IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 33

Originating Application No 14 of 2024 (Summons No 38 of 2024)

Between

FIC Properties Sdn Bhd

… Claimant

And

(1) PT Rajawali Capital International
(2) PT Rajawali Corpora

… Defendants

Originating Application No 21 of 2024

Between

(1) PT Rajawali Capital International
(2) PT Rajawali Corpora

… Claimants

And

FIC Properties Sdn Bhd

… Defendant

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside — Fraud]
[Arbitration — Award — Recourse against award — Setting aside — Illegality]
[Arbitration — Award — Recourse against award — Setting aside — Natural justice]
[Arbitration — Award — Enforcement]

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FIC Properties Sdn Bhd
v
PT Rajawali Capital International and another and another matter

[2024] SGHC(I) 33

Singapore International Commercial Court — Originating Application No 14 of 2024 (Summons No 38 of 2024) and Originating Application No 21 of 2024
Philip Jeyaretnam J, Roger Giles IJ and Yuko Miyazaki IJ
4 November 2024, 18 November 2024

16 December 2024 Judgment reserved.

Philip Jeyaretnam J (delivering the judgment of the court):

Introduction

1 SIC/OA 14/2024 ("OA 14") was an application by FIC Properties Sdn Bhd ("FIC") for permission to enforce Singapore International Arbitration Centre Award No. 076 of 2024 (the "Second Award")[1] against PT Rajawali Capital International and PT Rajawali Corpora (respectively, "Rajawali Capital" and "Rajawali Corpora"; collectively, the "Rajawalis") in Singapore. An order granting FIC permission to do so (the "Enforcement Order") was made by the learned Deputy Registrar on 11 July 2024. SIC/OA 21/2024 ("OA 21")

[1] Rizki Indra Kusuma's witness statement dated 23 August 2024 filed in SIC/OA 14/2024 ("RIK-1") at pp 280–358 (the "Second Award").

and SIC/SUM 38/2024 ("SUM 38") are respectively the Rajawalis' cross-applications to set aside the Second Award and the Enforcement Order.

2 The Rajawalis raised three grounds in support of their applications, namely fraud, illegality and breach of natural justice. Having considered the evidence and parties' submissions, we hold that none of the Rajawalis' grounds for setting-aside the Second Award or the Enforcement Order have been made out. OA 21 and SUM 38 are therefore dismissed. These are our reasons.

Background

3 Rajawali Capital is an Indonesian company and a subsidiary of Rajawali Corpora. Both companies are part of the wider Indonesian conglomerate commonly referred to as the "Rajawali Group".[2]

4 FIC, on the other hand, is a Malaysian company that is wholly owned by the Federal Land Development Authority of Malaysia ("FELDA"). FIC is a corporate vehicle through which FELDA pursues its commercial dealings.[3]

The relevant contractual arrangements

5 The parties' underlying dispute arose out of a contract dated 23 December 2016 (the "SPA")[4] by which Rajawali Capital agreed to sell, and FIC agreed to purchase, shares (the "EHP Shares") representing a 37% stake in PT Eagle High Plantations Tbk ("EHP") for US$505,415,919.00. Rajawali Corpora was a party to the SPA as Rajawali Capital's guarantor. The sale of the EHP Shares to FIC was duly completed and it is not the focus of these proceedings.

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2 RIK-1 at para 17.

3 RIK-1 at para 20; Second Award at para 101.

4 RIK-1 at pp 85–195.

6 Central to the parties' dispute is cl 7A of the SPA, which gave FIC a "Put Option". This was essentially a contractual right on FIC's part to sell the EHP Shares back to the Rajawalis at the original contract price plus interest:[5]

> 7A. **GRANT OF PUT OPTION**
>
> The Seller and the Guarantor jointly and severally grant to the Purchaser an irrevocable and unconditional right to require the Seller and/or the Guarantor to purchase the Option Shares for the Option Price (the "**Put Option**") in accordance with the terms set out in Schedule 7.

7 The relevant conditions set out in Schedule 7 of the SPA (as referred to in cl 7A) may be summarised as follows.[6]

8 The Put Option is stated as exercisable only during the "Option Period",[7] *ie*, the period following completion of the initial sale-and-purchase of the EHP Shares to FIC and up to the "Option End Date" (which, in the event, was 11 May 2022).

9 Before the Option End Date, FIC would only be at liberty to exercise the Put Option upon the occurrence of defined "Trigger Events". On the Option End Date, however, the Put Option would be exercisable "at the sole and absolute discretion of [FIC] for any reason whatsoever":[8]

> 3. **EXERCISE**
>
> 3.1 The Put Option may be exercised by the Purchaser by delivering the Put Option Notice to the Seller and/or the Guarantor during the Option Period in accordance with the following:

---

5 RIK-1 at p 107, cl 7A.

6 RIK-1 at pp 188–193.

7 RIK-1 at p 188, para 1 ("Option Period").

8 RIK-1 at p 188, para 3.1.

> 3.1.1 at any time during the Option Period upon the occurrence of a Trigger Event;
>
> 3.1.2 at the sole and absolute discretion of the Purchaser for any reason whatsoever on the Option End Date.
>
> …

10 The Put Option was to be exercised by delivering a "Put Option Notice" to Rajawali Capital and/or Rajawali Corpora. That notice was to be in the form prescribed by Part C of Schedule 7.[9] The operative words of the notice included the requirement that it be "irrevocable and unconditional".

11 In the event the Put Option was validly exercised by FIC, the parties would "be bound to complete the sale and purchase of the [EHP Shares]" on timelines that varied depending on the basis for FIC's exercise of the Put Option:[10]

(a) If the Put Option was exercised on the Option End Date, then the resale of the EHP Shares was to be completed within 14 days after the Put Option Notice was served.

(b) If the Put Option was exercised upon the occurrence of a Trigger Event, then the resale was to be completed within either one day or 12 months after the Put Option Notice was served, depending on the Trigger Event in question.

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9 RIK-1 at p 188, para 3.1 and p 193 ("Part C of Schedule 7").

