HKIAC (HONG KONG INTERNATIONAL ARBITRATION CENTRE)

HKIAC Case No. A17071

TOP JET ENTERPRISES LIMITED V. (1) SINO JET HOLDING LIMITED; (2) SKYBLUEOCEAN LTD; AND (3) JET MIDWEST GROUP, LLC

PARTIAL AWARD

---

22 June 2020

Tribunal:
Michael Hwang (Appointed by the claimant)
Dan Tan (President)
Jennifer Kirby (Appointed by the Appointing Authority)

Table of Contents

Partial Award

Pursuant to Articles 32.1 and 34 of the Administered Arbitration Rules of the Hong Kong International Arbitration Centre ("HKIAC") effective 1 November 2013 (the "Rules"), and any mandatory provisions of the Hong Kong Arbitration Ordinance (the "Arbitration Ordinance"), the arbitral tribunal (the "Tribunal") makes this award.

1. PARTIES

1.1. Claimant in this arbitration is Top Jet Enterprises Limited ("Claimant"), a company incorporated in the British Virgin Islands. Claimant's contact details are as follows:
China (Shanghai) Free Trade Zone
Jia Tai Road No. 29, Building No. 2
East Side Room 604-A04
Shanghai, China

Claimant is a subsidiary of Zhongzhi Enterprise Group Co. Ltd. ("ZEG"), a financial organisation.

1.2. Claimant is represented by:
Mr. Robert L. Sills
Mr. Geoffrey Sant
Mr. Eric Epstein
Ms. Carol Lee
Ms. Michelle K. Ng
Pillsbury Winthrop Shaw Pittman LLP
1540 Broadway
New York, NY 10036, USA
Tel. +1 212 858 1000
Email: robert.sills@pillsburylaw.com
geoffrey.sant@pillsburylaw.com
eric.epstein@pillsburylaw.com
carol.lee@pillsburylaw.com
michelle.ng@pillsburylaw.com

1.3. First Respondent is Sino Jet Holding Limited (the "Joint Venture"), a company incorporated in the Cayman Islands. The contact details of the Joint Venture are as follows:
12/F Huaye International Center Tower A
No. 39 East 4th Ring Middle Road
Chaoyang District
Beijing 10025, China

Tel. + 86 10 5634 9888
Email: paul.kraus@jetmidwest.com
luxcool@126.com

The Joint Venture is a joint venture between Claimant and Second Respondent.

1.4. The Joint Venture is not represented by counsel and has not participated in these proceedings despite having been invited to do so.

1.5. Second Respondent is Skyblueocean Ltd. ("Sky"), a company incorporated in the British Virgin Islands. Sky's contact details are as follows:
Jet Midwest Group, LLC
1105 North Market Street
Wilmington, DE 19801, USA
Tel. +1 310 652 0296
Email: paul.kraus@jetmidwest.com

Sky is a subsidiary of Third Respondent.

1.6. Third Respondent is Jet Midwest Group, LLC ("JMG"), a company incorporated in Delaware. JMG's contact details are as follows:
1105 North Market Street Wilmington, DE 19801, USA
Tel. +1 310 652 0296
Email: paul.kraus@jetmidwest.com

JMG is in the business of buying used aircraft, aircraft engines and aircraft parts, reconditioning them and re-selling them.

1.7. Sky and JMG are represented by:
Mr. Sacha M. Cheong
K&L Gates
44/F Edinburgh Tower The Landmark
15 Queen's Road Central, Hong Kong
Tel. +852 2230 3590
Email: sacha.cheong@klgates.com

Mr. Leon Ho
Sir Oswald Cheung's Chambers
10/F, New Henry House
10 Ice House Street
Central, Hong Kong
Tel. +852 2524 2156
Email: leon@siroswald.com

2. ARBITRAL TRIBUNAL

The members of the Tribunal are as follows:
Mr. Dan Tan
Dan Tan Law
155 Sansome Street, Suite 500
San Francisco, CA 94104, USA
Tel. +1 646 580 0080
Email: dan@dantanlaw.com

Dr. Michael Hwang S.C.
Michael Hwang Chambers LLC
150 Beach Road
#06-01 Gateway West
Singapore 189720
Tel: +(65) 6391 9390
Email: michael@mhwang.com

Ms. Jennifer Kirby
Kirby
68 rue du Faubourg Saint-Honoré
75008 Paris, France
Tel. +33 1 42 74 64 55
Email: jennifer.kirby@kirbyarbitration.com

Mr. Tan is the presiding arbitrator.

3. ADMINISTRATOR

These proceedings are administered by the HKIAC in accordance with the Rules. The contact details for the HKIAC are as follows:
38/F, Two Exchange Square
8 Connaught Place
Central, Hong Kong
Tel. +852 2525 2381
Email: arbitration@hkiac.org

4. DISPUTE RESOLUTION PROVISION

4.1. Claimant brought this arbitration further to the arbitration clause contained in Section 9.2 of a Shareholders Agreement dated 14 December 2015 (the "Shareholders Agreement"). This clause provides as follows:

> *9.2. **Dispute Resolution.** Any dispute, controversy or claim arising out of or relating to this Agreement, or the interpretation, breach, termination, validity or invalidity thereof, shall be submitted to and settled by arbitration in Hong Kong by the Hong Kong International Arbitration Centre (the "**HKIAC**") in accordance with the Hong Kong International Arbitration Centre Administered Arbitration Rules (the "**HKIAC Rules**") in force in accordance with the HKIAC Rules then in force. The place of arbitration shall be in Hong Kong. There shall be three (3) arbitrators. The claimants to the dispute shall collectively choose one arbitrator, and the respondents shall collectively choose one arbitrator, within thirty (30) days after the delivery of the Notice to the other Party. Both arbitrators shall agree on the third arbitrator within thirty (30) days of their appointment. If any of the members of the arbitral tribunal have not been appointed within thirty (30) days after the Arbitration Notice is given, the relevant appointment shall be made by the Secretary-General of the HKIAC. The arbitration shall comply with the Arbitration Ordinance Chapter 341 of the Laws of Hong Kong.* [1]

4.2. The Shareholders Agreement was originally between Claimant, JMG, an affiliate of JMG called Jet Midwest International LLC ("JMW"), the Joint Venture and its two wholly-owned subsidiaries—Yortime Development Limited ("Yortime") and Sheng Ze Financial Leasing Co., Ltd. ("Sheng Ze").[2] It is undisputed that the Shareholders Agreement was subsequently amended such that Sky replaced JMW. As a consequence, all parties in this case are parties to the Shareholders Agreement.

4.3. The Shareholders Agreement is closely related to a Share Purchase Agreement dated 19 October 2015 that contains an identical arbitration clause in Section 9.3.

4.4. The Share Purchase Agreement was originally between a ZEG subsidiary called Daily Crown Enterprises Limited ("Daily Crown") and JMG. It is undisputed that the Share Purchase Agreement was subsequently amended such that the Joint Venture replaced Daily Crown and Sky replaced JMG.

4.5. On 28 June 2019, Sky and JMG circulated track-change versions of the Shareholders Agreement and the Share Purchase Agreement that reflect those Agreements as they currently stand following the various amendments that were made to them. On 19 July 2019, Claimant agreed that these could be regarded as the definitive versions for purposes of this arbitration. The Tribunal refers to these track-change documents as the "SHA" and the "SPA", respectively. When quoting from these documents, the Tribunal omits the track-change markings (e.g., underscoring).

5. JURISDICTION

5.1. Article 19.1 of the Rules provides that the Tribunal may rule on its own jurisdiction under the Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement.

---

[1] Quotations are set forth "as is". Any grammatical or typographical errors are in the original documents, as is any bolding, italics, or underlining unless otherwise indicated.

[2] As of 18 April 2016, Yortime changed its name to Jet Midwest International Co. Limited. For ease of reference, the Tribunal continues to refer to it as Yortime in this award.

5.2. As noted above at para 4.2, all parties in this case are parties to the SHA, which contains the arbitration clause.

5.3. Sky and JMG have raised objections to the scope of the Tribunal's jurisdiction that the Tribunal addresses and rejects below in connection with the issues to which they relate. *See infra* para 19.50.

5.4. As noted above at para 1.4, the Joint Venture has not participated in these proceedings. For avoidance of doubt, as the Joint Venture is a party to the SHA containing the arbitration clause, the Tribunal considers that it has jurisdiction over the Joint Venture and the entirety of the parties' dispute.

5.5. The Tribunal accordingly has jurisdiction over the parties' dispute.

6. NUMBER OF ARBITRATORS

Further to Section 9.2 of the SHA, the number of arbitrators is three.

7. LANGUAGE OF ARBITRATION

The language of arbitration is English. [3]

8. PLACE OF ARBITRATION

Further to Section 9.2 of the SHA, the seat of the arbitration is Hong Kong.

9. APPLICABLE LAW

9.1. Section 9.1 of the SHA provides as follows:
9.1. Governing Law. This Agreement shall be governed by and construed under the Laws of Hong Kong, without regard to principles of conflict of Laws thereunder.

9.2. The SPA contains an identical provision in Section 9.2.

9.3. Further to Article 35.1 of the Rules, the Tribunal shall decide the substance of the dispute in accordance with the law agreed upon by the parties. Failing such a designation by the parties, the Tribunal shall apply the rules of law that it determines to be appropriate.

9.4. Further to Article 35.3 of the Rules, in all cases, the Tribunal shall decide the case in accordance with the terms of the relevant contracts and may take into account the usages of the trade applicable to

[3] Procedural Order 1 at Section 16.

the transactions.

10. PROCEDURAL RULES

10.1. Article 13.1 of the Rules provides that, subject to the Rules, the Tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay and expense, having regard to the complexity of the issues and the amount in dispute, provided such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case.

10.2. Further to Article 13.5 of the Rules, the Tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration.

10.3. Further to Article 31 of the Rules, a party who knows or ought reasonably to know that any provision of, or requirement arising under, the Rules (including the arbitration agreement) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.

10.4. Further to Article 34.2 of the Rules, all awards shall be final and binding on the parties and any person claiming through or under any of the parties. The parties and any such person shall be deemed to have waived their rights to any form of recourse or defense in respect of enforcement and execution of any award, in so far as such waiver can validly be made.

10.5. Further to Article 34.3 of the Rules, the parties undertake to comply without delay with any award or order made by the Tribunal.

11. PROCEDURAL HISTORY

11.1. It is unnecessary to recapitulate the entirety of the correspondence over the course of these proceedings. All procedural orders have been reduced to writing and are part of the record of these proceedings. No useful purpose would be served by reproducing or summarising them in this section of the Award. For context, the main procedural steps in this arbitration have been the following.

11.2. On 5 April 2017, Claimant submitted its Notice of Arbitration ("Notice").

11.3. In its Notice, Claimant designated Dr. Hwang S.C. as co-arbitrator. On 22 May 2017, HKIAC confirmed Dr. Hwang S.C.'s designation as co-arbitrator pursuant to Article 9.1 of the Rules.

11.4. Respondents did not designate an arbitrator within the time limit specified in Section 9.2 of the SHA.

11.5. On 8 June 2017, HKIAC notified the parties that the Secretary General of HKIAC had appointed Ms. Kirby as co-arbitrator further to Section 9.2 of the SHA.

11.6. On 21 June 2017, Ms. Kirby and Dr. Hwang S.C. jointly nominated Mr. Tan as the presiding arbitrator.

11.7. On 11 July 2017, HKIAC notified the parties that the Secretary General of HKIAC had appointed Mr. Tan as the presiding arbitrator further to Section 9.2 of the SHA.

11.8. On 12 July 2017, HKIAC transferred the file to the Tribunal.

11.9. On 31 July 2017, Sky and JMG each filed an Answer and Counterclaim. Citations to Sky's Answer and Counterclaim are abbreviated "Sky Answer" and citations to JMG's Answer and Counterclaim are abbreviated "JMG Answer".

11.10. On 15 September 2017, the Tribunal held a conference call regarding the organisation of the proceedings. Although all parties were invited, only Claimant, Sky and JMG participated in the call.

11.11. On 3 October 2017, after seeking comments from the parties, the Tribunal issued Procedural Order 1, which included a provisional timetable for the arbitration further to Article 13.2 of the Rules.

11.12. On 6 November 2017, Claimant filed its Statement of Claim. Citations to the Statement of Claim are abbreviated "SOC".

11.13. On 8 January 2018, Sky and JMG each filed a Statement of Defence and Counterclaim. Citations to Sky's Statement of Defence and Counterclaim are abbreviated "Sky SOD" and citations to JMG's Statement of Defence and Counterclaim are abbreviated "JMG SOD".

11.14. On 8 February 2018, Claimant filed a First Amended Statement of Claim. Citations to Claimant's First Amended Statement of Claim are abbreviated "FASOC".

11.15. On 12 February 2018, Claimant filed its Reply and Defence to Counterclaims ("Reply").

11.16. On 26 June 2018, after seeking comments from the parties, the Tribunal issued Procedural Order 2, which amended the provisional timetable.

11.17. On 29 June 2018, Sky and JMG each filed a Rejoinder.

11.18. On 20 July 2018, Claimant, Sky and JMG filed an agreed Preliminary List of Issues.

11.19. That same day, the Tribunal held a conference call with the parties regarding the status of the proceedings. Although all parties were invited, only Claimant, Sky and JMG participated in the call.

11.20. On 30 July 2018, Claimant filed a request for production of documents by Sky and JMG.

11.21. On 18 September 2018, the Tribunal invited Respondents to submit any objections they might have to Claimant's document requests no later than 24 September 2018, failing which the Tribunal would make an order granting the requests.

11.22. In the absence of any objections from Respondents, on 30 September 2018, the Tribunal granted Claimant's document requests and ordered Sky and JMG to produce the requested documents by 5 October 2018.

11.23. However, Sky and JMG did not produce any documents.

11.24. On 5 November 2018, Claimant filed a Second Amended Statement of Claim. Citations to Claimant's Second Amended Statement of Claim are abbreviated "SASOC".

11.25. On 10 January 2019, after seeking comments from the parties, the Tribunal issued Procedural Order 3, which amended the provisional timetable.

11.26. On 25 January 2019, (1) Claimant submitted a witness statement dated 18 January 2019 from Ms. Constance Meng, a director of the Joint Venture ("Meng 1") and (2) Sky and JMG submitted a witness statement dated 25 January 2019 from Mr. Paul Kraus, a shareholder and director of Sky, a member and officer of JMG and a director of the Joint Venture ("Kraus 1").

11.27. On 4 February 2019, Claimant submitted a witness statement dated 4 February 2019 from Ms. Meng ("Meng 2").

11.28. On 19 February 2019, Claimant submitted an expert report dated 18 February 2019 from Mr. Louis M. Bowen, chairman and chief executive of Asia Capital Management Limited ("Bowen 1").

11.29. On 18 April 2019, Claimant, Sky and JMG submitted a Final List of Issues.

11.30. On 24 April 2019, Claimant made an application requesting that the Tribunal grant Sky and JMG a final time limit to pay their share of the deposits requested by HKIAC, failing which their counterclaims would be dismissed ("24 April Application")—an application Sky and JMG opposed on 3 May 2019.

11.31. On 3 May 2019, Claimant, Sky and JMG submitted an Agreed Hearing Bundle ("Agreed Bundle").

11.32. On 10 May 2019, Claimant, Sky and JMG filed their Opening Written Submissions. Citations to Claimant's Opening Written Submission are abbreviated "COS". Citations to the joint Opening Written Submissions from Sky and JMG are abbreviated "ROS".

11.33. On 16 May 2019, the Tribunal held a pre-hearing conference call with the parties. Although all parties were invited, only Claimant, Sky and JMG participated in the call.

11.34. On 20 May 2019, after inviting comments from the parties, the Tribunal issued Procedural Order 4 regarding the upcoming hearing.

11.35. On 24 May 2019, Claimant filed its Statement of Damages and Sky and JMG filed their Quantification for Damages. Citations to Claimant's Statement of Damages are abbreviated "CSD". Citations to the Quantification for Damages from Sky and JMG are abbreviated "RQD". In addition, Claimant, Sky and JMG submitted an Amended Joint Final List of Issues.

11.36. On 29 May 2019, Claimant made further submissions in support of its 24 April Application and, on 31 May 2019, Sky and JMG made further submissions in opposition.

11.37. On 31 May 2019, Claimant, Sky and JMG filed their Responsive Opening Written Submissions. Citations to Claimant's Responsive Opening Written Submission are abbreviated "CROS". Citations to the joint Responsive Opening Written Submissions from Sky and JMG are abbreviated "RROS".

11.38. On 5 June 2019, Claimant, Sky and JMG submitted a Further Amended Joint Final List of Issues.

11.39. On 7 June 2019, the Tribunal rejected Claimant's 24 April Application.

11.40. Further to Article 22.4 of the Rules, on 10 to 14 June 2019, the Tribunal held a hearing in Hong Kong. Although all parties were invited, only Claimant, Sky and JMG attended.

11.41. At the hearing, Ms. Meng and Messrs. Kraus and Bowen were cross-examined.

11.42. Real-time transcribers were present and made a transcript of the hearing. Citations to the transcript are abbreviated "Tr." followed by the day, page and line reference.

11.43. At the hearing, the parties made reference to the Agreed Bundle.

11.44. At the close of the hearing, the Tribunal asked Claimant, Sky and JMG if they had any objections to the way the proceedings had been conducted. No party raised any.[4]

11.45. On 24 June 2019, after consultation with the parties, the Tribunal issued Procedural Order 5 regarding post-hearing submissions.

11.46. On 5 July 2019, Claimant filed a supplemental expert report dated 4 July 2019 from Mr. Bowen ("Bowen 2").

11.47. That same day, Sky and JMG asked the Tribunal to disregard Bowen 2 or, alternatively, allow them to respond to it with fact and/or expert witness evidence of their own—a request Claimant opposed on 8 July 2019 and Sky and JMG reiterated on 9 July 2019.

11.48. On 11 July 2019, the Tribunal accepted Bowen 2 and allowed Respondents to file responsive fact and/or expert evidence.

11.49. On 9 August 2019, Sky and JMG submitted a witness statement dated 8 August 2019 from Mr. Kraus ("Kraus 2") in response to Bowen 2.

11.50. On 23 August 2019, Claimant filed its Post-Hearing Written Submissions. Citations to Claimant's Post-Hearing Written Submissions are abbreviated "CPH".

11.51. In support of its Post-Hearing Written Submissions, Claimant filed, among other things, an opinion letter from Maples and Calder on certain issues of Cayman Islands law ("Maples Opinion").[5]

---

[4] Tr. 5:102:10-103:22.

11.52. On 27 August 2019, Sky and JMG asked the Tribunal to disregard the Maples Opinion—a request Claimant opposed on 29 August 2019.

11.53. On 5 September 2019, the Tribunal accepted the Maples Opinion and allowed Respondents an opportunity to respond to it.

11.54. On 27 September 2019, Sky and JMG filed their Post-Hearing Written Submissions. Citations to the joint Post-Hearing Written Submissions from Sky and JMG are abbreviated "RPH".

11.55. On 4 November 2019, Claimant filed further documentary evidence and submissions, to which Sky and JMG responded with further documentary evidence and submissions on 26 November 2019, and Claimant replied with further documentary evidence on 9 December 2019.

11.56. On 19 March 2020, the Tribunal declared the proceedings closed pursuant to Article

30.1. of the Rules.

11.57. On 31 March 2020, Claimant made an application to reopen the proceedings to admit a 25 March 2020 United States court decision. Sky and JMG opposed this application on 1 April 2020. On 9 April 2020, the Tribunal declined to reopen the proceedings.

11.58. On 31 May 2020, Claimant made an application to reopen the record or for the Tribunal to exercise "its general authority to take arbitral notice of matters of public record" with respect to a 26 May 2020 United States court decision. On 6 June 2020, the Tribunal denied Claimant's request.

12. REQUESTS FOR RELIEF

12.1. In its Notice, Claimant sought the following relief:

1. an order that the First Respondent complete the redemption of all Shares held by the Claimant in the capital of the First Respondent, being 10,000 Shares, at the Redemption Price determined in accordance with the terms of the Redemption Right;

2. an order that the Second Respondent and the Third Respondent refrain from taking any action that could have the effect of delaying, undermining or restricting such redemption and take, without delay, any actions reasonably requested by the Claimant to increase the amount of funds legally available within the Group Companies [i.e., the Joint Venture, Yortime and Sheng Ze] *for such redemption including, without limitation, actions necessary to enable* [Yortime] *and the* [Sheng Ze] *to distribute any and all available funds to the First Respondent for purposes of paying the Redemption Price;*

[5] At the Hearing, the Tribunal raised a question about the enforceability of the redemption provisions under Cayman law. The Maples Opinion submitted by Claimant addressed the points raised at the Hearing, and none of the Respondents addressed or took up the issue in any submission. Accordingly, the Tribunal does not see any need to take this point any further. Claimant also argued that Cayman law should govern the issue of reflective loss. As we have found that the reflective loss argument fails, even if Sky and JMG are correct that Hong Kong law governs the issue, there is no need to consider Claimant's arguments under Cayman law as to why the reflective loss argument should not succeed.

3. an order that, should the assets of the First Respondent be insufficient to pay the Redemption Price as so determined, the Second Respondent and the Third Respondent jointly and severally pay to the Claimant the remaining balance thereof plus a premium or interest thereon equal to 15% per annum *of the remaining balance from the Second Payment Date to the date of payment;*

4. an award to the Claimant as against the Second Respondent and the Third Respondent of damages in amounts to be determined by the tribunal for breaches by those Respondents of their obligations under the Share Purchase Agreement and the Shareholders Agreement;

5. such other relief and remedies as the tribunal may deem just and equitable; and

6. an award to the Claimant of the costs of the arbitration, including the Claimant's own legal and other costs incurred in connection therewith.[6]

12.2. In its Answer and Counterclaim, Sky asked the Tribunal:
1. To reject the Claimant's claims in their entirety;

2. To reject the Claimant's Prayers for Relief and Remedies in their entirety;

3. Award to the Second Respondent as against the Claimant, damages in amounts to be determined by the tribunal for breaches of the Claimant's obligations under the Share Purchase Agreement, the Shareholding Agreement and the Side Letter;

4. Award such other relief and remedies to the Second Respondent as the tribunal may deem just and equitable; and

5. Award to the Second Respondent the costs of the arbitration, including the Second Respondent's own legal and other costs incurred in connection therewith.[7]

12.3. In its Answer and Counterclaim, JMG asked the Tribunal:
1. To reject the Claimant's claims in their entirety;

2. To reject the Claimant's Prayers for Relief and Remedies in their entirety;

3. Award to the Third Respondent as against the Claimant of damages in amounts to be determined by the tribunal for breaches of the Claimant's obligations under the Share Purchase Agreement, the Shareholding Agreement and the Side Letter;

4. Award such other relief and remedies to the Third Respondent as the tribunal may deem just and equitable; and

5. Award to the Third Respondent of the costs of the arbitration, including the Third Respondent's own legal and other costs incurred in connection therewith.[8]

---

[6] Notice at page 7.
[7] Sky Answer at pages 9.
[8] JMG Answer at pages 8-9.

12.4. In its Statement of Claim, Claimant asked that the Tribunal render an award granting the following principal elements of relief:
(A) an order that the First Respondent complete the redemption of all Shares held by the Claimant in the capital of the First Respondent, being 10,000 Shares, at the Redemption Price determined in accordance with the terms of the Redemption Right as set out in Section 8.4(i) of the SHA;

(B) an order that the Second Respondent and the Third Respondent refrain from taking any action that could have the effect of delaying, undermining or restricting such redemption and take, without delay, any actions reasonably requested by the Claimant to increase the amount of funds legally available within the Group Companies for such redemption including, without limitation, actions necessary to enable [Yortime] *and Sheng Ze to distribute any and all available funds to the First Respondent for purposes of paying the Redemption Price;*

(C) an order that, should the combined assets of the Group Companies [i.e., the Joint Venture, Yortime and Sheng Ze] *be insufficient to pay the Redemption Price as so determined, or should the Redemption Price as so determined not otherwise be paid within thirty (30) days after the date of the final award save as to costs herein, the Second Respondent and the Third Respondent must jointly and severally pay to the Claimant the remaining balance of the Redemption Price plus a premium or interest thereon equal to 15%* per annum *of the remaining balance from 30 June 2016 to the date of payment;*

(D) an award to the Claimant, as against the Second Respondent and the Third Respondent, jointly and severally, of damages in amounts to be established in these proceedings for breaches by those Respondents of their obligations under the SPA and the SHA;

(E) an award to the Claimant, as against the Second Respondent and the Third Respondent, jointly and severally, of the costs of the arbitration, including the Claimant's own legal and other costs incurred in connection therewith;

(F) interest on the amounts awarded under heads (D) and (E) at rates determined in accordance with applicable law; and

(G) such other relief and remedies as the Tribunal may deem just and equitable.[9]

12.5. In its Statement of Defence and Counterclaim, Sky asked the Tribunal to:
1. Reject the Top Jet's claims in their entirety;

2. Reject Top Jet's Prayers for Relief and Remedies in their entirety;

3. Award to Skyblueocean as against the Top Jet, damages in amounts to be determined by the tribunal for breaches of Top Jet's obligations under the SHA, SPA and related agreements;

4. Award such other relief and remedies to Skyblueocean as the tribunal may deem just and equitable; and

5. Award to Skyblueocean the costs of the arbitration, including Skyblueocean's own legal and other costs incurred in connection therewith.[10]

---

[9] SOC at para 59.

