IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA(I) 2

Court of Appeal / Civil Appeal No 7 of 2023

Between

CNA

… *Appellant*

And

(1) CNB
(2) CNC

… *Respondents*

In the matter of Originating Summonses Nos 2 and 5 of 2023

Between

CNA

… *Plaintiff*

And

(1) CNB
(2) CNC

… *Defendants*

GROUNDS OF DECISION

[Arbitration — Award — Recourse against award — Setting aside]
[Arbitration — Arbitral tribunal — Jurisdiction]

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CNA
v
CNB and another

[2024] SGCA(I) 2

Court of Appeal — Civil Appeal No 7 of 2023
Sundaresh Menon CJ, Steven Chong JCA, Robert French IJ
14 November 2023

16 May 2024

Robert French IJ (delivering the grounds of decision of the court):

Introduction

1 The appeal in this case was dismissed at the hearing following the close of oral argument. The reasons for that decision follow. The factual background was of some complexity and is set out in detail in the judgment of the Singapore International Commercial Court (the "SICC") appealed against in *CNA v CNB and another and other matters* [2023] SGHC(I) 6 (the "SICC Judgment"). That detail is not repeated here beyond the following outline.

Factual and Procedural Background

2 The appellant, CNA, applied to the SICC to set aside partial awards on liability and costs against it given on 8 June 2020 and 31 July 2021 by an International Chamber of Commerce ("ICC") Tribunal (the "2017 ICC Tribunal"). The arbitration concerned a dispute arising out of a Software

Licensing Agreement dated 29 June 2001 (the "SLA") relating to a computer game series entitled [X]. CNA contended, inter alia, that the arbitration clause under the SLA (the "ICC Clause"), providing for an ICC arbitration applying Singapore law, had been superseded by a subsequent extension agreement in 2017. That agreement contained a term providing for arbitration of all disputes arising under the SLA, any amendments to the SLA, and the extension agreement, at the Shanghai International Arbitration Centre ("SHIAC") applying the law of the People's Republic of China ("PRC") (the "SHIAC Clause").

3 The claimants in the ICC arbitration were a former co-owner of the copyright in the game with CNA, namely CNB and its wholly owned subsidiary, CNC. CNB is a company incorporated in Korea, engaged in the business of developing and providing services related to Massively Multiplayer Online Role Playing Games and mobile game software. CNC is a company incorporated in Korea. It was established on 23 May 2017 by way of what was described in the judgment as "a vertical spin-off from CNB." CNC became CNB's successor in title to the intellectual property rights to the game series on 23 May 2017. The respondents in the arbitration were CNA, CND and CNE. CND is incorporated in the PRC and is the wholly owned indirect subsidiary of CNE, a company incorporated in the Cayman Islands. CND and CNE were members of a corporate group which is a leading developer, operator and publisher of online games in the PRC.

4 The SLA was one of a series of agreements, including agreements extending it from time to time. It had been preceded by a Basic Agreement made on 18 February 2000 between CNA and CNB providing that they would cooperate with each other with regard to the joint development of the game series and execute a separate joint development agreement. On 23 February

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2000 they also entered into a "Domestic Agreement" to regulate their roles in the development and dealership of the game. That agreement provided that sales revenues on the first game series should be recognised as CNA's profits. CNA would pay 50% of the sales revenues as commission to CNB. If CNB developed the game and the total number of concurrent users exceeded a specified threshold, CNA would pay 60% of sales revenues on the game series as commission to CNB. CNA and CNB were to own a half share each in the game series during the term of the agreement. CNA was to assign ownership to CNB following the expiration of the term of the agreement under another agreement separately entered into. CNB was to hold all rights to operate and manage matters related to the developed products. CNA was to sincerely cooperate with CNB. The Domestic Agreement was effective until 31 December 2003.

5 The third agreement between CNA and CNB was called the "Overseas Agreement" and was dated 26 February 2001. The application of the Domestic Agreement was limited by Art 2 of the Overseas Agreement to sales within Korea. The overseas sales of the game series were to be recognised as the revenue of CNA. A commission structure and development fee payments for CNB were set out. The Overseas Agreement was effective until 31 December 2004.

