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

[2021] SGHC 192

Originating Summons No 1293 of 2020 (Summons No. 288 of 2021)

Between

CNA

… *Plaintiff*

And

(1) CNB
(2) CNC

… *Defendants*

Originating Summons No 1306 of 2020 (Summons No. 289 of 2021)

Between

(1) CND
(2) CNE

… *Plaintiffs*

And

(1) CNB
(2) CNC

… *Defendants*

JUDGMENT

[Civil Procedure] — [Striking out]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

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CNA
v
CNB and another
and another matter

[2021] SGHC 192

General Division of the High Court — Originating Summons No 1293 of 2020 (Summons No 288 of 2021) and Originating Summons No 1306 of 2020 (Summons No 289 of 2021)
Ang Cheng Hock J
14 May 2021

13 August 2021 Judgment reserved.

Ang Cheng Hock J:

1 The two Originating Summonses in these cases are applications by the plaintiffs to set aside an international arbitral award in which they were unsuccessful. The setting aside applications have not been heard. This is because the defendants, who succeeded on the question of liability in the award, have applied to strike out the two Originating Summonses on the grounds that the setting aside applications were filed out of time. These striking out applications form the subject matter of this decision.

2 The two Originating Summonses were filed almost six months after the plaintiffs received the arbitral award. The plaintiffs argue that they acted within time because one of the plaintiffs had made requests for an interpretation and correction of the award, and their setting aside applications were made within

three months of the arbitral tribunal's disposal of those requests. The defendants, however, are of the view that, following the approach adopted by the Court of Appeal in its recent decision in *BRS v BRQ and another and another appeal* [2021] 1 SLR 390 ("*BRS (CA)*"), no valid request was made for an interpretation or correction of the award; hence, time for applying to set aside the arbitral award was never extended. As such, the defendants contend the two Originating Summonses must be struck out because the plaintiffs are already time-barred.

Background to the dispute

3 The plaintiff in OS 1293/2020 ("OS 1293") is [CNA], the developer of a popular online game [X].[1]

4 In or about early 2000, a key developer of the game wanted to leave CNA.[2] After some negotiations, it was agreed that that developer and his development team would leave CNA to set up [CNB]. That developer would hold 60% of the shares in CNB, while CNA would hold the remaining 40%. CNA and CNB would co-own the X series software and continue to develop the software through mutual cooperation.[3]

5 To this end, CNA and CNB entered into several agreements in 2000 and 2001.[4] Under one of these agreements, called the "Overseas Agreement", CNA was responsible for the development and management of the overseas markets

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1 1st Affidavit of [CNA's Chief Executive Officer, J] dated 21 December 2020 ("J's 1st Affidavit") at para 15.

2 J's 1st Affidavit at para 17.

3 J's 1st Affidavit at para 18.

4 J's 1st Affidavit at para 20–36.

for the game.[5] CNA would pay 50 to 60% of the overseas sales revenue to CNB.[6] Pursuant to the authority granted to it under the Overseas Agreement, CNA entered into a software licensing agreement (the "SLA") in June 2001, on behalf of itself and CNB, with [B] Ltd and [C] Corp, granting them the exclusive license to the Chinese-language version of a sequel to the game, [X2], in China.[7]

6 In July 2002, CNA, CNB and B Ltd entered into a supplementary agreement to the SLA, which detailed CNB's obligation to resolve technical problems that might affect the servicing and normal operation of the Chinese-language version of X2 in China.[8] In the disputes that subsequently arose, CNA has relied on the preamble to this supplementary agreement, which provides, *inter alia*, that "[CNB] will entrust [CNA] with the exercise of all its rights as co-Licensor, and the entrustment is irrevocable during the term of the [SLA] and [the supplementary agreement]".[9]

7 Subsequently, disputes arose between CNA and CNB, which resulted in both parties bringing proceedings against each other.[10] In April 2004, CNA and CNB managed to resolve their differences and reached a settlement.[11] One of the terms in the settlement was that the right to renew the existing agreements with B Ltd lay with CNA, but the latter would have to consult with CNB when renewing any such agreements.[12]

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5 J's 1st Affidavit at para 29.

6 J's 1st Affidavit at p 453.

7 J's 1st Affidavit at para 37.

8 J's 1st Affidavit at para 45.

9 J's 1st Affidavit at p 481.

10 J's 1st Affidavit at paras 53–61.

11 J's 1st Affidavit at para 62.

12 J's 1st Affidavit at p 734.

8 The SLA was subsequently amended, extended and/or assigned on a number of occasions.[13] In 2009, [CND] became the licensee of X2 under the SLA.[14] A company related to CND, [CNE], became a guarantor of CND's obligations to CNA.[15] Both B Ltd and C Corp dropped out of the picture.[16]

9 It should be mentioned that, since late 2004, CNE has owned part of the shareholding of CNA. CNE started with a minority stake, but it now presently holds 51.1% of CNA, through a wholly owned subsidiary.[17]

10 It also bears mention that in 2007, CNA ceased being a shareholder in CNB.[18] Then, in 2017, CNB transferred all of its software-related business divisions to [CNC].[19]

11 By 2017, the SLA had been extended on two occasions, in 2005 and 2008.[20] After this last extension in 2008, the SLA was due to expire on 28 September 2015, with an automatic extension to 28 September 2017 if no new disputes arose with respect to the X2 license between CNA and CNE.[21] In January of that year, CNB communicated to CNA that it would not agree to any extension of the SLA because of alleged copyright infringements and breaches

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13 J's 1st Affidavit at paras 67–74.

14 J's 1st Affidavit at para 72.

15 J's 1st Affidavit at para 72.

16 J's 1st Affidavit at paras 67–74.

17 J's 1st Affidavit at para 65.

18 J's 1st Affidavit at para 66.

19 J's 1st Affidavit at para 90.

20 J's 1st Affidavit at paras 68 and 70.

21 J's 1st Affidavit at p 769.

of the SLA by CND and CNE.[22] In the emails and letters that were subsequently exchanged between CNA and CNB/CNC, CNA took the position that it had the authority to review and ultimately decide on whether to renew the SLA.[23] CNB/CNC refuted this in their replies.[24] Parties were at an impasse.

