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

[2025] SGHC 255

Originating Application No 941 of 2025

Between

DRO

… *Applicant*

And

DRP

… *Respondent*

JUDGMENT

[Arbitration — Arbitral tribunal — Jurisdiction — Whether member of a consortium had *locus standi* to commence arbitration on its own, or only jointly with other consortium member]
[Arbitration — Arbitral tribunal — Jurisdiction — Whether failure to comply with pre-arbitration procedures went to admissibility or jurisdiction]
[Arbitration — Arbitral tribunal — Jurisdiction — Whether pre-arbitration procedures were conditions precedent]
[Contract — Waiver — Whether compliance with pre-arbitration procedures had been waived]

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Chua Lee Ming J
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17 December 2025 Judgment reserved.

Chua Lee Ming J:

Introduction

1 The respondent commenced arbitration proceedings against the applicant who then filed a jurisdictional challenge but was unsuccessful in its challenge. In the present proceedings, the applicant seeks, pursuant to s 10(3)(*a*) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"), a declaration that the tribunal has no jurisdiction to hear and determine the arbitration proceedings commenced by the respondent. In the alternative, the applicant seeks an order setting aside the tribunal's decision on jurisdiction.

2 The applicant and respondent in these proceedings were, respectively, the respondent and claimant in the arbitration proceedings. In this judgment, the terms "applicant" and "respondent" refer to the applicant and respondent, respectively, in these proceedings.

Background facts

3 A contract (the "Contract")[1] was entered into between:

(a) the applicant (referred to in the Contract as the "OWNER"); and

(b) a "consortium consisting of":

(i) [Co A] (referred to in the Contract as the "OFF-SHORE CONSORTIUM PARTNER"); and

(ii) the respondent (referred to in the Contract as the "ON-SHORE CONSORTIUM PARTNER").

4 The Contract provides that:

(a) both [Co A] and the respondent shall "jointly and severally" be referred to as the "CONTRACTOR"; and

(b) both the OWNER and CONTRACTOR shall be referred to as "PARTY" individually and as "PARTIES" collectively.

It is undisputed that the consortium ("Consortium") is not a legal entity.

5 Clause B.1 of the Contract provides that the "Consortium parties" shall comprise [Co A] and the respondent and that [Co A] is appointed by the applicant "to act as the Leader of the Consortium and represent the Consortium … for any and all matters … relating to this Contract".

6 Clause B.2 provides that [Co A] shall be liable to the applicant with regard to the overall responsibility of the CONTRACTOR.

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[1] 1st Affidavit of Amir Hamzah bin Amha ("Amir's 1st Affidavit"), at pp 93–168.

7 Clause B.3 provides that (a) [Co A] shall be responsible for the "OFF-Shore part" of the Contract and the respondent shall be responsible for the "ON-Shore part" of the Contract, and (b) [Co A] is to ensure that the scope of delivery and work are complete and fulfilled in time and quality as agreed with the applicant.

8 Clause 16 provides for [Co A] and the respondent to *each* invoice the applicant directly for their respective allocated scope of works (off-shore and on-shore) and for the applicant to pay [Co A] or the respondent accordingly, except that payment of the respondent's invoices will be made only after prior written approval of [Co A].

9 Separately, [Co A] and the respondent entered into an agreement setting out the relationship between them, the responsibility towards the applicant and the allocation of the individual scope of deliveries and services under the Contract ("Consortium Agreement").[2]

10 Issues arose in connection with the project, and the applicant claimed liquidated damages under the Contract. The applicant and [Co A] entered into a settlement agreement ("Settlement Agreement").[3] Preamble F to the Settlement Agreement states:

> Due to the reluctance of [the respondent] to agree on a comprehensive and final solution, [the applicant] and [Co A] have agreed to finally settle the issue and all matters arising or related to them on a bilateral basis, based on the terms set out in this Agreement.

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2 Amir's 1st Affidavit, at pp 222–233.

3 Amir's 1st Affidavit, at pp 343–355.

11 The respondent says that for a brief period, [Co A] engaged it on the proposed terms of the settlement with the applicant, and the respondent had a discussion with the applicant, but the applicant did not respond to the respondent's proposals. The respondent says it was not aware of or involved in the bilateral discussion between [Co A] and the applicant and that it was left in the dark about the Settlement Agreement.[4]

12 The respondent commenced arbitration proceedings against the applicant for (a) payment on two final milestone invoices, and (b) payment for additional works carried out ("Arbitration").[5] As provided for in the Contract, the Arbitration is in accordance with UNCITRAL Arbitration Rules, and a three-arbitrator tribunal was constituted (the "Tribunal").

13 The applicant filed a jurisdictional challenge based on three grounds:

(a) That in view of the Settlement Agreement, there was no dispute to be adjudicated upon and therefore the Tribunal had no jurisdiction ("Settlement Agreement Ground").

(b) That the respondent had no *locus standi* to commence the Arbitration without joining [Co A] as a claimant ("*Locus Standi* Ground").