6 A further agreement was made on 23 May 2001 which provided that notwithstanding Arts 9 and 12 of the Domestic Agreement, both parties would retain their cooperative relationship even after 31 December 2003 and would operate their businesses by mutual and peaceful agreements in accordance with the ground understandings of the Basic Agreement. Those provisions were to apply to all agreements entered into between CNA and CNB after 18 February 2000.

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7 A further agreement, dated 1 August 2001 between CNA and CNB, provided, inter alia, that "overseas sales revenues" referred to "the amount [payable] under an agreement entered into by and between any party [*ie*,CNA or CNB] and a third party from a foreign nation." This was designed to clarify that the Overseas Agreement allowed CNB itself to establish an agreement with an overseas party and share profits with CNA according to the terms of the Overseas Agreement.

8 Returning to the SLA, the original parties to the SLA were CNA and CNE's predecessor and its import agent. For simplicity, we refer to both CNE and its predecessor as "CNE" hereinafter. Under the agreement CNE was granted a sole and exclusive licence to "use, promote, distribute, market, adapt or modify, and convert the Chinese-language version of the [computer game [X2] delivered in CD-ROM and internet and related documentation, images and films, published specifications and trademark, logo and artwork related to the game series]." The licence was valid for two years with an automatic extension of one year unless either party gave written notice to the other of its refusal to renew.

9 The SLA contained an ICC arbitration clause in the following terms:

> This Agreement shall be governed and construed by in accordance with the laws of Singapore. All disputes arising under this Agreement shall be submitted to final and binding arbitration. The arbitration shall be held in Singapore in accordance with the Rules of Arbitration of the International Chamber of Commerce.

10 In December 2001, technical issues arose with the game which CNA could not resolve because its co-owner of the intellectual property, CNB — not a party to the SLA — was responsible for its day-to-day servicing. This led to CNA, CNB and CNE entering into what was called the "2002 Supplementary

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Agreement". Under that agreement CNB was obliged to CNE to resolve technical problems and to maintain the game. The second recital to that agreement, which was significant in the proceedings before the SICC, was in the following terms:

> Whereas [CNE] is entitled to have relevant technical support in the course of the [SLA] and [CNA] proposed to engage [CNB], and [CNB] is willing to accept the proposed engagement, to perform relevant obligations in respect of the technical support. [CNA] and [CNE] have agreed to accept [CNB] as [X2's] co-Licensor, and *[CNB] will entrust [CNA] with the exercise of all its rights as co-Licensor, and the entrustment is irrevocable during the term of the Original Agreement [ie, the SLA] and this Supplementary Agreement.* [emphasis added]

11 CNA and CNB fell into dispute in 2003 and 2004, commencing multiple law suits in the Korean courts. CNE, on 4 July 2003, commenced arbitration proceedings against CNA and CNB (the "2003 ICC Arbitration"). It sought to challenge the effectiveness of notices of termination of the SLA which they had given on 24 January 2003 and 12 November 2002 respectively. CNE sought damages for breach of contract. That arbitration was settled between CNA and CNE under a Settlement Agreement made between them on 19 August 2003 (the "2003 Settlement Agreement"). As part of that settlement, CNA entered into the 2003 Amendment Agreement which extended the expiry date of the SLA to 28 September 2005, and further to 28 September 2006 if there were no disputes. CNE informed the ICC on 29 August 2003 that it had settled with CNA and was withdrawing the arbitration against CNA and CNB.

12 The matter was not completely resolved. On 8 September 2003, CNB filed its Answer with Counterclaim against CNE and objected to the withdrawal of the arbitration on the basis that it was not a party to the 2003 Settlement Agreement and the related 2003 Amendment Agreement. It subsequently filed cross-claims against CNA alleging that it had acted in breach of the Overseas

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Agreement. Following a hearing, Professor Lawrence Boo, the sole arbitrator in the 2003 ICC Arbitration, issued what was called the "2005 Interim Award" on 28 October 2005. He found that the Domestic Agreement and the Overseas Agreement governed the relationship between CNA and CNB. CNB's cross-claims fell within the scope of those agreements and not the 2002 Supplementary Agreement. The Supplementary Agreement primarily regulated the licensing arrangements between CNA and CNB as one interest bloc with CNE. The tribunal held it had no jurisdiction over CNB's cross-claims against CNA, which involved issues arising out of the Domestic Agreement and the Overseas Agreement.