The arbitration

12 In the original SLA, it was provided that it would be governed by Singapore law and that parties would submit any disputes to arbitration to be held in Singapore under the Arbitration Rules of the International Chamber of Commerce (the "ICC clause").[25] By 18 May 2017, CNB had commenced an arbitration pursuant to the ICC clause (the "ICC arbitration") against CND and CNE for breaching the SLA by, *inter alia*, illegally sub-licencing the software for the game and by allowing sub-licensees to develop and exploit unauthorised online, web and mobile versions of the game.[26]

13 Shortly after, on 30 June 2017, CNA executed an agreement with CND and CNE to extend the SLA (the "2017 Extension Agreement").[27] Under the 2017 Extension Agreement, the license fees payable were increased by 50%. More significantly, the 2017 Extension Agreement amended the arbitration clause under the SLA. The amended arbitration clause provided that the SLA would be governed by the laws of the People's Republic of China, and that all disputes would be submitted to arbitration at the Shanghai International

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22 J's 1st Affidavit at para 85.

23 J's 1st Affidavit at para 87(f) and p 877.

24 J's 1st Affidavit at p 885.

25 J's 1st Affidavit at p 471.

26 J's 1st Affidavit at pp 1415–1419.

27 J's 1st Affidavit at pp 1180–1185.

Arbitration Centre, to be held in Shanghai in accordance with the rules of that centre (the "SHIAC clause").[28]

14 Several months later, CNC was joined as a co-claimant, and CNA was added as an additional respondent, to the arbitral proceedings.[29] CNB and CNC claimed that CNA had either actively taken part in or abetted CND's and CNE's breaches of the SLA.[30] Part of the claims in the arbitration was that CNA conspired with CND and CNE to execute the 2017 Extension Agreement, with the intention of causing injury to CNB and CNC.[31] Part of the allegation of conspiracy involved the replacement of the ICC clause with the SHIAC clause, as well as a separate set of arbitral proceedings commenced by CND against CNA before the SHIAC, in which CND sought a declaration that the 2017 Extension Agreement, which includes the SHIAC clause, was valid. CNB and CNC claimed that the SHIAC arbitration was a sham conceived by CND and CNA to undermine the jurisdiction of the ICC tribunal.[32] In January 2018, the tribunal in the SHIAC arbitration issued an award confirming the validity of the 2017 Extension Agreement.[33]

15 The ICC tribunal issued its partial award on the issue of liability (the "Partial Award") on 8 June 2020. It first had to determine a preliminary issue as to whether it had jurisdiction to hear CNB's and CNC's claims.[34] This is

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28 J's 1st Affidavit at p 1182.

29 J's 1st Affidavit at pp 1453–1483.

30 2nd Affidavit of J dated 23 February 2021 ("J's 2nd Affidavit") at pp 187–189.

31 J's 2nd Affidavit at pp 187–189.

32 J's 2nd Affidavit at pp 187–189.

33 J's 1st Affidavit at p 1276.

34 J's 1st Affidavit at pp 261–262 (Partial Award, para 141).

because CNA, CND and CNE had argued that the ICC clause had been terminated, superseded and/or replaced by the SHIAC clause pursuant to the valid execution of the 2017 Extension Agreement.[35] In response, CNB and CNC had argued that CNA owed fiduciary duties to CNB/CNC,[36] and the 2017 Extension Agreement was void, because the execution of that agreement was in breach of CNA's fiduciary duties,[37] which was something known to CND and CNE.[38]

16 The tribunal in the ICC arbitration ultimately concluded that it had jurisdiction to hear the substantive disputes between the parties.[39] This is because the tribunal found that CNA had indeed breached its fiduciary duties to CNB/CNC with respect to both the renewal of the SLA and by agreeing to the terms of the renewal.[40] Given these findings, CNA's renewal of the SLA via the 2017 Extension Agreement was without authority and void.[41] Alternatively, the tribunal also found that CND and CNE were aware of CNA being in breach of its duties, which meant that CNB/CNC could elect (as they had done) to avoid the Extension Agreement.[42] The 2017 Extension Agreement, and hence the SHIAC clause, was thus invalid.[43]

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35 J's 1st Affidavit at pp 1437–1439 (CND/CNE's Answer to Request for Arbitration at paras 36–41) and pp 1493–1494 (CNA's Answer to Request for Joinder at paras 19–22).

36 J's 1st Affidavit at p 4288 (Claimants' Post-hearing Brief, para 50).

37 J's 1st Affidavit at pp 4294 and 4313 (Claimants' Post-hearing Brief, paras 74 and 123–125).

38 J's 1st Affidavit at pp 4311–4313 (Claimants' Post-hearing Brief, paras 115–122).

39 J's 1st Affidavit at pp 297–298 (Partial Award, para 240).

40 J's 1st Affidavit at p 289 (Partial Award, para 215).

41 J's 1st Affidavit at p 297 (Partial Award, para 238).

42 J's 1st Affidavit at p 297 (Partial Award, para 239).

43 J's 1st Affidavit at pp 297–298 (Partial Award, para 240).

17 I do not need to go into the details of the tribunal's reasoning and findings on the merits of the claims for the purpose of this judgment, save that the tribunal found that CND and CNE had breached the SLA in several respects, including by sub-licensing X2 without authorisation.[44] The tribunal found CNA to be jointly and severally liable with CND and CNE in assisting in their breaches of the SLA.[45] The tribunal also found that the claim in conspiracy was made out against all three respondents.[46]

The request for interpretation and correction

18 CNA, CND and CNE received the original hard copy of the Partial Award on 26 June 2020.[47] As such, under Art 34(3) of the Model Law on International Commercial Arbitration (the "Model Law"), which has force of law in Singapore pursuant to s 3 of the International Arbitration Act (Cap 143A), they had three months from 26 June 2020 to apply to set aside the Partial Award, if they believed that they had any basis to do so. In fact, a few days later, the parent company of CNA, CND and CNE made a public announcement that the three respondents to the arbitration would apply to set aside the Partial Award.[48]

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44 J's 1st Affidavit at pp 358–359, 371 and 378 (Partial Award, paras 424, 468 and 492).