10 RIK-1 at p 188, para 3.1.2 and p 190, para 5 ("Sale and Purchase").

12 The steps that parties had to undertake at "Option Completion" were set out in para 6 of Schedule 7 and is worth reproducing in full here:[11]

> 6. **OPTION COMPLETION**
>
> 6.1 At Option Completion, [Rajawali Capital] and/or [Rajawali Corpora] (as the case may be) shall instruct its bank to transfer the Option Price in US$ by electronic transfer to the account designated by [FIC] five days prior to the Option Completion Date.
>
> 6.2 At Option Completion, [Rajawali Capital] and/or [Rajawali Corpora] and [FIC] shall each deliver a buy order or a sell order (as applicable) in respect of the Option Shares to their respective brokers and shall procure that:
>
> 6.2.1 their respective brokers shall Cross or procure the Crossing of the Option Shares on the negotiated market of the IDX in the First Trading Session on the Option Completion Date;
>
> 6.2.2 upon the Crossing referred to in Paragraph 6.2.1, their respective brokers shall confirm the same by notice in writing to [Rajawali Capital] and/or [Rajawali Corpora] and [FIC];
>
> 6.2.3 their respective brokers shall execute the book entry settlement between the securities accounts of [Rajawali Capital] and/or [Rajawali Corpora] and [FIC] (or its nominee) through the Over the Counter of Central Depository and Book Entry Settlement Systems ("**C-Best**") by debiting the Option Shares from [FIC's] securities account (or securities account held for the benefit of [FIC]) with KSEI and crediting the Option Shares to [Rajawali Capital's] and/or [Rajawali Corpora's] securities account (or securities account held for the benefit of [Rajawali Capital] and/or [Rajawali Corpora]) with KSEI on the Option Completion Date; and
>
> 6.2.4 upon the settlement referred to above, their respective brokers shall confirm by notice in writing to [Rajawali Capital] and/or [Rajawali Corpora] and [FIC] that the brokers have received the confirmation receipt from KSEI

[11] RIK-1 at pp 190–191, para 6 ("Option Completion").

> through C-Best confirming the completion of the book entry settlement.

The GovCo Pledge

13 Separately, FIC's initial purchase of the EHP Shares was financed by a loan of RM2.5 billion from GovCo Holdings Bhd ("GovCo"). GovCo is another Malaysian state-owned entity.[12] In this connection, the EHP Shares were pledged by FIC to GovCo in or around October 2017 as security for the financing extended pursuant to a Facility Agreement dated 23 December 2016. We will refer to this pledge as the "GovCo Pledge" and to the Facility Agreement as the "GovCo Facility".

The First Arbitration

14 On 11 January 2019, FIC purported to exercise the Put Option on the basis that a Trigger Event had occurred.[13] We will refer to this as the "2019 Exercise".

15 Rajawali Capital disputed the validity of the 2019 Exercise and therefore commenced an arbitration (the "First Arbitration") against FIC on 30 January 2019 seeking *inter alia* a declaration as to the invalidity of the 2019 Exercise. This arbitration was presided over by a tribunal comprising Prof Bernard Hanotiau, Mr Alan Thambiayah, and Mr Nahendran Navaratnam (the "First Tribunal").[14]

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12 RIK-1 at para 21.

13 RIK-1 at para 44.

14 RIK-1 at paras 44–45; RIK-1 at p 230, para 13.

16 The First Tribunal found for Rajawali Capital in its award dated 11 August 2022 (the "First Award"),[15] essentially on grounds that FIC had acted unreasonably in denying the Rajawalis an extension of time which, if granted, would have precluded the relevant Trigger Event from occurring. The First Tribunal took the view that FIC could not rely on a Trigger Event precipitated by its own unreasonable conduct and, on that basis, declared the 2019 Exercise invalid.[16]

The Second Arbitration

17 Before the First Award was issued, the Option End Date (*ie*, 11 May 2022) came and FIC purported to exercise the Put Option for a second time on that date, pursuant to para 3.1.2 of Schedule 7. We will refer to this as the "2022 Exercise".[17]

18 The Rajawalis again disputed the validity of the 2022 Exercise. Faced with this, FIC commenced a second arbitration against the Rajawalis on 17 January 2023 (the "Second Arbitration") seeking *inter alia* a declaration that the 2022 Exercise was valid. The Second Arbitration was presided over by a tribunal comprising Prof Dr Klaus Sachs, Ms Judith Gill KC, and Mr Stuart Isaacs KC (the "Second Tribunal").[18] By the time the Second Arbitration was commenced, the First Award had already been issued some five months prior.

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15 RIK-1 at pp 224–270 ("First Award").

16 First Award at paras 179–181.

17 RIK-1 at para 51.

18 Second Award at paras 26 and 29–30.

19 Two defences were raised by the Rajawalis in the Second Arbitration:[19]

(a) The Rajawalis' first defence was that under the SPA, FIC was not entitled to "exercise the same Put Option more than once and concurrently". Having exercised the Put Option in 2019, the contractual right was spent and so the 2022 Exercise could be of no effect.

(b) The second was that the 2022 Exercise had been expressed as made without prejudice to the validity of the 2019 Exercise (given that the validity of the latter was still under consideration by the First Tribunal at the time of the former). To that extent, the second exercise was conditional in nature and therefore invalid because under the SPA, FIC's exercise of the Put Option had to be "irrevocable and unconditional".

20 The Second Tribunal rejected these defences and found for FIC. More will be said about the tribunal's reasons shortly. In the result, the Second Tribunal *inter alia* declared that the 2022 Exercise was valid and ordered the Rajawalis to specifically perform their obligations arising therefrom:[20]

> In view of the above considerations, the Arbitral Tribunal hereby AWARDS, DECLARES, AND ADJUDGES as follows:
>
> FINAL AWARD:
>
> I. DECLARING that Claimant validly exercised its right to the Put Option under Clause 7A and Schedule 7 of the SPA on 11 May 2022;
>
> II. DECLARING that Respondents have breached their obligations to give effect to Claimant's exercise of the Put Option on 11 May 2022 in accordance with the terms of the SPA;

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19 Second Award at paras 124–140.

