law, the Award against the Minors is disproportionate.

(d) The proportionality doctrine is part of the public policy of India for the purpose of setting aside arbitral awards.

175 Given the nature of Mr Subramanium's concessions *touching on Indian law*, and Mr Lee's paraphrasing of the concessions, they do not amount to any agreement to set aside the Award by consent. Accordingly, it is necessary for this court to consider the public policy arguments raised by Mr Lee.

Substantive protection of minors

176 Mr Lee submits that as no point of distinction between Singapore public policy and Indian public policy in relation to minors has been raised,[71] the outcome on the public policy objection should not be different in Singapore. He points out that both India and Singapore are signatories to the United Nations Convention on the Rights of the Child ("UNCRC") and whilst the legislative provisions giving effect to the convention may be different, the fundamental principle and policy with regard to the rights of children are the same. Art 3(1) of the UNCRC states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration", and the *United Nations' General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (CRC/C/GC/14, 29 May 2013) states that "courts of law" refer to "all judicial proceedings", including "arbitration processes" (at para 27). In addition, Mr Lee submits that the paramountcy of the welfare of

71 NE Day 5 at p 10.



Version No 2: 27 Oct 2020 (22:41 hrs)

children has been expressed in Singapore family law cases such as *BNS v BNT* [2015] 3 SLR 973 ("*BNS v BNT*") at [19].

177 I do not find the family law cases helpful because the considerations pertaining to the welfare of the child in the context of family law cases concern the upbringing of the child, and encompass the child's physical, intellectual, psychological, emotional, moral and religious well-being (*UKM* at [45]). It cannot be disputed that the present case deals only with the commercial relationship of a minor created by a contract, and the considerations in family law cases are not relevant. This case brings into sharp focus questions about the enforceability of such a contract, the minor's liability under it, and consequently, whether these questions engage the public policy of Singapore.

178 As a matter of Singapore law, in the commercial context, a minor is in general not bound by a contract that he enters into, but he may ratify the contract upon attaining age of majority, which is 21 years under common law (*The Law of Contract in Singapore* (Andrew Phang gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 9.004). Section 35(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA") has altered the common law position slightly by providing that a contract entered into by a minor who has attained the age of 18 years shall have effect as if he were of full age. There are certain contracts that may bind a minor in limited ways. For example, where a minor has been supplied with necessaries, he must pay a reasonable price for them (s 3(2) of Sale of Goods Act (Cap 393, 1999 Rev Ed)). Contracts which involve the acquisition of interests of a permanent nature, to which obligations of a continuing or a recurring nature are attached, usually bind a minor until and unless repudiated by him before or within a reasonable time after reaching majority (*The Law of Contract in Singapore* at para 09.011). These exceptions to the general position that contracts cannot bind minors are limited. The



Version No 2: 27 Oct 2020 (22:41 hrs)

protection of minors in contracts is buttressed by s 35(7) of the CLA, which provides that nothing in the section "shall limit or affect the rule of law whereby a minor is not liable in tort for procuring a contract by means of fraudulent representations as to his own age or any other matter". This means that a tort cannot be pursued where it is closely linked to a contract that is not binding by reason of the minor's incapacity and the effect of the action in tort is to compel performance of the contract. This prevents the protection of minors from being too easily nullified (*The Law of Contract in Singapore* at para 09.019). However, even if a contract with minor is unenforceable, the court may require the minor to return property to the counterparty where it is "just and equitable to do so" (s 3 of the Minors' Contracts Act (Cap 389, 1994 Rev Ed)). Reference to Art 3(1) of the UNCRC is not necessary because the protection of minors in the commercial context resides in the CLA and the common law.

179 The survey of the law of contract with regard to the legal position of minors in Singapore shows that there is protection given to minors. Importantly, minors only have a limited capacity to enter into binding contracts. I find that the principle of protecting the interests of minors in commercial transactions is part of the public policy of Singapore.