12.6. In its Statement of Defence and Counterclaim, JMG asked the Tribunal to:

1. Reject the Top Jet's claims in their entirety;

2. Reject Top Jet's Prayers for Relief and Remedies in their entirety;

3. Award to JMG as against the Top Jet, damages in amounts to be determined by the tribunal for breaches of Top Jet's obligations under the SHA, SPA and related agreements;

4. Award such other relief and remedies to JMG as the tribunal may deem just and equitable; and

5. Award to JMG the costs of the arbitration, including JMG's own legal and other costs incurred in connection therewith.[11]

12.7. In its First Amended Statement of Claim, Claimant asked that the Tribunal render an award granting the following principal elements of relief:

(A) an order that the First Respondent complete the redemption of all Shares held by the Claimant in the capital of the First Respondent, being 10,000 Shares, at the Redemption Price determined in accordance with the terms of the Redemption Right as set out in Section 8.4(i) of the SHA;

(B) an order that the Second Respondent and the Third Respondent refrain from taking any action that could have the effect of delaying, undermining or restricting such redemption and take, without delay, any actions reasonably requested by the Claimant to increase the amount of funds legally available within the Group Companies [i.e., the Joint Venture, Yortime and Sheng Ze] *for such redemption including, without limitation, actions necessary to enable* [Yortime] *and Sheng Ze to distribute any and all available funds to the First Respondent for purposes of paying the Redemption Price;*

(C) an order that, should the combined assets of the Group Companies be insufficient to pay the Redemption Price as so determined, or should the Redemption Price as so determined not otherwise be paid within thirty (30) days after the date of the final award save as to costs herein, the Second Respondent and the Third Respondent must jointly and severally pay to the Claimant the remaining balance of the Redemption Price plus a premium or interest thereon equal to 15% per annum *of the remaining balance from 30 June 2016 to the date of payment;*

(D) an award to the Claimant, as against the Second Respondent and the Third Respondent, jointly and severally, of damages in amounts to be established in these proceedings for breaches by those Respondents of their obligations under the SPA and the SHA and for the tortious deceit resulting from their fraudulent representations to Top Jet in connection with the conclusion of those agreements;

(E) an award to the Claimant, as against the Second Respondent and the Third Respondent, jointly and severally, of the costs of the arbitration, including the Claimant's own legal and other costs incurred in connection therewith;

(F) interest on the amounts awarded under heads (D) and (E) at rates determined in accordance with applicable law; and

---

[10] Sky SOD at page 13.

[11] JMG SOD at page 13.

(G) such other relief and remedies as the Tribunal may deem just and equitable. [12]

12.8. In its Reply, Claimant did not set out prayers for relief. However, Claimant contended that it had not breached the SHA, SPA or the related agreements. [13]

12.9. In its Rejoinder, Sky asked the Tribunal:
1. To reject the Claimant's claims in their entirety;

2. To reject the Claimant's Prayers for Relief and Remedies in their entirety;

3. Award to the Second Respondent as against the Claimant, damages in amounts to be determined by the tribunal for breaches of the Claimant's obligations under the Share Purchase Agreement, the Shareholding Agreement and related agreements;

4. Award such other relief and remedies to the Second Respondent as the tribunal may deem just and equitable; and

5. Award to the Second Respondent the costs of the arbitration, including the Second Respondent's own legal and other costs incurred in connection therewith. [14]

12.10. In its Rejoinder, JMG asked the Tribunal:
1. To reject the Claimant's claims in their entirety;

2. To reject the Claimant's Prayers for Relief and Remedies in their entirety;

3. Award to the Third Respondent as against the Claimant, damages in amounts to be determined by the tribunal for breaches of the Claimant's obligations under the Share Purchase Agreement, the Shareholding Agreement and related agreements;

4. Award such other relief and remedies to the Third Respondent as the tribunal may deem just and equitable; and

5. Award to the Third Respondent the costs of the arbitration, including the Third Respondent's own legal and other costs incurred in connection therewith. [15]

12.11. In its Second Amended Statement of Claim, Claimant asked that the Tribunal render an award granting the following relief:
(A) a declaration that, by its failure to make the Second Payment, the Second Respondent has materially breached and repudiated the SPA and the SHA;

(B) a declaration that the Second Respondent and the Third Respondent are jointly and severally

---

[12] FASOC at para 61.
[13] Reply at para 40.
[14] Sky Rejoinder at pages 15-16.
[15] JMG Rejoinder at pages 15-16.

liable to the Claimant in the amount of the Redemption Price determined in accordance with the terms of the Redemption Right as set out in Section 8.4(i) of the SHA;

(C) an order that, in partial discharge and satisfaction of the said liability, the Second Respondent transfer to the Claimant all of the shares in the capital of the First Respondent held by the Second Respondent, being 10,000 ordinary shares, without additional consideration for such transfer;

(D) an order that, in discharge and satisfaction of the remainder of the said liability, the Second Respondent and the Third Respondent jointly and severally pay to the Claimant damages in the amount by which (i) the Redemption Price, being the sum of US$50,000,000 plus an annual return on that sum of 15% per annum, compounded annually, from 30 June 2016 to the date of the award herein, exceeds (ii) the net asset value of the Group Companies [i.e., the Joint Venture, Yortime and Sheng Ze]*, being the First Respondent and its wholly-owned subsidiaries, determined on a consolidated basis but without taking into account the value, if any, of goods consigned under the Consignment Agreement except to the extent of any proceeds thereof that shall have been remitted to the any of the Group Companies as at the date of the award herein;*

(E) an order that the Second Respondent and the Third Respondent jointly and severally pay to the Claimant damages in an amount to be determined by the Tribunal in its discretion for the tortious deceit consisting of the fraudulent misrepresentations of the said Respondents to the Claimant in connection with the conclusion of the SPA, the SHA and the related agreements;

(F) an award to the Claimant, as against the Second Respondent and the Third Respondent, jointly and severally, of the costs of the arbitration, including the Claimant's own legal and other costs incurred in connection therewith;

(G) interest on the amounts awarded under heads (D) and (E) at rates determined in accordance with applicable law; and

(H) such other relief and remedies as the Tribunal may deem to be just and equitable.[16]

12.12. In its Opening Written Submissions, Claimant said as follows:

144. For the reasons set forth above, this Tribunal should find that Top Jet has proven its claims against the JMW Parties [i.e., Sky and JMG]*, and should dismiss the JMW Parties' Counterclaim. This Tribunal therefore should award Top Jet the relief requested in Paragraph 61 of the SASC.*

145. Such requested relief includes:

a. A declaration that all claims and counterclaims asserted herein come within the scope of the parties' arbitration agreement;

b. A declaration that Skyblueocean materially breached and repudiated the SPA and SHA;

c. A declaration that the JMW Parties are jointly and severally liable to pay the Redemption Price in accordance with SHA § 8.4(i);

[16] SASOC at para 61.

d. An order directing Skyblueocean to transfer to Top Jet, in partial satisfaction of the Redemption Price, the 10,000 shares of Sino Jet currently held by Skyblueocean;

e. An order that Skyblueocean and JMG must pay the Remaining Balance;

f. Damages for fraud;

g. The costs of this arbitration, including reasonable attorney fees;

h. Ongoing interest at 15% per annum on the Redemption Price, commencing on the date of breach;

i. Such other relief as this Tribunal deems proper.

146. As previously noted, the Redemption Price is $76,043,750.00 as of 30 June 2019.

147. If this Tribunal orders Skyblueocean to transfer, to Top Jet, the 10,000 shares of Sino Jet that currently are held by Skyblueocean, and if Skyblueocean promptly complies with that order, Top Jet will be able to reassume full control over Sino Jet and direct Sino Jet to transfer its remaining cash to Top Jet in partial satisfaction of the Redemption Price. In this scenario, the Remaining Balance owed by the JMW Parties as of 30 June 2019 will be approximately $47,072,629.57, as shown in Table 3 above. If this Tribunal chooses not to order Skyblueocean to transfer all of its remaining shares of Sino Jet to Top Jet, the Tribunal should: (i) order Sino Jet to transfer all of its remaining cash to Top Jet in partial satisfaction of the Redemption Price by a date certain following the conclusion of this arbitration; (ii) order the JMW Parties to pay, by another date certain, the Remaining Balance that Sino Jet fails to pay, and (iii) enjoin Skyblueocean from transferring its shares of Sino Jet to any person or entity other than Top Jet until such time as the Remaining Balance is paid in full. [17]

12.13. In their Opening Written Submissions, Sky and JMG did not set out prayers for relief. However, Sky and JMG contended that Claimant's claims should be rejected and Sky claimed loss of the use of US$10 million "i.e. interest that could have been generated by the US$10 million from 31 December 2015 to date of the award". [18]

12.14. In its Statement of Damages, Claimant said the following:

RELIEF SOUGHT IN CONNECTION WITH BREACH OF CONTRACT CLAIM

1. In connection with its breach of contract claim, Top Jet is seeking the following relief:

*i) A declaration that, by failing to make the Second Payment, Second Respondent Skyblueocean Ltd. ("**Skyblueocean**") materially breached and repudiated the SPA and SHA.* See *Second Amended Statement of Claim ("**SASC**") ¶ 61(A).*

*ii) A declaration that Skyblueocean and Third Respondent Jet Midwest Group, LLC ("**JMG**") are jointly and severally liable to Top Jet in the amount of the Redemption Price determined in accordance with the terms of the Redemption Right as set forth in SHA § 8.4(i).* See *SASC ¶ 61(B).*

[17] COS at paras 144-147.

[18] ROS at para 64.

*iii) An order that, in partial discharge and satisfaction of such liability, Skyblueocean must transfer to Top Jet all 10,000 of the shares of Sino Jet Holdings, Ltd. ("**Sino Jet**") held by Top Jet, without any additional consideration for such transfer.* See *SASC ¶ 61(C). In the alternative, the Tribunal should issue an order enjoining Skyblueocean from transferring such shares to any person or entity other than Top Jet until such time as any and all monetary relief awarded in favor of Top Jet in this arbitration is paid in full.* See *Opening Written Submission of Claimant Top Jet Enterprises, Ltd. (the "**Opening Written Submission**") ¶ 147.*

iv) An award of damages in favor of Top Jet and against the JMW Parties [i.e., Sky and JMG] *in the amount by which the Redemption Price exceeds Sino Jet's ability to pay the Redemption Price.* See *SASC ¶ 61(D). Top Jet's position is that, as of 30 June 2019, the Redemption Price is $76,043,750.00 pursuant to SHA § 8.4(i).* See *Opening Written Submission ¶ 121, Table 3. Top Jet's position is that Sino Jet is unable to pay any of the Redemption Price because Sino Jet's board and management are deadlocked as a result of the disputes at issue in this arbitration.* Id. *¶ 120. If Sino Jet's board and management were not deadlocked, Sino Jet still would be able to pay no more than $28,971,120.43 of the Redemption Price as of 30 June 2019, thus leaving a remaining balance of at least $47,072,629.56.* Id. *¶ 121, Table 3.*

RELIEF SOUGHT IN CONNECTION WITH FRAUD CLAIM

2. If this Tribunal decides Top Jet's breach of contract claim in favor of Top Jet and grants the relief requested by Top in connection with that breach of contract claim, Top Jet's fraud claim will be mooted because the breach of contract relief being sought by Top Jet would be sufficient to make Top Jet whole. See *Opening Written Submission ¶ 124.*

3. If, for any reason, the Tribunal chooses not to grant the relief by sought by Top Jet in connection with its breach of contract claim, the Tribunal should consider Top Jet's fraud claim. See *Opening Written Submission ¶ 125. Based on Top Jet's fraud claim, the Tribunal should award Top Jet monetary damages.* See *SASC ¶ 61(E). Top Jet's position is that such damages should be in the amount of $76,043,750.00. This amount is equivalent to the Redemption Price to which Top Jet is entitled under SHA § 8.4(i) and therefore is an appropriate measurement of the economic damages that Top Jet has sustained.*

OTHER RELIEF SOUGHT

4. Top Jet also is seeking the following additional relief against the JMW Parties:

i) An award of the costs of this arbitration, including Top Jet's legal costs and other costs incurred in connection with this arbitration. See *SASC ¶ 61(F).*

ii) Interest on all monetary damages awarded to Top Jet at a rate determined in accordance with applicable law. See *SASC ¶ 61(G).*

iii) Dismissal of the counterclaim that has been asserted against Top Jet by the JMW Parties. See *Opening Written Submission ¶¶ 133-137.*[19]

12.15. In their Quantification for Damages, Sky and JMG said that the "quantification of damages for [Sky]

[19] CSD at paras 1-3.

is US$10 million x US prime rate from time to time over the period from 31 December 2015 to the date of award." [20]

12.16. In its Responsive Opening Written Submissions, Claimant said that, for the "reasons set forth set forth herein and in Top Jet's Opening Brief, the Tribunal should grant the relief sought by Top Jet in this arbitration and dismiss the JMW Parties' [i.e., Sky and JMG's] counterclaim, with prejudice, with costs in favor of Top Jet, and with such other and further relief in favor of Top Jet as the Tribunal deems just and proper." [21]

12.17. In their Responsive Opening Written Submissions, Sky and JMG did not set out prayers for relief.

12.18. In its Post-Hearing Written Submissions, Claimant said that the Tribunal should issue an award in favor of Claimant and should grant the following relief:
a. Determine that the Redemption Price was $76,043,750.00 as of 30 June 2019.

b. Determine that the Redemption Price accrued compound interest of 15% per year, or $31,250.00 per day, from 30 June 2019 through the date of the award.

c. Grant a monetary award against Sino Jet and [Sky/JMG]*, jointly and severally, in the amount of the Redemption Price.*

d. Grant post-award interest of 15% per year until the Redemption Price is paid in full.

e. Until the Redemption Price has been paid in full, enjoin Skyblueocean from transferring the 10,000 Sino Jet shares owned by Skyblueocean.

f. Declare that once the Redemption Price has been paid in full – but not before – Top Jet shall relinquish its Sino Jet shares in order to complete the share redemption process. [22]

12.19. In their Post-Hearing Submissions, Sky and JMG said that, on the "basis of the evidence and these post-hearing submissions, the Tribunal should dismiss Claimant's claim with costs awarded to Sky and JMG, and allow Sky's counterclaim with costs against Claimant." [23]

13. FACTUAL AND CONTRACTUAL BACKGROUND

13.1. This case concerns an American/Chinese joint venture—namely, the Joint Venture. The principal purpose of the Joint Venture was to buy used aircraft, aircraft engines and aircraft parts, recondition them and re-sell them to third parties. [24] The Joint Venture did not go as planned, however, and gave rise to disputes between the parties that are the subject of this arbitration.

13.2. The two agreements that lie at the heart of this case are the SPA and the SHA, which were made on

---

[20] RQD at para 5.
[21] CROS at para 71.
[22] CPH at para 10.
[23] RPH at para 127.
[24] Jet Midwest Limited, Business Plan, Jan. 2016, Ex. C8D.

19 October and 14 December 2015, respectively. These agreements, as well as other ancillary related agreements, were negotiated principally by Ms. Meng (for ZEG) and Mr. Kraus (for JMG). [25]

13.3. The SPA is between the Joint Venture and Sky. [26]

13.4. Sky and JMG are jointly and severally liable with respect to all of their obligations under the SHA. The SAAA defines JMG as the "JMW Guarantor." [27] The SHA states:

> ***9.12. Joint Liabilities.*** [Sky] *and* [JMG] *shall be jointly and severally liable for the performance and observance of any and all of their obligations and liabilities whatsoever hereunder.* [28]

13.5. ZEG was obliged to contribute, and did contribute US$50 million in capital to the Group Companies. This was done by way of the transfer of the shares of Yortime, who held all of the registered capital of Sheng Ze of US$50 million, to the Joint Venture on 14 December 2015. [29]

13.6. Under the terms of the SPA and SHA, Sky was to pay an equivalent amount of US$50 million to the Group Companies. [30] In exchange, Sky would acquire 50% of the equity in the Joint Venture and the right to participate in the governance of Sino Jet. [31]

13.7. Sky was supposed to pay the US$50 million in two payments—a first payment of US$10 million at closing ("First Payment") and a second payment of US$40 million no later than 30 June 2016 ("Second Payment"). [32]

13.8. On 30 December 2015, Sky made the First Payment of US$10 million at closing and the Joint Venture gave Sky 10,000 shares. This was the only capital contribution that Sky or JMG made. [33]

13.9. Claimant owns the other 50% of the Joint Venture (i.e., also 10,000 shares). Claimant's capital contribution of US$50 million was paid in full by 18 November 2015 to Sheng Ze, one of the Joint Venture's wholly-owned subsidiaries. [34]

13.10. The SHA, which governs the management and operation of the Joint Venture, is between all of the parties to these proceedings, as well as Sheng Ze and Yortime, another wholly-owned subsidiary of the Joint Venture. [35]

13.11. In keeping with the 50/50 ownership structure, control of the Joint Venture is split evenly between

---

[25] Meng 1 at paras 3 and 24.

[26] SPA at 1; *see also* Share Purchase Agreement, 19 Oct. 2015, Ex. C1, at 1; First Assignment and Assumption Agreement, 14 Dec. 2015, Ex. C2; Second Assignment and Assumption Agreement, 23 Dec. 2015, Ex. C8.

[27] SAAA at Section 4.

[28] SHA at Section 9.12.

[29] Second Assignment and Assumption Agreement, Ex. C8 at 3rd Recital.

[30] SPA at Section 2.1(ii); SHA at Section 8.1(i).

[31] SPA at Section 2.1; SHA at Section 5.1(i).

[32] SPA at Sections 2.2(ii) and 2.2(iii).

[33] Meng 1 at paras 15 and 42.

[34] Sheng Ze Capital Verification Report, 11 Dec. 2015, Ex. C0B.

[35] SHA at 1; *see also* Shareholders Agreement, 14 Dec. 2015, Ex. C3; Second Assignment and Assumption Agreement, 23 Dec. 2015, Ex. C8.

Claimant and Sky such that, for all purposes material to this arbitration, the Joint Venture cannot act without the consent of both.[36]

13.12. With regard to the Second Payment of US$40 million that Sky owed the Joint Venture for its shares, Section 8.1(i) of the SHA provides that, if Sky is unable to make that payment by the 30 June 2016 deadline ("Second Payment Date"), Sky shall notify the Joint Venture in writing not less than 30 days before the payment is due (i.e., by 31 May 2016).[37] Upon receipt of such notice, Claimant, Sky and the Joint Venture shall negotiate in good faith for a period not exceeding 30 days to determine if alternative arrangements could be made for payment during the following 60 days.[38] During this period of time, Sky would be obligated to pay interest on the Second Payment at a rate of 15% compounded annually.[39]

13.13. As Sky's Second Payment was not due for several months, ZEG insisted that the parties share equally in the financial risks of the Joint Venture until it was fully capitalised in equal amounts. To that end, the parties had agreed in Section 8.1(ii) of the SHA that, pending receipt of Sky's Second Payment, expenditures by the Joint Venture, Yortime and Sheng Ze ("Group Companies") would be limited to an amount equal to twice the amount of the First Payment, plus the amount of any financing obtained by the Group Companies from financial institutions. That Section provides as follows:
(ii) From time to time after the Closing and prior to the Second Payment Date, the Group Companies shall only, and the JMW Parties [i.e., Sky and JMG] *shall cause the Group Companies only to, use up to (i) the amount of capital which has already been contributed to* [the Joint Venture] *by* [Sky] *then (the "***[Sky] *Paid-in Contribution****"); plus (ii) an amount equaling to the* [Sky] *Paid-in Contribution from the Original Investment (i.e. US$50,000,000) to* [the Joint Venture] *made by* [Claimant] *; plus (iii) any financing from financial institutions obtained by the Group Companies pursuant to Section 5.8 hereof.*

13.14. With regards to financing, Section 5.8 of the SHA provides as follows:
***Financing and Guarantee the Obligations of* [the Joint Venture].** *As soon as possible after the Closing,* [the Joint Venture] *shall obtain financing from financial institutions but such amount, in aggregate, shall not exceed ten times the amount of the capital contribution of* [the Joint Venture] *made by both shareholders (i.e., US$100 million). If necessary,* [Claimant] *shall cause* [Claimant's] *Affiliates to help* [the Joint Venture] *to obtain a lower interest rate on the loan(s) by guaranteeing* [the Joint Venture's] *obligation under such financing arrangements.*

13.15. Shortly after signing the SHA, JMW (predecessor of Sky) and the Joint Venture entered into a side letter that amended the SPA for the Joint Venture (or one of its affiliates) to purchase from JMG (or one of its affiliates) aircraft, aircraft engines and aircraft parts having a minimum aggregate purchase price of US$32 million, provided that the appraised value of the purchased assets must be not less than 1.5 times the purchase price and that the purchase must be completed no later than 15 March 2016 ("First Side Letter").[40] The First Side Letter further provided for at least one other purchase of additional assets having an unspecified purchase price but to be completed no later

---

[36] SHA at Section 5.1.
[37] *Id.* at Section 8.1(i).
[38] *Id.*
[39] *Id.*
[40] First Side Letter, 16 Dec. 2015, Ex. C4.

than 30 June 2016. [41]

13.16. Several days later, JMW and the Joint Venture signed a supplemental agreement further amending the SPA to clarify the requirements for an independent appraisal of the assets at issue under the First Side Letter ("Supplemental Agreement"). [42]

13.17. These amendments are reflected in Section 7.3 of the SPA, which provides:

*7.3 **Asset Transfer Agreement and Assignment Agreement.***

[The Joint Venture]*, the existing shareholder of* [the Joint Venture] *or one of its Affiliates (each an "Asset Buyer") shall enter into both of the following agreements on or before January 15, 2016: i) one or more asset purchase agreements with* [Sky] *or an Affiliate of* [Sky] *for the purchase of certain airframe, engine and parts inventory owned by* [Sky] *or an Affiliate of* [Sky] *(the "Asset Purchase Agreements") and ii) an Assignment Agreement (the "Assignment Agreement") with respect to certain future cash inflows from existing leases and joint ventures of* [Sky]*, on terms and conditions acceptable to* [Sky] *and the Asset Buyer(s), as payment in kind part of the considerations. The closing date for the first tranche of airframes, engines and parts inventory chosen by* [Sky] *and listed in the first Asset Purchase Agreement shall be no later than March 15, 2016 and the minimum aggregate purchase price for such airframes, engines and parts inventory shall be US$32,000,000, provided, however that an appraisal of such airframes, engines and/or parts inventory issued by an independent third party appraiser chosen by* [Sky] *shall list the appraised value of such assets as a value not less than the product of 1.5 times the purchase price for such airframes, engines and/ or parts inventory. On or before May 31, 2016,* [Sky] *or an Affiliate of* [Sky] *and the Asset Buyer shall enter in not less than one other Asset Purchase Agreement for additional airframes, engines and/or parts inventory chosen by* [Sky] *which are owned by* [Sky] *or an Affiliate of* [Sky] *and (i) the closing date(s) for the sale of such airframes, engines and/or parts inventory shall be on or before June 30, 2016 and (ii) the purchase price for such airframes, engines and/or parts inventory shall be in an amount not greater than 66% of the appraised value for such airframes, engines and/or parts inventory issued by an independent third party appraiser chosen by* [Sky].