20 Second Award at para 265.

> III. ORDERING that Respondent 1 and/or Respondent 2 specifically perform their obligations in Paragraphs 5 and 6 of Part A of Schedule 7 of the SPA, within 14 days from the date of the Award, namely:
>
> (i) Respondent 1 and/or Respondent 2 must pay to Claimant the Option Price calculated in accordance with Paragraph 2 of Schedule 7 of the SPA, i.e., USD 505,415,919.00, plus interest at the rate of 6% per annum on daily rests from 11 May 2017 until the date on which the sale and purchase of the Option Shares is completed; and
>
> (ii) Respondent 1 and/or Respondent 2 must take all necessary steps to give effect to Paragraph 6 of Part A of Schedule 7 of the SPA;
>
> IV. ORDERING that Claimant takes all necessary steps to give effect to Paragraphs 5 and 6 of Schedule 7 of the SPA;
>
> …
>
> [emphasis in original omitted]

The procedural history

21 On 9 July 2024, FIC applied by OA 14 for permission to enforce the Second Award as a judgment of the Singapore Court. As mentioned at [1] above, that application was allowed and the Enforcement Order was made by the learned Deputy Registrar on 11 July 2024.[21] The Enforcement Order was then served on the Rajawalis on 18 July 2024.

22 On 19 July 2024, FIC applied by SIC/SUM 31/2024 for an injunction freezing S$903,096.995 worth of the Rajawalis' assets in Singapore. An urgent *ex parte* hearing was convened on 23 July 2024 and the application was allowed on the same day.

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[21] SIC/ORC 37/2024.

23 On 13 August 2024, the Rajawalis applied by SIC/SUM 35/2024 for an extension of time to apply to set aside the Enforcement Order. The deadline for doing so was two days away (*ie*, 15 August 2024) and although the reasons for the Rajawalis' delay were not altogether clear, they were granted an extension of time until 5.00pm on 23 August 2024 to file their application. Even then, the application (*ie*, SUM 38) was eventually filed at 5.28pm on 23 August 2024, which was 28 minutes out of time. We were, however, prepared to look past that irregularity and the filing of SUM 38 was accepted.

24 The Rajawalis then applied on 13 September 2024 by OA 21 for the Second Award to be set aside. This was followed by an application from the Rajawalis for orders requiring the production by FIC of certain documents relating to the GovCo Pledge. We allowed the Rajawalis' application on 24 October 2024.

25 Given the overlap in subject matter, SUM 38 and OA 21 were jointly heard on 4 November 2024.

The Rajawalis' grounds for setting-aside

26 In these proceedings, the Rajawalis advance three grounds for setting aside the Second Award and the Enforcement Order. The first of those grounds is that the making of the Second Award had been induced or affected by fraud (the "Fraud Ground"). The Second Award was therefore liable to be set aside pursuant to s 24(*a*) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"), and the enforcement of the Second Award (having allegedly been procured by fraud) should be refused for being contrary to Singapore' public policy (pursuant to s 31(4)(*b*) of the IAA). The Rajawalis' arguments on the Fraud Ground changed significantly in the course of these proceedings. More will be said about this shortly.

27 The second ground, which we will refer to as the "Illegality Ground", posits that performance of the Second Award would be unlawful under Indonesian law. To that extent, it is said that the award itself and its enforcement would be contrary to Singapore public policy.[22]

28 The third is the "Natural Justice Ground". In this regard, the Rajawalis contend that the Second Tribunal erred in:[23]

(a) rendering a decision that was inconsistent with common ground that FIC and the Rajawalis had allegedly reached in the First Arbitration; and

(b) failing to properly consider an argument raised by the Rajawalis in the Second Arbitration, *ie*, that FIC "was not being deprived of its entitlement to exit its investment because it was the author of its own supposed misfortune".

Ground 1: The Fraud Ground

The Rajawalis' submissions

29 Beginning with the Fraud Ground, the argument – as originally framed in the Rajawalis' supporting affidavits – centres on the allegation that FIC had "deliberately failed to disclose" the existence of the GovCo Pledge in the Second Arbitration.[24]

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22 RIK-1 at para 10(b); Rizki Indra Kusuma's witness statement dated 13 September 2024 filed in SIC/OA 21/2024 ("RIK-3") at para 1(b).

23 RIK-1 at para 10(c); RIK-3 at para 1(c).

24 RIK-1 at para 10(a).

30 This argument begins with the contention that the existence of the GovCo Pledge was a matter of significance to the Rajawalis' defence in the Second Arbitration. This was because the existence of the pledge at the time of the 2022 Exercise meant that the exercise of the Put Option was invalid under the terms of the SPA (as interpreted in accordance with Indonesian law).[25]

31 This then feeds into the argument that FIC had "intentionally and wrongfully failed to notify" the Rajawalis and the Second Tribunal that the EHP Shares were subject to the GovCo Pledge at the time of the 2022 Exercise. In doing so, FIC deprived the Rajawalis of the opportunity to raise defences premised on the existence of the GovCo Pledge which, according to the Rajawalis, would have likely (if not certainly) led the Second Tribunal to decide differently.[26] We will refer to this as the "Non-Disclosure Argument".

32 The Fraud Ground then took on an entirely different complexion in the Rajawalis' written and oral submissions before us.[27] Although not having abandoned the Non-Disclosure Argument, the focus shifted to how FIC had allegedly "misrepresented to the [Rajawalis] and the Second Tribunal that it was ready, and able to perform the Second Put Option and transfer unencumbered title of the [EHP Shares] back to the [Rajawalis]" despite FIC having been in no position to do so by reason of the GovCo Pledge.[28] The failure to disclose the existence of the GovCo Pledge in the Second Arbitration was merely a step in

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25 RIK-1 at paras 75(a)–75(c); Gunawan Widjaja's witness statement dated 23 August 2024 filed in SIC/OA 14/2024 ("GW-1") at pp 18–29, paras 31–59.

26 RIK-1 at paras 73 and 75(d); GW-1 at pp 31–38, paras 68–92.

27 Rajawali Entities' Written Submissions dated 28 October 2024 ("RWS").

28 RWS at paras 7 and 212.

perpetrating this fraudulent misrepresentation.[29] We will refer to this as the "Misrepresentation Argument".