13 In the event, all pending litigation between the parties was settled under a Settlement Agreement made on 29 April 2004, and approved by the Seoul Central District Court. The Agreement as recorded and sealed by the Court, and referred to in the SICC Judgment as the "2004 Settlement Record", contained terms governing their future relationships.

14 The settlement clauses set out in the Settlement Record included provisions in the following terms:

> 6. After the settlement, [CNA] and [CNB] shall not claim damage or any other liability against the other party in connection with the ICC arbitration in Singapore.
>
> 7. (A) The right to renew the existing agreements with [CNE] and [redacted] shall be vested in [CNA], and the right to renew the existing agreements with [redacted] and [redacted] shall be vested in [CNB]; provided, *however*, that [CNA] and [CNB] shall consult with each other when renewing any of such agreements.
>
> (B) When entering into an agreement with a new counterparty overseas with respect to '[X2]' … or '[X3]' … the sales shall be allocated between [CNA] and [CNB] at the ratio of 30:70 if the deal is sourced by [CNA] or at the ratio of 20:80 if the deal is sourced by [CNB]. The

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> right to recognize sales shall be vested in either party who has sourced the deal.

15 The SLA was assigned, amended and extended several times over the years.

16 In 2005, CNE through a related company, became the largest shareholder in CNA, holding 38.1% of its shares. As of May 2017, CNE owned 51.09% of CNA through its wholly owned British Virgin Islands subsidiary.

17 On 18 May 2017, CNB commenced the arbitration in question in this appeal against CND and CNE (the "2017 ICC Arbitration"), alleging breaches of the SLA. On 23 May 2017, CNC succeeded to all of CNB's rights and obligations in respect of [X2], and CNB later joined CNC as a co-claimant in the 2017 ICC Arbitration. The ICC Tribunal was constituted on 27 December 2017.

18 The SLA was due to expire on 28 September 2017. However, an Extension Agreement was concluded between CNA, CND and CNE on 30 June 2017. It provided, inter alia, that disputes under the SLA would be governed by PRC law and be arbitrated before the SHIAC, seated in Shanghai.

19 The parties to the Extension Agreement were CNA, CND and CNE. The agreement contained a number of recitals. The first referred to the SLA. The second was in the following terms:

> WHEREAS, [CNA], [CNE] and [CNB] entered into a Supplementary Agreement dated July 14, 2002 (the 'First Amendment'), which amended the Original Software Licensing Agreement to add CNB as a co-Licensor (as defined therein) of [X2] and CNB irrevocably entrusted CNA to exercise all rights as a co-licensor on behalf of CNB;

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20 The substantive provisions included provisions for the license term to be extended from 29 September 2017 until 28 September 2023. That "End Date" was to be automatically extended to September 2025 at no additional cost to CND if there were no new disputes with respect to the [X2] License between CNA and CND. CND was to pay to CNA an amount of US$11m.

21 Clause 2 of the 2017 Extension Agreement provided:

> Amendment to Disputes, Governing Law. The Original Software Licensing Agreement, each of the Amendments, and this Agreement shall be governed and construed by in accordance with the laws of People's Republic of China. All disputes arising under either the Original Software Licensing Agreement, any of the Amendments or this Agreement shall be submitted to final and binding arbitration to Shanghai International Arbitration Centre ('*SHIAC*'). The arbitration shall be held in Shanghai, PRC in accordance with the Rules of SHIAC.

CNB was not consulted by CNA about the 2017 Extension Agreement or any of its terms. Specifically, it did not consult CNB about the new dispute resolution term.

22 CND and CNE relied upon the new dispute resolution clause in the 2017 Extension Agreement to challenge the jurisdiction of the 2017 ICC Tribunal hearing the arbitration under the original SLA provision. That arbitration, as noted above, was initiated on 18 May 2017.