Notwithstanding anything in the Share Purchase Agreement to the contrary, [Sky] *hereby agrees to the following:*

A For the benefit of [the Joint Venture]*, that the appraisers referred to in Section 7.3 of the Share Purchase Agreement shall satisfy the following criteria: (a) in the case of airframes and engines, such appraiser shall be an independent, third party appraiser certified by the International Society of Transport Aircraft Trading that is mutually acceptable to* [Sky] *and* [the Joint Venture] *and/or (b) in the case of parts, such appraiser shall be an independent, third party, industry recognized appraiser for commercial aircraft parts that is mutually acceptable to* [Sky] *and* [the Joint Venture] *(an appraiser specified in (a) or (b) above is hereinafter referred to as an "Approved Appraiser").*

B With respect to any of the sales contemplated under Section 7.3 of the Share Purchase Agreement, [Sky] *shall provide or cause to be provided to* [the Joint Venture] *purchase agreements, bills of sale, security agreements, releases or any other documents which evidence the ownership of the airframes, engines and/or parts inventory being sold and any liens or encumbrances applicable*

---

[41] *Id. See also* Meng 2 at paras 12-20.

[42] Supplemental Agreement, 27 Dec. 2015, Ex. C8A.

thereto and [the Joint Venture] *shall receive reasonable assurance from* [Sky] *in writing, individually or together with other selling parties, as applicable, that at the time of such sale the Asset Buyer will receive good title to such airframes, engines and/or parts inventory free and clear of any liens or encumbrances.*

C In the event that any of the foregoing criteria is not satisfied, [the Joint Venture] *and/or its Affiliate may choose not to purchase such airframes, engines and/or parts inventory at its discretion.*

13.18. At about the same time, the Joint Venture and Jet Midwest, Inc. ("Jet Midwest", an affiliate of JMG), entered into an agreement for the consignment by the Joint Venture (or one of its affiliates) to Jet Midwest of particular aircraft assets ("Consignment Agreement").[43] The Consignment Agreement contemplated that the Joint Venture would acquire used aircraft, engines and parts, as foreseen in the First Side Letter, which would be reconditioned (as appropriate) and resold or otherwise disposed of by Jet Midwest for the benefit of the Joint Venture.

13.19. Simultaneously with the Consignment Agreement, the Joint Venture and JMG entered into an agreement under which the Joint Venture appointed JMG as its agent to service, manage and administer the consigned assets, including the marketing, leasing, sale or other disposition of those assets ("Servicing Agreement").[44]

13.20. Because the Joint Venture was to serve as a holding company rather than an operating company, the actual purchase of the assets for consignment to Jet Midwest was delegated to Yortime. Yortime acquired assets in two transactions.[45]

13.21. The first transaction was concluded on 17 December 2015. Further to this transaction, Yortime paid JMG US$18.5 million for certain aircraft and engines JMG had previously agreed to buy from American Airlines and its affiliate Envoy Air ("AA Assets").[46]

13.22. In connection with the Aircraft Sales Agreement between JMG and Yortime dated 17 December 2015 ("AA Agreement"), Yortime and JMG entered into a side letter agreement under which JMG agreed to repurchase the AA Assets from Yortime unless Jet Midwest achieved a specified sales target within one year ("Second Side Letter").[47]

13.23. A little over a month later, in a second transaction, Yortime bought aircraft parts from Diversified Aero Services, Inc. ("DASI") and GRG Consulting, Inc. ("GRG") for US$12 million ("DASI/GRG Assets").[48]

13.24. The AA Assets and the DASI/GRG Assets were delivered to Jet Midwest, as consignee.[49]

---

[43] Consignment Agreement, 16 Dec. 2015, Ex. C5.

[44] Servicing Agreement, 16 Dec. 2015, Ex. C6.

[45] Meng 1 at para 37.

[46] AA Agreement, 17 Dec. 2015, Ex. C7A.

[47] Second Side Letter, 16 Dec. 2015, Ex. C7.

[48] Asset Purchase Agreement between DASI and Yortime, 25 Jan. 2016, Ex. C8G; Asset Purchase Agreement between GRG and Yortime, 25 Jan. 2016, Ex. C8H.

[49] Meng 1 at para 41; Meng 2 at paras 21-25 and 30-33.

13.25. The aggregate amount of these transactions—US$30.5 million—created a problem under the SHA. This is because, as noted above at para 13.13, until Sky made the Second Payment of US$40 million, the SHA limited the total outlays of the Group Companies to US$20 million (the amount of Sky's First Payment plus an equivalent amount from the US$50 million that Claimant had contributed). To remedy this, Claimant, Sky, JMG and the Group Companies entered into a side letter on 1 February 2016 under which Sky agreed to contribute US$6 million to the Joint Venture by 1 March 2016 (the "Interim Payment") (reducing the balance of the Second Payment due on 30 June 2016 to US$34 million) ("Third Side Letter"). [50]

13.26. Accordingly, following the execution of the Third Side Letter, Sky was required to:
(1) make the US$6 million Interim Payment by 1 March 2016; and

(2) pay the US$34 million balance of the $40 million Second Payment by the final deadline of 30 June 2016.

13.27. The consignment of the AA Assets and the DASI/GRG Assets to Jet Midwest has not resulted in any returns to the Joint Venture. This is because Jet Midwest and JMG, the servicer, are not returning sales proceeds to the Joint Venture. While the combined gross value of the AA Assets and DASI/GRG Assets was US$30.5 million, to date, Jet Midwest and JMG have returned only US$154,147 in sales proceeds to the Joint Venture—0.5% of the original acquisition price of the consigned goods. The last time Jet Midwest/JMG returned any sales proceeds to the Joint Venture was on 29 April 2016. Together with additional expenses the Joint Venture paid for the tear-down and repair of the consigned goods, the consignment arrangement has resulted in a net loss to the Joint Venture of US$31,028,879.57. The Joint Venture stopped paying Jet Midwest's invoices for alleged tear-down and refurbishment services as of 11 May 2016. [51]

13.28. On 1 March 2016, Sky failed to make the US$6 million payment required under the Third Side Letter.

13.29. On 9 May 2016, the Joint Venture sent Mr. Kraus an email with three separate proposals to help Sky address the issue of the Second Payment, including exchanging debt into equity and reducing Claimant's capital contribution from US$50 million to US$40 million. [52] Representatives of ZEG sent a WeChat message dated 23 June 2016. [53] ZEG's proposals included: (i) estimating the amount of cash that could be injected by Sky and JMG by 30 June 2016; (ii) exchanging debt for equity; (iii) reducing Claimant's capital contribution and Sky and JMG's obligation from US$50 million to US$40 million; and (iv) helping Mr. Kraus seek a bridge loan. Mr. Kraus failed to respond to any of these proposals. [54] As Sky and JMG's counsel acknowledged at the hearing, Mr. Kraus "was less than cooperative in a lot of events after February 2016... there were some messages that seems to show that ZEG Group was trying to help Mr. Kraus to provide capital, but Mr. Kraus was just not that responsive." [55]

---

[50] Third Side Letter, 1 Feb. 2016, Ex. C9.

[51] Meng 1 at paras 43-45, 59-60; Meng 2 at paras 44-51; email exchange between Jet Midwest and Ms. Nina Fu (Chief Financial Officer of the Joint Venture), 11 May 2016, Ex. C10A.

[52] Email from Ms. Julia Zhu to Mr. Kraus, 9 May 2016, Ex. C10; *see also* email from Ms. Fu to Mr. Kraus, 15 May 2016, Ex. C11.

[53] Agreed Bundle, Tab 83.

[54] Meng 1 at para 56.

[55] Tr. 4:71:15-72:3.

13.30. On 31 May 2016, Claimant and the Group Companies sent Sky, JMG, JMW and Mr. Kraus a default notice demanding that Sky immediately make the US$6 million payment that had been due on 1 March 2016 and provide a payment plan for the US$40 million Second Payment that was due in full by 30 June 2016 (the "Default Notice").[56] In the Default Notice, Claimant noted that Sky and JMG were in breach of the SPA and SHA due to the failure to make the US$6 million Interim Payment.[57] Claimant demanded that Sky and JMG make the Interim Payment and that Sky and JMG confirm their ability and intent to pay the Second Payment by the Second Payment Date.[58]

13.31. Under the SHA, this was the same day that Sky was to inform the Joint Venture if it would be unable to make the Second Payment of US$40 million by 30 June 2016 (i.e. the Second Payment Date).[59] Sky and JMG never provided any such written notice in advance of the Second Payment Date.[60]

13.32. Upon receiving Claimant's Default Notice, Mr. Kraus—for the first time—began complaining about the lack of progress in obtaining third party financing for the Joint Venture.[61] At no time prior to 31 May 2016 had Mr. Kraus ever suggested that Sky's obligation to make its capital contribution was in any way related to any benchmark of success in obtaining third party financing.[62]

13.33. Indeed, during an earlier visit to Los Angeles in February 2016, Claimant had raised the matter of Sky's obligation to make the Second Payment of US$40 million by 30 June 2016. Mr. Kraus told Claimant (for the first time) that there were some vaguely described encumbrances on JMG's cash and assets that needed to be released to allow the payment to be made, but he implied that a way would be found to make this possible. He made no mention at that point of any relationship between the obtaining of financing by the Joint Venture and the ability of Sky to make the Second Payment.[63]

13.34. Likewise on 29 April 2016, Ms. Fu sent Mr. Kraus a summary of the management process that had been developed for sourcing external financing for the Joint Venture and invited any questions he might have. Mr. Kraus did not raise any questions or suggest that there was any connection between such financing and Sky's ability to make the Second Payment.[64]

13.35. In addition, Mr. Kraus failed to cooperate with the initial steps that would have been needed to obtain financing. For example, on 7 April 2016, the Joint Venture asked Mr. Kraus to provide shareholder documents to the Bank of Communications International in Hong Kong (the "BOC") to enable the Joint Venture to open an account at the BOC.[65] On 13 May 2016, the Joint Venture let Mr. Kraus know that Ms. Meng would be traveling to Hong Kong on 18 May 2016 to try to open the account. To open the account, the BOC required documentation of the direct and indirect shareholders of the Joint Venture. Ms. Meng had already provided the BOC with the documents for

---

[56] Letter from Claimant and the Group Companies to Sky, JMG, JMW and Mr. Kraus, 31 May 2016, Ex. C12.

[57] Meng 1 at para 57.

[58] *Id.*

[59] SHA at Section 8.1(i).

[60] Tr. 2: 133:13-137:8 (Mr. Kraus).

[61] Email from Mr. Kraus to Ms. Fu, 31 May 2016, Ex. C12A.

[62] Meng 1 at para 50.

[63] *Id.*

[64] Email from Zhu Yun to Mr. Kraus, 29 Apr. 2016, Ex. C9B; Meng 1 at para 51.

[65] Email exchange between Zhu Yun and Mr. Kraus, 7 Apr. 2016, Ex. C9C.

the ZEG side but was still waiting for Mr. Kraus to send the documents for the JMG side. The Joint Venture told Mr. Kraus that, if the documents were not received by 18 May 2016, the BOC would cancel the application, which it did. [66]

13.36. Ms. Meng made other efforts to try to open accounts for the Joint Venture to obtain low-cost financing, including trying to open an account with the Export-Import Bank of China (the "Bank"), a state-owned enterprise of the Chinese government. To open such an account, the Bank needed certain company documents. Although Mr. Kraus said he would arrange for the required documents to be provided, Ms. Meng never received them. [67]

13.37. In all events, the fact that Sky had yet to make its full capital contribution undermined the Joint Venture to such an extent that no lender would provide significant financing on acceptable terms. In contacting several potential lenders, Ms. Meng and Ms. Fu found that asset-based financing collateralised by older aircraft, engines and parts was not feasible for what was a start-up venture that had not been fully capitalised and had no track record of revenue generation and profitability. In addition, the financial condition of Sky and JMG were so lacking in transparency that the claim of the Joint Venture upon Sky and JMG for the Second Payment could not be taken into account for credit purposes as part of the Joint Venture's capital. [68]

13.38. On 30 June 2016, the Second Payment Date, Sky and JMG sent a letter asking that the payment date be extended to 31 July 2016, but Claimant did not agree to the requested extension. [69] In the 30 June letter, Mr. Kraus did not dispute the fact that Sky and JMG were obligated to contribute an additional US$40 million to the Joint Venture or the fact that they had failed to comply with that obligation.

13.39. In light of this letter, Ms. Meng sent a team to Los Angeles to commence an audit of the assets that had been consigned to Jet Midwest, but Mr. Kraus refused to provide the information needed to perform the audit. [70]

13.40. Following this trip, on 18 August 2016, Claimant sent the Joint Venture, Sky and JMG a Notice of Default and Redemption pursuant to Section 8.4 of the SHA ("First Redemption Notice"). [71]

13.41. Section 8.4 of the SHA is of central importance to this case. It provides in pertinent part as follows:
(i) Without limiting any other rights that [Claimant] *may have hereunder, in the event that: (a)* [the Joint Venture] *fails to have Net Profit within 20% of the 2016 Performance Target; (b)* [the Joint Venture] *fails to have Net Profit within 10% of the 2017 Performance Target; (c)* [the Joint Venture] *fails to meet the 2018 Performance Target; or (d) there is a material breach by* [Sky or JMG] *or any Group Company under any Transaction Document,* [[72]] *which breach cannot be cured or, if curable,*

---

[66] Email from Zhu Yun to Mr. Kraus, 13 May 2016, Ex. C10B.

[67] Email exchange between Ms. Fu and Mr. Kraus, 13 May 2016, Ex. C10C; email exchange between Mr. Kraus and Ms. Fu, 31 May-1 Jun. 2016, Ex. C9B; Meng 1 at para 53; Meng 2 at para 38.

[68] Meng 1 at para 54; Meng 2 at para 39; email from Ms. Julia Zhu to Mr. Kraus, 1 Jun. 2016, Ex. C9B.

[69] Letter from Sky and JMG to Sheng Ze, 30 Jun. 2016, Ex. C14.

[70] Meng 1 at paras 58-61.

[71] Letter from Claimant to the Joint Venture, Sky, JMG and JMW, 18 Aug. 2016, Ex. C15.

[72] The SHA defines "Transaction Documents" as "this Agreement, the Share Purchase Agreement and any other documents entered into pursuant to the foregoing agreements." SHA, Schedule 1. We do not understand there to be any dispute between the parties that this definition encompasses the First Side Letter, Second Side Letter and the Third Side Letter.

is not cured within 90 days after being notified in writing of the same, [Claimant] *shall have the right (the "***[Claimant's] *Redemption Right***") *but not the obligation to have all or a portion of the Shares held by* [Claimant] *redeemed by* [the Joint Venture] *at a price (the "***[Claimant's]*Redemption Price***") equal to the higher of (x) the proportion of the Original Investment paid for such Shares to be redeemed (calculated based on a total investment cost of US$50,000,000 paid for all of the Shares held by* [Claimant] *), plus a premium calculated at an annual return of 15% of such original investment cost, compounded annually from and including the date of the Second Payment up to the date of redemption, plus all declared but unpaid dividends thereon up to the date of redemption), or (y) the then fair market value of such Shares to be redeemed, the valuation of which shall be determined through an independent appraisal performed by an appraiser selected by* [Claimant].

(ii) [Claimant's] *Redemption Right shall be exercisable by a written notice of* [Claimant] *to* [the Joint Venture] *and* [Sky] *(the "***[Claimant's] *Redemption Notice***").* [The Joint Venture] *shall complete such redemption within six (6) months after the date on which such written notice is delivered by* [Claimant] *or such other period as agreed by the Parties. If the Redemption Price for all of the Shares to be redeemed is not paid in full by* [the Joint Venture] *within six months (6) months after the date on which the written notice is issued by* [Claimant] *or such other time as agreed by the Parties,* [Claimant] *shall have the right, during the period from the expiration of such six-month period to the date on which the Redemption Price for all of the Shares to be redeemed is paid in full, to require the Group Companies to take all actions necessary in order to enable* [the Joint Venture] *to pay the full amount of the Redemption Price, including borrowing funds, selling assets, distributing available dividends, applying for and obtaining approval for reduction of capital of any Group Company or liquidating and making liquidation distributions, and/or causing any Group Company to do any of the foregoing. If the assets of* [the Joint Venture] *are insufficient to pay the full* [Claimant's] *Redemption Price, then* [Sky and JMG] *shall pay the remaining balance of the* [Claimant's] *Redemption Price as follows: (a)* [Sky and JMG] *shall pay interest on the remaining balance at an interest rate equal to 15% per annum monthly in arrears until such remaining balance is paid in full; and (b)* [Sky and JMG] *shall pay such remaining balance in full no later than the first anniversary of the date the* [Claimant's] *Redemption Price was due and payable to* [Claimant]. *If* [Sky and JMG] *fail to make any of the payments specified in clause (a) of the immediately preceding sentence when due, the entire remaining balance of the* [Claimant's] *Redemption Price shall become immediately due and payable.*

...

(iv) Once [the Joint Venture] *and/or* [Sky] *have received* [Claimant's] *Redemption Notice,* [the Joint Venture] *and* [Sky] *shall not, and shall not permit any other Group Companies to, take any action which could have the effect of delaying, undermining or restricting the redemption, and* [the Joint Venture] *and* [Sky and JMG] *shall in good faith use all reasonable efforts as expeditiously as possible to increase the amount of legally available redemption funds including without limitation, causing any other Group Company to distribute any and all available funds to* [the Joint Venture] *for purposes of paying the* [Claimant's] *Redemption Price.*

13.42. In response, on 9 September 2016, Sky and JMG sent their own default notice to Claimant, Yortime and Sheng Ze ("Sky/JMG Default Notice"). In the Sky/JMG Default Notice, Sky contended that (1) the Joint Venture had failed to obtain financing from any financial institutions in breach of Section 5.8

of the SHA; (2) neither the Joint Venture nor its affiliates had made any asset purchases in breach of Section 7.3 of the SPA; (3) the Joint Venture had failed to fund the expenses associated with the tear-down and refurbishment of aircraft, engines and parts in breach of the Consignment Agreement, the Servicing Agreement, the SPA and the SHA; and (4) accounting officers at the Joint Venture (who were appointed by Claimant, Yortime and/or Sheng Ze) failed to provide Mr. Kraus with bank statements for the Group Companies. [73]

13.43. Based on these contentions, Sky and JMG said that "material defaults ha[d] occurred on the part of the [Group Companies and Claimant] with respect to their obligations under the Shareholders Agreement, the Share Purchase Agreement, the Consignment Agreement and the Servicing Agreement." [74] In addition, Sky and JMG said that the "Disclosure Failure constitute[d] bad faith on the part of the Accounting Officers and the Sheng Ze Entities." [75]

13.44. According to Sky and JMG, these "material defaults ha[d] caused material harm to [Sky and JMG]" and "made it impossible to maintain the financial viability of the [Joint Venture] and, therefore, these material defaults (i) terminated [Sky's] obligation to make the Second Payment (as defined in the Share Purchase Agreement) and (ii) terminated [Claimant's] right of redemption set forth in the Shareholder's Agreement." [76] Sky and JMG further contended that they would be entitled to damages in connection with such defaults. [77]

13.45. This was the first time Mr. Kraus had ever alleged a breach of any of the above-mentioned agreements. [78]

13.46. On 25 November 2016, Claimant sent a letter to JMW and the Joint Venture withdrawing the redemption demand contained in its First Redemption Notice "to allow JMW a full opportunity to remedy its material breaches of the SHA", while reserving the right to submit a further Redemption Notice in due course. [79] Neither Sky nor JMG ever made the Second Payment.

13.47. On 18 January 2017, Claimant sent JMG, as the common addressee for notices to Sky and JMG under Section 9.3 and Schedule II of the SHA, a termination notice terminating the SPA and the SHA ("Termination Notice"). [80] In its Termination Notice, Claimant said, among other things, the following:

> *The fundamental breaches of the SHA and SPA by the JMW Parties* [i.e., Sky, JMG and JMW] *and the unambiguous statements in the letter of 9 September 2016 make it amply clear that the JMW Parties do not intend to perform their obligations under the SHA and SPA and have thus repudiated those agreements.* [Claimant, the Joint Venture, Yortime] *and Sheng Ze (the "Sheng Ze Parties") hereby accept the JMW Parties' repudiation of the SHA and SPA and declare those agreements terminated, without prejudice to the rights of the Sheng Ze Parties to claim damages and other*

---

[73] Sky/JMG Default Notice, 9 Sept. 2016, Ex. C16; Kraus 1 at paras 7-22 and Exhibits 1 and 2; Kraus 2 at paras 2, 5.
[74] Sky/JMG Default Notice, 9 Sept. 2016, Ex. C16.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] Meng 1 at para 64.
[79] Letter from Claimant to Sky, JMG, JMW and the Joint Venture, 25 Nov. 2016, Ex. C17.
[80] Termination Notice, 18 Jan. 2017, Ex. C18.

available remedies under applicable law for the breaches by the JMW Parties. [81]

13.48. On 27 March 2017, Claimant sent the Joint Venture, Sky and JMG a second redemption notice pursuant to Section 8.4 of the SHA ("Second Redemption Notice"). [82] In its Second Redemption Notice, Claimant said that, despite the termination of the SHA, its redemption rights survived. In this regard, Claimant said the following:

> *While the SHA itself has since been terminated and is no longer in force, clause 8.4 thereof set out the redemption rights as agreed between* [Claimant] *and the* [Joint Venture] *when the Shares were issued, which, pursuant to Article 15 of the* [Joint Venture's] *Articles of Association, became attached to the Shares upon such issuance. Those rights, accordingly, have survived termination of the SHA itself.* [Sky] *and* [JMG] *(the "JMW Parties") are reminded that the right of redemption of the Shares in the present instance arises from,* inter alia*, their anticipatory breach and repudiation of their obligations under clauses 8.1 and 8.4 of the SHA, for which obligations, as stated in clause 9.12 of the SHA, they are jointly and severally liable. That being the case, under the terms of clause 9.9 of the SHA, the JMW Parties continue to be bound by their obligations under clause 8.4 notwithstanding the termination of the SHA. This constitutes notice to them that* [Claimant] *intends to enforce those obligations.* [83]

13.49. On 5 April 2017, Claimant filed for arbitration.

14. PARTIES' KEY CLAIMS

14.1. Article 22.1 of the Rules provides that each party shall have the burden of proving the facts relied on to support its claim or defence.

14.2. In preparing this award, the Tribunal has considered all of the allegations, evidence and arguments in the record but refers only to those it considers relevant to its reasoning and decisions. The fact that the Tribunal does not refer to a certain fact or argument does not mean that it has not been considered.

A. Claimant's Claims

14.3. Claimant contends that Sky failed to comply with its obligation to make the US$50 million capital contribution. After Sky made an initial US$10 million capital contribution, Sky failed to make the remaining US$40 million capital contribution, and specifically an interim payment that the parties agreed that Sky and JMG should have made on 1 March 2016. [84] Sky and JMG have further breached

---

[81] *Id.*

[82] Second Redemption Notice, 27 Mar. 2017, Ex. C19.

[83] *Id. ; Amended and Restated Memorandum and Articles of Association of the Joint Venture, 31 Dec. 2015, Ex. C8C. See also letter from Claimant to Sky, JMG and JMW, 4 Apr. 2017, Ex. C20.*

[84] CPH at para 156.

their obligations under the SHA by making clear that they did not intend to meet their obligation, under Section 8.4(ii) of the SHA, to pay the portion of the Redemption Price that the Joint Venture is unable to pay.[85] Claimant submits that these breaches constitute material breaches of both the SPA and SHA.[86]

14.4. Claimant contends that the SHA and SPA provide that where a material breach occurs, such as the breach of the obligation to make the entire US$50 million capital contribution to the Joint Venture, Claimant has the right to have its shares in Sino Jet be redeemed (i.e., the Redemption Right) for a contractually specified cash price (i.e., the Redemption Price).[87]

14.5. This Redemption Price is to be paid by the Joint Venture. In the event the Joint Venture lacks sufficient assets to pay the full Redemption Price, Sky and JMG are required to pay the shortfall.[88]

14.6. Claimant claims that Sky and JMG breached their obligation to make the promised US$50 million capital contribution, and it had properly invoked its Redemption Right. Because the Joint Venture did not have sufficient assets to pay the Redemption Price, Sky and JMG are responsible for paying the remaining balance of the Redemption Price. Sky and JMG did not pay any part of the Redemption Price and are in breach of contract.

14.7. Claimant further claims that Sky and JMG are in further breach of contract by taking the position that Claimant's Redemption Right had been terminated. This is a repudiatory breach of contract.