33 We should state at the outset that it is not open to the Rajawalis to recast their arguments in this way. The Misrepresentation Argument was only raised for the first time in the Rajawalis' written submissions, and nothing to that effect was said in any of the witness statements filed in OA 21 and SUM 38. FIC's witnesses were therefore given no opportunity to respond to these new allegations. Where a party seeks to set aside an award, it should put forward its material allegations of fact on which its challenge is based in its initial supporting witness statement. This is all the more important where allegations of fraud are in play, because the court must be careful not to find fraud unless it is distinctly pleaded and proved: *Ching Chew Weng Paul, deceased, and others v Ching Pui Sim and others* [2011] 3 SLR 869 at [26], citing *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712. The Rajawalis' failure to raise the Misrepresentation Argument prior to their written submissions would suffice as grounds for us to disregard it altogether. Be that as it may, we are of the view that neither the Non-Disclosure Argument nor the Misrepresentation Argument succeeds on its merits, and we deal with both of them in the sections that follow.

The Non-Disclosure Argument

34 We begin with the Non-Disclosure Argument. In our judgment, two aspects of the evidence are material.

35 First, the existence of the GovCo Pledge was a matter of public information. As deposed to by Mr Mahadzir Mustafa (who is one of FIC's directors), the GovCo Pledge was first disclosed in FIC's financial statement for

[29] RWS at para 213.

the financial year ending 31 December 2017.[30] The pledge has also been noted in FIC's subsequent financial statements.[31] Mr Rizki Indra Kusuma (who is a director of both Rajawali Capital and Rajawali Corpora), has himself acknowledged that those financial statements were publicly accessible.[32] His only explanation was that he had never reviewed those statements for himself at the time of the 2022 Exercise or in the course of the Second Arbitration.[33]

36 Quite apart from FIC's public disclosures of the GovCo Pledge, there is also evidence that FIC had apprised the Rajawalis – or persons affiliated with the Rajawalis – of its intention to create the GovCo Pledge and, later, the creation of the GovCo Pledge itself.

37 We refer firstly to an email dated 16 December 2016, which was sent by one Vik Tang of Hiswara Bunjamin & Tandjung ("HBT", who were FIC's solicitors) in the course of negotiations over the SPA's wording.[34] That email was addressed to the "Rajawali team" and among its recipients were Mr Kusuma, along with three of his colleagues. It was explicitly mentioned in this email that FIC was expecting a loan from GovCo and that the EHP Shares would consequently be pledged to GovCo as security for the loan:

> Dear Rajawali team
>
> As far as we can currently work out, the so-called partial closing would consist of the following:
>
> - A deferred consideration concept. i.e. US$260 million (1st tranche payment) will be paid by [FIC] on

30 Mahadzir Mustafa's witness statement dated 18 September 2024 filed in SIC/OA 21/2024 ("MM-4") at para 22.

31 MM-4 at para 23.

32 RIK-1 at para 109.

33 RIK-1 at para 88.

34 MM-4 at pp 684–685.

> satisfaction of all CPs in CSPA, including MOA and BKPM approvals (there will be no waiver on the CPs). 37% of the shares in EHP will be released by CS [*ie*, Credit Suisse] (from the existing pledge in favour of CS) and transferred to [FIC], on payment by [FIC] of 1st tranche payment. *The 2nd tranche payment will be paid by* [*FIC*]*, as and when the funds become available to* [*FIC*].
>
> - CS escrow account concept remains in place for 1st tranche payment. i.e. US$260 million will go into CS escrow account prior to closing date. On closing date, the US$260 million will be released from escrow account and transferred to relevant CS account, with simultaneous (or near simultaneous) "crossing" of the 37% stake on IDX to [FIC]. To be discussed whether escrow account still necessary for 2nd tranche payment.
>
> - CS to undertake to [FIC] that it will release the pledge it has over the 37% stake in EHP shares upon receipt of the 1st tranche payment.
>
> *- Upon receipt of the 37% stake,* [*FIC*] *will need to pledge these shares to Govco. Also, the CS escrow account need to be charged in favour of Govco as well.*
>
> - All other terms to the CSPA stay the same.
>
> Is this your understanding?
>
> …
>
> [emphasis in original omitted; emphasis added in italics]

38 Next, there is an email dated 18 January 2017 and sent by one Delwyn Wono of HBT to (among others) Mr Kusuma and four of his colleagues.[35] Attached to that email was a revised "Loan, Funding and Completion Steps Plan", which the Rajawalis were invited to review and comment on:

> Dear All
>
> Please find attached revised funding and steps plan in clean and in comparison with the version of 23 December 2016. Note that this is still subject to comments from our client.

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35 MM-4 at p 961.

> We would be grateful if **Rajawali** could review and let us know if there any [*sic*] comments in particular in relation to the CPs and completion obligations.
>
> We would also be grateful if **KAAP** team could also review/comment in particular on the financing items/CPs.
>
> Thank you.
>
> …
>
> [emphasis in original]

39 Relevant for present purposes is item 25 of that document, *ie*, "Pledge Over Shares (of the 37% EHP shares in favour of Financier) to be perfected within 6 months". GovCo was identified as the "Financier" a little below in the document:[36]

No	Actions	Time	Comments	Reference	Complete Yes/No
	and beneficial owner of the Sale Shares.				
25.	Pledge Over Shares (of the 37% EHP shares in favour of Financier) to be perfected within 6 months.	Within 6 months after first Disbursement or partial Disbursement, whichever is earlier.	Pledge Over Shares will be signed together with all the other financing documents. Parties to decide whether or not the Pledge Over Shares will be in notarial deed form.	3.4 of the FA	

40 Lastly, we refer to FIC's formal notice to EHP of the GovCo Pledge dated 6 October 2017 (the "Pledge Notice").[37] This notice was addressed to EHP's Board of Directors and was eventually signed by Mr Nicolaas Bernadus Tirtadinata as President Director of EHP. At the time, Mr Tirtadinata was also a Commissioner of Rajawali Capital and President Commissioner of Rajawali Corpora.[38] A scanned copy of the Pledge Notice was sent to Mr Kusuma, amongst others. It should also be noted that Mr Kusuma's assistance was sought

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36 MM-4 at p 973.