45 J's 1st Affidavit at p 396 (Partial Award, paras 563 and 564).

46 J's 1st Affidavit at p 406 (Partial Award, paras 596).

47 J's 1st Affidavit at para 150; 2nd Affidavit of [CND's Director, K] dated 1 March 2021 at para 6.

48 2nd Affidavit of [CNB/CNC's attorney, L] dated 5 April 2021 at pp 2683–2686.

19 Then, on 24 July 2020, CNA made an application to the Secretariat of the ICC under Art 36(2) of the ICC Arbitration Rules ("CNA's Application").[49] Art 36 provides as follows:

> 1 On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.
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> 2 Any application of a party for the correction of an error of the kind referred to in Article 36(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.
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> 3 A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 32, 34 and 35 shall apply *mutatis mutandis*.
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> 4 Where a court remits an award to the arbitral tribunal, the provisions of Articles 32, 34, 35 and this Article 36 shall apply *mutatis mutandis* to any addendum or award made pursuant to the terms of such remission. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.

20 CNA's Application contained two separate requests. First, CNA sought an interpretation of sub-para 598(4) of the Partial Award.[50] That sub-paragraph

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49 J's 1st Affidavit at para 151 and pp 4820–4825.

50 J's 1st Affidavit at pp 4822–4823.

was in the dispositive section of the Partial Award, and it is where the tribunal granted a declaration "that the license term under the [SLA] expired on 28 September 2017 at the latest, and that the [SLA] thereafter ceased to be in effect".[51] CNA asked the tribunal to interpret this sub-paragraph by clarifying whether the declaratory relief applied to CNA, or whether the declaratory relief applied *only* to CND and CNE.[52]

21 Second, CNA sought a correction in respect of sub-para 598(10) of the Partial Award,[53] where the tribunal ordered that "[CNA] be liable to pay [CNB and CNC] damages, if any, *or to account for profits*, as may be appropriate, in relation to the findings made [in the Partial Award] for assisting in breaches of contract and … for conspiracy" (emphasis added).[54] CNA asked for a correction of the order that it was liable to account for profits.[55] CNA stated in its application that it believed that this order must been "framed mistakenly" by the tribunal because CNB and CNC "never sought an accounting of profits from [CNA]".[56]

22 On 25 September 2020, the tribunal issued its decision on CNA's Application, which it dismissed entirely.[57] For CNA's request for a clarification of sub-para 598(4) of the Partial Award, the tribunal was of the view that the request appeared to be one for the tribunal to re-consider its decision to grant

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51 J's 1st Affidavit at p 408.

52 J's 1st Affidavit at p 4823.

53 J's 1st Affidavit at pp 4823–4825.

54 J's 1st Affidavit at pp 408–409.

55 J's 1st Affidavit at p 4825.

56 J's 1st Affidavit at p 4825.

57 J's 1st Affidavit at pp 4829–4836.

the declaratory relief, rather than one that was seeking to remove any ambiguities or uncertainties in the terms of the declaratory relief.[58] For the request for a correction of sub-para 598(10), the tribunal was of the view that the request was not one for the correction of any mechanical errors, or errors in the same nature as a "clerical, computational or typographical error".[59]

23 CNA received the original hard copy of the tribunal's decision on 5 October 2020.[60]

24 On 18 December 2020, CNA filed its application to set aside the Partial Award in OS 1293. On 23 December 2020, CND and CNE filed their application to set aside the Partial Award in OS 1306/2020 ("OS 1306"). CNA, CND and CNE (collectively, the "plaintiffs") rely on Art 34(3) of the Model Law, which provides that:

> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award *or, if a request had been made under Art 33, from the date on which that request had been disposed of by the arbitral tribunal.*
>
> [emphasis added]

25 Art 33 is the provision in the Model Law that refers to requests for corrections and interpretations of arbitral awards:

> (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
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> > (*a*) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

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58 J's 1st Affidavit at p 4833 (para 20).

59 J's 1st Affidavit at p 4835 (para 33).

60 J's 1st Affidavit at para 152.

> (*b*) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

26 Since the tribunal disposed of CNA's Application on 25 September 2020, the plaintiffs' position is that the two setting aside applications were filed within the three-month period permitted for such applications.

27 On 19 January 2021, CNB and CNC (collectively, "the defendants") filed the present applications, seeking orders that both OS 1293 and OS 1306 be struck out and/or dismissed on the basis that they were filed out of time and thus time-barred. Pending the resolution of these striking out applications, CNB and CNC have not filed their substantive affidavits in reply to the plaintiffs' affidavits in support of the Originating Summonses.

SUM 288/2021 & 289/2021 – the striking out applications

28 Central to the defendants' applications to strike out is the recent Court of Appeal decision in *BRS (CA)*. In that case, the plaintiff (the party seeking to set aside the arbitral award) had relied on a request for correction of the award under Art 33 of the Model Law to file its setting aside application based on the extended timelines in Art 34(3). The plaintiff argued that the court should not be concerned with whether a correction request was in substance one that fell within Art 33. Rather, as long as there was a request that was described as one seeking a correction under Art 33, that would be sufficient to extend the time for the making of a setting aside application under Art 34(3) of the Model Law. On the other hand, the defendants, who were resisting the setting aside application, contended that the court ought to look at the substance of the request and determine if it was one that really fell within Art 33.