14.8. Claimant seeks the following relief in this arbitration:
a. Determine that the Redemption Price was $76,043,750.00 as of 30 June 2019.

b. Determine that the Redemption Price accrued compound interest of 15% per year, or $31,250.00 per day, from 30 June 2019 through the date of the award.

c. Grant a monetary award against the Joint Venture and Sky and JMG, jointly and severally, in the amount of the Redemption Price.

d. Grant post-award interest of 15% per year until the Redemption Price is paid in full.

e. Until the Redemption Price has been paid in full, enjoin Sky from transferring the 10,000 Joint Venture shares owned by Sky.

f. Declare that once the Redemption Price has been paid in full—but not before—Claimant shall relinquish its Sino Jet shares in order to complete the share redemption process.[89]

B. Sky and JMG's Defenses

---

[85] *Id.* at para 157.
[86] *Id.* at para 156.
[87] SHA at Section 8.4(i); CPH at para 156(j).
[88] SHA at Section 8.4(ii); CPH at paras 156(k), 162.
[89] CPH at para 10.

14.9. In response to Claimant's claims above, Sky and JMG do not deny that they failed to make the remaining US$40 million capital contribution. Sky and JMG argue, however, that they were prevented by Claimant, the Joint Venture, Yortime and Sheng Ze (the "Top Jet Parties") from fulfilling the obligation to make the capital contribution. Sky and JMG argue that the Top Jet Parties fully knew that Sky and JMG did not have sufficient liquidity to meet the Second Payment of US$40 million. [90] For this reason, the parties agreed on two mechanisms to assist Sky and JMG with meeting the Second Payment:

(1) Section 5.6 of the original Share Purchase Agreement provided for JMG to make payment in kind.

(2) Section 7.3 was added to the SPA under the First Side Letter requiring the Joint Venture to purchase assets from JMG. [91]

14.10. Sky and JMG argue that the Top Jet Parties failed to comply with either provision, resulting in Sky and JMG not having the funds that the Top Jet Parties knew Sky needed to make the second US$40 million capital contribution. [92] To hold otherwise would be to allow the Top Jet Parties to take advantage of their own wrong. [93]

14.11. In any event, assuming for the sake of argument that there was an unexcused breach of their obligation to make the required capital contribution, Sky and JMG point out that, even if the Top Jet Parties issued a proper Redemption Notice, the remedy that the Top Jet Parties seek—which is embodied in Section 8.4 of the SHA— cannot be granted by this Tribunal.

14.12. Sky and JMG argue that Section 8.4 is either a liquidated damages provision or a clause that grants the Top Jet Parties certain rights that are enforceable by way of an order for specific performance. Either way, Sky and JMG explain that this Tribunal should not provide any remedy pursuant to Section 8.4: (1) if Section 8.4 is a liquidated damages clause, it cannot be enforced because it contravenes the reflective loss doctrine, or because it is an unenforceable penalty clause, and (2) if Section 8.4 is a clause that confers rights, any claim for specific performance should be denied because Claimant already terminated the SHA before it sought to exercise its rights under Section 8.4 of the SHA, and Claimant does not have clean hands. [94]

C. Sky's Counterclaim

14.13. Sky has also advanced a counterclaim in these proceedings. Sky claims that Claimant was in breach of Section 5.8 of the SHA, in that it failed to enlist its affiliates (including ZEG) to help the Joint Venture to obtain low interest loans. Further, Claimant, through its representatives, prevented Sky and JMG from making the Second Payment, and thus prevented Sky and JMG from enjoying the fruits of success of the joint venture. Sky argues that it suffered loss, in that the US$10 million that it injected could have been meaningfully used elsewhere. Sky therefore claims loss of use of the

---

[90] RPH at para 60(1).
[91] *Id.* at paras 25, 60(3).
[92] *Id.* at para 46.
[93] *Id.* at para 60(7).
[94] *Id.* at para 2.

US$10 million, i.e., interest that could have been generated by the US$10 million from 31 December 2015 to the date of the arbitral award. [95]

D. JMG's Counterclaim

14.14. As set out above at paras 12.3 and 12.6, JMG initially asserted a counterclaim against Claimant. However, it subsequently abandoned its counterclaim during the course of the proceedings. [96]

15. KEY ISSUES TO BE DECIDED

In the Tribunal's view, in order to determine whether Claimant is entitled to the relief it seeks in this arbitration, it is necessary to determine the following key issues:
(1) Is Claimant entitled to invoke the Redemption Right as a result of a material breach of the SPA or SHA by Sky and JMG?

(2) If Sky and JMG are in material breach, are Sky and JMG nevertheless excused from the consequences of the material breach?

(3) Did Claimant properly invoke its Redemption Right under Section 8.4 of the SHA?

(4) If Claimant properly invoked the Redemption Right, what remedy is it entitled to?

16. ISSUE 1: IS CLAIMANT ENTITLED TO INVOKE THE REDEMPTION RIGHT AS A RESULT OF A MATERIAL BREACH OF THE SPA OR SHA OR ANY OTHER TRANSACTION DOCUMENT BY SKY AND JMG?

16.1. Claimant submits that Sky and JMG have materially breached the SPA and SHA and the Third Side Letter in several ways:
(1) On 1 March 2016, Sky and JMG materially breached the Third Side Letter by failing to make the Interim Payment.

(2) On 31 May 2016, Claimant sent a Default Notice regarding the failure of Sky and JMG to make the Interim Payment. In the Default Notice, Claimant demanded that Sky and JMG make the Interim Payment and that Sky and JMG confirm their ability and intent to make the Second Payment by the 30 June 2016 deadline. Sky and JMG failed to respond to the Default Notice prior to the Second Payment Date.

(3) The SHA required Sky and JMG to provide 30-days' advance notice, in writing, of any anticipated

---

[95] *Id.* at para 113.
[96] *Compare* JMG SOD at para 13 *with* ROS at para 64, RQD at para 5 and RPH at para 127.

difficulty in making the US$40 million Second Payment.[97] Sky and JMG once again materially breached the SHA by failing to send any such advance notice.[98]

(4) On 30 June 2016, Sky and JMG once again materially breached the SPA and SHA by failing to make the Second Payment.[99]

16.2. Under Section 8.4(i) of the SHA, in the event of a material breach by Sky or JMG under any Transaction Document (including the SPA, the SHA, and the Third Side Letter), which breach cannot be cured or, if curable, is not cured within 90 days after being notified in writing of the same, Claimant is entitled to invoke its Top Jet Redemption Right.

16.3. There is no dispute that Sky failed to comply with its obligation to contribute US$50 million in capital contributions. After the initial US$10 million contribution, the parties agreed that Sky would then make the US$6 million Interim Payment by 1 March 2016, and that Sky would pay the US$34 million balance by the Second Payment Date. Sky failed to do so.

16.4. There can be no doubt that the failure to make the Interim Payment due under the Third Side Letter and to contribute the remaining US$40 million of the agreed US$50 million capital contribution pursuant to Section 8.1(i) of the SHA and Section 2 of the SPA amount to material breaches of the Transaction Documents.[100] Sky and JMG never cured these breaches.

16.5. Claimant sent Sky the Default Notice, notifying Sky of its breach of the Third Side Letter, on 31 May 2016. According to Section 8.4(i) of the SHA, Claimant's Redemption Right accordingly arose when the breach remained uncured 90 days after the date of the Default Notice—on 29 August 2016.

17. ISSUE 2: IF SKY AND JMG ARE IN MATERIAL BREACH, ARE SKY AND JMG NEVERTHELESS EXCUSED FROM THE CONSEQUENCES OF THE MATERIAL BREACH?

A. Parties' Arguments

17.1. Sky and JMG argue that, even if they failed to comply with the terms of the SPA and SHA, Claimant should nevertheless not be able to exercise its Redemption Right or be given a remedy for such a breach. Claimant cannot be allowed to take advantage of its own wrong and cannot blame Sky and

---

[97] SHA at Section 8.1(i).

[98] Tr. 2:133:13-137:8.

[99] CPH at para 156.

[100] Claimant has argued that Sky and JMG committed an anticipatory breach of the SPA and SHA, specifically Section 8.4 of the SHA, when they repudiated their obligations by demonstrating that they were unable and unwilling to comply with their obligations under that section. CPH at paras 152-154, 157; Amended Issues of Claimant, Issue 4. Claimant has also argued that the Joint Venture is also guilty of anticipatory breach of Section 8.4(i) as it did not have the ability to comply with Section 8.4 (i). CPH at paras 158 and 159. As we have found that Claimant's Redemption Right arose on 29 August 2016 by virtue of Sky's uncured breach of the Third Side Letter, we do not need to discuss these issues.

JMG for their inability to make the Second Payment on time. [101]

17.2. Sky and JMG argue that Sky was unable to make the Second Payment by the Second Payment Date because of a series of breaches by the Top Jet Parties, particularly the breach of Section 7.3 of the SPA. [102]

17.3. Sky and JMG argue at some length that ZEG knew that JMG did not have US$50 million in cash to make the capital contribution. [103] This was because, among other things, Ms. Meng was in a position to request for financial documents from Mr. Kraus and JMG, reviewed financial documents provided by JMG and concluded that JMG did not have cash to make the capital contribution. [104] Sky and JMG conclude that a person like Ms. Meng would have known that neither JMG nor Mr. Kraus had the US$50 million with which to make the promised capital contribution.

17.4. Sky and JMG argue that as ZEG knew that JMG did not have the US$50 million, ZEG would have known that there would need to be some arrangement in order to allow JMG to raise funds to make the capital contribution.

17.5. For this reason, Sky and JMG argue that there was all along an agreed plan for JMG and its related companies (the "JMW Group") to provide capital contribution to the Joint Venture by selling assets, and the JMW Group did perform the plan at least up to end of 2015. This is consistent with the following contemporaneous evidence:
(1) The financials of the JMW Group, which showed that the JMW Group had much less than US$50 million before the execution of the SPA;

(2) The asset appraisal done in November 2015, which showed that the JMW Group had assets worth US$200 million;

(3) Section 5.6 of the original Share Purchase Agreement, which was subsequently replaced by the First Side Letter and the Supplemental Agreement (reflected in Section 7.3 of the SPA), which showed that the Top Jet Parties and the JMW Group had an arrangement for the latter to sell assets as a means of making Sky's cash contribution; and

(4) The further provision of the security interest report and appraisal report on 28 December 2015. [105]

17.6. Sky and JMG claim that by 15 January 2016 (which is the date mentioned in the First Side Letter for such an agreement to be entered into), the asset transfer agreement envisaged by Section 7.3 of the SPA had not been executed.

17.7. The parties' arrangement for an asset sale that would allow Sky to obtain the funds to make the capital contribution is also evidenced by Section 5.6 of the original Share Purchase Agreement, which provided as follows:

---

[101] RPH at para 60(7).
[102] *Id.* at paras 2, 60.
[103] *Id.* at para 3.
[104] *Id.* at paras 6-7.
[105] *Id.* at para 25.

5.6 Asset Transfer Agreement and Assignment Agreement. The Company, the existing shareholder of the Company or one of its Affiliates (each an "Asset Buyer") shall enter into i) one or more asset purchase agreements with the Purchaser or an Affiliate of Purchaser (the "Asset Purchase Agreement") for the purchase of certain airframe, engine and parts inventory owned by the Purchaser or an Affiliate of the Purchaser and ii) an Assignment Agreement (the "Assignment Agreement") with respect to certain future cash inflows from existing leases and joint ventures of the Purchaser, on terms and conditions acceptable to the Purchaser and the Asset Buyer(s), as payment in kind for part of the considerations. [106]

17.8. According to Mr. Kraus, the purpose of Section 5.6 of the original Share Purchase Agreement was to allow Mr. Kraus and his entities to raise the capital necessary to make the required capital contribution. [107]

17.9. Sky and JMG also point out that this explanation is consistent with the contents of an email from Xiao Meng (a lawyer representing ZEG) on 16 November 2015, which states in part that:
We understand from Sheng Ze that [JMG] may have difficulty in contributing the $40,000,000 capital in cash to the New Co before June 30, 2015, and to solve this problem, [JMG] has proposed to transfer some airplane asset ("Asset") to the New Co and uses the proceeds from selling the Asset as capital contribution....

Sheng Ze finds this proposal worth considering based on the following pre-conditions:

(i) [JMG] *makes its US$10,000,000 capital contribution and becomes New Co's shareholder; and (ii) the parties agree on other major terms. To conduct further consultation, Sheng Ze wants to make some clarification in the first place and needs some further information from* [JMG]: *(Note to Sheng Ze Team: Please correct me if our understanding is inaccurate) 1. Clarification Sheng Ze understands* [JMG] *'s proposal as below. Please kindly confirm if our understanding is correct:*

(1) The Assets have been evaluated by an independent third party appraisal firm and in aggregate worth no less than $200 million ;

...

A separate contract (i.e. an "Asset Transfer Agreement") will be entered among Sheng Ze, [JMG] *and New Co to outline the entire proposed arrangement.* [108]

17.10. Sky and JMG claim that the assets were appraised in accordance with this arrangement in November 2015 and that the appraised value of the assets was no less than US$200 million. [109]

17.11. Moreover, on 16 December 2015, the Joint Venture and JMW (predecessor of Sky) entered into the First Side Letter to amend the SPA. [110] The First Side Letter amended the SPA by inserting Section 7.3,

---

[106] Original Share Purchase Agreement at Section 5.6 (emphasis added).

[107] Tr. 2:157:22-24. "Because we need the – to go into the partnership, we needed the capital to put in. And so this is the agreed-to mechanism."

[108] Kraus 1, Exhibit 1 (email dated 16 November 2015 from Claire Xiao to Dave Kulowiec) (emphasis added).

[109] RPH at para 16.

[110] *Id.* at para 19.

which provides that the Joint Venture was to enter "on or before January 15, 2016: i) one or more asset purchase agreements with [JMG] or an Affiliate of [JMG] (the "Asset Purchase Agreements") for the purchase of certain airframe, engine and parts inventory owned by [JMG] or an Affiliate of [JMG], and ii) an Assignment Agreement (the "Assignment Agreement") with respect to certain future cash inflows from existing leases and joint ventures of [JMG], on terms and conditions acceptable to [JMG] and the Asset Buyer(s), **as payment in kind part of the considerations**." (emphasis added)

17.12. On 27 December 2015, JMW (later replaced by Sky) sent a Supplemental Agreement letter to the Joint Venture on further requirements on the appraisal report for the asset purchase agreements referred to in Section 7.3 of the SPA.

17.13. Sky and JMG argue that the Supplemental Agreement was a unilateral promise (not an agreement, because it was not signed by the Joint Venture) written for the benefit of the Joint Venture, and no consideration was required from the Joint Venture. [111]

17.14. Moreover, the Supplemental Agreement was a letter issued to the Joint Venture, and no consideration was required from the Top Jet Parties. Sky and JMG argue that Claimant plainly cannot rely on, let alone enforce, the Supplemental Agreement against Sky for the trite principle that it was a bare promise without consideration and is therefore unenforceable. [112]

17.15. Sky and JMG point out that Mr. Kraus sent appraisal reports to the Top Jet Parties in November 2015, December 2015 and April 2016. The Top Jet Parties did not take issue with the appraisal reports, but also did not purchase aircraft parts from the JMW Group in accordance with Section 7.3 of the SPA. [113]

17.16. On 27 April 2016, Mr. Kraus emailed a Certified Appraisal Report prepared by Collateral Verifications LLC dated 24 April 2016 (the "Appraisal Report") to Ms. Meng, Ms. Zhu, and Ms. Fu. [114] Page 16 of the Appraisal Report confirms that the fair market value of aircraft parts in the inventory list of JMG was US$55,187,840 (the original equipment manufacturer price being US$256,849,373). [115] Sky and JMG argue that Ms. Meng could have asked for more information or raised questions about the appraisal, or told Mr. Kraus that the report was inadequate or incomplete, but never did so. [116]

17.17. Accordingly, as of early February 2016, not only did the Top Jet Parties do nothing in relation to Section 7.3 of the SPA, but they also used the DASI Agreement and the GRG Agreement to illegitimately coerce Sky to accelerate its obligation to pay capital. [117]

17.18. Claimant argues that the prevention principle that Sky and JMG use to defend themselves against Claimant's breach of contract claim does not have any merit.

---

[111] *Id.* at para 23.
[112] *Id.* at para 36.
[113] *Id.* at para 34.
[114] Exhibit 1a of ROS.
[115] *Id.* ; RPH at para 32.
[116] RPH at para 33.
[117] *Id.* at para 38.

17.19. The prevention principle only applies where the defendant can show that the plaintiff itself had breached the contract, and that the breach at issue is a direct consequence of the prior breach. Neither condition is satisfied in this case. [118]

17.20. There was no breach of the First Side Letter, as Sky and JMG allege, because the First Side Letter was amended by the 27 December Supplemental Agreement, which clarified that the Joint Venture was not required to purchase any assets except in response to an offer satisfying certain appraisal and unencumbered assets requirements. [119] Sky and JMG have cited no documentary evidence that they ever timely presented the Joint Venture with an offer satisfying the appraisal and unencumbered assets requirements. In addition, Mr. Bowen has concluded that there is no evidence that Sky and JMG had assets meeting those requirements. [120]

17.21. For this reason, Claimant argues that the Tribunal must find that there was no obligation to purchase or that Sky and JMG did not have assets that could have been purchased pursuant to the First Side Letter to sell in any event. [121] And, in all events, to the extent there was any such obligation, Claimant substantially complied with it.

17.22. Claimant argues that the fact that Sky and JMG failed to raise the issue of the breach of the First Side Letter at any point before their 9 September 2016 Sky/JMG Default Notice (some two months after the Second Payment Date) or to provide the contractually required 30 day notice that they would not be able to make the Second Payment, shows that there is no truth to the prevention argument and the allegation that Claimant had breached its obligations is simply a pretext for Sky to refuse to make the Second Payment. [122]

B. Tribunal's Analysis

17.23. At the heart of Sky and JMG's opposition to Claimant's claim that there has been a material breach of the SPA and SHA that triggers its Redemption Right are two key arguments:
(1) First, that Claimant has itself breached its obligations under the relevant Transaction Documents.

(2) Second, that this breach prevented Sky and JMG from performing their obligation to contribute the remaining US$40 million of capital that they were to contribute.

17.24. Neither argument is persuasive.

17.25. First, Sky and JMG argue that the parties all along had an agreement that the parties would conclude a sale and purchase agreement of certain assets in order to provide Sky and JMG with the necessary funds to make the remaining US$40 million capital contribution.

---

[118] CPH at paras 169-172, 178-179.
[119] *Id.* at para 176.
[120] *Id.* at para 177.
[121] *Id.* at para 178.
[122] *Id.* at paras 175, 180.

17.26. The agreement that Sky and JMG claim had been agreed is not explicitly stated in the SHA or any of the Transaction Documents. Sky and JMG do not point to any provision in the SHA that qualifies or conditions the obligation to contribute US$50 million of capital in Section 8.1 of the SHA:
8.1 Capital Contribution.

> [Sky] *shall make its capital contribution of US$50,000,000 to* [the Joint Venture] *as follows: (i) US $10,000,000 on or before December 31, 2015, provided that such date shall be postponed accordingly by* [the Joint Venture] *in the event that* [the Joint Venture's] *bank account has not been opened by December 31, 2105, and (ii) US$40,000,000 on or prior to June 30, 2016 (the "Second Payment Date") pursuant to the Share Purchase Agreement. If* [Sky] *is unable to make all or a portion of the Second Payment on or before June 30, 2016,* [Sky] *shall notify* [the Joint Venture] *in writing (the "Second Payment Notice") not less than thirty (30) days prior to the Second Payment Date. Upon receipt of the Second Payment Notice by* [the Joint Venture], [Claimant] *and* [Sky] *shall negotiate in good faith for a period not exceeding thirty (30) days to determine if alternative arrangements can be made for payment by* [Sky] *of the balance of the Second Payment during the next sixty (60) days; provided, however, that such alternative arrangements shall include the requirement that* [Sky] *pays interests for the period commencing on the Second Payment Date and ending on the date the entire amount of the Second Payment has been made at a rate of 15% compounded annually.* [123]

17.27. In fact, Section 8.1 of the SHA makes clear that the parties agreed that the obligation to contribute US$50 million is not qualified or contingent on any other arrangement between the parties.

17.28. Only in the event that all or a portion of the Second Payment could not be made on or before the Second Payment Date, should Sky notify the Joint Venture of this fact, and upon the receipt of this notice, Claimant and Sky are to negotiate in good faith for a period not exceeding 30 days to determine if alternative arrangements can be made by Sky in the next 60 days. Any such alternative arrangements shall include Sky paying interest for the period until the entire Second Payment is made at a rate of 15% compounded annually.

17.29. Sky and JMG claim, however, that the arrangement to put Sky with funds in order to make the capital contribution in Section 8.1 of the SHA, is found in Section 7.3 of the SPA:
7.3 Asset Transfer Agreement and Assignment Agreement.

> [The Joint Venture]*, the existing shareholder of* [the Joint Venture] *or one of its Affiliates (each an "Asset Buyer") shall enter into both of the following agreements on or before January 15, 2016: i) one or more asset purchase agreements with* [Sky] *or an Affiliate of* [Sky] *for the purchase of certain airframe, engine and parts inventory owned by* [Sky] *or an Affiliate of* [Sky] *(the "Asset Purchase Agreements") and ii) an Assignment Agreement (the "Assignment Agreement") with respect to certain future cash inflows from existing leases and joint ventures of* [Sky]*, on terms and conditions acceptable to* [Sky] *and the Asset Buyer(s), as payment in kind part of the considerations. The closing date for the first tranche of airframes, engines and parts inventory chosen by* [Sky] *and listed in the first Asset Purchase Agreement shall be no later than March 15, 2016 and the minimum aggregate purchase price for such airframes, engines and parts inventory shall be US$32,000,000, provided, however that an appraisal of such airframes, engines and/or parts inventory issued by an independent third party appraiser chosen by* [Sky] *shall list the appraised value of such assets as*

[123] SHA at Section 8.1.1(i).

a value not less than the product of 1.5 times the purchase price for such airframes, engines and/ or parts inventory. On or before May 31, 2016, [Sky] *or an Affiliate of* [Sky] *and the Asset Buyer shall enter in not less than one other Asset Purchase Agreement for additional airframes, engines and/or parts inventory chosen by* [Sky] *which are owned by* [Sky] *or an Affiliate of* [Sky] *and (i) the closing date(s) for the sale of such airframes, engines and/or parts inventory shall be on or before June 30, 2016 and (ii) the purchase price for such airframes, engines and/or parts inventory shall be in an amount not greater than 66% of the appraised value for such airframes, engines and/or parts inventory issued by an independent third party appraiser chosen by* [Sky].

Notwithstanding anything in the Share Purchase Agreement to the contrary, [Sky] *hereby agrees to the following:*

A For the benefit of [the Joint Venture], *that the appraisers referred to in Section 7.3 of the Share Purchase Agreement shall satisfy the following criteria: (a) in the case of airframes and engines, such appraiser shall be an independent, third party appraiser certified by the International Society of Transport Aircraft Trading that is mutually acceptable to* [Sky] *and* [the Joint Venture] *and/or (b) in the case of parts, such appraiser shall be an independent, third party, industry recognized appraiser for commercial aircraft parts that is mutually acceptable to* [Sky] *and* [the Joint Venture] *(an appraiser specified in (a) or (b) above is hereinafter referred to as an "Approved Appraiser").*

B With respect to any of the sales contemplated under Section 7.3 of the Share Purchase Agreement, [Sky] *shall provide or cause to be provided to* [the Joint Venture] *purchase agreements, bills of sale, security agreements, releases or any other documents which evidence the ownership of the airframes, engines and/or parts inventory being sold and any liens or encumbrances applicable thereto and* [the Joint Venture] *shall receive reasonable assurance from* [Sky] *in writing, individually or together with other selling parties, as applicable, that at the time of such sale the Asset Buyer will receive good title to such airframes, engines and/or parts inventory free and clear of any liens or encumbrances.*

C In the event that any of the foregoing criteria is not satisfied, [the Joint Venture] *and/or its Affiliate may choose not to purchase such airframes, engines and/or parts inventory at its discretion.*

17.30. Section 7.3 of the SPA was, of course, only inserted into the SPA by way of the First Side Letter and the Supplemental Agreement. The First Side Letter added Section 7.3 of the SPA as a new provision, and deleted Section 5.6 of the original Share Purchase Agreement, which read:
5.6 Asset Transfer Agreement and Assignment Agreement.