37 MM-4 at pp 1053–1054.

38 MM-4 at para 21.

from FIC's solicitors in procuring documents preparatory to the issuance of the Pledge Notice by emails providing a draft of the Pledge Notice.[39] This was not denied by Mr Kusuma.[40]

41 The Rajawalis say that none of this is fatal to the Non-Disclosure Argument because FIC was *still* positively obliged to disclose the fact of the subsisting GovCo Pledge and its terms in the Second Arbitration. This obligation is said to arise from FIC's duty to act in good faith under Indonesian law, and Indonesian law was relevant because it was the law governing the arbitration agreement. FIC and the Rajawalis, so the argument goes, had to "perform the arbitration agreement in accordance with the Indonesian law duty of good faith".[41]

42 These are surprising submissions. The law governing an arbitration agreement is chiefly concerned with the existence and validity of the arbitration agreement in question. It also governs the subject-matter arbitrability of a dispute at the pre-award stage (following *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [55]). What it certainly does *not* govern is the manner in which the arbitration should be conducted and parties' obligations in that regard; those are plainly issues that fall to be considered by reference to the law of the seat (or the *lex arbitri*). In this case, whether FIC had acted fraudulently in omitting to notify the Rajawalis and the Second Tribunal of the GovCo Pledge's existence and its terms is plainly a question of Singapore law.

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39 MM-4 at pp 1044–1052.

40 RIK-1 at para 86.

41 RWS at paras 164 and 205.

43 Under Singapore law, "fraud" within the meaning of s 24(*a*) of the IAA includes "procedural fraud", that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have substantial effect on the making of the award: *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 1 SLR 1045 ("*Bloomberry (CA)*") at [41].

44 Importantly, any conduct said to constitute procedural fraud must have been *aimed at deceiving* the arbitral tribunal. The touchstone, therefore, is an intention to deceive and unless such an intention can be demonstrated to the court's satisfaction, an award will not be set aside (nor its enforcement refused) on grounds of the alleged procedural fraud (*Bloomberry (CA)* at [41] and [71]):

> 41 In this respect we agree with the appellants' submission that the "fraud" referred to in the section must include procedural fraud, that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have substantial effect on the making of the award: see *BVU v BVX* [2019] SGHC 69 at [47] ("*BVU*"). We further note, however, that in the same paragraph, *BVU* states that there must be a causative link between any concealment *aimed at deceiving the arbitral tribunal* and the decision in favour of the concealing party. …
>
> …
>
> 71 … As alluded to above, in order for the non-disclosure or suppression of evidence to warrant allowing the application to resist enforcement, *it must be shown that there was concealment aimed at deceiving the arbitral tribunal*: see *BVU v BVX* ([41] supra) at [47] in the context of setting aside. This has not been shown in the present case, and *the evidence would equally support a finding of, for example, negligent failure to disclose*.
>
> [emphasis in original omitted; emphasis added in italics]

45 Having regard to the facts as set out at [35]–[40] above, we find it impossible to say that FIC intentionally concealed the existence of the GovCo Pledge in the Second Arbitration with a view to deceiving the Second Tribunal

or the Rajawalis. The existence of the pledge was a matter of public information and had for all intents and purposes been specifically communicated to persons who were employed by (or otherwise associated with) the Rajawalis. The Rajawalis have advanced sophisticated arguments on how the knowledge acquired by those persons was incomplete or not imputable to the Rajawalis, but these are not answers to the basic hurdle standing in the Rajawalis' way: there is simply no evidence whatsoever of FIC having omitted to disclose the existence of the GovCo Pledge in the Second Arbitration *with the intention of deceiving anyone*. It could not reasonably be concluded that FIC had any intention to deceive when it had disclosed the pledge in earlier communications with the Rajawalis and the pledge remained a matter of public record. Further, it has not been established that the issues as they were framed in the Second Arbitration gave rise to any obligation to disclose the pledge or its terms. The Rajawalis did not seek in the Second Arbitration any disclosure or production of documents concerning whether or on what terms the EHP Shares might be encumbered. In our judgment, these features of the case are fatal to the Rajawalis' Non-Disclosure Argument.

The Misrepresentation Argument

46 As we observed at [33] above, the Misrepresentation Argument was raised too late in the day and that would suffice as reason for us to dismiss it. For completeness, however, we shall explain why we would have rejected the Misrepresentation Argument even if it had been properly advanced in these proceedings.

47 The pith of the Misrepresentation Argument is that in seeking an order from the Second Tribunal requiring the Rajawalis to "specifically perform their

obligations in paragraphs 5 and 6 of Part A Schedule 7 of the SPA",[42] FIC represented to the Second Tribunal – if not expressly, then impliedly – that it was ready, able and willing to perform its end of the bargain despite the GovCo Pledge having presented an insuperable obstacle to the timely completion of the transaction.[43] In support, the Rajawalis rely on *Facade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 ("*Facade Solution*") where an adjudication determination was set aside on the ground that the claimant had falsely represented that it was in a position to deliver certain window panels stored off-site despite knowing that it was not in control of them. We discuss this case at [58] below.

48 We accept that in commencing an arbitration with a view to obtaining specific performance of the Rajawalis' obligations under Schedule 7 of the SPA, FIC impliedly represented to the Second Tribunal that it was ready, able, and willing to likewise perform its reciprocal obligations to the Rajawalis. Under Schedule 7, however, FIC's only real obligation was to procure the transfer of the EHP Shares to the Rajawalis on "Option Completion". Pursuant to the orders made in the Second Award (see [20] above), "Option Completion" was to occur within 14 days from the date of the award. That was what FIC requested in its prayers to the Second Tribunal:[44]

> 141 In its Reply Memorial, Claimant requests the Tribunal to award the following relief:
>
> *6.1.1* *an **order** dismissing the Respondents' defence in its entirety;*
>
> *6.1.2* *a **declaration** that Claimant validly exercised its right to the Put Option on 11 May 2022;*

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42 Second Award at para 141.