(c) That the respondent did not satisfy the pre-arbitration requirements in the Contract before commencing the Arbitration ("Pre-Arbitration Proceedings Ground").

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4 1st Affidavit of Ong Kok Wah ("Ong's 1st Affidavit"), at para 20.

5 Amir's 1st Affidavit, at pp 371–381 (Notice of Arbitration).

14 The Tribunal dismissed the applicant's jurisdictional challenge. The Tribunal concluded as follows:[6]

(a) The Settlement Agreement Ground raised questions of admissibility and not questions of jurisdiction.

(b) The arbitration clause in the Contract did not require that the Arbitration must involve all three parties to the Contract.

(c) The pre-arbitration procedures in the Contract were not conditions precedent to the respondent's ability to commence the Arbitration.

15 In the present proceedings, the applicant relies only on the *Locus Standi* Ground and the Pre-Arbitration Proceedings Ground.

Section 10(3)(*a*) IAA – *de novo* review

16 Section 10(3)(*a*) of the IAA provides that if the arbitral tribunal rules on a plea as a preliminary question that it has jurisdiction, any party may, within 30 days after having received notice of that ruling, apply to the General Division of the High Court to decide the matter.

17 It is common ground that in hearing an application under s 10(3)(*a*), the court will apply a *de novo* standard of review (*PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [163]).

18 In this regard, the distinction between jurisdiction and admissibility has been accepted by the Court of Appeal: *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263 ("*Swissbourgh*") at [207]–[208]; *BBA*

6 Amir's 1st Affidavit, at pp 2742–2751.

v BAZ [2020] 2 SLR 453 (*"BBA"*) at [74]–[79]; *BTN v BTP* [2021] 1 SLR 276 at [68]–[69]. In the present case, it is also common ground that a decision of the arbitral tribunal in respect of jurisdiction can be reviewed *de novo* by the supervisory courts at the seat of the arbitration, but a decision of the tribunal on admissibility cannot.

Locus Standi Ground

19 The arbitration clause is found in cl 25 of the Contract. It states as follows:

> **Clause 25: Applicable Law and Arbitration**
>
> 25.1 All disputes … which cannot be settled amicably shall be finally settled by arbitration in accordance with UNCITRAL Arbitration Rules …
>
> 25.2 All service of notice relating to the arbitration shall be deemed to be duly served by personal delivery, courier or prepaid registered at the last known address of the PARTIES.
>
> 25.3 There shall be three (3) arbitrators, one to be nominated by each of the PARTIES in dispute and the third arbitrator … to be selected by the two other arbitrators so nominated by the PARTIES in dispute as aforesaid. If the arbitrators cannot agree … then the Singapore International Arbitration Centre shall be the appointing authority.
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> 25.4 The arbitration proceedings including the award shall take place in Singapore and the award of the arbitrators shall be final and binding upon the PARTIES.
>
> 25.5 The language to be used in the arbitration proceedings shall be English.
>
> 25.6 The validity, interpretation and implementation of this CONTRACT shall be governed by and construed in all respects in accordance with the laws of Singapore.
>
> 25.7 Notwithstanding the above, any dispute between the PARTIES shall, in first instance, be submitted by the PARTIES to their respective project management level for resolution, failing which the dispute shall then be referred to their respective senior management level.

20 The question is whether the respondent has the *locus standi* to commence the Arbitration on its own or whether it can only do so jointly with [Co A]. The Tribunal decided that the respondent has the *locus standi* to maintain the action in the Arbitration on its own. There is no dispute that the Tribunal's decision on this issue is in respect of jurisdiction and can be reviewed *de novo*.

21 The applicant's case is that the Contract envisaged a two-party regime comprising the applicant and the Consortium. The applicant submits that, consequently, the respondent cannot commence the Arbitration by itself because (a) the respondent is not a party to the Contract in its individual capacity, and (b) under the Contract, both [Co A] and the respondent are required to act together (as the Consortium) in any arbitration proceedings.

22 The substance of both of the applicant's submissions is the same, *ie*, that the party to the Contract is [Co A] and the respondent *acting jointly*, and hence the arbitration clause can only be invoked by both of them acting jointly. Whether this is so is plainly a question of interpretation of the Contract.

23 The applicant relies on the following provisions in support of its submission that the Contract envisages a two-party regime:[7]

(a) The Contract is described as being between applicant on the one hand and "the consortium consisting of" [Co A] and the respondent on the other hand.

(b) Clauses 18.2, 18.6, 19.9, 19.15 and 27.2(c) of the Contract use the terms "either" or "neither" in reference to the PARTIES' rights and

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7 Applicant's Written Submissions, at paras 27–36.

obligations. For example, cl 18.2 provides that "neither PARTY" is liable to the other for the loss of production and cl 19.9 provides that "[e]ither PARTY" may terminate the Contract.