29 The High Court, in its decision in *BRS and another v BRQ and another and another matter* [2019] SGHC 260 ("*BRS (HC)*"), agreed with the plaintiff. In a nutshell, the High Court declined to apply a qualitative test in considering whether a request made under Art 33 of the Model Law actually fell within the ambit of that article. Instead, the judge thus accepted that as long as there was a correction request that was framed as one under Art 33, time for making the setting aside application would be extended (at [44]–[50]). The defendants appealed. The critical issue on appeal was what the phrase "a request had been made under Art 33" in Art 34(3) of the Model Law meant – did it require the court to undertake an examination of whether the request was genuinely one that fell within Art 33?

30 The Court of Appeal delivered its judgment in *BRS (CA)* on 29 October 2020. Notably, this was over a month after the expiry of the initial three-month time limit from the time that CNA, CND and CNE received the Partial Award on 26 June 2020. In its judgment, the Court of Appeal disagreed with the High Court and overturned *BRS (HC)*. The Court of Appeal held that *the substance of a request* under Art 33 must come within the scope of that article before it can have the effect of extending the time limit under Art 34(3) (at [64]–[72]). Put another way, the Court of Appeal's view was that a request that complied with Art 33 only *in form* would not suffice to qualify to extend time under Art 34(3). Instead, the court will consider the substance of the request to determine if it indeed fell within Art 33.

31 The defendants argue that CNA's Application did *not* contain, in substance, requests that fell under Art 33 of the Model Law, and hence, the time for making the setting aside applications was not extended.[61] For the

[61] Defendants' written submissions in SUM 288 at para 4.

interpretation request, they argue the declaratory relief granted by the tribunal at sub-para 598(4) of the Partial Award, *ie*, the declaration that the SLA had expired on 28 September 2017 at the latest, was clear in its terms, and quite obviously applied to CNA, given that the issue of CNA's breaches of fiduciary duties and the effect of such breaches on the 2017 Extension Agreement was heavily contested by the parties in the arbitration.[62]

32 As for the correction request, the defendants' counsel accepts that he had, in the post-hearing oral closing submissions, withdrawn the defendants' claim for an account of profits against CNA. Thus, he accepts that CNB/CNC was not pursuing such a remedy against CNA.[63] However, counsel argues that even if the tribunal had thus made an error by forgetting CNB/CNC's ultimate position at the post-hearing oral closing submissions, this error was in its "thought process" rather than in the "expression of its thoughts".[64] The defendants submit that such errors in the "thought process" would not come within the scope of a correction request under Art 33(1)(*a*), which deals with "errors in computation, any clerical or typographical errors or any errors of similar nature".[65]

33 According to the defendants, given that CNA's Application did not in substance fall within Art 33, CNA's setting aside application is out of time, and OS 1293 should be struck out as disclosing no cause of action, or being doomed to fail.

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62 Defendants' written submissions in SUM 288 at paras 46–53 and 57.

63 Hearing of 14 May 2021.

64 Defendants' reply submissions in SUM 288 at para 85.

65 Defendants' reply submissions in SUM 288 at para 86.

34 As for CND and CNE, it is argued that they cannot "piggy back" on CNA's Application to extend the time limit for them to apply to set aside the Partial Award.[66] Given that CND and CNE did not seek any interpretation or correction of any part of the Partial Award, the defendants argue that CND and CNE must have found the Partial Award to be clear.[67] As such, there is no reason in principle for time to be extended for CND and CNE to apply to set aside the Partial Award.[68] Given that CND and CNE are out of time, the defendants say that OS 1306 should also be struck out.[69]

The issues

35 Given the arguments raised by the defendants, the essential issues that I have to decide in the two striking out applications are (i) whether the two requests in CNA's Application were in substance requests that came within Art 33 of the Model Law; and (ii) whether CNA's Application extended the time for CND and CNE to make their setting aside application in OS 1306.

36 The plaintiffs also make arguments to the effect that I should find that the ruling in *BRS (CA)* only had a prospective effect. This is because they claim that they would be irreparably prejudiced by their reliance on *BRS (HC)* in not making their setting aside applications earlier, *if* the substance of CNA's Application is found by the court to fall outside the ambit of Art 33(1) of the Model Law, and they are then "retroactively barred" from making their applications to set aside the Partial Award.[70] This is despite the fact that the

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66 Defendants' written submissions in SUM 289 at paras 69–78.

67 Defendants' written submissions in SUM 289 at para 75.

68 Defendants' reply submissions in SUM 289 at paras 100–116.

69 Defendants' reply submissions in SUM 289 at paras 45.

70 Plaintiff's written submissions in SUM 288 at para 11.

Court of Appeal in *BRS (CA)* did not hold that its ruling would only have prospective effect. Ultimately, I did not have to deal with this rather novel point, given my conclusions below.

37 However, what I do have to decide is a preliminary issue raised by the defendants in their written submissions, which is that the court should accord deference to the tribunal's decision that CNA's Application fell outside the scope of Art 33(1) of the Model Law because that decision was in the nature of a procedural order.[71]

Preliminary issue: was the tribunal's decision on CNA's Application a procedural order, such that the court should defer to it?

38 The defendants cite the well-established principle that procedural orders are matters that normally fall within the exclusive province of the arbitral tribunal, and the courts are highly deferential to such procedural rulings.[72] They argue that the tribunal's decision on CNA's Application was in essence a procedural order.[73] This is because the decision did not dispose of any matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to any issue or claim. Rather, it was the Partial Award that disposed of matters submitted to arbitration.[74] The defendants also argue that the nature of the issues dealt with the tribunal was "not significant as they did not deal with the parties' substantive rights".[75] Also, it was argued that a reasonable recipient of the tribunal's decision on CNA's Application would

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71 Defendants' written submissions in SUM 288 at paras 28–35.