43 RWS at paras 7-9, 180 and 212–213.

44 Second Award at para 141.

> *6.1.3* *a* ***declaration*** *that the Respondents have breached their obligations to give effect to Claimant's exercise of the Put Option on 11 May 2022 in accordance with the terms of the SPA;*
>
> *6.1.4* an **order** that RCI and/or RC specifically perform their obligations in paragraphs 5 and 6 of Part A Schedule 7 of the SPA, immediately and within 14 days from the date of the Award*;*
>
> …
>
> [emphasis in original]

49 Seen in that light, the implied representation made by FIC was that it was ready, able and willing to transfer the EHP Shares to the Rajawalis *within 14 days of the Second Award in accordance with the mechanism in para 6 of Schedule 7 of the SPA*. To the extent that the Rajawalis go further in asserting a representation from FIC that it was prepared to complete the transaction *immediately* (with the implication that it had unencumbered control over the EHP Shares),[45] this extension is not substantiated in the arbitral record and we would therefore reject it.

50 Nonetheless, we accept that FIC's apparent readiness to proceed with and complete the resale of the EHP Shares was something that the Second Tribunal was cognisant of in reaching its decision to order specific performance against the Rajawalis:[46]

> Moreover, the Tribunal understands the requirement of irrevocability and unconditionality of the Put Option Notice is to serve clarity and certainty between the Parties. *That is, Claimant must undertake its Put Option Exercise with an unencumbered intention to bring it to Option Completion.* This is the case for both 2019 and 2022 Put Option Notices. *The Cover Letter shows that Claimant was willing to proceed with the completion of a Put Option Notice one way or the other*, and to

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45 RWS at para 212–213.

46 Second Award at para 226.

> hold that against Claimant would violate the logic of Clause 7A and Schedule 7 of the SPA.
>
> [emphasis added]

51 In the premises, the Misrepresentation Argument turns on a single question of fact: did FIC commence the Second Arbitration without any genuine belief in its ability to transfer the EHP Shares to the Rajawalis in accordance with the mechanism in para 6 of Schedule 7 of the SPA within 14 days of specific performance being ordered against the latter?

52 The Rajawalis say that the answer to that question must be 'yes'. They submit that FIC was in no financial position to independently discharge the GovCo Pledge; instead, it was FIC's intention that it would discharge the pledge using monies received from the Rajawalis on Option Completion before executing a transfer of the EHP Shares to the latter. For this arrangement to work, however, FIC would have had to (a) receive the Rajawalis' monies; (b) transfer those monies to GovCo and procure a release of the GovCo Pledge; (c) have GovCo release its block on transfers of the EHP Shares on the Indonesian Central Securities Depository; and (d) execute a transfer of the EHP Shares to the Rajawalis, *all within a single working day or less*. The Rajawalis submit that there was no realistic prospect of FIC achieving this, and that FIC knew that.[47] As a variant of the argument, they submit that because of a clawback provision in the GovCo Pledge, FIC was not in a position "to provide a free and unencumbered transfer of the shares".[48] In other words, FIC commenced the Second Arbitration on false pretences concerning its ability to transfer the EHP Shares to the Rajawalis on the date fixed for Option Completion.

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47 RWS at para 239.

48 RWS at para 142.

53 We were presented with no direct evidence of FIC having contemplated these apparent difficulties in procuring a timeous transfer of the EHP Shares to the Rajawalis. There was no direct evidence that FIC positively knew that it would be unable to transfer the EHP Shares. We have instead been called on to infer that knowledge based on circumstances which, in our judgment, could equally indicate that FIC simply assumed that there would be no difficulty in procuring release of the GovCo Pledge in time for the EHP Shares to be transferred.

54 We observe that after the Second Award was issued, FIC's solicitors sent a letter to the Rajawalis' solicitors enclosing a draft sale-and-purchase agreement. In that letter, FIC's solicitors sought details on how and to whom the EHP Shares should be transferred on completion:[49]

> 12 In the meantime, please provide us with the following details to be included in the draft Agreement prior to its execution:
>
> a. the identity of the entity who will make payment to [FIC], purchase and receive the Sale Shares (i.e. whether it is RCI or RC, or if both, the relevant proportions to be specified);
>
> b. the details of the broker who will effect the transfer for the Rajawali Entities (referred to in the draft Agreement as the Buy-Side Broker); and
>
> c. the securities accounts details of RCI and/or RC.
>
> Once we have received the above information, we will update the Agreement and circulate the final updated Agreement for execution.

This letter and the enclosed draft are in fact evidence that FIC believed that it could carry out the award by transferring the EHP Shares in return for the receipt

[49] RIK-1 at p 648.

of the Rajawalis' monies. There is nothing in FIC's conduct or the contemporaneous documents warranting our drawing the inference that FIC never genuinely believed it could transfer the EHP Shares to the Rajawalis on completion of the resale. This evidential gap is, in our view, dispositive of the Misrepresentation Argument.

55 It is also worth noting that the Rajawalis' contention rests on the idea that FIC sought to obtain the Rajawalis' monies, not transfer the EHP Shares, and then rely on its own insolvency to block the Rajawalis from recovering the monies they had transferred. Not only did the evidence not establish any such fraudulent intention or scheme, it was not proved that receipt of the monies, release of the pledge and transfer of the shares could not take place within one day or otherwise in a manner that protected the respective interests of the parties. Indeed, when an order for specific performance has been made, parties would be expected to cooperate in carrying out that order in a sensible manner. As for the Rajawalis' argument relying on the presence of the clawback provision in the GovCo Pledge, FIC's counsel took the position at the hearing that FIC would enter into necessary arrangements with GovCo to ensure that the exchange would take place within one day.[50] This could include agreeing with GovCo the release of any clawback rights. The evidence adduced before us supported FIC's expression through counsel of its intention to perform its obligations under the SPA and to do so with GovCo's consent. An example of such evidence was

[50] Transcript of proceedings on 4 November 2024 at p 107, lns 17–26.