(c) Under the Contract, [Co A] is designated as the Consortium's leader with authority to represent the Consortium and [Co A] is obliged to act as such (cll B.1 and B.3). The Contract also contains various other provisions that are consistent with [Co A]'s role as the leader of the Consortium.[8] [Co A] is liable to the applicant for the overall responsibility of the CONTRACTOR (cl B.2). [Co A] is involved in decision-making, *eg*, [Co A] decides whether an instruction by the applicant amounts to a "CHANGE" as defined in the Contract (cl 5.2.1), certain procedures to be approved by the applicant (cl 7.1), certain time schedules to be approved by the applicant (cl 8.2), the appointment of a project representative for the CONTRACTOR (cl 9.2), and whether the respondent's invoices to the applicant should be approved for payment (cl 16.1).

(d) Under the Contract, [Co A] is authorized and obliged to notify the applicant of critical matters, *eg*, discrepancies in documents (cl 2.8), hiring of subcontractors (cl 4.2), CHANGES as defined in the Contract (cl 5), delay and actions to make good or preclude the delay (cl 8.4) and change of project representative (cl 9.3).

(e) Under the Contract, the Consortium members (*ie*, [Co A] and the respondent) are "jointly and severally liable" to the applicant for the performance of the Contract (cl 27.6(i)).

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8 Amir's 1st Affidavit, at Annex A.

(f) The *Consortium Agreement* defines "Consortium" to mean [Co A] and the respondent collectively and provides that the consortium is liable to the applicant and each consortium member would be accountable to each other for their proportion of work to be done. The Consortium Agreement also contains provisions that are consistent with the Contract (*eg*, [Co A]'s position as Consortium leader, [Co A]'s responsibility to the applicant, [Co A] has to approve the respondent's invoices to the applicant).

24 All that can be said of the provisions in the Contract that are referred to above, is that they largely reflect [Co A]'s role as leader of the Consortium and are consistent with the applicant's two-party regime submission. However, the question is whether the arbitration also reflects the two-party regime structure advocated by the applicant. Specifically, the question is whether the parties to the Contract intended that the arbitration clause in the Contract can *only* be invoked by [Co A] and the respondent acting jointly. To answer this question, one must (as the applicant itself submits) view the Contract as a whole. In this regard, the fact that the Consortium Agreement (between [Co A] and the respondent) contains provisions that are consistent with the Contract is of limited assistance in ascertaining the parties' intention under the Contract.

25 Underlying the applicant's two-party regime argument is the argument that [Co A] and the respondent must act jointly in every aspect of the Contract, including, commencing arbitration against the applicant *regardless of the nature of the dispute*. In my view, this is not borne out by the Contract.

26 The structure of the Contract itself recognises that [Co A] and the respondent do not have to act jointly in every instance. The Contract provides that "[b]oth OWNER and CONTRACTOR shall … be referred to as PARTY

individually and as PARTIES collectively".[9] However, as the Tribunal noted in its decision on the applicant's jurisdictional challenges,[10] the Contract defines the term "CONTRACTOR" as both [Co A] and the respondent "jointly *and severally*". Thus, the Contract clearly envisages that the term "CONTRACTOR" can mean the respondent acting on its own. Whether it does would depend on the context.

27 Clause 16.1 of the Contract is a clear example where the two-party regime argument breaks down. Clause 16.1 provides as follows:

> The CONTRACTOR will invoice each of its allocated scope (off-shore and on-shore) directly to the OWNER. The OWNER shall make the payment of the TOTAL CONTRACT PRICE separated for the off-shore and on-shore supply … to the respective consortium party. … OWNER will pay invoices for the on-shore party only after prior written approval of [Co A].

28 Clearly, the term "CONTRACTOR" in cl 16.1 means [Co A] and the respondent *severally*, not jointly. [Co A] and the respondent are to separately invoice for off-shore work and on-shore work carried out by them respectively and each is entitled to payment on its own invoices. The fact that payment of the respondent's invoices requires [Co A]'s prior written approval does not change the fact that the respondent is entitled to payment on its own invoices to the exclusion of [Co A].

29 Turning to the arbitration clause, cl 25.1 does not use the terms "PARTY" or "PARTIES" or "OWNER" or "CONTRACTOR". It merely states that "[a]ll disputes … shall be finally settled by arbitration …" (see [19] above). Nevertheless, it is clear (and not disputed) that cl 25.1 can be invoked by either

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9 Amir's 1st Affidavit, at p 93.

10 At para 25 (Amir's 1st Affidavit, at p 2746).

PARTY, which as defined, means OWNER or CONTRACTOR. In turn, CONTRACTOR means [Co A] and the respondent "jointly and severally". Thus, as a matter of construction, cl 25.1 can be invoked by [Co A] and the respondent jointly, or by [Co A] or the respondent acting alone.

30 In my view, whether [Co A] and the respondent must act jointly or whether each of them can act alone to invoke cl 25.1 depends on the nature of the dispute. A dispute under the Contract can arise between the applicant and (a) [Co A] and the respondent jointly, or (b) [Co A] alone, or (c) the respondent alone. Clause 16.1 shows that a dispute can arise between the applicant and [Co A] alone or the respondent alone.