The Company, the existing shareholder of the Company or one of its Affiliates (each an "Asset Buyer") shall enter into i) one or more asset purchase agreements with the Purchaser or an Affiliate of Purchaser (the "Asset Purchase Agreement") for the purchase certain airframe, engine and parts inventory owned by the Purchaser or an Affiliate of the Purchaser and ii) an Assignment Agreement (the "Assignment Agreement") with respect to certain future cash inflows from existing leases and joint ventures of the Purchaser, on terms and conditions acceptable to the Purchaser and the Asset Buyer(s), as payment in kind for part of the considerations.

17.31. Section 5.6 of the original Share Purchase Agreement, which contemplates an Asset Transfer

Agreement and Assignment Agreement, is framed as an agreement to agree. It was contemplated that there may be purchase agreements or assignment agreements that would be entered into for "certain airframe, engine and parts inventory", "on terms and conditions acceptable to the Purchaser", "as payment in kind for part of the considerations." In our view, this provision amounts only to an unenforceable agreement to agree to these agreements. The reference to "on terms and conditions acceptable to the Purchaser" shows that these agreements were essentially subject to contract.

17.32. While the current Section 7.3 of the SPA contains further details on the agreements, Section 7.3 speaks to "one or more asset purchase agreements" with Sky for "the purchase of certain airframe, engine and parts inventory" owned by Sky and an Assignment Agreement "with respect to certain future cash inflows" from existing leases and joint ventures of Sky, "on terms and conditions acceptable to [Sky] and the Asset Buyers", as payment in kind part of the considerations.

17.33. We consider that an agreement to enter into one or more of such agreements for "the purchase of certain airframe, engine and parts inventory" and an assignment agreement "with respect to certain future cash inflows" "on terms and conditions acceptable" is likewise an unenforceable agreement to agree. Section 7.3 fails to identify with any certainty the subject matter of these agreements, and the fact that these agreements are to be entered into "on terms and conditions acceptable" to the parties shows that these agreements are subject to contract and further agreement. While Section 7.3 does refer to "minimum aggregate purchase price" of US$32,000,000, and purchase price for such airframes, engines and/or parts inventory shall be in an amount not greater than 66% of the appraised value, these merely set minimum and maximum transaction amounts and do not represent an agreement on the transaction amount of the various agreements referred to.

17.34. Sky and JMG argue that Section 7.3 is not an agreement to agree, for the following reasons:

(1) Courts are reluctant to find an agreement to be too vague and uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement. [124]

(2) The parties were able to reach agreements based on clauses similar to Section 7.3 of the SPA, for example the service agreements referred to in Section 5.7 of the SPA.

(3) The parties had agreed in Section 9.10 of the SHA to use their "reasonable

best efforts to take or cause to be taken all action, to do or cause to be done, to execute such further instruments, and to assist and cooperate with the other Parties hereto in doing, all things necessary, proper or advisable under applicable Laws or otherwise to consummate and make effective, in the most expeditious manner practicable, the transactions contemplated by this Agreement."

17.35. None of these points is persuasive:

(1) Without the subject matter and price terms of the agreements identified, the agreement to agree in Section 7.3 of the SPA is too vague and uncertain to be enforceable. Section 7.3 merely refers to "certain airframe, engine and parts inventory" and "certain future cash inflows". Sky and JMG's argument that the "price is to be ascertained by an independent, third party appraiser that

[124] RPH at para 62.

is mutually acceptable to [Sky] and [the Joint Venture]" does not assist. The appraiser must first be mutually acceptable to both parties, and even then, Section 7.3 does not say that the appraisal would set the price, but merely that the purchase price shall be in an amount "not greater than 66% of the appraised value". This means that the parties have still to agree on a price for these "certain airframe, engine and parts inventory", so long as the agreed price does exceed 66% of the appraised value. Last, the explicit statement that these agreements would be "on terms and conditions acceptable to [Sky] and the Asset Buyers" makes it clear that any such agreements are subject to contract and further agreement by the parties.

(2) The fact that the parties were able to conclude agreements referred to in other agreements to agree does not render enforceable an agreement to agree that the parties could not themselves abide by.

(3) The reasonable efforts and cooperation clause in Section 9.10 of the SHA cannot convert a vague, uncertain, and unenforceable agreement to agree that does not have sufficiently certain subject matter and price terms, which are explicitly "on terms and conditions acceptable to Sky and the Asset Buyers" into an enforceable agreement to agree.

17.36. Sky and JMG also argue that, as far as Section 7.3 of the SPA itself is concerned:

(1) Price is to be ascertained by an independent, third party appraiser that is mutually acceptable to Sky and the Joint Venture, and "the purchase price for such airframes, engines and/or parts inventory shall be in an amount not greater than 66% of the appraised value for such airframes, engines and/or parts inventory issued by an independent third party appraiser chosen by [Sky]".

(2) Goods are "airframes, engines and parts inventory owned by [Sky] or an Affiliate of [Sky]".

(3) Other minor terms are not spelled out, but other terms can be implied with reasonableness. Further, the parties had prior experience in agreeing to minor terms in the Consignment Agreement and the Servicing Agreement.

(4) The date of closing is specified.

Thus, Sky and JMG consider that Section 7.3 of the SPA is sufficiently certain, and the Top Jet Parties were in breach of it, and this directly caused Sky to be unable to make the Second Payment. [125]

17.37. We find Sky and JMG's argument that Section 7.3 of the SPA is sufficiently certain to be unpersuasive:

(1) Under Section 7.3, the independent, third party appraiser does not ascertain the price, but merely indirectly sets a ceiling for the purchase price that the parties would still have to agree on.

(2) Under Section 7.3, the goods are not "airframes, engines and parts inventory owned by [Sky] or an Affiliate of [Sky]", but rather "***certain*** airframe, engine and parts inventory owned by the Purchaser or an Affiliate of the Purchaser" (emphasis added). The word "certain" means that the subject goods are still to be identified or agreed on, and could consist of some goods, some specific goods, or all of the goods owned by Sky or its affiliates. Either way, the subject goods have not been

[125] *Id.* at paras 68-69.

identified with any degree of certainty.

(3) Even if we accept *arguendo* that other minor terms can be implied with reasonableness, this cannot render enforceable an agreement to agree that does not sufficiently identify either the price or the subject matter of any agreement.

(4) The date of closing has only been identified to take place on or before 30 June 2016.

17.38. We therefore do not find that Section 7.3 of the SPA is sufficiently certain to be an enforceable agreement to agree.

17.39. We also cannot find that the parties themselves thought that they had concluded an arrangement to enable Sky to come into funds to make the remaining capital contribution. It is surprising that, while Sky and JMG claim that, in light of the known lack of liquidity on the part of Mr. Kraus and his entities, and that the parties agreed that the capital contributions from Sky would be funded through various sale and assignment agreements that the parties agreed they would enter into, yet: (1) This supposed funding arrangement—which was allegedly to be the source of the majority of the capital contribution from Sky and JMG, was not mentioned until the Second Payment Date—30 June 2016—had passed. If this was in fact the arrangement through which Sky would come into funds to make the Second Payment, one would have expected that the parties would have been discussing this arrangement prior to the Second Payment Date.

(2) One would also have expected Sky, JMG, or Mr. Kraus to have told Claimant in contemporaneous correspondence prior to the Second Payment Date that Sky and JMG obviously could not meet their obligation to make the Second Payment because Claimant and the Joint Venture had failed to enter into the agreements that would put them in funds, but no such statements appear to have been made until after the Second Payment Date had passed.

(3) We also note that Sky had to give 30 days prior notice pursuant to Section 8.1(i) of the SHA if it anticipated being unable to make the Second Payment in full by the Second Payment Date. Yet, no such notice was given, and no demand was made to Claimant or the Joint Venture demanding that they conclude the agreements that would allow Sky to make the Second Payment by 30 June 2016.

(4) In fact, in Sky's letter of 30 June 2016, Mr. Kraus only asked for the "full support and commitment from Sheng Ze Financial Leasing on cooperation with us to sell all related assets and ensure normal operation". [126] There was no mention of the alleged breaches by Claimant and the Joint Venture that he now claims caused Sky and JMG to breach their obligation to contribute capital that very day.

(5) It was only in the 9 September 2016 Sky/JMG Default Notice, written in response to the First Redemption Notice sent on 18 August 2017, that Mr. Kraus took the position that the failure of Sheng Ze and related companies to (i) obtain financing, and (ii) enter into purchase agreements for the acquisition of assets, were material breaches of the SPA that, among other things, "terminated the Purchaser's obligation to make the Second Payment." [127]

---

[126] Letter from Sky and JMG to Sheng Ze, 30 Jun. 2016, Ex. C14.

[127] Sky/JMG Default Notice, 9 Sept. 2016, Ex. C16.

17.40. At no time prior to the Second Payment Date did Sky or JMG take the position that Claimant or the Joint Venture had breached the First Side Letter or any other aspect of the SPA or SHA. If there was in fact some sort of funding arrangement, one would have expected Mr. Kraus or Sky to have raised this before the Second Payment Date once they knew that they were in danger of not being able to meet that deadline because of breaches of that arrangement by Claimant or the Joint Venture. The fact is that there was no agreement between the parties to provide Sky with the necessary funds to make the agreed capital contribution. Even if there was an attempt to provide for such an agreement in Section 7.3, Section 7.3 is an unenforceable agreement to agree and neither Claimant nor the Joint Venture could have breached Section 7.3.

17.41. The fact that there is no breach of Section 7.3 also means that Sky and JMG's argument based on the prevention principle must fail. Sky and JMG argue that because Claimant failed to cooperate with Sky and JMG or to perform its obligation to enter into the Asset Transfer Agreement and Assignment Agreement referred to in Section 7.3 of the SPA, Claimant is precluded from exercising its Redemption Right. [128]

17.42. Ordinarily, the breach of a contractual obligation does not excuse the performance of another contractual obligation unless the contract itself is discharged by the initial breach. Sky and JMG however rely on the "prevention principle" to claim that the breach of obligation to enter into the agreements contemplated by Section 7.3 excuses their inability to make the capital contribution.

17.43. Sky and JMG argue that the requirements for the prevention principle are set out in *Kensland Realty Ltd v Whale View Investmen* t *Ltd & Another* (2001) 4 HKCFAR 3811, at paras 94 and 95, namely:

(1) The relevant party's wrong involves his breach of the contract in respect of an obligation owed to the other party.

(2) The contractual rights or benefits which the party in question is seeking to assert or claim arise as a direct consequence of that party's prior breach. [129]

17.44. Relying on the prevention principle, Sky and JMG argue as follows:
(1) Before the SHA was executed, the Top Jet Parties (through Ms. Meng) fully knew that Sky and JMG did not have sufficient liquidity to meet the Second Payment.

(2) Because the Top Jet Parties knew that Sky and JMG did not have sufficient liquidity to meet the Second Payment, the parties devised a number of mechanisms to assist Sky and JMG to meet the Second Payment:

(a) Section 5.6 of the original Share Purchase Agreement specifically provided for JMG to make payment in kind.

(b) Section 7.3 was added to the SPA under the First Side Letter requiring the Joint Venture to purchase assets from JMG.

(3) In order to alleviate the Top Jet Parties' concern about whether JMG actually had sufficient assets

---

[128] RPH at para 60(4).
[129] *Id.* at para 59.

to inject into the Joint Venture as payment in kind, the following steps were carried out:

(a) In November 2015, Mr. Kraus provided an asset appraisal to show that the aircraft parts owned by the JMW Group were appraised at US$200 million. [130]

(b) The Supplemental Agreement was signed on 27 December 2015. The next day, on 28 December 2015, Mr. Kraus provided another asset appraisal report and a security interest report. [131]

(4) In light of the above, Claimant and other parties to the SHA were obligated to cooperate with Sky and JMG. However, Claimant through its representatives in the Joint Venture failed to cooperate, and such failure directly caused Sky and JMG to be unable to make the Second Payment.

(5) Claimant confirms that it has no documentary evidence to show that it made any further follow up request for information from Mr. Kraus in relation to the aircraft parts to be sold under Section 7.3 of the SPA.

(6) Even if one ignores the earlier appraisal in November 2015 showing that the JMW Group had over US$200 million worth of aircraft parts, the Appraisal Report alone shows that JMG had aircraft parts of fair market value of US$55,187,840. This would translate to close to US$37 million capital under Section 7.3 of the SPA. There would be a very real possibility that Sky would be able to make the Second Payment on time if the sale of the aircraft parts was actually done, by using funds in the JMW Group or financing from Mr. Ken Woolley, a business associate of Mr. Kraus. [132]

(7) In the circumstances, Claimant should be prevented from taking advantage of its own wrong and cannot blame Sky and JMG for their inability to make the Second Payment on time. [133]

17.45. For the prevention principle to apply, Sky and JMG must first show that there has been a breach of a term of the contract. This is made clear by two cases cited by Claimant:
(1) *Tin Shui Wai Dev. Ltd. v. Yiu Sun Hung & Woo Kwan Lee & Lo Solicitors*, [2005] H.K.E.C. 75 at para 41 ("To invoke the Prevention Principle, there must be a breach of a term of the contract.... I also disagree that this principle can operate independently of any breach of any term of a contract."); and

(2) *Ricacorp Prop. Ltd. v. Profit City Holdings Ltd.*, [2016] H.K.E.C. 2074 at para 33 ("the 'prevention principle' is simply not engaged here, as I have found that [Kwok Chin Man] and his subordinates had not been guilty of any breaches of duty or contract whatsoever against the defendants.").

17.46. As we have found that Section 7.3 is an unenforceable agreement to agree, there cannot be a breach of Section 7.3 that would be necessary to invoke the prevention principle.

17.47. As we have concluded that the parties themselves did not conclude an arrangement to enable Sky to come into funds to make the remaining capital contribution, there cannot be a failure on the part

---

[130] Tr. 1:148:1-3.

[131] Tr. 2:161:24-162:18; 83:23-84:4.

[132] Tr. 3:32:13-33:10.

[133] RPH at para 60.

of Claimant to cooperate in that endeavour.

17.48. Sky and JMG plead several other breaches of the SHA to attempt to justify their failure to make the Second Payment: [134]

(1) Sky and JMG claim that Claimant breached Section 5.1 of the SHA. Sections 5.1(i) and (iii) of the SHA provide that three directors shall be appointed by each of Sky and Claimant in the board of directors of the Group Companies. However, eventually no directors were appointed by Sky in Yortime and Sheng Ze. Ms. Meng at all material times either served as the president or as the sole director of Yortime and Sheng Ze. [135] As the Top Jet Parties acted in breach of Section 5.1 of the SHA, nobody from Sky or the JMW Group was appointed as a director of Yortime and Sheng Ze. The upshot is that the Top Jet Parties were in full control of all banking and finance matters to the exclusion of Mr. Kraus and the JMW Group. [136]

(2) Sky and JMG also argue that Claimant breached Section 5.8 of the SHA, which obliges the Joint Venture to obtain financing. Section 8.1(ii) of the SHA provides that "after the Closing and prior to the Second Payment date", the Group Companies shall only use two times the capital paid in by Sky, plus any financing from financial institutions obtained by the Group Companies pursuant to Section 5.8 of the SHA. Thus, it was plainly contemplated the Joint Venture would obtain financing during the first half of 2016. It is wrong to suggest at para 62 of Claimant's Post-Hearing Written Submissions that Claimant's obligation to obtain financing was "mooted", because there was the obligation to obtain financing from the first day the SHA was executed until Claimant issued the Termination Letter in 2017. However, the Group Companies did not obtain any financing in 2016. [137]

(3) Sky and JMG point out that it was the Top Jet Parties that had the obligation to obtain financing. [138] Section 6.1 of the SHA provides that Claimant shall be entitled to appoint the Chief Financial Officer and the Chief Risk Officer. Conversely, Mr. Kraus had no control over the bank accounts of the Group Companies, and he believed Ms. Meng and Ms. Fu had the signing authority. [139]

(4) Sky and JMG also point out that there appear to be several irregularities with Yortime's accounts that need explanation [140]

17.49. As Sky and JMG concede, the second requirement for the prevention principle to apply is to show that the breach at issue was a direct consequence of a prior breach. [141] The breaches that Sky and JMG complain of above did not result in the direct consequence that Sky was unable to make the Second Payment of US$40 million, and therefore do not call into operation the prevention principle. There is therefore nothing that would prevent Claimant from asserting its rights that flow from a material breach of the SHA by Sky and JMG.

---

[134] *Id.* at para 46.
[135] Meng 1 at para 2; RPH at para 39.
[136] RPH at para 43.
[137] *Id.* at para 40.
[138] *Id.* at para 41.
[139] Tr. 2:88:13-91:10; RPH at para 42.
[140] RPH at para 43.
[141] *Id.* at para 59.

17.50. In all events, with respect to Sections 5.1(i) and 5.1(iii) of the SHA, Sky and JMG do not attempt to explain how Sky's failure to appoint members to the boards of Yortime or Sheng Ze could constitute a breach by Claimant of Section 5.1 and we reject any suggestion that it did.

17.51. There is likewise nothing that links Sky's obligation to make the Second Payment under Section 8.1(i) of the SHA with the Joint Venture's obligation to obtain financing under Section 5.8. Section 5.8 merely obliges the Joint Venture to obtain financing as soon as possible after closing. It does not require that the Joint Venture obtain financing before the Second Payment is due or by any other specific time. Indeed, if anything, Section 5.8 seems to contemplate that the Joint Venture would obtain financing after the Second Payment is made by limiting the amount of financing to "ten times the amount of the capital contribution of the [Joint Venture] made by both shareholders (i.e., US$100 million)." And in all events, the obligation to obtain financing lies with the Joint Venture, not Claimant. Claimant's only obligation under Section 5.8 is to help the Joint Venture obtain a lower interest rate under any loans the Joint Venture obtains. As the Joint Venture never obtained any loans, Claimant's obligation in this regard was never triggered.

17.52. Sky and JMG have argued that the words "plus any financing" in the spending limitations provision in Section 8.1(ii) of the SHA confirm that the Joint Venture would obtain financing before the Second Payment was due. We fail to see why this is the case. Section 8.1(ii) says nothing about when financing might be obtained. It merely contemplates that financing may be obtained at some undefined point in the future and specifies how this would affect the spending limitations in Section 8.1(ii).

17.53. Furthermore, as a practical matter, the idea that the Joint Venture could obtain significant financing between the time the SHA was signed (i.e., 14 December 2015) and the time the Second Payment was due (i.e., 30 June 2016)—a period of about six and half months—is unrealistic. The Joint Venture was a start-up that had yet to generate any revenue (much less make a profit) or receive Sky's capital contribution in full. And by May 2016, the Joint Venture had in fact suffered a net loss of over US$31 million. It is hard to imagine that any lender would have been willing to provide significant financing on acceptable terms in these circumstances. [142]

17.54. Nevertheless, as detailed above at paras 13.29, 13.34-13.36, Ms. Meng, Ms. Fu and Ms. Julia Zhu tried to obtain financing for the Joint Venture and we reject any suggestion that they did not or that Claimant failed to cooperate in this regard. Indeed, it was Mr. Kraus who repeatedly failed to respond to requests for information that was needed to support these efforts. Had he thought Sky's obligation to make the Second Payment hinged on the Joint Venture's obtaining financing under Section 5.8—or that the Joint Venture could not reach its financial targets without it, particularly in light of the spending restrictions in Section 8.1(ii) of the SHA—we would have expected him to have been more engaged and to have raised the alarm about this early and often. As noted above at paras 13.32-13.34, 13.45, however, Mr. Kraus never voiced any concern about the Joint Venture's failure to obtain financing until after he received Claimant's Default Notice on 31 May 2016, when only a month remained before the Second Payment was due.

17.55. We also do not accept the suggestion that the Joint Venture's lack of financing led to a series of cascading events that rendered Sky unable to make the Second Payment.

---

[142] *See* Bowen 1 at 17-21.

17.56. At the outset (and at the risk of stating the obvious), we note that, had the Joint Venture obtained financing, that financing would have gone to the Joint Venture, not to Sky. To the extent those funds were used to trade, the proceeds from that trading would have been retained within the Joint Venture except to the extent of any distributed profits, which would have been split evenly between Claimant and Sky. Even assuming a profit margin of 20% and distribution of all profits, the Joint Venture would have had to generate in its first six months of existence at least US$400 million in revenue to put Sky in a position to make the Second Payment by 30 June 2016. The idea that the Joint Venture could have obtained such financing and then used it to produce such a large amount of trading activity in such a short time frame is unrealistic. [143]

17.57. With respect to Sky and JMG's defenses, we note that Sky and JMG initially raised defenses based on duress and vexatious litigation. [144] They later appeared to abandon these defenses, [145] but to the extent they have not, we reject them for lack of evidence. [146]

18. ISSUE 3: DID CLAIMANT PROPERLY INVOKE ITS REDEMPTION RIGHT UNDER SECTION 8.4 OF THE SHA?

A. The Right of Redemption under Section 8.4 of the SHA.

18.1. In the event of a material breach of any Transaction Document, which is defined to include the SHA as well as the Third Side Letter (since it is a document entered into pursuant to the SHA), if that breach is not cured after Claimant has provided 90 days' notice, Claimant shall have the right to exercise its Redemption Right:

8.4 Redemption

(i) Without limiting any other rights that [Claimant] *may have hereunder, in the event that: (a)* [the Joint Venture] *fails to have Net Profit within 20% of the 2016 Performance Target; (b)* [the Joint Venture] *fails to have Net Profit within 10% of the 2017 Performance Target; (c)* [the Joint Venture] *fails to meet the 2018 Performance Target; or (d)* ***there is a material breach by any JMW Party or any Group Company under any Transaction Document, which breach cannot be cured or, if curable, is not cured within 90 days after being `notified in writing of the same,*** [Claimant] ***shall have the right (the "Top Jet Redemption Right") but not the obligation to have all or a portion of the Shares held by*** [Claimant] ***redeemed by*** [the Joint Venture] *at a price (the "Top Jet Redemption Price") equal to the higher of (x) the proportion of the Original Investment paid for such Shares to be redeemed (calculated based on a total investment cost of US$50,000,000 paid for all of the Shares held by* [Claimant] *), plus a premium calculated at an annual return of 15% of such original investment cost, compounded annually from and including the date of the Second Payment up to the date of redemption, plus all declared but unpaid dividends thereon up to the date of redemption), or (y) the then fair market value of such Shares to be redeemed, the valuation of which shall be determined*

---

[143] *See* Bowen 1 at 12-17.

[144] *See* Sky Answer at para 20; JMG Answer at para 20; Sky SOD at para 71; JMG SOD at para 71; Sky Rejoinder at para 15; JMG Rejoinder at para 15.

[145] RROS at para 51.

[146] *See, e.g.*, Tr. 2:144:23-145:18 (Mr. Kraus testifying that he signed the Third Side Letter "under duress"); RPH paras 37-38, 91.

through an independent appraisal performed by an appraiser selected by [Claimant]. [147]

18.2. As we found above at paras 16.3-16.4, Sky is in material breach of its obligation to make the Interim Payment under the Third Side Letter, and Sky and JMG are in material breach of their obligation to make the Second Payment on the Second Payment Date.

18.3. Section 8.4(ii) requires Claimant to exercise its Redemption Right by sending a Redemption Notice to the Joint Venture and Sky:

(ii) ***Top Jet Redemption Right shall be exercisable by a written notice of*** **[Claimant]** ***to*** **[the Joint Venture]** ***and*** **[Sky]** ***(the "Top Jet RedemptionNotice").*** [The Joint Venture] *shall complete such redemption within six (6) months after the date on which such written notice is delivered by* [Claimant] *or such other period as agreed by the Parties. If the Redemption Price for all of the Shares to be redeemed is not paid in full by* [the Joint Venture] *within six months (6) months after the date on which the written notice is issued by* [Claimant] *or such other time as agreed by the Parties,* [Claimant] *shall have the right, during the period from the expiration of such six-month period to the date on which the Redemption Price for all of the Shares to be redeemed is paid in full, to require the Group Companies to take all actions necessary in order to enable* [the Joint Venture] *to pay the full amount of the Redemption Price, including borrowing funds, selling assets, distributing available dividends, applying for and obtaining approval for reduction of capital of any Group Company or liquidating and making liquidation distributions, and/or causing any Group Company to do any of the foregoing.* ***If the assets of*** **[the Joint Venture]** ***are insufficient to pay the full Top Jet Redemption Price, then JMW Parties shall pay the remaining balance of the Top Jet Redemption Price as follows*** *: (a) JMW Parties shall pay interest on the remaining balance at an interest rate equal to 15% per annum monthly in arrears until such remaining balance is paid in full; and (b) JMW Parties shall pay such remaining balance in full no later than the first anniversary of the date the Top Jet Redemption Price was due and payable to* [Claimant]. *If JMW Parties fail to make any of the payments specified in clause (a) of the immediately preceding sentence when due, the entire remaining balance of the Top Jet Redemption Price shall become immediately due and payable.* [148]

18.4. On 18 August 2016, Claimant sent the Joint Venture and Sky and JMG the First Redemption Notice, pursuant to Section 8.2 of the SHA.