72 Defendants' written submissions in SUM 288 at para 29.

73 Defendants' written submissions in SUM 288 at para 31.

74 Defendants' written submissions in SUM 288 at para 31(a).

75 Defendants' written submissions in SUM 288 at para 31(b).

regard it as a procedural order because the reasoning was not as detailed as in the Partial Award.[76]

39 I was unpersuaded by these submissions by the defendants. They run contrary to the approach taken in *BRS (CA)* where the Court of Appeal came to its own view as to whether the correction request fell within Art 33(1), without examining the reasoning of the tribunal at all (see *BRS (CA)* at [73]–[81]). Further, I agree with the submission by counsel for CND and CNE[77] that the approach of deference as suggested by the defendants would lead to the unwarranted result that arbitral tribunals would have the ability to insulate their awards from any review by the courts by dismissing requests for interpretations and/or corrections three months after the issuance of their awards.

40 More fundamentally, however, I do not agree that the tribunal's decision in respect of CNA's Application was procedural in nature. I agree with the submission by CND and CNE that the essence of a procedural order is that it is one that the tribunal can revisit.[78] This is supported by the views of the Court of Appeal in *Republic of India v Vedanta Resources plc* [2021] SGCA 50 at [50], affirming the observations of the High Court below in that matter:

> 50 Finally, we note that as disclosure orders are interlocutory in nature, the appellant was, and continues to be, at liberty to reapply to the Vedanta Tribunal for reconsideration of the VPOs. This was similarly observed by the Judge at [48]–[49] of the GD:
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> > 48 So where does that leave a procedural order? A procedural order (as opposed to an award) is not final and may be reconsidered and revised by a tribunal *but* cannot be nullified by a court. This is not a

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76 Defendants' written submissions in SUM 288 at para 31(d).

77 Hearing of 14 May 2021.

78 Hearing of 14 May 2021.

> contradiction. This is merely an aspect of the tribunal being the exclusive master of its own procedure …
>
> 49 Does this mean that a party may repeatedly ask a tribunal to reconsider and revise its procedural orders? In theory yes. As the cases make clear, until the tribunal issues its final award and becomes *functus officio*, it has the jurisdiction to reconsider and revise earlier procedural orders. And a party does nothing wrong by inviting a tribunal to do so. It is simply invoking another facet of the tribunal's mastery of its own procedure.
>
> [emphasis in original]

41 When the tribunal makes a decision on a request for the interpretation or correction of an arbitral award, that is not a decision that can be revisited by the tribunal at some later stage of the proceedings. In fact, the tribunal is already *functus officio* in respect of the issues on liability on the issuance of the Partial Award; Art 33 of the Model Law merely provides a limited exception to the end of the arbitral tribunal's mandate, by permitting the tribunal to make corrections of the type described in Art 33(1), and or providing an interpretation of any specific portion of the award. Once the tribunal renders its decision on the Art 33(1) request, there is no further exception provided in the Model Law or the ICC Arbitration Rules for it to re-examine or re-consider its decision on the request. In that sense, its mandate in respect of issues of liability has, in all respects, come to an end.

42 As for whether the decision by the tribunal appears on its face to be a procedural order, that can hardly be determinative of the issue. While the decision by the tribunal is not detailed in setting out its reasons for rejecting the two requests, I note that the decision had to be scrutinised by the ICC Court before it was issued. Also, under Art 36(4) of the ICC Arbitration Rules of 2017, any decision to correct or to interpret the Partial Award has to take the form of an addendum to the Partial Award, and will constitute part of the Partial

Award. That being so, I find that the process governing the making of any correction or the giving of any interpretation of the award under Art 36 of the ICC Arbitration Rules makes it clear that the decision by the arbitral tribunal on the request cannot be regarded as a mere procedural order.

The request for an interpretation of sub-para 598(4) of the Partial Award

43 The defendants point out[79] that a request for an interpretation of an award is available only if a party is able to demonstrate that the award is ambiguous and requires clarification for its effective execution (see Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2020) ("*Born*") at p 3401). In this case, the defendants submit that the grant of declaratory relief at sub-para 598(4) of the Partial Award is unambiguous and clear in its intent.[80]

44 On the other hand, the plaintiffs submit that there was an ambiguity in sub-para 598(4) because it was unclear as to whether the declaratory relief also applied to CNA, or whether it applied only to CND and CNE.[81] They argue that CNA was genuinely confused as to whether the declaration applied to it, because CNA had been led to understand that CNB and CNC were pursuing only tortious claims against CNA for which remedies lay only in damages. CNA's understanding therefore was that there was no substantive claim against it that would result in a declaration that the SLA had come to an end by September 2017, *ie*, that the 2017 Extension Agreement was void.[82] CNA further argues that the issue raised by CNB/CNC that it had breached its

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79 Defendants' written submissions in SUM 288 at para 38.

80 Defendants' written submissions in SUM 288 at para 54.

81 Plaintiff's written submissions in SUM 288 at para 115.

82 Plaintiff's written submissions in SUM 288 at para 140.

fiduciary duties in relation to the execution of the 2017 Extension Agreement was only in response to CNA's challenges to the tribunal's jurisdiction, and it was not a separate substantive claim against CNA.[83]

45 In my view, the claims brought by CNB and CNC was such that it was difficult for the parties and the tribunal to completely separate any discussion of the issues that dealt solely with jurisdiction from the issues that dealt only with liability. In short, there was a substantial overlap in respect of many of the issues, both relating to jurisdiction and liability. As pointed out by counsel for the defendants,[84] their tortious claims against CNA for conspiracy and for assisting in CND's and CNE's breach of the SLA, included references to the fact CNA had wrongfully, in breach of its fiduciary duties, executed the 2017 Extension Agreement. That is hardly surprising given that the 2017 Extension Agreement was central to CNB/CNC's case that CNA was prepared to extend the license for CND to continue to use the software for the game, despite CND's and CNE's breaches of the SLA, and the purported extension of the license was an attempt to allow them to continue breaching the SLA.