31 Further, cl 25.3 of the Contract provides for three arbitrators, "one to be nominated by each of the PARTIES in dispute". As the respondent emphasised, cl 25.3 uses the phrase "PARTIES *in dispute*". In my view, the phrase "PARTIES in dispute" also recognises that a dispute may arise between the applicant and (a) [Co A] and the respondent jointly, or (b) [Co A] alone, or (c) the respondent alone.

32 Whether the respondent has *locus standi* to commence the Arbitration in this case therefore depends on the nature of the dispute in the Arbitration. The respondent's claim in the Arbitration is in respect of on-shore work carried out by it. Specifically, the respondent claims (a) payment on two final milestone invoices, and (b) payment for additional works carried out by it.

33 It is clear from cl 16.1 that the applicant's refusal to pay the respondent for work carried out by the respondent gives rise to a dispute between the applicant and the respondent only. Thus, for the purposes of cl 25.3, the "PARTIES in dispute" are the applicant and the respondent. [Co A] is not

involved in this dispute, whether as a member of the Consortium or as the leader of the Consortium. The fact that the applicant may be able to justify its refusal to pay (whether on the ground that the respondent's invoices have not been approved by [Co A] or by relying on the Settlement Agreement) does not change the nature of the dispute as being one between the applicant and the respondent only.

34 In its written submissions, the applicant refers to cl 27.6(i) which provides that the Consortium members "shall be deemed jointly and severally liable" to the applicant. The applicant points out that this means that it is the only party that can elect to seek recourse for liabilities of the Consortium against either Consortium member (*ie,* either [Co A] or the respondent), or the Consortium as a whole.[11] The applicant submits that the Tribunal did not address this facet of its case and instead merely focused on the phrase "jointly and severally" in the definition of the term "CONTRACTOR".

35 In my view, the Tribunal was correct to focus on the phrase "jointly and severally" in the definition of the term "CONTRACTOR". The respondent's claim against the applicant in the Arbitration is based on its right or entitlement to be paid for on-shore work carried out by it. The fact that [Co A] and the respondent are jointly and severally liable to the applicant under the Contract has nothing to do with this.

36 The applicant's submission that [Co A] and the respondent must act jointly to invoke the arbitration clause with respect to the dispute in the Arbitration does not make commercial sense. The respondent's claim in the Arbitration is for payment for on-shore work carried out by it. It is clear from

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[11] Applicant's Written Submissions, at paras 45–46.

cl 16.1 that the respondent alone is entitled to invoice the applicant and be paid for work carried out by it. *Vis-à-vis* the applicant, [Co A] has no claim to payment in respect of on-shore work. It does not make commercial sense that the respondent's right to invoke the arbitration clause in respect of such a claim is dependent on [Co A]'s consent to invoke the arbitration clause jointly with the respondent. Similarly, there is no reason why [Co A] alone cannot invoke the arbitration clause in respect of a dispute between the applicant and [Co A] over payment for off-shore work (to which the respondent has no claim). In my view, the applicant's interpretation of the arbitration clause could not have been intended by the parties to the Contract.

37 In fact, during oral submissions, the applicant went even further and submitted that the respondent, acting on its own, also cannot commence court proceedings in respect of its claims for payment and that such court proceedings can only be commenced by [Co A] and the respondent jointly. With respect, this would be an absurd result and only points to the flaw in the applicant's interpretation of the Contract and the arbitration clause.

38 In my view, on its proper interpretation, the arbitration clause allows the respondent (or [Co A]), acting on its own, to invoke the arbitration clause where the dispute is between the applicant and respondent (or [Co A]) alone. In contrast, where a dispute with the applicant involves [Co A] and the respondent jointly, it would follow that [Co A] and the respondent must act jointly if they wish to invoke the arbitration clause.

39 As the dispute in the Arbitration is between the applicant and the respondent alone, the arbitration clause was properly invoked by the respondent in this case.

40 In its submissions, the applicant also refers to (a) *In the matter of an arbitration between a consortium comprising TPL and ICB and AE Limited* [2021] HKCFI 2341 ("*TPL and ICB*"), (b) *Raster Images Pvt Ltd Tamil Nadu v State of UP* 2023 STPL (Web) 126 Allahabad ("*Raster*"), and (c) *Geo Miller & Co Pvt Ltd v Bihar Urban Infrastructure Development Corporation Ltd* (2017) 1 ArbiLR 245 ("*Geo Miller*"). In my view, none of these cases assists the applicant.

41 *TPL and ICB* concerned an application to set aside an order granting leave to the applicant (described as "A Consortium comprising TPL and ICB") to enforce arbitral awards issued in favour of the "Consortium" (which was described in the Awards as comprising TPL and ICB). The Hong Kong Court of First Instance held (at [17]):

> Being an unincorporated association, the joint venture, or "Consortium", is not a legal entity which can sue or be sued in its name … In the eyes of the law, an unincorporated association is the sum total of its members, and the rights and liabilities of the members in relation to contracts made on their behalf are prima facie joint and all members should be included as claimants, and conversely, as defendants …

The Court went on to allow an amendment to the application to join TPL and ICB as second and third applicants (at [23]).