180 The effect of the Award on the Minors is to enforce the SPSSA, which is not a contract falling under any of the exceptions to the general position that contracts do not bind minors. This violates the protection given to minors in contractual relationships under Singapore law. The Award finds them jointly and severally liable for the fraudulent misrepresentation that induced the counterparty to enter the SPSSA. This liability is imposed on the Minors for the fraudulent misrepresentation of their guardian or principal on matters which the Minors had no knowledge of. This has the effect of violating the protection given to a minor under s 35(7) of the Civil Law Act. As stated above, the



Version No 2: 27 Oct 2020 (22:41 hrs)

provision protects a minor even where the minor made a misrepresentation personally. All in all, such an award against the Minors that saddles them with legal liability for an amount exceeding S$720 million shocks the conscience, and it violates Singapore's most basic notion of justice to find the Minors liable under a contract that was entered into when they were only between three to eight years old at the material time. At the time of the arbitration, they were only between eight and twelve years old.

181 Mr Lee takes the position that this court should have regard to the child's habitual residence when considering the public policy objection. He explains that in the context of family law cases, it has been held that in determining what is best for the welfare of a child, it is important to have regard to the position taken by the state where the child habitually resides. This is because, as held in *TDX v TDY* [2015] 4 SLR 982 at [33], "the child's habitual residence is likely to have a close affinity with and good understanding of the child's cultural background, value systems, social norms and other societal circumstances". Notably, the regard given to the habitual residence of the child pertains to the consideration of his welfare in family law cases, which in my view, are not helpful in the commercial context of the present case. Above all, I reject this contention as it potentially brings into consideration concepts of public policy of foreign states which may be different from the public policy concepts of Singapore.

PROPORTIONALITY OF AWARD

182 The Minors submit that the Award against them violates the public policy of Singapore because it is disproportionate. On the principle of proportionality, I have already held above at [165]–[168] that the principle of



Version No 2: 27 Oct 2020 (22:41 hrs)

proportionality between the damages awarded and the size of shareholding of one particular defendant is not part of the public policy of Singapore.

183 Mr Lee argues that this court should have regard to the DHC Judgment which has held that the Award against the Minors is disproportionate. For the reasons stated above at [181], I do not accept this submission.

Procedural protection of minors

184 Mr Lee highlights s 36 of the CLA, which states that a minor who has attained the age of 18 years and not otherwise under any legal disability, may in his own name and without a litigation representative, bring, defend, conduct or intervene in any legal proceeding or action. The corollary, Mr Lee argues, is that a minor under the age of 18 years would be unable to bring, defend, conduct or intervene in any legal proceeding or action in his own name and without a litigation representative. Mr Lee submits that the phrase "legal proceeding" should be read to encompass arbitration proceedings. The Minors' case is that the Tribunal should have taken active steps to protect their interests, such as issuing a direction or order that a litigation representative be appointed to represent them in the arbitration, or at the very least inviting submissions from the counsel for the respective parties as to whether the Minors could be held jointly and severally liable.

185 Under O 76 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"), a person under disability, which includes a person who is a minor, "may not bring, make a claim in, defend, make a counterclaim in, or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his litigation representative". The litigation representative must act by a solicitor (O 76 r 2(3) of the ROC).



Version No 2: 27 Oct 2020 (22:41 hrs)

Where there is no need for a court order appointing a person to be the litigation representative of a minor, the litigation representative has to file a written consent in Form 202 to be the litigation representative (O 76 r 3(7) of the ROC). The solicitor has to file a certificate in Form 203, certifying that the litigation representative "has no interest in the cause or matter in question adverse to that of the [minor]" (O 76 r 3(7)(*c*)(iii) of the ROC).