46 As such, counsel for the defendants pointed out that, in CNB/CNC's memorial on liability in the arbitration, they had sought a declaration against all of the plaintiffs that the 2017 Extension Agreement was not valid.[85] In CNA's counter-memorial on liability in the arbitration, CNA dealt with this declaration being sought against them.[86] This same issue was also dealt with in CNA's submissions to the tribunal on issues of jurisdiction, where it was argued that,

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83 Plaintiff's written submissions in SUM 288 at para 130.

84 Hearing of 14 May 2021.

85 J's 1st Affidavit at p 2641 (Claimants' Memorial on Liability at para 273(h)).

86 J's 1st Affidavit at pp 2987–2988 (CNA's Counter-memorial on Liability at paras 35–36).

even if there had been a breach of fiduciary duty on CNA's part, that would not affect the validity of the 2017 Extension Agreement.[87] CNA argued that, since the agreement was valid, the operative arbitration clause was not the ICC clause, but the SHIAC clause.[88]

47 I therefore accept the submission by the defendants that the issue of the validity of the 2017 Extension Agreement, and hence the continued effect of the SLA, was an issue that was squarely contested by the parties in the arbitration, both within the framework of the objections to jurisdiction and the liability claims. As such, there should have been no surprise at all to CNA when the tribunal dealt with the issue, and granted the declaration as to the status of the SLA. From an objective viewpoint, whatever CNA's own beliefs might have been, the declaration granted by the tribunal was clear in its terms and would not have caused any confusion to CNA. This declaration arose from both the issues as to jurisdiction as well as on liability, and quite clearly and logically would apply to the parties that executed the 2017 Extension Agreement, which included CNA, and not only CND and CNE.

48 In this regard, I do not accept CNA's counsel's submission[89] that, having only advanced claims in conspiracy and assistance in CND's and CNE's breach of contract, the only remedy available to CNB/CNC was damages, and not any declaratory relief regarding the validity of the SLA. It was entirely within the province of the tribunal to also grant a declaration in relation to the expiry of the SLA even in the context of the tortious claims. The grant of the declaration

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87 J's 1st Affidavit at pp 3227 (CNA's Reply Memorial on Jurisdictional Challenges on at para 8).

88 J's 1st Affidavit at pp 2771–2772 (CNA's Submission on Objections to Jurisdiction at paras 26–29).

89 Plaintiff's written submissions in SUM 288 at para 140.

flowed directly from the tribunal's reasoning. In any event, as I pointed out to counsel at the hearing, the declaratory relief was relevant also to the issue of the tribunal's jurisdiction, and hence was also explicable on that basis.

49 I noted that, in its written submissions, CNA had referred at several places to its "genuine confusion" as to whether the declaratory relief applied to it.[90] This suggested that the court should examine the matter from the subjective perspective of CNA. Counsel for CNA did, however, clarify at the hearing that he was not advocating that the court examine only CNA's subjective views. Instead, counsel argued that the question is whether there was a reasonable basis for CNA to have been confused as to whether the declaration would apply to it. As already explained above, I do not think that there is any reasonable basis for such a belief, given the context of the issues raised in the arbitration and the parties' submissions to the tribunal.

50 In my judgment, the substance of the request in relation to an interpretation of sub-para 598(4) was not one that fell within Art 33(1) of the Model Law because there was really nothing ambiguous about the way the declaratory relief was worded, such that it could have caused genuine confusion as to whether it applied to CNA. As already explained, given the way the issues had been contested in the arbitration, I agree with the defendants that it would be obvious that the declaration at sub-para 598(4) applied to all three of the respondents to the arbitration, and CNA ought to have been aware of this. The request for interpretation of sub-para 598(4) was thus not in substance a request to remove any ambiguities or uncertainties, or to clarify the meaning of that part of the Partial Award.

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90 *Eg* Plaintiff's written submissions in SUM 288 at para 6(a).

The request for a correction of sub-para 598(10) of the Partial Award

51 The defendants submit that only very narrow categories of "errors" may be corrected under Art 33(1) of the Model Law and Art 36(1) of the ICC Arbitration Rules, *ie*, computational, clerical or typographical errors, or any errors "of similar nature". They argue that only technical, mechanical and non-substantive errors may be corrected (citing *Born* at p 3383; Thomas H Webster & Michael W Bühler, *Handbook of ICC Arbitration: Commentary and Materials* (Sweet & Maxwell, 4th Ed, 2018) at para 36-5; and *Tay Eng Chuan v United Overseas Insurance Ltd* [2009] 4 SLR(R) 1043 at [16] and [18]).[91]

52 In this regard, it is common ground between the parties that an arbitral tribunal is not authorised under Art 33 of the Model Law to correct errors in its reasoning or judgment, whether in law or fact: *BRS (CA)* at [73] and [74]. Hence, even if a tribunal, on the face of the award, quite clearly misunderstood or overlooked some critical provision of the parties' agreement or some essential piece of evidence, the remedy is not generally a correction of the award under Art 33, but rather an application to set aside the award or the relevant portion of the award: *Born* at p 3384.

53 The plaintiffs argue that the wording of Art 33(1)(*a*) of the Model Law simply encapsulates what is commonly referred to in court proceedings law as the "slip rule", which allows clerical rectifications of accidental slips or omissions.[92] For this, they cite, *inter alia*, the Court of Appeal's express mention of Art 33(1)(*a*) as being "equivalent" to the "slip rule": *BRS (CA)* at [70]. They argue that the tribunal must have made an inadvertent "slip" when

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91 Defendants' written submissions in SUM 288 at paras 39–40.