FIC's seeking[51] and obtaining[52] the consent of GovCo to the 2022 Exercise in accordance with cl 9(c) of the GovCo Facility.[53]

56 Before leaving the present discussion, we note that there is a dispute concerning whether the Fraud Ground can be relied upon in circumstances where the Rajawalis could have discovered the existence of the GovCo Pledge and its terms had they exercised greater diligence in the Second Arbitration. This inquiry assumes, of course, that the Rajawalis had no such knowledge at the material time.

57 FIC has urged us to answer that question in the negative. Emphasis was placed on the apparently settled proposition that "when new evidence is being introduced to demonstrate fraud at the setting aside stage, the applicant would have to demonstrate why, at the time of the arbitration, the new evidence was not available or could not have been obtained with reasonable diligence": *BVU v BVX* [2019] SGHC 69 ("*BVU*") at [106]; *CLX v CLY and another and another matter* [2023] 4 SLR 241 at [59(d)] ("*CLX*").

58 As we have mentioned at [47] above, the Rajawalis rely on *Facade Solution*. This was a case arising out of an adjudication determination made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). The Court of Appeal considered the UK Supreme Court's decision in *Takhar v Gracefield Developments Ltd and others* [2019] 2 WLR 984 and ultimately took the view (at [33]) that:

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51 Rajawali Entities' Core Bundle of Documents (Volume 1) dated 28 October 2024 ("RCB-1") at pp 603–604.

52 RCB-1 at p 606.

53 RCB-1 pp 144–145.

> Where it is established that an [adjudication determination] is infected by fraud, it is neither material nor relevant to inquire as to whether the innocent party could have discovered the truth by the exercise of reasonable diligence. A fraudulent party cannot be allowed to claim that he could have been caught had reasonable diligence been exercised, but because he was not caught, he should be allowed to get away with it. Such a view would bring the administration of justice into disrepute and it would be unprincipled to hold in effect that there is no sanction on the fraudulent party because he could have been found out earlier. Parties dealing with the court, and in the same vein, with the adjudicator in the adjudication of their disputes under the Act are expected to act with utmost probity.

59 In this case, nothing of substance turns on whether the Rajawalis could have discovered the facts now said to be material had they been more diligent in the Second Arbitration. Their arguments under the Fraud Ground have been dismissed for other reasons, and it is therefore unnecessary for us to express a view on whether the position stated in *BVU* and *CLX* has been overtaken by *Facade Solution*.

Ground 2: The Illegality Ground

60 Turning to the Illegality Ground, the argument advanced by the Rajawalis is that the Second Award itself and its enforcement would be contrary to the public policy of Singapore because it "could involve the parties having to perform acts that are potentially illegal in Indonesia".[54] The illegal act, so the Rajawalis submit, would be the transfer of shares subject to a pledge.[55]

61 There is no merit to this contention. FIC and the Rajawalis were ordered by the Second Award to perform their respective obligations arising from a valid exercise of the Put Option. So far as FIC was concerned, that meant transferring

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54 RIK-1 at para 10(b).

55 GW-1 at p 30, paras 63–64; RWS at para 261.

the EHP Shares to the Rajawalis on Option Completion. There is nothing inherently unlawful about the Second Tribunal's orders or the outcomes envisaged by them. The Illegality Ground therefore resolves itself into the argument that the Second Award should be set aside because FIC *may conceivably* perform its obligation to transfer the EHP Shares in a manner that is illegal under Indonesian law. This is plainly not a basis for setting aside the Second Award or refusing its enforcement.

62 We would observe for completeness that the Rajawalis' argument on how FIC may potentially transfer the EHP Shares in breach of Indonesian law is undercut by their own expert's view that shares held in the Indonesian Central Securities Depository that are subject to a pledge will be "frozen" and cannot be dealt with without the pledgee's consent:[56]

> 42 … Shares that are put up as collateral will be: (i) annotated in the pledgor's securities sub-account, which is specifically used to record any collateral over the shares; or (ii) frozen according to the number of shares put up as collateral in the pledgor's securities sub-account.
>
> 43 As long as there is an annotation or freezing of shares in the pledgor's securities sub-account, such shares cannot be withdrawn or transferred for the settlement of any transaction. If the shares are needed to be transferred the freezing must first be released, which may be done by the request of the security account holder (based on instruction of the pledgee).
>
> 44 In the circumstances, [FIC] would have ordinarily needed to ensure that all amounts owing to Gov Co in respect of the Share Pledge were fully paid off and that Gov Co provided the necessary consent and instructions for the Sale Shares to be released to [FIC], unencumbered – before the 2022 Put Option could be performed.

The suggestion that FIC may potentially procure a transfer of the EHP Shares in breach of Indonesian law is, therefore, dubious.

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[56] GW-1 at p 22, paras 42–45.

Ground 3: The Natural Justice Ground

63 It remains for us to consider the Natural Justice Ground. As mentioned at [28] above, two arguments were put forth by the Rajawalis in this connection.

The Second Tribunal's alleged failure to acknowledge parties' common ground in the First Arbitration

64 The Rajawalis first contend it was common ground between them and FIC in the First Arbitration that "the Put Option Clause should be read disjunctively, such that it only allowed [FIC] to exercise one Put Option at any given time".[57] In FIC's Response to the Notice of Arbitration in the First Arbitration (the "RNOA"), the word "or" had been inserted in between paras 3.1.1 and 3.1.2 of Schedule 7 of the SPA. The Rajawalis say that this common ground was acknowledged by the First Tribunal when it:[58]

> stated, at paragraph 176 of the First Award, that the Put Option Clause should be read disjunctively – expressly referring to the word "or" in between Paragraphs 3.1.1 and 3.1.2 of Schedule 7 of the SPA…

65 This is a mischaracterisation of both para 3 and the First Tribunal's observations. Firstly, there is in fact no disjunctive "or" between cll 3.1.1 and 3.1.2 (see [9] above). Secondly, what the First Tribunal in fact stated at paragraph 176 of the First Award was that:[59]

> Clause 3, Schedule 7 of the SPA specifies that the Put Option can be exercised at any time upon the occurrence of a "Trigger Event" *or* at [FIC's] sole discretion upon the fifth anniversary of the Completion Date…
>
> [emphasis added]

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57 RIK-1 at para 91.