23 On 22 August 2017, CND commenced an arbitration in the SHIAC under the 2017 Extension Agreement seeking a declaration that that agreement was valid and effective. CNB said it was unaware of that arbitration until 11 October 2017 when CND relied upon it to oust the PRC courts' jurisdiction in proceedings that CNB and CNC had commenced against CNA and CND. The Tribunal in that arbitration delivered an Award on 23 January 2018 confirming the validity of the 2017 Extension Agreement.

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24 Injunctive relief to restrain CND and CNE from continuing with the SHIAC Arbitration was refused by the 2017 ICC Tribunal.

25 On 30 August 2017, CNB submitted a request for joinder to join CNA as an additional respondent in the 2017 ICC Arbitration. The request was granted.

26 The 2017 ICC Arbitration proceeded to deal with jurisdictional challenges. CNA, CND and CNE argued that the Tribunal lacked jurisdiction because the ICC Clause in the SLA had been superseded by the SHIAC Clause in the 2017 Extension Agreement. CNB and CNC argued that the 2017 Extension Agreement was void because it was executed by CNA in breach of fiduciary obligations owed to them.

27 CNB and CNC argued that CND and CNC had breached the SLA by authorising or facilitating third parties to develop and exploit unauthorised versions of the game. That claim was premised on the asserted limited scope of the SLA, which conferred on CND only the right to use or promote or distribute the game in PC-client format and to sub-license to six permitted sub-licensees. CNB and CNC alleged that CNA had procured or induced or actively assisted CND and CNE in their breaches of the SLA. They also claimed that CNA, CND and CNE had conspired to injure them by unlawful means, in amending the dispute resolution and governing law clause via the 2017 Extension Agreement and by procuring the SHIAC Award. The SHIAC Award was the award given by the Tribunal in that case on 23 January 2018 confirming the validity of the 2017 Extension Agreement.

28 The 2017 ICC Tribunal issued its First Partial Award on liability on 8 June 2020. It held that:

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(a) The 2017 Extension Agreement was invalid. The source of CNA's authority to renew or extend the SLA arose from an Entrustment Recitation in the 2002 Supplementary Agreement which was governed by Singapore Law. CNA was an agent of CNB and CNC and owed fiduciary duties to them in the exercise of their rights as co-licensors to, *inter alia*, act in the joint interests of itself and CNB and CNC and act in good faith and with due diligence. The Tribunal had jurisdiction to determine whether CNA owed and breached fiduciary duties and/or the duty to consult under the 2004 Settlement Record because there was a close connection to the SLA. The ICC Clause ought to be interpreted widely. CNA had breached its fiduciary duties and its duty to consult. Thus, CNB and CNC were not bound by CNA's renewal of the SLA and the 2017 Extension Agreement was voidable.

(b) The scope of the SLA covered only the PC-client version of the game, [X2], and CND and CNE had breached the SLA.

(c) CNA had procured, induced, or assisted CND and CNE in their breaches of the SLA by unilaterally issuing authorisation letters in 2016 and 2017, and colluding with them with respect to the execution of the 2017 Extension Agreement.

(d) CNA, CND and CNE were liable for unlawfully conspiring to injure CNB and CNC by amending the dispute resolution and governing law clause via the 2017 Extension Agreement.

29 The 2017 ICC Tribunal issued a Second Partial Award on 31 July 2021 in which it awarded CNB and CNC US$2.79m for legal costs and expenses in the liability phase and US$381,622 for the interim relief applications. At the time of judgment those proceedings were in the quantum phase.

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The primary cases before the SICC

30 As set out in the SICC Judgment, the primary case brought by CNA was that the entirety of the First Partial Award should be set aside on the basis that the Tribunal did not have jurisdiction over the entire dispute because the ICC Clause pursuant to which the arbitration was commenced was terminated and/or superseded on 30 June 2017 by the SHIAC Clause in the 2017 Extension Agreement. Further it was said, and in any event, the Tribunal had no jurisdiction to determine the validity of the 2017 Extension Agreement.