92 Plaintiff's written submissions in SUM 288 at para 84.

it ordered CNA to account for profits, because CNB and CNC did not eventually seek an account of profits as a relief against CNA specifically.[93]

54 Counsel for CNB and CNC, on the other hand, point me to their memorial on liability, where they had referred to being entitled to an account of profits against all *three* respondents, including CNA.[94] However, I note that the "reliefs" section of the memorial did *not* seek an order for an account of profits against CNA.[95] There was also no mention of seeking an account of profits against CNA in CNB/CNC's opening statement for the arbitration hearing. Having said that, as pointed out by counsel, CNB/CNC's post-hearing brief *did* expressly seek an order for an account of profits against CNA as an alternative remedy.[96]

55 In my view, the position taken by CNB/CNC as to whether they were seeking an account of profits against CNA could fairly be described as unclear. What is critical, however, is that, at the oral closing arguments before the tribunal, *after* the post-hearing briefs were submitted, the issue was clarified by the counsel for CNB and CNC when he was questioned by the tribunal as to legal basis for seeking this relief for an account of profits against CNA. Counsel's reply, as can be seen from the transcript of the hearing, was that CNB/CNC "would not pursue that".[97] Hence, regardless of what had been stated in the various documents submitted earlier, the final position of CNB and

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93 Plaintiff's written submissions in SUM 288 at para 93.

94 J's 1st Affidavit at p 2639 (Claimants' Memorial on Liability at paras 265–266).

95 J's 1st Affidavit at pp 2640–2641 (Claimants' Memorial on Liability at para 273).

96 J's 1st Affidavit at p 4388 (Claimants' Post-hearing Brief at para 391(e)).

97 J's 1st Affidavit at p 4775 (Transcript, 12 October 2019, p 200 lines 4–21).

CNC in the arbitral proceedings, insofar as liability was concerned, was that they were *not* pursuing an order for an account of profits against CNA.

56 Given the circumstances, I think that CNA could hardly be faulted for being somewhat surprised by the tribunal's order at sub-para 598(10) of the Partial Award. As counsel for CNA points out, other than at that sub-paragraph in the dispositive section of the Partial Award, the only other place in the Partial Award where there is any mention of "an account of profits" is where the tribunal sets out the reliefs *being sought by CNB/CNC* (in particular, at para 55). There is nothing in the Partial Award which sets out, even briefly, any analysis as to why an account of profits is being ordered. Indeed, as noted above, CNB and CNC had confirmed that they were not seeking an account of profits. Therefore, I agree with counsel for CNA that it would have appeared to CNA, when it received the Partial Award, that the tribunal made a mistake in the following manner: after setting out the reliefs sought by CNB/CNC in its post-hearing briefs, the tribunal omitted to mention that CNB/CNC had abandoned their claim to an account of profits against CNA as confirmed by counsel during the oral closing submissions; this led to the inclusion of an order for an account of profits against CNA at sub-para 598(10), after the tribunal had discussed and set out their findings on liability of CNA, CND and CNE. According to the plaintiffs, this appeared to be a mistake by the tribunal, or a "slip", and is a correctable error under Art 33(1) of the Model Law.

57 The defendants' response to this is that, even if the tribunal had possibly made a mistake in inadvertently making an order for CNA to account for profits, this was not the type of error that was correctable under Art 33(1) of the Model Law. This is because this was an error in the "thought process" of the tribunal,

and not in the "expression of their thought".[98] What counsel for the defendants was conveying by this expression, I understand, is that this was *not* an error in "computation", which obviously means a mistake in arithmetic, or a "clerical or typographical" error, or any error of "a similar nature".

58 I agree with counsel for the defendants that this specific language in Art 33(1)(*a*) of the Model Law, and also in Art 36(1) of the ICC Arbitration Rules, indicates that the intention is for Art 33(1) of the Model Law to be read in a circumscribed manner. In my view, the starting point in the analysis must be this language used in the article, and not cases on the "slip rule", which is a rule of common law dealing with court proceedings. This is regardless of whether Art 33(1) of the Model Law is intended to be coextensive in scope with the "slip rule", which itself was a point that counsel hotly contested before me.

59 The possible mistake by the tribunal in including an order for CNA to account for profits was quite obviously not a computational error. There was no arithmetic calculation involved here. It was also clearly not a typographical error, which usually refers to errors of expression, spelling mistakes, errors in references, *etc*. There was some suggestion that it might have been a clerical error of some sort, when the tribunal copied over para 55 of its Partial Award to the dispositive section at para 598, but forgot to delete the relief of "an account of profits" against CNA.[99] However, counsel for the defendants showed, by a comparison of the relevant passages in question, that it is difficult for one to conclude that there the later paragraph was a cut-and-paste of the earlier

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98 Defendants' reply submissions in SUM 288 at paras 80–81.

99 Hearing of 14 May 2021.

paragraph, or for that matter, a cut-and-paste of the paragraph in CNB/CNC's post-hearing brief asking for an account of profits.[100]

60 The question that then arises is whether the possible mistake by the tribunal in inadvertently including an account of profits against CNA can be described as an error "of similar nature". The well-established principle of construction that would be applicable here is the *ejusdem generis* rule, whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. In applying the *ejusdem generis* rule, it is crucial to identify the "genus" or common thread running through the words, which may be ascertained by identifying some common and dominant feature of the limited words: *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 at [105]–[121].

61 In the case of Art 33(1)(*a*), the wide words "any errors of similar nature" should be read in light of the character of the more narrowly named "errors in computation" and "clerical or typographical errors". In my view, what characterises these specifically enumerated types of errors is that they are all errors in the nature of inadvertent acts or omissions by the arbitral tribunal, which if corrected, do not affect the substance of what the tribunal *intended* to decide. That being the case, I am prepared to accept that, if a party had conveyed to the tribunal that it was abandoning its claim for a specific relief in the course of the closing submissions, but the tribunal had not noted this in the award, and then proceeded to grant that relief mistakenly, that would be an error that would fall within Art 33(1)(*a*). It would be an error that is similar to a computational, clerical or typographical error, because the tribunal would not have granted such an order, had it remembered that the specific prayer for relief

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had been expressly abandoned by the claimant. I would think that an arbitral tribunal must be presumed to intend to act within the scope of its mandate, and to not deliberately act beyond that scope.