42 *TPL and ICB* merely states that *prima facie*, all members of an unincorporated association should be included in the application as claimants (if they are suing) or as defendants (if they are being sued). There is nothing exceptional in that statement and it does not assist the applicant in the present case in which the question is whether on an interpretation of the Contract, the respondent alone had *locus standi* to invoke the arbitration clause when it commenced the Arbitration.

43 *Raster* concerned a service agreement between a consortium and the State of Uttar Pradesh. The agreement provided that:

> (a) the Governor of the State of Uttar Pradesh was referred to as the "Authority" and treated as a first party of the first part, and that the lead member of the Consortium comprising Consortium members (i) the petitioner and (ii) a third entity, were referred to as the Service Provider and party of the second part, and further that the Authority and the Service Provider were collectively referred to as the "parties" and individually as "party" (at [11]); and
>
> (b) any "dispute … between the Parties" which was not resolved amicably by conciliation shall be referred to arbitration and that "[e]ach Party" shall appoint one arbitrator and the two appointed arbitrators shall appoint a presiding arbitrator (at [12]).

44 The petitioner invoked the arbitration clause under the service agreement and, pursuant to such clause, nominated its arbitrator. However, there was no response from the respondent (the Authority). The petitioner filed a petition to the court, under the Indian Arbitration and Conciliation Act 1996 for appointment of an arbitrator on behalf of the respondent, with an alternate prayer for the petitioner's arbitrator to be permitted to continue as sole arbitrator or that any other person may be appointed as an arbitrator (at [16]).

45 The Allahabad High Court noted that the disputes raised by the petitioner gave a flavour of disputes between the Consortium members *inter se* and not so much between the Consortium and the Authority (at [23]). The Court then reasoned that:

(a) the service agreement envisaged a "two party regime", *ie*, the Authority and the Service Provider (at [34]);

(b) the arbitration clause provided that each party was required to appoint its own nominee arbitrator, which further indicated that in the two-party regime, the Authority was taken as one party and the members of the Consortium were taken "collectively" as the other party (at [38]); and

(c) the Consortium's jural relations with the Authority were that of "collective, one entity" and for this reason, the liability of the Consortium members was joint and several *qua* the Authority (at [40]).

46 In the event, the Allahabad High Court dismissed the petition, concluding that (at [63]):

> … the petition has been filed by one member of the Consortium only without impleading the other Consortium members including against whom allegations have been levelled and the said allegations are prima facie indicative of disputes inter-se the Consortium members which may not be referrable for arbitration.

47 In my view, *Raster* does not assist the applicant. The court in *Raster* had to construe the agreement before it. There is no suggestion in *Raster* that the agreement in question defined the term "Service Provider" to mean the consortium members "jointly and severally" or provided for certain rights that belonged to individual members of the consortium to the exclusion of the other members.

48 Further, the decision in *Raster* was influenced by the court's view that the subject matter of the arbitration concerned disputes between the consortium members *inter se* and not so much between the consortium and the Authority

(at [23] and [63]). In contrast, in the present case, the dispute in the Arbitration is a dispute between the applicant and the respondent relating to the applicant's refusal to pay the respondent for work done by the respondent. The fact that the applicant's defence to the claim may involve the Settlement Agreement between the applicant and [Co A], or the question as to whether there was prior written approval from [Co A] for payment of the respondent's invoices, does not change the fact that the dispute in the arbitration is one between the applicant and the respondent.

49 In *Geo Miller*, the Bihar Urban Infrastructure Development Corporation Ltd ("BUIDCO") invited bids for a project. A bid by a consortium (comprising Geo Miller and Gammon India) was accepted. A tripartite agreement was entered into between BUIDCO, the consortium and another entity, Patna Nagar Nigam ("PNN"). Gammon India was the lead member of the consortium. It is not clear from the judgment who PNN was.

50 Geo Miller filed an application under s 11(6) of the Indian Arbitration and Conciliation Act 1996 seeking appointment of an arbitrator to adjudicate the disputes between the parties.

51 The arbitration clause provided that: any "Dispute … shall be finally decided by reference to arbitration …"; "each Party shall select one [arbitrator] …"; any "Award … shall be final and binding on the Parties … and the Contractor and Employer agree and undertake to carry out such Award …" (at [18]).

52 The High Court of Delhi at New Delhi held that the application was not maintainable at the instance of Geo Miller alone (at [25]). The Court reasoned that:

(a) the arbitration clause clearly referred to and envisaged disputes only "between parties" and the parties to the arbitration agreement were clearly the consortium and BUIDCO (at [19]); and

(b) the parties never intended that one of the members of the consortium could separately invoke the arbitration agreement; the agreement clearly envisaged the consortium acting through the lead member, Gammon India (at [20]).

53 The decision in *Geo Miller* was also based on the court's interpretation of the agreement in that case. As in the case of *Raster*, there is no suggestion in *Geo Miller* that the agreement in question contained any definition referring to the consortium members "jointly and severally" or provided for certain rights that belonged to individual members of the consortium to the exclusion of the other members.