186 The mere fact that the Tribunal did not issue a direction or order that a litigation representative be appointed to represent the Minors in the arbitration, or invite submissions from the counsel for the respective parties as to whether the Minors could be held jointly and severally liable, is *not* a violation of the public policy of Singapore. It could not be said that the lack of an appointment of a litigation representative would shock the conscience of the court, or be wholly offensive to the ordinary reasonable and fully informed member of the public, or violate Singapore's most basic notion of morality and justice. First, there is no procedural requirement for the Tribunal to appoint a litigation representative in the arbitration. Second, even under Singapore procedure law, there is only a need for a court order appointing a litigation representative for a minor in limited circumstances, where there is already or has been a litigation representative or where no appearance is made by the minor (O 76 r 3(2) of the ROC). Third, the Minors, together with the other defendants in the arbitration, were jointly represented by a law firm, and the solicitors could have represented arguments in the Minors' interests during the arbitration. In my view, the safeguard provided by O 76 is a procedural safeguard, and the lack of a mechanism in an arbitration in appointing a litigation representative by the Tribunal or the filing a form signifying the consent of a litigation representative does not go towards the public policy of Singapore.



Version No 2: 27 Oct 2020 (22:41 hrs)

187 For the reasons stated above at [179] and [180], I allow the Award to be set aside as against the Minors. Although there is no express reference to severability under Art 34(2)(*b*)(ii) of the Model Law, unlike that in Art 34(2)(*a*)(iii), I find that the Award is severable, because the successful public policy challenge only pertains to the Minors. I agree with the Hong Kong court in *JJ Agro Industries (P) Ltd (A firm) v Texuna International Ltd* [1992] HKCFI 182 at [39] (a case on enforcement based on the New York Convention) in holding that the doctrine of severability applies where only part of an award is tainted by a challenge on a public policy ground.

**Conclusion**

188 In conclusion, I dismiss the application to set aside the Award in OS 784. Summons No 4499 of 2016 filed by the OS 784 Sellers in OS 490 follows the outcome of OS 784. With respect these applications, costs follow the event. Therefore, I order one set of costs to the Buyer to be taxed on a standard basis if not agreed.

189 I allow the application to set aside the Award as against the Minors in OS 787. Summons No 4497 of 2016 filed by the Minors in OS 490 follows the outcome of OS 787. Consequently, the order granting leave to enforce in HC/ORC 3190/2016 is to be varied accordingly.

190 Mr Lee for the Minors seeks costs to be taxed on an indemnity basis for the late concessions made by Mr Subramanium. The late concessions made little difference, as I explained in [175] above. With respect the Minors' applications in OS 787 and Summons No 4497 of 2016, costs follow the event. Therefore, I order one set of costs to the Minors to be taxed on a standard basis if not agreed.



Version No 2: 27 Oct 2020 (22:41 hrs)

Belinda Ang Saw Ean
Judge

Suresh Divyanathan, Aaron Leong and Victoria Choo (Oon & Bazul LLP) and Gopal Subramanium (Senior Advocate as Co-Counsel) for the plaintiff;
Alvin Yeo SC, Smitha Menon and Stephanie Yeo and Doralyn Chan (WongPartnership LLP) and Harish Salva (Senior Advocate and Co-Counsel) for the 1st to 4th, 6th to 8th and 13th to 20th defendants;
Lee Eng Beng SC. Kelvin Poon, Alyssa Leong and Matthew Koh (Rajah & Tann Singapore LLP) and Harish Salva (Senior Advocate and Co-Counsel) for 5th, 9th to 12th Defendants
in HC/OS No 490 of 2016.

Alvin Yeo SC, Smitha Menon, Stephanie Yeo and Doralyn Chan (WongPartnership LLP) and Harish Salva (Senior Advocate and Co-Counsel) for the plaintiffs;
Suresh Divyanathan and Aaron Leong (Oon & Bazul LLP) and Gopal Subramanium (Senior Advocate as Co-Counsel) for the defendants
in HC/OS No 784 of 2016.

Alvin Yeo SC, Smitha Menon, Stephanie Yeo and Doralyn Chan (WongPartnership LLP) and Harish Salva (Senior Advocate and Co-Counsel) for the plaintiffs;
Suresh Divyanathan, Aaron Leong and Victoria Choo (Oon & Bazul LLP) and Gopal Subramanium (Senior Advocate as Co-Counsel) for the defendants
in HC/OS No 787 of 2016.

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Version No 2: 27 Oct 2020 (22:41 hrs)