31 An alternative case mounted by CNA was that the Tribunal had exceeded its jurisdiction in relation to CNA's breach of the duty to consult which was said to arise under the 2004 Settlement Record and therefore outside the scope of the ICC Clause. Further it was said, the Tribunal had no jurisdiction to make orders and/or declarations in favour of CNB given that the Tribunal had found that CNB successfully transferred its rights and obligations under the SLA to CNC, it had no jurisdiction to make orders and/or declarations in favour of both.

32 As to the Second Partial Award, CNA submitted that it was a costs award inextricably linked to the First Partial Award and should be set aside entirely or partially to an extent corresponding with the First Partial Award.

33 In the SICC, CND and CNE also sought to set aside the entirely of the First Partial Award on the same jurisdictional basis as CNA. In the alternative they sought to set aside parts of the First Partial Award. They also applied to set aside the Second Partial Award in its entirety or in part.

34 CNB and CNC contended that the Tribunal had jurisdiction because the arbitration was commenced prior to the signing of the 2017 Extension

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Agreement. The Tribunal had rightly exercised its jurisdiction under the ICC Clause because the 2017 Extension Agreement containing the SHIAC Clause was invalid. They identified as the fundamental question whether the Tribunal's jurisdiction could be ousted by the 2017 Extension Agreement after the arbitration had been commenced.

The SICC's conclusions

35 At the end of a lengthy and comprehensive judgment, the SICC set out its conclusions, which it is convenient to reproduce here:

> 201 We have concluded that CNA's authority to bind CNB in relation to CND / CNE was established by and contained in the 2002 Supplementary Agreement, which was entered into as a tripartite agreement precisely because until that agreement, CNB had not been contractually bound to perform positive obligations, such as that of technical support, in connection with the SLA. Their relationship was consequently governed by Singapore law, and, on the facts of this case, CNA owed CNB fiduciary and equitable duties in relation to the exercise of its power to alter CNB's legal relations with CND / CNE.
>
> 202 In entering into the 2017 Extension Agreement, CNA acted in haste and secrecy, without resolving important matters such as the scope of the SLA. It did so at CND / CNE's instigation because CND / CNE wanted to rely on the change from the ICC Clause to the SHIAC Clause as a jurisdictional objection in the Present Arbitration.
>
> 203 This was a breach of CNA's fiduciary duty and CNB was entitled to and did avoid the 2017 Extension Agreement.
>
> 204 Consequently, the ICC Clause remained operative and the Tribunal did not cease to have jurisdiction over the disputes referred to it.

The SICC's Orders

36 The SICC dismissed both applications to set aside the First Partial Award in their entirety. The applications to set aside the Second Partial Award

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were dismissed as well. Further directions were made for the determination and assessment of costs.

CNA's case on appeal

37 CNA, on the appeal to this Court, contended, in its written case, that the First and Second Partial Awards should be set aside under Art 34(2)(*a*)(i) and/or (ii) of the UNCITRAL Model Law on International Commercial Arbitration, as enacted in the International Arbitration Act 1994 (2020 Rev Ed). CNA argued that the 2017 ICC Tribunal had no jurisdiction to determine the question in the present arbitration because the ICC Clause, which purportedly gave it jurisdiction, had been superseded by the SHIAC Clause.

38 CNA submitted more specifically that the SICC erred in finding that CNA's authority to bind CNB / CNC to the 2017 Extension Agreement and the SHIAC Clause arose from the 2002 Supplementary Agreement. CNA contended that its authority to bind CNB / CNC was established under the Overseas Agreement which had pre-dated the 2002 Supplementary Agreement and which was restated in the 2004 Settlement Record. That authority was said to be governed by Korean law. Under Korean law, so it was contended, the 2017 Extension Agreement and the SHIAC Clause were valid, even if CNA breached duties owed to CNB and CNC in executing the 2017 Extension Agreement.

39 The written case advanced an argument contending for an issue estoppel said to arise from the 2005 Interim Award of the 2003 ICC Tribunal. That argument was not pressed at the oral hearing.

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CNB and CNC's case on appeal

40 In their written case on appeal, CNB / CNC took up the issue of CNA's authority to execute the 2017 Extension Agreement, which they identified as the 2002 Supplementary Agreement. They also addressed CNA's issue estoppel argument. It is not necessary to refer to their submissions on that point here.