54 In conclusion, I find that the respondent has the requisite *locus standi* to commence the Arbitration.

Pre-Arbitration Proceedings Ground

55 Clause 25.7 of the Contact provides as follows:

> 25.7 Notwithstanding the above, any dispute between the PARTIES shall, in first instance, be submitted by the PARTIES to their respective project management level for resolution, failing which the dispute shall then be referred to their respective senior management level.

The term "above" in cl 25.7 refers to cll 25.1 to 25.6, which are provisions relating to arbitration and governing law (see [19] above).

56 The applicant's case is that cl 25.7 is a condition precedent to arbitration and that the respondent cannot commence arbitration because it has not complied with cl 25.7. On the other hand, the respondent's case is that failure to comply with a condition precedent to arbitration goes to admissibility, that cl 25.7 is not a condition precedent to arbitration and that in any event, it was complied with and/or waived by the applicant.

57 The issues before me are:

(a) whether failure to comply with a condition precedent to arbitration goes to admissibility or jurisdiction;

(b) whether cl 25.7 is a condition precedent; and

(c) whether cl 25.7 has been complied with, and if not, whether it has been waived by the applicant.

Admissibility or jurisdiction

58 The applicant relies on *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 ("*Lufthansa*"). In that case, the appellant challenged the arbitral tribunal's jurisdiction on the grounds that it was not a party to the arbitration agreement and that even if it was, the respondent had not fulfilled the preconditions for the commencement of arbitration. The Court of Appeal held that the tribunal did not have jurisdiction. With respect to the non-fulfilment of the precondition, the Court of Appeal stated as follows (at [62]–[63]):

> 62 Where the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled. … where a specific procedure has been prescribed as a condition precedent to arbitration or litigation, then absent any question of waiver, it must be shown to have been complied with.

> ***Our ruling***
>
> 63 Given that the preconditions for arbitration set out in cl 37.2 had not been complied with, and given our view that they were conditions precedent, the agreement to arbitrate in cl 37.3 … could not be invoked. The Tribunal therefore did not have jurisdiction over the Appellant and its dispute with the Respondent. …

59 The applicant relies on *Lufthansa* as authority for its proposition that a condition precedent to arbitration is a matter that goes to jurisdiction rather than admissibility. However, this was not argued in *Lufthansa*. The jurisdiction/admissibility dichotomy was not one of the issues that the Court had to decide (see *Lufthansa* at [16]). The Court proceeded on the uncontested premise that a condition precedent was a matter going to jurisdiction rather than admissibility. I agree with the respondent that the Court's treatment of conditions precedent to arbitration as matters going to jurisdiction was *obiter* and therefore not binding on me.

60 The defendant relies on *BTN*. In *BTN*, the Court of Appeal decided that a tribunal's decision on the *res judicata* effect of a prior decision is a decision on admissibility, not jurisdiction (at [68] and [71]). What is relevant for present purposes is that in coming to its decision, the Court of Appeal referred (at [68]–[69]) to the distinction between admissibility and jurisdiction, as explained in *Swissbourgh* and in *BBA*. In this connection, the Court of Appeal in *BTN* also said the following (at [70]–[71]):

> 70 Jan Paulsson further states (Jan Paulsson, "Jurisdiction and Admissibility" (2005) in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (Gerald Aksen *et al* eds) (ICC Publishing, 2005) at p 616) that, following the lodestar of this distinction as set out in the preceding paragraph, tribunals' decisions on objections regarding preconditions to arbitration, like time limits, the fulfilment of conditions precedent such as conciliation provisions before arbitration may be pursued,

> mootness, and ripeness are matters of admissibility, not jurisdiction.
>
> 71 In our judgment, determinations of *res judicata* issues should likewise be treated as decisions on matters of admissibility, not jurisdiction. …

The decision in *BTN* did not refer to *Lufthansa*.

61 However, the issue in *BTN* was whether a tribunal's decision on the *res judicata* effect of a prior decision went to admissibility or jurisdiction. *BTN* did not have to decide whether a condition precedent to arbitration goes to admissibility. The Court referred to Jan Paulsson's view (that conditions precedent to arbitration are matters of admissibility) with approval, but that was, strictly speaking, also *obiter*.

62 The defendant submits that the proposition that preconditions to arbitration are matters of admissibility rather than jurisdiction is reflective of the principles of international arbitration law:

(a) Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd Ed, 2024) ("*International Commercial Arbitration*") where the author states (at para 5.08) that "pre-arbitration procedural requirements should be characterized as procedural or substantive (not jurisdictional) and the consequences of non-compliance should be non-jurisdictional".