58 RIK-1 at para 91; RWS at para 265.

59 First Award at para 176.

The First Tribunal was therefore listing the circumstances in which the Put Option could be validly exercised by FIC, which was what FIC had done in its Response. Nothing in FIC's RNOA conceded or asserted that cll 3.1.1 and 3.1.2 operated disjunctively in a way that only allowed FIC one attempt at exercising the Put Option. The same applies to the rest of the First Award: there was no finding that cll 3.1.1 and 3.1.2 operated disjunctively, nor does it record this position as common ground. This is entirely unsurprising because the First Arbitration was only concerned with the validity of the 2019 Exercise (that having been the *only* exercise of the Put Option in play in the First Arbitration).

66 The question of whether FIC was contractually permitted to invoke the Put Option more than once only arose in the Second Arbitration, because that was one of two grounds upon which the Rajawalis challenged the validity of the 2022 Exercise (see [19] above). FIC disagreed with the Rajawalis' arguments and the Second Tribunal eventually held in favour of FIC on the point:[60]

> Contrary to what Respondents suggest, no language implying mutual exclusivity of Paragraphs 3.1.1 and 3.1.2 is present in the provision. Referring to an argument made by Respondents as an example of such language, there is no conjunction 'or' connecting the paragraphs. The Tribunal notes that Claimant's use of the conjunction 'or' between the paragraphs in its submissions filed in the course of the First Arbitration bears no relevance in the present case and cannot alter the language of the underlying contractual provision for the purposes of this Tribunal's interpretation.

67 It is therefore clear to us that the Second Tribunal in fact addressed its mind to the Rajawalis' suggestion that FIC had previously conceded the point and rejected it. In the premises, this first limb of Rajawalis' Natural Justice Ground is unarguable.

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60 Second Award at para 161.

The Second Tribunal's alleged failure to consider an argument raised by the Rajawalis in the Second Arbitration

68 The Rajawalis further submit that the Second Tribunal had failed to consider their argument that FIC was "the architect of its own misfortune" by not having conceded in the First Arbitration that the 2019 Exercise was invalid:[61]

> … [FIC] could have protected its position and validly exercised the 2022 Put Option by conceding in the First Arbitration that the 2019 Put Option was invalid. If this was done before [FIC] purported to exercise the Second Put Option, and putting aside any issue of the fraud that the Rajawali Entities have now discovered, the Rajawali Entities would have a much weaker case in the Second Arbitration (putting aside the issues in relation to the Share Pledge that surfaced after the Second Award.)

69 There is no merit to this submission. As mentioned at [19] above, the question that the Second Tribunal had to decide was whether the 2022 Exercise was invalid by reason of (a) FIC having already purported to exercise the Put Option once in 2019; and (b) the 2022 Exercise having been expressed as being without prejudice to the validity of the 2019 Exercise. Those were the defences raised by the Rajawalis and whether they would have had a weaker case had FIC conceded the invalidity of the 2019 Exercise does not go toward any question of natural justice concerning how those defences were considered by the Second Tribunal.

70 Moreover, the Second Tribunal in its final award considered fully the different permutations involved in there having been two exercises of the Put Option, as shown by the following observations:[62]

> 221. … the Tribunal recalls its finding above that Claimant was not prevented by its previous Put Option Exercise

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61 RWS at para 272; RIK-1 at para 95.

62 Second Award at paras 221–222.

> under Paragraph 3.1.1 (challenged and, as of 11 May 2022, not consummated) from carrying out another Put Option Exercise under Paragraph 3.1.2. The only logical consequence of this finding is that subsequent Put Option Notices cannot be deemed formally invalid under the SPA if Claimant acknowledges the existence of a previous Put Option Notice, explains that it is unaffected by the subsequent Put Option Notices, and reserves all rights. *Simply put, if the 2019 Put Option Exercise* per se *does not invalidate the 2022 Put Option Exercise, the acknowledgement of its existence similarly cannot have this effect. The outcome would be the same if Claimant had not reserved its rights in the Cover Letter*: if the First Award had determined the 2019 Put Option Exercise to be valid and it proceeded to completion, the 2022 Put Option Exercise would be redundant due to the fact that only a singular Put Option can be completed.
>
> 222. *Claimant was under no obligation explicitly to waive its rights under the 2019 Put Option Notice if it wished to proceed with the 2022 Put Option Exercise*. As discussed above at paragraph 204, given the overlap between the pending arbitration initiated by Respondents regarding the 2019 Put Option Notice and the one day on which Claimant could issue the 2022 Put Option Notices, Claimant had no other choice but to issue the 2022 Put Option Notices without awaiting the outcome of the First Arbitration.
>
> [emphasis added]

71 Given these observations, it is clear to us that the Second Tribunal was either alive to the Rajawalis' argument (that FIC should have conceded the invalidity of the 2019 Exercise) and in fact rejected it, or would have rejected the argument in any event. On either view, the Rajawalis' submission that the Second Tribunal failed to consider the argument in breach of natural justice lacks merit.

Conclusion

72 For the foregoing reasons, the Rajawalis' applications are dismissed. Turning to costs, these should follow the event which is in FIC's favour. Parties are to seek to agree costs, failing which parties are to file and exchange

submissions on costs within three weeks of the date of this judgment. The court will thereafter proceed to determine and award costs without an oral hearing.

Philip Jeyaretnam
Judge of the High Court

Roger Giles
International Judge

Yuko Miyazaki
International Judge

Daniel Chia Hsiung Wen, Ker Yanguang (Ke Yanguang), Samyata Ravindran and Low Hui Xuan Carrisa (Prolegis LLC) (instructed), Gitta Satryani Juwita and Reshma Nair (Herbert Smith Freehills) (instructing) for the claimant in HC/OA 14/2024 and defendant in HC/OA 21/2024;
Nish Kumar Shetty, Loh Ying Li Ashley, Damien Chng Cheng Yee and Faraaz Amzar Mohamed Farook (Cavenagh Law LLP) (instructed), Kabir Singh s/o Baldhiraj Singh and Matthew James Hayward Brown (Clifford Chance Pte Ltd) (instructing) for defendants in HC/OA 14/2024 and claimants in HC/OA 21/2024.