41 They expounded upon the source of CNA's authority to execute the 2017 Extension Agreement, which they located in the 2002 Supplementary Agreement as the SICC had concluded. Indeed, CNA itself had taken the position in the arbitration in question that the 2002 Supplementary Agreement was the source of its right to execute the 2017 Extension Agreement. That position was maintained as late as its opening submissions on 27 May 2019. CNA had taken the same position in proceedings involving other parties. There were submissions about the effect of the entrustment in the Recitals of the 2002 Supplementary Agreement. CNB / CNC submitted that CNB's entrustment of rights to CNA was irrevocable under that Agreement and replaced the prior alleged entrustment under the Overseas Agreement.

42 CNB / CNC then submitted that the Overseas Agreement under Korean law was not the source of CNA's authority to execute the 2017 Extension Agreement. Nor did CNA derive authority from the 2004 Settlement Record, which it claimed partially modified the entrustment established by the Overseas Agreement while reaffirming that the entrustment allowed CNA to renew existing agreements.

43 In any event, CNB / CNC relied upon the SICC's finding that, assuming the source of CNA's authority was the 2004 Settlement Record, its duty to consult CNB took the form of an obligation of mutual cooperation and effort

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based on good faith. The fact was that CNA had not bothered to consult CNB on any of the proposed terms of the 2017 Extension Agreement. On that basis, CNB / CNC submitted that CNA did not act in good faith in renewing the SLA in breach of its duty to consult under the 2004 Settlement Record. The hasty execution of the agreement meant that CNA and CNB lost the opportunity to use the SLA as leverage for CND / CNE to remedy their breaches.

44 CNB / CNC contended that the 2017 Extension Agreement was invalid under Korean law as a result of CNA's breach of its duty to consult.

Consideration and Conclusion

45 Despite the elaborate arguments constructed around the provisions of the various agreements by both sides, the pathway to dismissal of this appeal was relatively clear and short.

46 In the opinion of the Court, the SICC was correct to find that CNA was in breach of its fiduciary duty to CNB in entering into the 2017 Extension Agreement. The source of its fiduciary obligations to CNB was to be found in the relationship between them established by the 2002 Supplementary Agreement. The haste and secrecy with which CNA acted in entering into the 2017 Extension Agreement in the circumstances found by the SICC indicated a purpose of supporting a jurisdictional objection to the 2017 ICC Arbitration.

47 Further, in our judgment, in considering the effect of the dispute resolution clause in the 2017 Extension Agreement (see [21] above), it was necessary to have in mind that the 2017 ICC Arbitration had already been commenced when the 2017 Extension Agreement was executed. The question this raises is whether the language of cl 2 of the 2017 Extension Agreement is

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sufficiently clear to affect arbitration proceedings that had already been commenced prior to that.

48 As a matter of construction, the language of the dispute resolution clause in the 2017 Extension Agreement was not apt to remove the jurisdictional foundation previously agreed in the SLA between the parties to the 2017 ICC Arbitration. To affect an arbitration that was already afoot, cl 2 would have needed to be explicit in its terms; but that plainly was not done, presumably because it would have shone the light on precisely what CNA was trying to do — namely to fabricate a jurisdictional objection. Hence, for this reason also, even if it had not breached its fiduciary obligations to CNB, CNA could not have succeeded on the jurisdictional challenge based on the new dispute resolution provision.

49 After the oral hearing, the following orders were made:

(a) CA/CAS 7/2023 is dismissed.

(b) The appellant is to pay the respondents' costs in the aggregate sum of $85,000 (inclusive of disbursements).

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

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Robert French
International Judge

Cavinder Bull SC, Lim Gerui, Tan Yuan Kheng (Chen Yuanqing), Lea Woon Yee, Tan Jui Yang Benedict, Kenneth Sean Teo Hao Jin (Drew & Napier LLC), Junwoo Kim (alias Junu Kim) and Han Gil Lee (Bae, Kim & Lee LLC) (Korean law) for the appellant;
Chan Hock Keng, Chen Chi, Ng Wei Qi (WongPartnership LLP) and Eun Nyung Lee (Yulchon LLC) (Korean law) for the first and second respondents.

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