(b) *The Oxford Handbook of International Arbitration* (Thomas Schultz and Federico Ortino eds) (Oxford University Press, 2020), which states (at para 3.2):

> … the question of jurisdiction concerns the power of the tribunal. The question of admissibility is related to the claim, rather than the tribunal, and asks whether this is a claim which can be brought. In particular, it

> considers the question of whether there are any conditions attached to the exercise of the right to arbitrate which have not been fulfilled. Those conditions might be, for example, a limitation period applicable to the right to commence arbitration, or a requirement to mediate and/or negotiate before arbitral proceedings may be commenced …

(c) *Republic of Sierra Leone v SL Mining Ltd* [2021] Bus LR 704 ("*Sierra Leone*"), where the High Court of England and Wales (at [21]) agreed with the conclusion of the arbitrators that a condition precedent to arbitration was a question of admissibility of the claim, and not a matter of jurisdiction. In arriving at its decision, the Court referred (at [14]–[19]) to the views of leading academic writers, the US Supreme Court's decision in *BG Group v Republic of Argentina* (2014) 134 S Ct 1198, the Singapore Court of Appeal's decisions in *BBA* and *BTN*, and the guidance given by the Chartered Institute of Arbitrators in its *International Arbitration Practice Guideline: Jurisdictional Challenges* (last revised 29 November 2016).

(d) *NWA v NVF* [2021] Bus LR 1788, in which the High Court of England and Wales (at [46]) agreed with *Sierra Leone*, and held (at [41]) that the contention (that the dispute was not yet arbitrable because the parties had not yet sought to settle the dispute by mediation) concerned the admissibility of the claim, rather than whether the arbitrator had jurisdiction. The Court explained (at [54]):

> … To give an arbitration clause such as this a commercial construction so that pre-arbitration procedural requirements are not jurisdictional is appropriate because, in most cases, if a dispute is not settled in the pre-arbitration procedure, it remains the same dispute, so non-compliance with the pre-arbitration procedure does not affect whether it is a dispute of the kind which the parties agreed to submit to arbitration.

63 In my view, a precondition to arbitration is a matter that goes to admissibility and not jurisdiction. First, in principle, this is consistent with the distinction between jurisdiction (*ie*, the power of the tribunal to hear a case) and admissibility (*ie*, whether it is appropriate for the tribunal to hear it): see *BTN* at [68]. Second, the Court of Appeal in *BTN* has approved of this view, albeit *obiter*. Third, this would be in line with the general consensus in international arbitration that preconditions to arbitration should be treated as matters of admissibility rather than jurisdiction. There is no reason why Singapore should adopt a contrary position.

64 For completeness, I should also deal with the respondent's submission that, in any event, I am not bound by *Lufthansa* to conclude that a precondition to arbitration goes to jurisdiction because the jurisdiction-admissibility dichotomy is a new issue that was not considered in *Lufthansa*. The respondent submits that lower courts may reconsider settled rulings of higher courts where a new legal issue is raised, such as where a lower court is faced with fresh arguments not raised before the higher court.[12] The respondent relies on *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101 ("*Bedford*") and *Carter v Canada (Attorney General)* [2015] 1 SCR 331 ("*Carter*") for its submission.

65 In *Bedford*, the Canadian Supreme Court held (at [42] and [44]) that:

> 42 … a trial judge can consider and decide arguments based on [the Canadian Charter of Rights and Freedoms] provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.
>
> …

12 Respondent's Written Submissions, at para 41.

> 44 … a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

66 In *Carter*, the Canadian Supreme Court applied *Bedford* and held (at [44]) that:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised and (2) where there is a change in the circumstances that 'fundamentally shifts the parameters of the debate'" (*Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at. para 42).

67 However, in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 ("*Johnson Ong*"), the High Court (in *obiter*) declined to adopt the approach advocated in *Bedford* and *Carter* on the ground that it promotes uncertainty in relation to the scope of constitutional rights (which was in issue in that case) (at [310]–[313]).

68 I respectfully agree with the Court's observation in *Johnson Ong* that the *Bedford/Carter* approach leads to uncertainty in the law and that the integrity of vertical *stare decisis* ought to be preserved and maintained (at [314]). The doctrine of *stare decisis* promotes certainty whereas the *Bedford/Carter* approach leads to uncertainty. With respect, I disagree with *Bedford* that the approach taken there creates the right balance for finality and stability. The creativity of lawyers in fashioning "new issues" cannot be underestimated. It is best left to the higher court to reconsider its previous

decision where appropriate. Specifically, in this case (if *Lufthansa* is binding on me), it is best left to the Court of Appeal to settle the inconsistency between *Lufthansa* and *BTN* on the question whether preconditions to arbitration goes to jurisdiction or admissibility.

Whether cl 25.7 is a condition precedent

69 It is common ground that as a general principle, clear words are necessary to create a condition precedent to the commencement of arbitration: *CZQ v CZS* [2024] 3 SLR 111 at [13].

70 The arbitration clause in cl 25.1 provides for all disputes "which cannot be settled amicably" to be finally settled by arbitration. Clause 25.1 contains no reference to cl 25.7 (which the applicant says is the condition precedent). I agree with *CZQ* at [20]) that this tends against a finding that compliance with the procedure in cl 25.7 is a condition precedent to the commencement of arbitration under cl 25.1.

71 I agree with the respondent that the phrase "which cannot be settled amicably" is not sufficiently clear to make cl 25.1 subject to cl 25.7. As was the case in *CZQ*, the term "settled amicably" is not a defined term in the Contract. As explained in *CZQ* (at [22]) a dispute can be "settled amicably" in a variety of ways, one of which could be the procedure in cl 25.7.