18.5. On 25 November 2016, Claimant withdrew "the demand for the redemption of Shares contained in the Default and Redemption Notice" to give Sky and JMG a final chance to cure their breaches of the SPA and SHA. [149] Claimant's 25 November 2016 letter noted that:

However, absent immediate payment by JMW of the Second Payment and other amounts owing under the Term Loan Agreement identified below, Sheng Ze reserves the right to submit a further redemption notice in due course. In this regard, we note that the Default and Redemption Notice contained a clear written notification, within the meaning of clause 8.4(i) of the SHA, of material

---

[147] SHA at Section 8.4(i) (emphasis added).

[148] *Id.* at Section 8.4(ii) (emphasis added).

[149] As we have found above at para 16.5 that Claimant's Redemption Right first arose on 29 August 2016 i.e., 90 days after the Default Notice was sent to Sky, the First Redemption Notice is irrelevant in any event.

breaches by JMW under the SHA and SPA respectively....

18.6. Sky and JMG did not cure the breach of their obligation to make the Second Payment.

18.7. On 18 January 2017, Claimant sent JMG and Sky the Termination Notice stating:
The fundamental breaches of the SHA and SPA by the JMW Parties and the unambiguous statements in the letter of 9 September 2016 make it amply clear that the JMW Parties do not intend to perform their obligations under the SHA and SPA and have thus repudiated those agreements. Top Jet, Sino Jet, JMI and Sheng Ze (the "Sheng Ze Parties") hereby accept the JMW Parties repudiation of the SHA and SPA and declare those agreements terminated, without prejudice to the rights of the Sheng Ze Parties to claim damages and other available remedies under applicable law for the breaches by the JMW Parties. Acceptance of such repudiation by the Sheng Ze Parties and the termination of the SPA and SHA do not affect any other agreements among the parties which for the avoidance of doubt, are hereby affirmed by the Sheng Ze Parties. [150]

18.8. On 27 March 2017, Claimant sent the Second Redemption Notice purporting to exercise the right to seek redemption of all 10,000 shares in the capital of the Joint Venture held by Claimant. [151]

B. Parties' Arguments

18.9. Claimant argues that the requirements triggering Claimant's Redemption Right under Sections 8.4(i) and (ii) have been satisfied:
(1) There has been a material breach of the Third Side Letter and Section 8.1 of the SHA to make the Interim Payment and the Second Payment.

(2) Claimant properly gave a notice of default and a notice of redemption pursuant to Section 8.4(ii).

(3) At no time was the default cured.

(4) Claimant withdrew the First Redemption Notice, but not the notice of default, in order to give Sky and JMG a final opportunity to cure.

(5) When the default was still not cured, Claimant issued a final notice of redemption on 27 March 2017 (i.e. the Second Redemption Notice).

18.10. Sky and JMG make several arguments against Claimant's ability to rely on Section 8.4:
(1) Sky and JMG argue that Section 8.4 of the SHA is a clause that confers rights, and is not a liquidated damages provision.

---

[150] Termination Notice from Claimant to JMG and Sky, 18 Jan. 2017, Ex. C18.

[151] We note that the Second Redemption Notice, which is the operative Redemption Notice in the present case, was sent long after any possible cure period of Sky's material breach of the Third Side Letter (which was notified in writing to Sky on 31 May 2016 via the Default Notice), or Sky and JMG's material breach of the SHA (which was notified in writing to Sky and JMG on 18 August 2016 via the First Redemption Notice).

(2) Because it is a clause that confers rights, any claim for specific performance of those rights should be denied because Claimant already accepted repudiation of the SHA before it sought to exercise its rights under Section 8.4 of the SHA. Also, Claimant does not have clean hands and specific performance should therefore not be ordered.

(3) If Section 8.4 is a liquidated damages clause, it cannot be enforced because of the reflective loss doctrine, or because it is an unenforceable penalty clause. [152]

C. Is Section 8.4 a Liquidated Damages Provision or a Clause Conferring Rights?

18.11. Sky and JMG emphasize that the applicable legal principles on liquidated damages and specific performance are different. Either Section 8.4 is a damages clause or it is a clause conferring rights. It cannot be both. Sky and JMG argue that Claimant's attempt to muddle the characterisation of Section 8.4 of the SHA does not assist the Tribunal in resolving the disputes between the parties to these proceedings. [153]

18.12. Sky and JMG argue that Section 8.4 is not a liquidated damages clause, but is a clause that confers rights for the following reasons:
(1) A liquidated damages clause means a clause providing that in the event of a breach, the contract-breaker shall pay to the other a specified sum of money. [154]

(2) Section 8.4(i) of the SHA provides that "[Claimant] shall have the right... but not the obligation to have all or a portion of the Shares held by [Claimant] redeemed by [the Joint Venture]". On the other hand, Section 8.4 of the SHA does not use the word "damages" or "compensation".

(3) Section 8.4(ii) of the SHA requires optional positive steps to be taken by Claimant, i.e., to issue a written notice to redeem its shares of the Joint Venture. On the other hand, a liquidated damages clause will invariably provide that if a party is in breach of a term, the secondary obligation (e.g., to pay a fixed sum) will automatically be triggered.

(4) Section 8.4 of the SHA enables Claimant to give up control of its shares of the Joint Venture. This is not the function of a liquidated damages clause.

(5) The nature of a liquidated damages clause is that where a breach occurs, only the contract-breaker is to take action, i.e., to pay a sum. However, Section 8.4 requires all parties to the SHA to take action in order to carry out the redemption. The ownership of Yortime and Sheng Ze will be affected, even if Yortime and Sheng Ze may not be the contract-breaker. [155]

18.13. The Tribunal agrees with Sky and JMG and finds that Section 8.4 is not a liquidated damages provision. Section 8.4 does not set out the amount of damages that are to be paid upon a breach of the SHA. Rather, Section 8.4 provides that upon the occurrence of certain events, including a material breach of the Transaction Documents that remains uncured, Claimant would have the

---

[152] RPH at para 2.
[153] *Id.* at para 73.
[154] *See* §26-190 of Chitty on Contracts (33rd Edition) ("Chitty").
[155] RPH at para 74.

right to have its shares redeemed by the Joint Venture at a price to be calculated on an agreed formula. Section 8.4 further provides that Claimant will have the right to require that certain actions be taken to facilitate this process, and to have Sky and JMG pay the Redemption Price in the event and to the extent the Joint Venture is unable to do so. Section 8.4 is not a liquidated damages provision, but rather a right on the part of Claimant to have its investment redeemed in certain circumstances.

D. If Section 8.4 of the SPA Is a Clause Conferring Rights, Can It Still Be Exercised If Claimant Terminates the SPA?

18.14. Because Section 8.4 is a clause that confers rights, Sky and JMG argue that Claimant's claim for the Redemption Price must be dismissed because Claimant accepted the repudiation of the SHA on 18 January 2017 and so the SHA, including Section 9.4 of the SHA (which provides for specific performance), is also dead and cannot be invoked.

18.15. In essence, Sky and JMG's argument is that, if a non-breaching party accepts the repudiation of the agreement, it cannot then ask for specific performance of any of the provisions in the agreement.

18.16. Sky and JMG remind the Tribunal that the Top Jet Parties terminated the SHA and SPA by way of the Termination Notice dated 18 January 2017:
The fundamental breaches of the SHA and SPA by the JMW Parties and the unambiguous statements in the letter of 9 September 2016 make it amply clear that the JMW Parties do not intend to perform their obligations under the SHA and SPA and have thus repudiated those agreements. **[Claimant], [the Joint Venture], [Yortime]** ***and Sheng Ze (the "Sheng Ze Parties") hereby accept the JMW Parties' repudiation of the SHA and SPA and declare those agreements terminated,*** *without prejudice to the rights of the Sheng Ze Parties to claim damages and other available remedies under applicable law for the breaches by the JMW Parties.* [156]

18.17. In support of their argument, Sky and JMG cite *Johnson v Agnew* [1980] AC 367, in which Lord Wilberforce explained:

> *It is easy to see that a party who has chosen to put an end to a contract by accepting the other party's repudiation cannot afterwards seek specific performance. This is simply because the contract has gone —* ***what is dead is dead.*** [157]

18.18. Sky and JMG also point out that §27-012 of Chitty also explains that the remedy of specific performance is predicated on a valid and enforceable contract:
27-012 Scope of the remedy *The jurisdiction to order specific performance of a contractual obligation is based on the existence of a* ***valid, enforceable contract.*** [158]

---

[156] Termination Notice from Claimant to JMG and Sky, 18 Jan. 2017, Ex. C18 (emphasis added).

[157] *Johnson v Agnew* [1980[AC 367 at paras 398E – F (emphasis added).

[158] RPH at para 78 (emphasis added).

18.19. Claimant responds that the question of whether a contractual obligation survives termination is a question of construction of the contract and the intent of the parties:
As discussed above, under Hong Kong law, "it is a question of construction whether or not the parties intended the contractual obligation in question to survive the termination of the contract." See *Chitty on Contracts § 24-050. Here, each party to the SHA is entitled to "* enforce specifically *the terms and provisions of" the SHA.*[159] *(emphasis added). Moreover, "[i]f any Party breaches [the SHA] before the termination of [the SHA],* it shall not be released from its obligations arising from such breach on termination *".*[160]

18.20. Claimant places some emphasis on Section 9.9 of the SHA, which states that a party that breaches the agreement "shall not be released from its obligations arising from such breach on termination":
***Termination**. This Agreement shall terminate upon mutual consent of the Parties hereto or upon the closing of a Qualified IPO. If this Agreement terminates, the Parties shall be released from their obligations under this Agreement, provided that Sections 8.6, 9.1, 9.2 and 9.9 shall survive the termination of this Agreement. If any Party breaches this Agreement before the termination of this Agreement, it shall not be released from its obligations arising from such breach on termination.*[161]

18.21. Thus, Claimant explains, because the obligation to pay the Redemption Price stems from pre-termination breaches by Sky and JMG, Sky and JMG will not be released from this obligation:
Before Top Jet sent its 18 January Letter, R2/R3 breached the SHA, and its contractual obligations to Top Jet, twice: first, by failing to make mandatory capital contributions to the JV, and second, by wrongfully declaring Top Jet's Redemption Right to be terminated. These were material breaches of the SHA. Under SHA § 8.4, these material breaches of the SHA led to an obligation on the part of Sino Jet and R2/R3 to pay the Redemption Price. In the words of SHA § 9.9, the obligation to pay the Redemption Price is an obligation "arising from" pre-termination breaches....[162]

18.22. Sky and JMG argue that Section 9.9 of the SHA only states that, if a party breaches the SHA before the termination of the SHA, it shall not be released from "its obligation arising from such breach on termination". The obligation arising from breach of contract that is referred to is the secondary obligation to pay monetary damages. As stated in §24-001 of Chitty:
The innocent party, or in some cases, both parties, are excused from further performance of their primary obligations under the contract; ***but there is then substituted for the primary obligations of the party in default a secondary obligation to pay monetary compensation for his non-performance.***[163]

18.23. Claimant also relies on Section 9.4 of the SHA to claim that it is entitled to specific performance of the Redemption Right:
***Rights Cumulative; Specific Performance**. Each and all of the various rights, powers and remedies*

---

[159] *SHA at Section 9.4.*
[160] *Id.* at Section 9.9; CPH at para 161.
[161] SHA at Section 9.9.
[162] CPH at para 162.
[163] RPH at para 82.

of a party hereto will be considered to be cumulative with and in addition to any other rights, powers and remedies which such Party may have at Law or in equity in the event of the breach of any of the terms of this Agreement. The exercise or partial exercise of any right, power or remedy will neither constitute the exclusive election thereof nor the waiver of any other right, power or remedy available to such Party. Without limiting the foregoing, the Parties hereto acknowledge and agree irreparable harm may occur for which money damages would not be an adequate remedy in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the Parties shall be entitled to injunction to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement.

18.24. Sky and JMG argue that Claimant's reliance on Section 9.4, under which each party is entitled to "enforce specifically the terms and provisions of"[164] the SHA, is unavailing because, if Claimant accepted the repudiation of the SHA on 18 January 2017, then the SHA, including Section 9.4, is also dead and cannot be relied upon at this stage regardless.[165]

18.25. The key to resolving whether Claimant is entitled to enforce the Redemption Right under Section 8.4 is the effect of Claimant's termination of the SHA on 18 January 2017. Sky and JMG argue that, once Claimant elected to terminate the SHA on that date, it could no longer invoke the contractual provisions of the SHA—in particular to seek specific performance of Section 8.4 or Section 9.4 that speaks to specific enforcement of the contractual provisions of the SHA.

18.26. We do not agree that Claimant's termination of the SPA renders all the contractual provisions of the SPA to be without effect. Certain contractual provisions and obligations survive termination of the agreement. Sky and JMG allude to the idea of "secondary obligations" when they refer to the obligation to pay damages.[166] Parties could also agree, as the parties did in Section 9.9 of the SHA, that certain provisions of the agreement would survive termination.

18.27. Similarly, it would also be open to the parties to provide that termination of the agreement would not operate to release a party that had breached the agreement before it was terminated, from any obligations that flow from that breach under the agreement. This is also what the parties to the SHA agreed in Section 9.9, the relevant part of which states: "If any Party breaches this Agreement before the termination of this Agreement, it shall not be released from its obligations arising from such breach on termination."

18.28. Indeed, the Termination Notice issued by the Top Jet Parties is consistent with the parties' agreement in Section 9.9 that termination would be without prejudice to any rights that Claimant would have against (Sky and JMG), when it "accept[ed] the JMW Parties' repudiation of the SHA and SPA and declare those agreements terminated, **without prejudice to the rights of the Sheng Ze Parties** [Claimant, the Joint Venture, Yortime and Sheng Ze] **to claim damages and other availableremedies under applicable law for the breaches by the JMW Parties**" (emphasis added).

18.29. Sky and JMG argue that "obligations" as the word is used in Section 9.9, merely refers to the

---

[164] RPH at para 84.

[165] *Id.* at para 80.

[166] *Id.* at para 82.

"secondary obligation" to pay damages, and nothing more. We do not agree. The secondary obligation to pay damages arises by operation of law and there is no need for the parties to preserve the obligation to pay damages in the event of termination explicitly. There is also nothing in the wording of Section 9.9 that compels us to read "obligations" narrowly as "the secondary obligation to pay damages."

18.30. Rather, the "no-release" provision in Section 9.9 operates to preserve Sky and JMG's "obligations arising from such breach", and precludes Sky and JMG from raising Claimant's termination of the SHA as a defense to any obligations they would otherwise have under the SHA that flow from their breach of the SHA.

18.31. In our case, Claimant had already declared and given notice of a material breach of contract under Section 8.4(i). The Redemption Right under Section 8.4(i) had therefore accrued on 29 August 2016, was not withdrawn by Claimant, and remains in place.

18.32. Only the redemption demand in the First Redemption Notice was withdrawn by Claimant. The issue therefore is whether the right to give notice of redemption and to require redemption pursuant to Section 8.4(ii) survives termination of the agreement. Section 8.4 (ii) states:
Top Jet Redemption Right shall be exercisable by a written notice of [Claimant] *to* [Sky and JMG] *(the "**Top Jet Redemption Notice**"). [The Joint Venture] shall complete such redemption within six (6) months after the date on which such written notice is delivered by* [Claimant] *or such other period as agreed by the Parties. If the Redemption Price for all of the Shares to be redeemed is not paid in full by* [the Joint Venture] *within six months (6) months after the date on which the written notice is issued by* [Claimant] *or such other time as agreed by the Parties,* [Claimant] *shall have the right, during the period from the expiration of such six-month period to the date on which the Redemption Price for all of the Shares to be redeemed is paid in full, to require the Group Companies to take all actions necessary in order to enable* [the Joint Venture] *to pay the full amount of the Redemption Price, including borrowing funds, selling assets, distributing available dividends, applying for and obtaining approval for reduction of capital of any Group Company or liquidating and making liquidation distributions, and/or causing any Group Company to do any of the foregoing. If the assets of* [the Joint Venture] *are insufficient to pay the full Top Jet Redemption Price, then* [Sky and JMG] *shall pay the remaining balance of the Top Jet Redemption Price as follows: (a)* [Sky and JMG] *shall pay interest on the remaining balance at an interest rate equal to 15% per annum monthly in arrears until such remaining balance is paid in full; and (b)* [Sky and JMG] *shall pay such remaining balance in full no later than the first anniversary of the date the Top Jet Redemption Price was due and payable to* [Claimant]*. If* [Sky and JMG] *fail to make any of the payments specified in clause (a) of the immediately preceding sentence when due, the entire remaining balance of the Top Jet Redemption Price shall become immediately due and payable.*

18.33. We find that Section 8.4(ii) survives termination of the agreement. Termination of the SHA cannot affect a right, such as the Redemption Right in Section 8.4(i), that has already accrued and was not withdrawn by Claimant. Section 8.4(ii) must survive termination as it defines the remedy that Claimant is entitled to when it exercises its accrued Redemption Right. If the remedy set out in Section 8.4(ii) is of no effect upon termination, then it would render meaningless the accrued and unwithdrawn Redemption Right in Section 8.4(i), and this could not have been the intent of the parties.

18.34. Section 8.4(ii) sets out the mechanism through which the accrued Redemption Right in Section 8.4(i) would be exercisable. This section must have been intended by the parties to survive the termination of the SHA since it sets out the mechanism by which Claimant would be able to unwind its investment upon, among other things, a material breach of any of the Transaction Documents. Where such a material breach occurred and is either uncurable or remains uncured, Claimant must be able to terminate the SHA and to put an end to its primary obligations under the SHA, but without prejudice to its right to exercise its Redemption Right in accordance with the agreed mechanism in Section 8.4(ii).

18.35. If Claimant cannot terminate without prejudice to its ability to invoke the agreed remedy, it would be forced to keep the SHA alive while it carries out the various steps set out in Section 8.4(ii)—some of which can only be carried out six months after the Redemption Notice was issued—while at the same time running the risk that Claimant would itself breach its obligations under the operative provisions of the SHA. Both as a matter of construction and the intent of the parties, Claimant must be able to put an end to the substantive obligations of both parties under the SHA by terminating the SHA, while pursuing the obligations relating to redemption that flow from the accrued Redemption Right in Section 8.4(i).

18.36. Our conclusion is reinforced by Section 9.9 of the SHA, whereby the parties made clear that "[i]f any Party breaches this Agreement before the termination of this Agreement, it shall not be released from its obligations arising from such breach on termination." This evidences the parties' intention that termination of the agreement would be without prejudice to any obligations that arise from such breach on termination, including the obligations that flow from a material breach that are set out in Sections 8.4(i) and (ii).

18.37. Sky and JMG belatedly raised an argument based on the "clean hands" doctrine. Scant authority was cited. The Tribunal dismisses this argument and finds that this doctrine does not apply as: (i) Sky and JMG's complaints about Claimant's conduct are unsubstantiated and/or irrelevant, and cannot be a basis to find that Claimant does not have "clean hands"; and (ii) in any event, Claimant's Redemption Right in this case is a contractual (not equitable) right.

18.38. We therefore conclude that Claimant was entitled to enforce its accrued Redemption Right under Section 8.4(i) by sending the Second Redemption Notice pursuant to Section 8.4 (ii) on 27 March 2017. The Section 8.4(ii) provisions are merely the means of carrying out the Redemption Right that first arose as a result of the material breach of the Third Side Letter by Sky, and the parties had agreed in Section 9.9 that termination of the SHA would not release Sky and JMG from their obligations that flow from pre-termination breaches.

19. ISSUE 4: IF CLAIMANT PROPERLY INVOKED THE REDEMPTION RIGHT, WHAT REMEDY IS IT ENTITLED TO?

19.1. While we have found above that Claimant properly invoked Section 8.4(ii), the parties differ on the proper remedy that flows from the issue of a Redemption Notice and what remedies Section 8.4 offers.

A. Did Claimant Satisfy All the Requirements in Section 8.4 before Seeking a Monetary Award against Sky and JMG?

19.2. Sky and JMG argue that, according to Section 8.4 of the SHA, Sky and JMG are not required to pay just because Claimant had issued a written notice pursuant to Section 8.4. Rather, there are four separate and incremental steps that the Top Jet Parties have to comply with before Sky and JMG are obliged to pay anything:
(1) "Top Jet Redemption Right shall be exercisable by a written notice of [Claimant] to [the Joint Venture] and [Sky] (the "**Top Jet Redemption Notice**")"

(2) "[The Joint Venture] shall complete such redemption within six (6) months after the date on which such written notice is delivered by [Claimant] or such other period as agreed by the Parties."

(3) "If the Redemption Price for all of the Shares to be redeemed is not paid in full by [the Joint Venture] within six months (6) months after the date on which the written notice is issued by [Claimant] or such other time as agreed by the Parties, **[Claimant] shall have the right**, during the period from the expiration of such six-month period to the date on which the Redemption Price for all of the Shares to be redeemed is paid in full, **to require the Group Companies to take all actions necessary in order to enable [the Joint Venture] to pay the full amount of the Redemption Price**, including borrowing funds, selling assets, distributing available dividends, applying for and obtaining approval for reduction of capital of any Group Company or liquidating and making liquidation distributions, and/or causing any Group Company to do of the foregoing." ... (emphasis added)

(4) "If the assets of [the Joint Venture] are insufficient to pay the full Top Jet Redemption Price, then [Sky and JMG] shall pay the remaining balance of the Top Jet Redemption Price as follows..." [167]

19.3. Sky and JMG point out that the Top Jet Parties did not carry out step three of Section 8.4(ii) of the SHA. This is plainly an essential step, because it was known to the parties that funds and assets of the Joint Venture were actually kept at Yortime and Sheng Ze. [168]

19.4. We do not agree that the Top Jet Parties have failed to carry out an essential step that is a prerequisite to Sky and JMG's obligation to pay the remaining balance of the Redemption Price. Instead, Section 8.4(ii) sets out the following requirements:
(1) The Joint Venture shall complete the redemption within six months after the Redemption Notice is issued. This means that the Joint Venture shall pay the full Redemption Price in exchange for the shares within six months from the date of the Redemption Notice.

(2) If the Joint Venture does not pay the Redemption Price in full, then Claimant "**shall have the right**" after this six-month period, "to require the Group Companies to take all actions necessary in order to enable [the Joint Venture] to pay the full amount of the Redemption Price" (emphasis added).

---

[167] RPH at para 49.
[168] *Id.* at paras 49-50.

(3) "If the assets of [the Joint Venture] are insufficient to pay the full Top Jet Redemption Price, then [Sky and JMG] shall pay the remaining balance of the Top Jet Redemption Price."

19.5. Contrary to what Sky and JMG claim, there is no requirement that Claimant or the Top Jet Parties must require the Group Companies to take all actions necessary in order to enable the Joint Venture to pay the full amount of the Redemption Price. As Section 8.4(ii) itself states, this is merely a "right" that the Top Jet Parties could avail themselves of in order to increase the amount of available funds that the Joint Venture has in order to pay the Redemption Price.

19.6. Claimant may decide not to exercise this "right". Here, it is understandable why it did not, as there is no reason to believe that Sky and JMG would have cooperated to take actions that would have enabled the Joint Venture to be placed in funds to enable the Joint Venture to pay the Redemption Price.[169] Indeed, by all accounts, Sky, JMG, and Mr. Kraus had no desire to assist Claimant in redeeming its shares and to be paid part or all of the Redemption Price, despite having an obligation under Section 8.4(iv) of the SPA to act in good faith to use all reasonable efforts as expeditiously as possible to increase the amount of legally available redemption funds for purposes of paying the Redemption Price.

19.7. Under Section 8.4(ii), Claimant only had the right to require that certain actions be taken. There is no obligation to invoke and pursue such a right before seeking other remedies available to Claimant in Section 8.4(ii).