62 In this case, I find that the possible mistake by the tribunal was one that was potentially correctable under Art 33(1)(*a*) of the Model Law and Art 36(1) of the ICC Arbitration Rules. Therefore, I find that there was a proper basis for CNA to have made a request to the tribunal to correct the error by asking for the deletion of the order for an account of profits on the basis that it might been "framed mistakenly". I see no reason a correction cannot include a deletion, if it is something that the tribunal had inadvertently stated, and would have been removed if the tribunal's attention had been brought to that error before the issuance of the Partial Award. I must add that, in coming to this conclusion, I have followed *BRS (CA)* in not considering the reasons given by the tribunal for rejecting CNA's request for the correction.

63 Finally, I should add that, while the defendants' counsel drew my attention to the use of the phrase "excess of the tribunal's mandate" in CNA's Application and submitted that complaints about the tribunal's excess of mandate should properly be the subject of an application to set aside the Partial Award, I accept the point raised by counsel for CNA that an "excess of mandate" would arise even if the tribunal had made a genuine mistake as to the scope of CNB/CNC's claims and what they were seeking in terms of their remedies. Hence, it was not inaccurate to describe the granting of the order for an account of profits against CNA as something which was "in excess" of the tribunal's mandate.

Whether CNA's Application extended the timeline for CND and CNE to make their application to set aside the Partial Award

64 The defendants' submission here is that CND and CNE should not be allowed to "piggy back" on CNA's Application. Since they did not themselves seek any interpretation or correction of the Partial Award, it is argued that there was nothing that prevented them from filing their application to set aside the Partial Award within the three-month time limit as set out in Art 34(3) of the Model Law. As such, regardless of the court's decision on whether CNA was within time in making its setting aside application, the defendant contends that CND and CNE are clearly out of time in filing their setting aside application, and OS 1306 should be struck out.[101]

65 I am not able to accept this submission. Again, the starting point in the analysis is the text under in the article. The words used in Art 34(3) requires close examination. It provides that the application for setting aside may not be made after three months has elapsed from the date "on which the party making that application had received the award or, if *a request had been made under Article 33*, from the date on which that request had been disposed of" (emphasis added). As a matter of interpretation, the use of the words "a request had been made under Article 33" is critical. The drafters would have inserted the underlined words "a request by that party had been made" if the intention was that time would be extended for a party only if the request was one made by *that party* making the application to set aside the award. However, the use of the words "a request", without specifying which party made that request, indicates to me that a request by *any* party to the arbitration would extend the time for *all* parties to make their application to set aside the award. Of course, this is all

101 Defendants' written submissions in SUM 289 at paras 69–78.

predicated on there being a request being made that properly falls within the ambit of Art 33(1), and, in this case, I have already found that CNA's correction request does fall within that article.

66 I also agree with the submission by counsel for CND and CNE that, until a decision is made by the tribunal on the request for an interpretation or correction, there is uncertainty as to the precise content of the award.[102] In other words, the award is not truly final, until the request is decided by the arbitral tribunal. This follows from the fact that under Art 33(1) of the Model Law and Art 36(3) of the ICC Arbitration Rules, the interpretation forms part of the award. That being so, as a matter of policy, it makes perfect sense that all parties who intend to make a setting aside application should be given the extended timeline to do so. Otherwise, one is faced with the possibility that there may be different applications to set aside different versions of the arbitral award, one which has been corrected, and one which has not. Two different sets of timelines would provide an unnecessary complexity to the process of setting aside. That appears to me unprincipled, impractical and undesirable.

67 On the facts of this case, CNA's Application – in particular, the request for a correction of the order for CNA to account for its profits – had a potential impact on CND and CNE. That is because all three respondents were held by the tribunal to be jointly and severally liable for the account of profits. Further, any decision by the tribunal to correct the Partial Award would have bound all the parties to the award. As such, in that sense, it is quite irrelevant that CND and CNE might have thought that the Partial Award was clear on its terms, or that there was no need for any correction. If the defendants are right in their contention on this issue, and there are two separate timelines, then it would

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102 Plaintiffs' reply submissions in SUM 289 at para 88.

mean that, despite being bound by any correction, CND and CNE would have lost the right to challenge the Partial Award, even if it had been corrected. Indeed, if the defendants' contention is correct, CND and CNE would have had to make their setting aside application within three months of receipt of the original award, without knowing the impact, if any, of CNA's request for correction on that award.

68 As such, I was unable to accept the defendants' submission that time for the making of the setting aside application was not extended for CND and CNE as a result of CNA's Application, given that CNA's correction request fell within the scope of Art 33(1) of the Model Law. It follows from this that I do not agree that CND and CNE were out of time in making their application to set aside the Partial Award in OS 1306.

Conclusion

69 For the reasons given above, I find that the plaintiffs were not time-barred from making their applications to set aside the Partial Award. In the case of CNA, while I agreed that the request for an interpretation was not, in substance, one that fell within Art 33(1) of the Model Law, the request for a correction was. As such, CNA's Application was one that extended the timelines for the three plaintiffs to make their setting aside applications.

70 I dismiss SUM 288/2021 and SUM 289/2021. I will deal separately with the issue of costs.

Ang Cheng Hock
Judge of the High Court

Bull Cavinder SC, Tan Yuan Kheng, Lea Woon Yee, Jasdeep Singh Gill and Sim Hong (Drew & Napier LLC) for the plaintiff in HC/OS 1293/2020;
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Yeo Khirn Hai Alvin SC, Chan Hock Keng, Chen Chi and Liang Fang Ling Elisabeth (WongPartnership LLP) for the defendants in HC/OS 1293/2020 and HC/OS 1306/2020.