19.8. At the hearing, Sky and JMG suggested that, in failing to exercise its right to require the Group Companies to take all actions necessary to enable to Joint Venture to pay the full Redemption Price, Claimant failed to mitigate its damages.[170] As there is no reason to believe that Sky would have cooperated in any such efforts (as illustrated by the corporate deadlock), we do not consider that there is any basis to find that Claimant breached the duty to mitigate. It is significant that Sky and JMG did not pursue the mitigation argument in their Post-Hearing Submissions.

19.9. Sky and JMG have at times suggested that Claimant has failed to prove that the assets of the Joint Venture are insufficient to pay the full Redemption Price.[171] Given that (i) the Redemption Price stands at over US$76 million; (ii) the Joint Venture never had more than the US$60 million in capital that Claimant and Sky contributed; and then (iii) suffered net losses of over US$31 million, we fail to see how there could be any doubt on this point. But for avoidance of doubt, Mr. Bowen's review of the Group Companies' financial records has confirmed the obvious.[172] To the extent Mr. Kraus has attempted to suggest otherwise[173], we consider his testimony speculative and contrary to the documentary evidence.

19.10. The parties expressly contemplated that there may be a situation in which the Joint Venture may not have legally available funds to pay the full Redemption Price. In such a case, Sky and JMG shall

---

[169] Indeed, both sides have pointed out that the Joint Venture is in a state of deadlock: *see e.g.,* RPH at paras 57(c) and 88; CPH at para 158(d).

[170] Tr. 5:43:25-45:15.

[171] *See, e.g.*, RROS at paras 20-26.

[172] *See* Bowen 2 at 3-6 finding that the Group Companies' only material asset is approximately US$33.4 million in cash in Sheng Ze.

[173] *See* generally Kraus 2.

pay the remaining balance of the Redemption Price:
[Sky and JMG] *shall pay the remaining balance of the Top Jet Redemption Price as follows: (a)* [Sky and JMG] *shall pay interest on the remaining balance at an interest rate equal to 15%* per annum *monthly in arrears until such remaining balance is paid in full; and (b)* [Sky and JMG] *shall pay such remaining balance in full no later than the first anniversary of the date the Top Jet Redemption Price was due and payable to Top Jet. If* [Sky and JMG] *fail to make any of the payments specified in clause (a) of the immediately preceding sentence when due, the entire remaining balance of the Top Jet Redemption Price shall become immediately due and payable.*[174]

19.11. In this case, Claimant properly issued the Second Redemption Notice on 27 March 2017 pursuant to Section 8.4(ii). As we explain above at paras 18.33-18.38, this is merely exercising the remedy that flows from the accrued Redemption Right in Section 8.4(i). The Final Notice of Redemption required the Joint Venture to pay the entire Redemption Price in full within six months—i.e. by late September 2017. As the Redemption Price was not paid in full within this time period, Claimant had the right "to require the Group Companies to take all actions necessary in order to enable [the Joint Venture] to pay the full amount of the Redemption Price." Claimant did not exercise this right. As we explain above at paras 19.5-19.7, there is no obligation on the part of Claimant do so.

19.12. Section 8.4(ii) then provides that Sky and JMG are to pay the unpaid portion of the Redemption Price:
If the assets of [the Joint Venture] *are insufficient to pay the full Top Jet Redemption Price, then* [Sky and JMG] *shall pay the remaining balance of the Top Jet Redemption Price as follows* : *(a)* [Sky and JMG] *shall pay interest on the remaining balance at an interest rate equal to 15% per annum monthly in arrears until such remaining balance is paid in full; and* (b) [Sky and JMG] *shall pay such remaining balance in full no later than the first anniversary of the date the Top Jet Redemption Price was due and payable to Top Jet. If* [Sky and JMG] *fail to make any of the payments specified in clause (a) of the immediately preceding sentence when due, the entire remaining balance of the Top Jet Redemption Price shall become immediately due and payable.*[175]

19.13. Under the relevant part of Section 8.4(ii) set out above, Sky and JMG are to pay the remaining balance of the Redemption Price on terms set out in that part of Section 8.4(ii). The lead-in clause "[i]f assets of [the Joint Venture] are insufficient to pay the full Top Jet Redemption Price", must be read as referring to legally available assets of the Joint Venture being insufficient to pay the Redemption Price.

19.14. This interpretation that Sky and JMG are obliged to pay the Redemption Price if there are insufficient legally available Joint Venture assets with which to pay the Redemption Price is supported by Section 8.4(iv), which imposes an obligation on the Joint Venture and the JMW Parties not to take any action that would undermine the redemption, but to act in good faith and to use all reasonable efforts as expeditiously as possible to increase the amount of "legally available redemption funds":
Once [the Joint Venture] *and/or* [Sky] *have received a Top Jet Redemption Notice,* [the Joint Venture] *and* [Sky] *shall not, and shall not permit any other Group Companies to, take any action which could*

---

[174] SHA at Section 8.4(ii).
[175] *Id.*

have the effect of delaying, undermining or restricting the redemption, and [the Joint Venture] *and* [Sky and JMG] *shall in good faith use all reasonable efforts as expeditiously as possible to increase the amount of legally available redemption funds including without limitation, causing any other Group Company to distribute any and all available funds to* [the Joint Venture] *for purposes of paying the Top Jet Redemption Price.*[176]

19.15. If despite the Joint Venture, Sky and JMG acting in good faith and using all reasonable efforts to increase the amount of legally available redemption funds, the Joint Venture is still unable to pay the Redemption Price, Sky and JMG would have to pay it in order to redeem Claimant's shares and to allow Claimant to exit the joint venture arrangement. If Sky and JMG did not act in good faith and use all reasonable efforts as expeditiously as possible to increase the amount of legally available redemption funds to pay the Redemption Price, and it is clear that they did not, they cannot complain that Claimant then elected to exercise its contractual right to seek the Redemption Price from them instead. We therefore find that the requirements in Section 8.4(ii) for seeking the Redemption Price from Sky and JMG have been satisfied.

B. Is Section 8.4, in Particular the Interest Component, an Unenforceable Penalty Clause?

19.16. As we have found that Section 8.4 is a not a liquidated damages clause, it is, on Sky and JMG's own submission, not strictly necessary for us to consider whether it is an unenforceable penalty clause.[177] As this issue was extensively briefed, however, for the sake of completeness, we have decided to do so.

19.17. Sky and JMG object that Section 8.4(i), in particular the 15% compound interest element, is an unenforceable penalty clause because:

(1) The sum stipulated is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have flowed from the breach.

(2) Section 8.4(i) provides for a single lump sum regardless of whether one event or several events occurred, some which might be serious and others not.

(3) Section 8.4(i) does not take into account the loss suffered in that Claimant would be able to ask for the US$50,000,000 plus 15% compound interest if the performance targets fall just short of the threshold, or if Sky only failed to make half of the capital contribution, and a breach in the third year would still result in interest running from the Second Payment Date and result in the same amount of interest as a breach in the first year.

(4) Claimant cannot possibly suffer any loss from the inability of Sky to contribute capital to the Joint Venture.

(5) Section 8.4 is not compensatory in nature.

---

[176] SPA at Section 8.4(iv).

[177] RPH at para 94(1).

(6) Claimant could have provided internal funding at around 10% per annum interest rate and therefore should not be able to ask for 15% per annum compound interest under Section 8.4(i).[178]

19.18. Claimant responds that Hong Kong law provides that the onus of proving that a provision is a penalty clause lies with the party opposing it, and that whatever the parties had agreed should typically be upheld.[179] The key question is whether the clause is a genuine pre-estimate of what the loss is likely to be.[180] Claimant quoted the case of *Philips Hong Kong Ltd. v. Attorney General of Hong Kong* [1993] H.K.C.U. 623 ("*Philips*"), a case agreed by both parties to be a leading authority on the issue in Hong Kong:

> *Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectively penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so is a perfectly valid liquidated damage provision. The use in argument of unlikely illustrations should therefore not assist a party to defeat a provision as to liquidated damages. As the Law Commission stated in Working Paper No. 61 (page 30): - 'The fact that in certain circumstances a party to a contract might derive a benefit in excess of his loss does not... outweigh the very definite practical advantages of the present rule upholding a genuine estimate, formed at the time the contract was made of the probable loss.'*[181]

19.19. Even if we assume, *arguendo*, that Section 8.4 constituted a liquidated damages clause, we do not find that Section 8.4(i) is an unenforceable penalty clause.

19.20. Under Hong Kong law, when a contract contains a liquidated damages clause, "what the parties have agreed should normally be upheld", as "[a]ny other approach will lead to undesirable uncertainty especially in commercial contracts."[182] This presumption in favor of enforcing such clauses grows stronger the "more difficult it is likely to be to prove and assess the loss which a party will suffer in the event of a breach."[183] "The tacit premise must be that, if the liquidated damages provisions were outrageous," the defendant "would have complained about them at the time of

---

[178] RPH at paras 101-111. *Citing Polyset Ltd. v. Panhandat Ltd.*, [2002] 5 HKCFAR 234 ("*Polyset*"), paras 76-79 (on whether a clause is a valid liquidated damages clause or a penalty); *Jeancharm Ltd. v. Barnet Football Club Ltd.*, [2003] 92 ConLR 26, para 16 (noting that "one can have an increased rate of interest as a valid clause in some circumstances"); *Hong Leong Fin. Ltd. v. Tan Gin Huay* [1999] 2 SLR 153, para 27 (finding a clause in a mortgage that imposed a default interest rate of 18% per year (as opposed to 6.75% when there was no default) to be a penalty clause); *Donegal Int'l Ltd. v. Zambia* [2007] EWHC 197 (Comm), paras 12, 510-523 (finding a clause that, upon default, varied a simply interest rate of 6% per year to 8% per year compounded quarterly to be a penalty clause). On this basis, Sky and JMG contend that Claimant's claim should be dismissed. Sky Answer para 11; JMG Answer para 11; Sky SOD para 70; JMG SOD para 70; ROS paras 50-59; RPH paras 2, 103-111.

[179] CPH at para 199.

[180] *Id.* at para 200.

[181] *Phillips* at para 7.

[182] *Id.*

[183] *The Mandarin Containers*, [2004] 4 HKC 505, para 8 (internal quotation marks omitted).

tender."[184]

19.21. Where a party objects to the enforcement of a liquidated damages clause, the burden is on that party to demonstrate that the clause is an improper penalty provision.[185] To meet that burden, the defending party must show that the liquidated damages clause was not "a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer from a breach of the obligation in question."[186]

19.22. If the party opposing a liquidated damages clause cannot meet the burden of proving that the clause was anything other than a genuine estimate in advance of the loss, the liquidated damages clause "is enforceable irrespective of the loss actually suffered."[187] In other words, in determining whether a liquidated damages clause should be enforced, the actual loss that was ultimately suffered by the innocent party is "irrelevant."[188]

19.23. Under Section 8.4(i), Claimant's Redemption Right arises in situations where the Joint Venture misses its net profit performance targets by specified margins or the Joint Venture, Sky or JMG materially breach the Transaction Documents. In considering the lawfulness of the 15% rate, we accordingly consider it helpful to look at the agreed net profit performance targets for the Joint Venture set out in Section 8.3 of the SHA. For the first year (fiscal year 2016), the performance target was RMB300 million, which translates to about US$46 million.[189] Claimant's share of this figure would have been US$23 million—i.e., a 46% rate of return on its US$50 million investment—with the rate of return projected to increase substantially in fiscal years 2017 and 2018.[190] Against this backdrop, we have no trouble finding the 15% rate specified in Section 8.4 to be a "genuine pre-estimate" of Claimant's loss.[191]

19.24. In resisting this conclusion, Sky and JMG point out that the 15% rate applies to the whole of Claimant's original investment (i.e., US$50 million), irrespective of the amount involved that triggers Claimant's Redemption Right. Thus, for example, if the Joint Venture failed to meet its performance targets only slightly, Section 8.4(i) would allow Claimant to exercise its right of redemption to seek a 15% annual rate of return (compounded annually) on US$50 million. Moreover, no matter when an event occurs that triggers Claimant's Redemption Right, the 15% rate applies from the due date for the Second Payment (30 June 2016) up to the date of redemption. Thus, for example, if it were determined in 2019 that the Joint Venture had missed its performance target for 2018, Section 8.4(i) would allow Claimant to claim the 15% rate on US$50 million as from 30 June 2016—more than two and half years earlier. Sky and JMG contend that these examples show that Section 8.4(i) is oppressive and disproportionate for the purpose it was designed to serve.

19.25. As a preliminary point, payment of the Redemption Price, with interest specified in Section 8.4(i), can only occur as a result of serious events that the parties have agreed would entitle Claimant to

---

184 *Hong Kong Inst. of Educ. v. Aoki Corp.*, [2004] 2 HKC 397 at para 41.

185 *See Wesco China Ltd. v. Liu Fu Tien,* [2007] 1 HKC 576 ("Wesco"), para 109.

186 *Ip Ming Kin v. Wong Siu Lan*, [2012] HKEC 463 at para 61.

187 *Id.*

188 *Wesco* at para 109.

189 Section 8.3(i) of the SHA.

190 *Id.* at Sections 8.3(ii) and 8.3(iii).

191 *Polyset* at para 78.

exit the joint venture. It is therefore not true that Section 8.4(i) is a clause that provides for a fixed sum whether one or more events occur, and regardless of whether these events are serious or not.

19.26. At best, the hypothetical scenarios described above at para 19.24—none of which bear any resemblance to what happened in this case—suggest that there could be circumstances where the application of the 15% rate in practice would result in Claimant getting more than it had lost as a result of the events triggering its Redemption Right. As the court in *Philips* explained, however, the "use in argument of unlikely illustrations should… not assist a party to defect a provision as to liquidated damages." [192] This is because the "fact that in certain circumstances a party to a contract might derive a benefit in excess of his loss does not… outweigh the very definite practical advantages of the present rule upholding a genuine estimate, formed at the time the contract was made of the probable loss." [193]

19.27. As set out above at para 19.18, the *Philips* court instructed that it will normally be insufficient to establish that a provision is objectively penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. So long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision. [194]

19.28. As to whether Section 8.4(i) is sensitive enough to take into account various permutations and to provide for an accurate estimate of loss in each of these situations, as *Philips* explains, it is not useful to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss instructs. What is required is a genuine pre-estimate of loss that is not extravagant having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made. There is no need for the clause to take into account every situation that might occur and to take into account each of those situations in assessing the amounts payable.

19.29. In a similar spirit, Sky and JMG also contend that, when the costs of rectifying any breach flowing from Sky's failure to make the Second Payment are considered, Section 8.4(i) is plainly a penalty clause. In this regard, Sky and JMG allege that, before the SHA was signed, ZEG, Claimant and Sheng Ze had indicated a willingness to provide capital for Sky to meet the Second Payment. And Claimant had an obligation under Section 5.8 of the SHA to obtain low-interest-rate loans to help finance the Joint Venture as soon as possible after closing. Thus, when Sky failed to make the Second Payment, the most natural way for Claimant and the Joint Venture to remedy the situation would have been for them to induce ZEG or its affiliates to make loans to the Joint Venture, which ZEG could have provided at a rate of 10% or lower. Had they done so, Sky and JMG say, the extra interest costs incurred in obtaining extra funding would be the loss resulting from Sky's failure to make the Second Payment. This would have been much less than the 15% rate under Section 8.4 of the SHA and therefore demonstrates how grossly disproportionate that rate is.

19.30. There are numerous problems with this argument. As a preliminary matter, it is a red herring. As

---

[192] *Phillips* at para 7.

[193] *Id.* (internal quotation marks omitted).

[194] *Id.*

the *Philips* court said, "Arguments of this nature should not be allowed to divert attention from the correct test as to what is a penalty provision— namely, is it a genuine pre-estimate of what the loss is likely to be?—to the different question, namely, are there possible circumstances where a lesser loss would be suffered?" [195]

19.31. Moreover, we are aware of no evidence on record that, before the SHA was signed, ZEG, Claimant or Sheng Ze indicated a willingness to provide capital for Sky to meet the Second Payment. On the contrary, before signing the SHA, JMG had suggested that Sky might meet the Second Payment in kind by transferring aircraft assets to the Joint Venture. [196] While it appears that Sheng Ze was willing to consider this proposal, there is no evidence that it was ever accepted, and it is nowhere reflected in the SHA.

19.32. In addition, as explained above at para 17.51, Claimant had no obligation under Section 5.8 of the SHA to obtain low-interest-rate loans to help finance the Joint Venture as soon as possible after closing or ever. Claimant's only obligation under Section 5.8 was to help the Joint Venture obtain a lower interest rate under any loans the Joint Venture obtained. As the Joint Venture never obtained any loans, Claimant's obligation in this regard was never triggered.

19.33. And while ZEG at one time indicated a willingness to provide financing to the Joint Venture in the "second half year of 2016" [197]—i.e., after Sky was due to make the Second Payment on 30 June 2016, not before—we fail to see how Claimant or the Joint Venture would have had the power to induce ZEG or its affiliates to make loans to the Joint Venture at all, much less why ZEG would have been willing to do so after Sky failed to make the Second Payment.

19.34. As to Sky and JMG's remaining arguments:

(1) Claimant need not technically suffer loss itself from the failure of Sky to make a capital contribution to provide for an enforceable contractual rate of return in the event that it has to leave the joint venture.

(2) We have found that Section 8.4(i) is a genuine pre-estimate of loss and it is irrelevant whether it can be characterised as compensatory or not.

(3) Whatever rate Claimant could have provided internal funding at is irrelevant where parties have agreed on a contractual rate of interest, and there are no grounds to refuse enforcement of the agreed rate of interest.

19.35. Finally, in their Post-Hearing Submissions, Sky and JMG also contended that Section 8.4 is a penalty clause because, further to the reflective loss principle, Claimant cannot possibly suffer any loss due to Sky's failure to make the Second Payment to the Joint Venture. In light of this, any provision requiring Sky and JMG to compensate Claimant is extravagant and oppressive and cannot be a genuine pre-estimate of Claimant's loss. [198] We reject this argument for the reasons that we set out below when we address Sky and JMG's reflective loss argument at para 20 onwards.

---

[195] *Id.* at para 9.

[196] Kraus 1 Exhibit 1 (email dated 16 November 2015 from Claire Xiao to Dave Kulowiec).

[197] Email from Ms. Fu to Mr. Kraus, 31 May 2016, Ex. C9B.

[198] RPH at para 104.

C. The Amount of the Redemption Price

19.36. We conclude that in this case:

(1) Claimant properly sent its Second Redemption Notice on 27 March 2017.

(2) The Joint Venture was then obliged to, but did not, complete the redemption of Claimant's shares within six months of 27 March 2017.

(3) Claimant then properly elected not to invoke its right to require the Group Companies to take all actions necessary to enable the Joint Venture to pay the full amount of the Redemption Price.

(4) Because the assets of the Joint Venture were insufficient to pay the Redemption Price, Sky and JMG are obliged to pay the remaining balance of the Redemption Price as follows:

(a) Sky and JMG shall pay interest on the remaining balance at an interest rate equal to 15% *per annum* monthly in arrears until such remaining balance is paid in full; and

(b) Sky and JMG shall pay such remaining balance in full no later than the first anniversary of the date the Redemption Price was due and payable to Claimant.

If Sky and JMG fail to make any of the payments specified in clause (a) of the immediately preceding sentence when due, the entire remaining balance of the Redemption Price shall become immediately due and payable.

19.37. The Redemption Price due is set out in Section 8.4(i): "the 'Top Jet Redemption Price' [is] equal to the higher of (x) the proportion of the Original Investment paid for such Shares to be redeemed (calculated based on a total investment cost of US$50,000,000 paid for all of the Shares held by Top Jet), plus a premium calculated at an annual return of 15% of such original investment cost, compounded annually from and including the date of the Second Payment up to the date of redemption, plus all declared but unpaid dividends thereon up to the date of redemption), or (y) the then fair market value of such Shares to be redeemed, the valuation of which shall be determined through an independent appraisal performed by an appraiser selected by Top Jet."

19.38. As set out in para 50 of Claimant's Opening Written Submissions, this works out to:

Original Investment = US$50,000,000.00

Three years of compound interest at 15% PA from 30 June 2016 (Second Payment Date) = US$26,043,750.00

Redemption Price as of 30 June 2019 = **US$76,043,750.00.** [199]

19.39. The total balance of the Redemption Price that is payable by Sky and JMG is **US$76,043,750.00** as of 30 June 2019, and the Redemption Price will accrue compound interest of 15% per year, or US$31,250.00 per day, from 30 June 2019 through to the date of this award.

---

[199] COS at para 50.

D. The appropriate relief that should be awarded to Claimant

19.40. Claimant seeks the following relief in this arbitration:

a. Determine that the Redemption Price was $76,043,750.00 as of 30 June 2019.

b. Determine that the Redemption Price accrued compound interest of 15% per year, or $31,250.00 per day, from 30 June 2019 through the date of the award.

c. Grant a monetary award against Sino Jet [the Joint Venture] and R2/R3 [Sky and JMG], jointly and severally, in the amount of the Redemption Price.

d. Grant post-award interest of 15% per year until the Redemption Price is paid in full.

e. Until the Redemption Price has been paid in full, enjoin Skyblueocean from transferring the 10,000 Sino Jet shares owned by Skyblueocean.

f. Declare that once the Redemption Price has been paid in full – but not before – Top Jet shall relinquish its Sino Jet shares in order to complete the share redemption process. [200]

19.41. Sky and JMG take issue with the remedy sought by Claimant in this arbitration. Sky and JMG point out that because Claimant now seeks a monetary award of the Redemption Price of US$76,043,750, nothing more, nothing less, against all three Respondents (the Joint Venture, Sky, and JMG) jointly and severally, and if the Tribunal is not satisfied that Claimant is entitled to this remedy, it should give Claimant nothing as it has not framed its requested relief in a way that the Tribunal knows what it is seeking. [201] As we have decided to award Claimant the full amount it seeks—and, as explained below at paras 19.44-19.45, the majority finds all three Respondents jointly and severally liable—this argument is moot.

19.42. Sky and JMG also complain that because Claimant only seeks joint and several liability against the Joint Venture, Sky, and JMG, the proposed relief does not cover Yortime and Sheng Ze. The failure to include these entities in the relief is important because Ms. Meng has control over both these entities and the failure to include these entities in any award may allow Ms. Meng to shift the liability for the monetary award of US$76,043,750 to Sky and JMG by transferring away all the funds in the bank accounts of Yortime and Sheng Ze where most of the funds of the joint venture are kept, since she has control over Yortime and Sheng Ze, including their bank accounts. [202]

19.43. With regards to Sky and JMG's concerns about Ms. Meng, Sky and JMG do not explain what they consider the legal significance of these concerns to be (if any). In all events, however, to the extent that Sky and JMG fear that Ms. Meng may engage in conduct that is abusive, improper or unlawful—or has already done so— we find their fears speculative and devoid of any evidentiary support. Moreover, Yortime and Sheng Ze are not parties to these proceedings and the Tribunal is unable to make an award against these entities. To the extent that Ms. Meng is able to transfer funds belonging to the Joint Venture out of the ownership of the Joint Venture, this could be regarded as a payment of the Redemption Price if done in a manner envisaged by Section 8.4(ii), or the Joint

---

[200] CPH at para 10.

[201] RPH at para 57.

[202] *Id.*

Venture could bring an action at the time either to stop such a transfer or to take steps to recover the transferred amounts. But the Tribunal sees no need to consider a transfer that has not been proved to have happened and might never happen in awarding relief at this time.

19.44. We have already established that Claimant is entitled to claim the Redemption Price against Sky and JMG. It is clear that the liability of Sky and JMG is joint and several:
9.12. Joint Liabilities. [Sky] *and* [JMG] *shall be jointly and severally liable for the performance and observance of any and all of their obligations and liabilities whatsoever hereunder.* [203]

19.45. The majority also finds it appropriate to award the monetary award of US$76,043,750 on a joint and several basis against the Joint Venture. [204] As the Redemption Price was not paid in full by the Joint Venture within six months after the Second Redemption Notice was issued by Claimant, Section 8.4(ii) permits Claimant to look to Sky and JMG for the unpaid portion of the Redemption Price. But this right to pursue Sky and JMG for the unpaid amount does not release the Joint Venture from its obligation to pay whatever is outstanding of the Redemption Price. Accordingly, given that the functional effect of Section 8.4(ii) is to impose joint and several contractual liability on Sky, JMG and the Joint Venture for the unpaid portion of the Redemption Price, we find it appropriate to award the monetary award of US$76,043,750, representing the unpaid balance of the Redemption Price against Sky, JMG and the Joint Venture, jointly and severally.

19.46. A minority view (held by Dr. Hwang S.C.) is that, while the liability of Sky and JMG under the SHA is joint and several (as expressly provided in Section 9.12), the liability of the Joint Venture is separate and distinct from that of Sky and JMG. Its liability to Claimant is primary under Section 8.4(ii) of the SHA, while that of Sky and JMG is secondary under that same section. Hence, the Joint Venture was liable for the full amount of the Redemption Price after it received the Second Redemption Notice, while Sky and JMG were only liable for any shortfall on the Redemption Price if the assets of the Joint Venture were insufficient to pay the Redemption Price. In the event, because the Joint Venture was unable to pay any part of the Redemption Sum, the liability of Sky and JMG became the same amount as that owed by the Joint Venture. However, the conceptual nature of their separate liabilities remained unchanged.

19.47. Accordingly, the minority would dissent only on para 25.3 of the dispositive section of this Award insofar as that paragraph states that Respondents are jointly and severally liable for the Redemption Price. In the minority's opinion, the Joint Venture is separately liable for the full Redemption Price, while Sky and JMG are between themselves jointly and severally liable for the same Redemption Price.

19.48. As noted above at para 19.40, Claimant also seeks post-award interest of 15% per year until the Redemption Price is paid in full. Claimant notes that, further to Sections 79 and 80 of the Arbitration

---

[203] SHA at Section 9.12. For avoidance of doubt, we consider that Section 9.12, which provides for joint and several liability between Sky and JMG, also survives the termination of the SHA, since it is also a provision that defines the remedies that Claimant has. This is also consistent with Section 9.9 of the SHA, which provides that the parties shall not be relieved from obligations (which would include any joint liabilities) arising from any breaches on termination of the SHA.

[204] In reaching this conclusion, we note that Sky and JMG have contended that the Joint Venture cannot be a defendant in these proceedings because its articles of association do not permit it to initiate or settle any material arbitration without Sky's consent, which Sky has not given. Sky Rejoinder at 4-5; JMG Rejoinder at 4-5; Article of Association of the Joint Venture, 31 Dec. 2015, Exhibit A § 3.1(n). Section 3.1(n) has no applicability to the situation presented here, however, as the Joint Venture is a respondent and has neither initiated nor settled this arbitration.

Ordinance, we have discretion to award interest and to set the rate as we see fit. In this regard, Claimant contends that one of the factors we should consider is the contractual rate of interest, but it has not explained why post-award interest of 15% on an award denominated in US$ would be appropriate.[205] For their part, Sky and JMG contend that, while the Tribunal has discretion to award post-award interest as it sees fit, 15% is too high. In their view, any award of post-award interest in this case—where the principal award is made in US$—should be made with reference to the US Prime Rate,[206] which at the time of the drafting of this award is 3.25%.[207] We agree with Sky and JMG and have accordingly decided to award Claimant post-award simple interest at 4.25%—i.e., the US Prime rate plus 1%—from the date of this award until the date of payment.

19.49. Section 8.4 does not speak to the issue of when Claimant should relinquish its shares in the Joint Venture. Claimant seeks a declaration that, once the Redemption Price has been paid in full—but not before—Claimant shall relinquish its shares in the Joint Venture. Sky and JMG have opposed this request on the grounds that granting it would make Claimant a "secured creditor".[208] We fail to see how this is the case here, however, as we are talking about the disposition of Claimant's shares in the Joint Venture (not Sky's) and Sky and JMG have not explained their reasoning. The issue at stake is not related to securing assets but to control of the Joint Venture. As we see no reason that the balance of control in the Joint Venture should change until the Redemption Price is paid in full, we have decided to grant the declaration requested by Claimant.

19.50. We note that, at the hearing, Sky and JMG contended that the only "kind of relief that the claimant can claim is limited to what is stated in section 8.4" and that, to the extent Claimant seeks any relief that is "not provided under section 8.4, then there is simply no jurisdiction—there's basically just no basis for them to seek... additional reliefs that is not reflected in section 8.4."[209] It is not entirely clear to us whether Sky and JMG intended by these statements to make a jurisdictional objection. And if they did, it is not clear to us whether they intended that objection to apply to Claimant's request for a declaration regarding when Claimant should relinquish its shares. In all events, however, the arbitration clause in the SHA does not limit our jurisdiction to claims for relief set forth in Section 8.4. As noted above at para 4.1, the arbitration clause covers "[a]ny dispute, controversy or claim arising out of or relating to this Agreement". We accordingly consider that we have jurisdiction over Claimant's request for the declaration it seeks.

19.51. We note that Claimant also seeks to enjoin Sky from transferring its shares in the Joint Venture until the Redemption Price has been paid in full. In this regard, Claimant contends that Sky and JMG are insolvent. In light of this, Sky's shares in the Joint Venture are likely the only remaining assets upon which Claimant could levy execution to partially satisfy the monetary award granted by the Tribunal against Sky and JMG. Claimant considers that Sky and JMG should not be permitted to dissipate these assets while proceedings to enforce this award are pending.

19.52. We have decided to deny this request.

19.53. As a preliminary matter, and assuming *arguendo* that Sky and JMG are insolvent, we note that

---

[205] Tr. 4:123:1-24, 5:87:16-89:6.

[206] Tr. 4:112:15-114:25, 5:89:8-90:17.

[207] Wall Street Journal Prime Rate.

[208] Tr. 4:121:3-20; RPH at para 89.

[209] Tr. 4:104:22-105:3.

Claimant has not pointed to any provisions of the SHA or Hong Kong law that would give Claimant a right to the injunction it seeks. Nor has Claimant provided any evidence that Sky has any intention of transferring its shares in the Joint Venture to anyone at all, much less before the Redemption Price is paid in full. Moreover, as Claimant acknowledges, this request is related not so much to these proceedings as to the enforcement proceedings Claimant foresees bringing against Respondents after this award is issued—proceedings that would be for the relevant courts. In these circumstances, we see no basis to enjoin Sky from transferring the 10,000 shares owned by Sky in the Joint Venture until the Redemption Price is paid in full. Claimant's request for such an order is akin to a freezing injunction on Sky's property and Claimant has not made any showing that such an injunction is warranted.

20. DOES THE RULE AGAINST REFLECTIVE LOSS BAR THE REMEDY THAT CLAIMANT SEEKS?

20.1. There has been some argument as to whether the reflective loss principle bars the relief that Claimant seeks. Sky and JMG argue that the reflective loss principle prevents Claimant (who is a shareholder of the Joint Venture) from recovering in respect of a loss at the expense of the Joint Venture.[210] For this proposition, Sky and JMG refer to *In Waddington Ltd v Chan Chun Hoo* (2008) 11 HKCFAR 370 ("*Waddington*"), where Lord Millet held at paras 82, 85, and 87 that:

> *82. I explained the rationale of the principle in* Johnson v Gore Wood & Co (supra) *at p.62, where I said:* ***If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved.*** *Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.*
>
> *85. It is impossible not to share the determination of the Court of Appeal not to allow a defendant who has been guilty of such conduct to escape liability.* ***But with respect it could not be right to allow the shareholder to bring an action for its own benefit; this would entail recovery by the wrong party to the prejudice of the company and its creditors.*** *It would produce precisely the result which I identified as unacceptable in Johnson v Gore Wood & Co* (supra) *at p.64D; it would allow the plaintiff to obtain by a judgment of the court the very same extraction of value from the company at the expense of its creditors that it alleged the defendant had obtained by fraud. The Court of Appeal vouchsafed no explanation to justify this result, an explanation which might be thought to be particularly necessary given that the company was in administrative receivership.*
>
> *87. The Court of Appeal may have assumed that the principle established in Johnson v Gore Wood & Co is not engaged where the company has lost the right to sue. But the House of Lords expressly applied* ***the principle not only where the company had the right to sue but also where it had declined or failed to sue.*** *There was nothing new in this. In* Prudential (supra) *it had been submitted that a personal action at the suit of the shareholder will lie to recover reflective loss if the company's remedy is for some reason not pursued. The Court of Appeal countered the argument (at p.223) by*

[210] RPH at para 97 (emphasis added).

posing the rhetorical question: "How can the failure of the company to pursue its remedy against the robber entitle the shareholder to recover for himself?"

20.2. Sky and JMG also rely on *Suen Kwai Kam v Zhong Hua International Holdings Ltd & Others* HCA 1691/2005, unreported, 27 March 2013 ("*Suen Kwai Kam*"). The factual background of *Suen Kwai Kam* is that:

(1) The Plaintiff was the sole beneficial owner of Ever Brian Inc. ("Ever Brian"). The Plaintiff agreed to transfer shares of Ever Brian to the 2nd Defendant at HK$35,000,000. [211]

(2) However, the Plaintiff was asked to transfer shares of Ever Brian to a China Dragon Ventures Inc. ("China Dragon"), before the shares of Ever Brian are transferred to the 2nd Defendant. [212]

(3) The 3rd Defendant (the executive director of the 1st Defendant) proposed that he and the 1st Defendant jointly and severally guarantee the full payment of HK$35,000,000. [213]

(4) An agreement was entered between the 2nd Defendant and China Dragon for the transfer of shares of Ever Brian. As to the purchase price of HK$35,000,000, the 3rd Defendant provided his oral guarantee personally and also for and on behalf of the 1st Defendant. [214]

(5) However, the Plaintiff only received HK$1,500,000. [215]

(6) The Plaintiff sued the 1st Defendant and the 3rd Defendant under the guarantee.

20.3. Essentially, in *Suen Kwai Kam*, the action brought against the 1st and the 3rd Defendant was on a guarantee that they had given for the balance of the purchase price of certain shares that were only partially paid for by the 2nd Defendant. The 1st and 3rd Defendants sought to strike out the Plaintiff's claim under the reflective loss principle. [216] Registrar Lung (as his Lordship then was) held that:

26. Faced with such dilemma, I consider it necessary to resort to the rationale of the rule against reflective loss, which was set out by the Court

of Final Appeal in Waddington v. Chan Chun Hoo (2008) 11 HKCFAR 370 at §82...

27. Here, Lord Millet is referring to the situation of a shareholder claiming recovery of loss. The question whether such claim will amount to reflective loss depends upon whether there will be double recovery at the expense of the defendant, which Mr. Cheung is quite entitled to say that the present case involves not just one defendant, but other defendants too. But ***the next question is whether the shareholder will recover at the expense of the company and its creditors and other***

---

[211] *Suen Kwai Kam* at paras 4.6, 4.8.
[212] *Id.* at para 4.9.
[213] *Id.* at para 4.10.
[214] *Id.* at para 4.13.
[215] *Id.* at para 4.14.
[216] *Id.* at para 17.

shareholders**, which will pose difficulty for Mr. Cheung because **if the plaintiff is allowed to claim damages against the 1st defendant and the 3rd defendant, which will be the balance of the price for the Ever Brian Shares, the recovery of which will certainly take away China Dragon's claim against the 2nd defendant for the same Outstanding Consideration. Viewed in this way, the plaintiff's claims against the 1st defendant and the 3rd defendant, though they are different parties, will also be reflective loss too. As such, the plaintiff's claim against the 1st defendant and the 3rd defendant must be struck out because as Lord Millet said this is a matter of principle; there is no discretion involved. [217]

20.4. Sky and JMG therefore argue that according to *Suen Kwai Kam*, the principle of reflective loss applies even if the shareholder (the Plaintiff) and the company (China Dragon) have different causes of action against different parties under different agreements. This is because the test on reflective loss is not the form of relief but, whether as a matter of substance, the claim is for monies that the company may claim for itself. [218]

20.5. Thus, on the facts of this case, even if the Joint Venture cannot rely on Section 8.4 of the SHA to claim against Sky and JMG, Claimant's claim against Sky and JMG under Section 8.4 of the SHA is still caught under the principle of reflective loss, because both principles of reflective loss (double recovery and shareholder recovering loss at the expense of the company) in *Waddington* are engaged:

(1) Sky's inability to pay the Second Payment is the essential element of the cause of action for both the Joint Venture and Claimant.

(2) Even if Claimant is allowed to claim against Sky and JMG, the Joint Venture can also sue Sky for failure to make the Second Payment under Section 7.2 of the SPA and Section 8.1(i) of the SHA. Thus, there will be double recovery in the sense that the Joint Venture can rely on the same wrong to claim against Sky.

(3) Realistically, if Claimant redeems its shares and relinquishes control of the Joint Venture, the Joint Venture will not claim against Sky. However, if this is the case, Claimant (as shareholder of the Joint Venture) will recover at the expense of the Joint Venture. This again is not permissible.

(4) In short, Section 8.4 of the SHA will inevitably trigger the reflective loss principle because it is drafted such that Claimant will benefit from a breach or wrong done to the Joint Venture.

20.6. We do not find that the reflective loss principle bars an award ordering Sky and JMG to pay the balance of the Redemption Price to Claimant. Assuming for the sake of argument that, as Sky and JMG claim, the issue of reflective loss is governed by Hong Kong law, the aim of the principle is to (1) prevent double recovery at the expense of the defendant, and (2) to prevent the shareholder from recovering at the expense of the company and its creditors and other shareholders. [219]

---

[217] *Id.* at paras 26, 27 (emphasis added).

[218] *Pico North Asia Holdings Ltd v Cheung Yuk Ting Linda & Another* HCA 1371/2009, unreported, 8 February 2011, per Fok JA (as his Lordship then was) at para 33.

[219] See Lord Millett NPJ in *Waddington* at para 82.

20.7. Neither of these concerns is implicated in this case. It is first necessary to distinguish (1) the obligation of Sky to make the remaining US$40 million capital contribution (the Second Payment) to the Joint Venture under Section 8.1 of the SPA, and (2) the obligation of Sky and JMG to pay the outstanding balance of the Redemption Price upon a failure of the Joint Venture to pay such amount. These are entirely different obligations owed by Sky and JMG to different parties.

20.8. There is no risk of double recovery. It is true that the Joint Venture has a cause of action under Section 8.1 to seek the Second Payment from Sky and JMG. But that is not the subject of these proceedings and is a cause of action that is of an entirely different nature from Claimant's claim against Sky and JMG to pay the Redemption Price as a means for Claimant to be cashed out of its investment in the Joint Venture. Claimant could not pursue the Joint Venture for the Redemption Price if it is paid by Sky and/or JMG. Nor could the Joint Venture pursue Sky and JMG for the Redemption Price.

20.9. There is also no risk of the shareholder recovering at the expense of the company and its creditors and other shareholders. Claimant's right to pursue the balance of the Redemption Price from Sky and JMG is a unique right given to Claimant to effectively compel the other shareholders of the Joint Venture to cash them out of their investment in the event of, amongst other things, material breach of Transaction Documents and the Joint Venture fails to redeem Claimant's shares. This is not a right that the Joint Venture itself could ever avail itself of.

20.10. The *Suen Kwai Kam* case on which Sky and JMG rely on heavily as being analogous to this case stands for the proposition that the reflective loss principle applies if there is recovery at the expense of the company and its creditors or other shareholders, which would be the case where a recovery by a shareholder would be to take away the company's claim for the same outstanding consideration:

> *But the next question is* ***whether the shareholder will recover at the expense of the company and its creditors and other shareholders****, which will pose difficulty for Mr. Cheung because if the plaintiff is allowed to claim damages against the 1st defendant and the 3rd defendant, which will be the balance of the price for the Ever Brian Shares,* ***the recovery of which will certainly take away China Dragon's claim against the 2nd defendant for the same Outstanding Consideration.*** *Viewed in this way, the plaintiff's claims against the 1st defendant and the 3rd defendant, though they are different parties, will also be reflective loss too.* [220]

20.11. In our case, payment of the Redemption Price by Sky and JMG under Section 8.4(ii) would in no way reduce or undermine the Sky's obligation to make the Second Payment. These are conceptually distinct obligations, and there is nothing legally precluding or reducing the Joint Venture's ability to continue to seek the Second Payment from Sky. We therefore do not find that ordering Sky and JMG to pay the remaining balance of the Redemption Price would implicate the reflective loss principle.

20.12. As we explain above at para 20.11, the Joint Venture's right to claim Second Payment from Sky is conceptually distinct from Claimant's right to the Redemption Price. Payment of the latter does not legally bar the Joint Venture's claim to the Second Payment from Sky. If post-redemption, the Joint Venture would not pursue this claim, it will only be because Sky—then being the outright

---

[220] *Suen Kwai Kam* at para 27 (emphasis added).

shareholder of the Joint Venture—would not authorise a claim against itself, and not because there is any legal impediment to bringing such a claim. Claimant's claim cannot therefore legally be said to be a recovery at the expense of the Joint Venture.

20.13. Nor do we agree with Sky and JMG's claim that Section 8.4 would inevitably trigger the reflective loss principle because Claimant would benefit from a breach or wrong done to the Joint Venture. The purpose of Section 8.4 is not to benefit Claimant, but rather to provide Claimant with a right to have its shares redeemed in order for Claimant to exit the joint venture with a return of capital plus interest. Where the underlying event that gives rise to the right of redemption is a wrong to the Joint Venture, the Joint Venture may still pursue that cause of action against the wrongdoer. Allowing Claimant to cash out and exit the joint venture does not allow Claimant to benefit from a wrong done to the Joint Venture.

21. SKY AND JMG'S COMPLAINTS ON ACTIONS OF THE TOP JET PARTIES AFTER NOTICE OF REDEMPTION HAD BEEN ISSUED

21.1. In their post-hearing submissions, Sky and JMG argued that, after Claimant issued the Second Redemption Notice on 27 March 2017 and commenced the arbitration to enforce its purported right under Section 8.4 of the SHA, Claimant should no longer have been concerned with the affairs of Yortime and Sheng Ze (because Claimant would ultimately have to relinquish control of Yortime and Sheng Ze under Section 8.4 of the SHA).[221] Instead, the Top Jet Parties made a loan for Yortime to repay an intra-company loan to Sheng Ze. The Top Jet Parties also dissipated a sum of US$14.3 million for no apparent reason.[222]

21.2. Sky and JMG posit that the motivation of doing the above acts, especially incurring some US$14.3 million for the purported purpose of Yortime's litigation expenses against JMG (for a certain term loan agreement) and JMW (for the Consignment Agreement), is questionable and smacks of impropriety. This is because Claimant must be aware that, once Claimant relinquishes control of its shares of the Joint Venture to Sky, Sky will not allow Yortime to continue any litigation against JMW and JMG. Thus, if Claimant genuinely wanted to redeem its shares of the Joint Venture and to get out of the scene, Claimant need not cause Yortime and Sheng Ze to continue with the litigation.[223]

21.3. Sky and JMG also argue that plainly, after the issuance of the Repudiation Letter, Sheng Ze and Yortime have been operated in a way that is completely against the interests of Sky and JMG, and contrary to the purpose of redemption of shares. Although Sky was and is still a 50% indirect shareholder of Sheng Ze and Yortime, Sky has effectively been excluded from participating in any affairs of Sheng Ze and Yortime.[224]

21.4. It is unclear what Sky and JMG wish for the Tribunal to do with these observations. We do not understand Sky or JMG to have asserted any counterclaims based on these allegations and it is unclear to us why they were made or how they might be relevant to the decisions we need to take

---

[221] RPH at paras 51-52.

[222] *Id.* at para 52.

[223] *Id.* at para 53.

[224] *Id.* at para 54 ; *See generally* Kraus 2.

in this case. For avoidance of doubt, we also find them speculative and lacking any evidentiary support.

21.5. If Sky and JMG's complaints are intended to persuade the Tribunal that Claimant's acts somehow mean that it should not be permitted to redeem its share in the Joint Venture, we disagree. We fail to see how any of them, in and of themselves, would affect the ability of Claimant to either seek the Redemption Price or to seek the redemption of their shares in accordance with Section 8.4 of the SHA.

22. CLAIMANT'S FRAUD CLAIM

22.1. In the event that we were to find against Claimant on its breach of contract claim, Claimant has advanced an alternative claim for fraud and deceit related to misrepresentations Sky and JMG allegedly made when entering into the SHA.[225] In defense, Sky and JMG contended, among other things, that we lacked jurisdiction over this claim because it is a tort claim.[226] However, they did not cite any authority for this proposition and did not pursue it in their later submissions.

22.2. For avoidance of doubt, we consider that the arbitration clause in the SHA, which broadly encompasses any dispute, controversy or claim arising out of or relating to the SHA,[227] covers Claimant's claim for fraud and deceit. However, having found for Claimant on its breach of contract claim, that alternative claim is now moot.

23. SKY'S COUNTERCLAIM

23.1. Initially, Sky and JMG both brought counterclaims for unquantified damages and losses for breach of contract based on Claimant's allegedly having prevented the Group Companies from (1) obtaining financing, (2) purchasing assets further to the First Side Letter, and (3) meeting their obligations to cover tear-down and repair costs under the Consignment Agreement.[228]

23.2. During the course of the proceedings, however, JMG abandoned its counterclaim entirely.[229]

23.3. For its part, Sky continued to press its counterclaim. In this regard, Sky contended that Claimant prevented Sky and JMG from enjoying the fruits of the success of the Joint Venture by breaching its obligation under Section 5.8 of the SHA to enlist its affiliates (including ZEG) to help the Joint Venture obtain low-interest-rate loans. As a consequence, Sky suffered loss, in that the US$10 million it invested in the Joint Venture could have been meaningfully used elsewhere. Sky accordingly claims "loss of use of the US$10 million i.e. interest that could have been generated by the US$10 million from 31 December 2015 to the date of the award."[230]

---

[225] SASOC at paras 53-60; COS at paras 124-129; CROS at paras 58-62; CPH at paras 205-211.

[226] Sky Rejoinder at 5; JMG Rejoinder at 5.

[227] SHA at Section 4.1.

[228] Sky Answer at paras 22-23; JMG Answer at paras 22-23; Sky SOD at paras 50-60, 74-75; JMG SOD at paras 50-60, 74-75; Sky Rejoinder at 15; JMG Rejoinder at 15.

[229] *Compare* JMG SOD at 13 *with* ROS at para 64, RQD at para 6 *and* RPH at para 127.

23.4. It was in its Opening Written Submissions that Sky first articulated its counterclaim in precisely this fashion. In response, Claimant contended that Sky should not be permitted to "amend" its counterclaim in this way.[231] It is not clear to us, however, that Sky has so much amended its counterclaim as articulated it with greater specificity. In all events, Article 18.1 of the Rules expressly permits a party to amend or supplement its claims unless the Tribunal considers it inappropriate to allow such amendment having regard to the circumstances of the case. Assuming *arguendo* that Sky amended its counterclaim in its Opening Written Submissions, Claimant had ample opportunity to respond to it before the hearing in its Responsive Opening Written Submission, at the hearing and after the hearing in its Post-Hearing Written Submission. We accordingly see no reason to disallow the amendment.

23.5. As explained above at paras 17.51-17.56, however, Claimant did not breach Section 5.8 of the SHA or otherwise prevent Sky or JMG from enjoying the fruits of the success of the Joint Venture. We dismiss Sky's counterclaim on the merits.

24. ADVERSE INFERENCES

We note that Claimant asked us to draw certain adverse inferences against Sky and JMG in light of their failure to produce documents responsive to Claimant's document requests as ordered by the Tribunal.[232] As we have found in Claimant's favor on both its principal claim and Sky's counterclaim based on the evidence on file, we consider Claimant's request moot.

25. AWARD

25.1. For the reasons explained above, the Tribunal makes the following award:

25.2. The Tribunal has jurisdiction over the parties' dispute.

25.3. Respondents are jointly and severally liable to immediately pay Claimant US$76,043,750 with compound interest of 15% per year from 30 June 2019 through the date of this award.

25.4. On the amount awarded in para 25.3 (the "Award Sum"), Respondents are ordered to pay Claimant simple interest at the annual rate of 4.25% commencing on the day following the date of this award on such parts of the Award Sum as shall remain outstanding until full payment of the Award Sum.

25.5. Once the amount specified in para 25.3 is paid in full—but not before—Claimant shall relinquish its shares in the Joint Venture in order to complete the share redemption process.

25.6. Claimant's request for an injunction enjoining Sky from transferring its shares in the Joint Venture until the Redemption Price has been paid in full is denied.

---

[230] ROS at para 64; RQD at para 5; RROS at paras 47-50; RPH at paras 2, 113-117, 127.

[231] CROS at para 63.

[232] *See, e.g.*, COS paras 104-106; CROS paras 11, 64; CPH paras 145-149.

25.7. All issues as to costs are reserved to a future award.