72 The applicant argues that the phrase "[n]otwithstanding the above" in cl 25.7 means that the clause must be read together with cll 25.1 to 25.6. It is correct that cl 25.7 must be read with cll 25.1 to 25.6. However, that does not mean that one cannot invoke cl 25.1 without having complied with cl 25.7. The question remains whether it is clear that the arbitration clause in cl 25.1 is subject to prior compliance with the procedures in cl 25.7. In my view, the

phrase "notwithstanding the above" is equivocal. It can also mean that notwithstanding the arbitration clause, the parties have an obligation to comply with the procedural requirements in cl 25.7 but failure to do so will (as the Tribunal decided) only sound in damages.

73 The applicant relies on *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm) ("*Emirates*") and *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC) ("*Ohpen*"). However, both cases do not assist the applicant. The language in the relevant clauses in those cases showed clearly that there were conditions precedent to arbitration (in *Emirates*) and to litigation (in *Ohpen*).

(a) In *Emirates*, cl 11.1 of the agreement provided that "[i]n case of any dispute or claim arising …, the Parties shall first seek to resolve the dispute or claim by friendly discussion. … *If no solution can be arrived at … for a continuous period of 4 (four) weeks* then the non-defaulting party can invoke the arbitration clause and refer the dispute to arbitration" [emphasis added].

(b) In *Ohpen*, cl 11.1 of the agreement provided for internal escalation of disputes. Clause 11.2 provided that "*[i]f a Dispute is not resolved in accordance with the Dispute Procedure*, then such Dispute can be submitted by either Party to the exclusive jurisdiction of the English courts" [emphasis added]. "Dispute Procedure" was defined to refer to the procedure for resolving disputes contained in cl 11 of the agreement (at [20]).

74 The language in the relevant clause in *Lufthansa* was also clear that there was a condition precedent to arbitration. There, the arbitration clause provided that "[a]ll disputes arising out of this Cooperation Agreement, *which cannot be*

settled by mediation pursuant to Clause 37.2, shall be finally settled by arbitration …" [emphasis added].

75 In contrast, the arbitration clause in the present case does not clearly state that the right to invoke arbitration under cl 25.1 is subject to compliance with cl 25.7. The present case is similar to *CZQ*. In *CZQ*, sub-cl 20.5 of the contract provided for amicable settlement and sub-cl 20.6 provided that "[u]nless settled amicably, any dispute shall be finally settled by international arbitration. …". The Court concluded (at [12]) that sub-cl 20.5 was not a condition precedent to the commencement of arbitration under sub-cl 20.6. The Court concluded (at [25]) that the only restriction on the commencement of arbitration under sub-cl 20.6 was the term "[u]nless settled amicably" and sub-cl 20.6 did not mean "[u]nless settled amicably" *and* "unless sub-cl 20.5 has been complied with".

76 I find that cl 25.7 of the Contract is not a condition precedent to arbitration under cl 25.1.

Whether cl 25.7 has been complied with or waived

77 Clause 25.7 of the Contract requires the parties to submit any dispute, in the first instance, to their respective project management level for resolution, failing which the dispute shall be referred to their respective senior management level.

78 It is common ground that the applicant and the respondent held meetings on 31 May 2023 and 16 August 2023. The applicant's case is that cl 25.7 has not been complied with because:

(a) [Co A] was not involved in either meeting; and

(b) the 31 May 2023 meeting was not a project management level meeting and the 16 August 2023 meeting was not a senior management level meeting.

Whether the meetings had to involve [Co A]

79 The applicant submits that to comply with cl 25.7, the dispute (that has been referred to arbitration) must first be submitted to the respective project management levels and senior management levels of the applicant, the respondent *and [Co A]* for resolution.

80 I disagree with the applicant's submission that the meetings had to involve [Co A]. The submission is based on the applicant's two-party regime argument. As I have rejected the two-party regime argument, this submission fails as well. It could not have been the intention of the parties that a dispute between the applicant and the respondent alone must be referred to the project management level and senior management level of *[Co A]* for resolution. Similarly, the parties could not have intended that a dispute between the applicant and [Co A] alone has to be referred to the relevant management levels of *the respondent* for resolution.

The 31 May 2023 meeting

81 This meeting was held following the respondent's request for "… another meeting, strictly without prejudice, … to explore if there [was] any possibility of amicable settlement …".[13] The request did not refer to cl 25.7. The meeting was attended by the respondent's General Manager and Manager –

[13] Amir's 1st Affidavit, at p 2756.

Contracts. The applicant was represented by its General Manager (Procurement) and its legal team.

82 The applicant argues that the 31 May 2023 was not a project management level meeting as required under cl 25.7 because:[14]

(a) the respondent did not expressly invoke cl 25.7 nor communicate any intention that the meeting was a project management level meeting under cl 25.7; and

(b) the designated project managers for both the applicant and the respondent did not attend the meeting.

83 The respondent argues that the Contract does not define "project management level" and that there is no requirement that the request for meeting must explicitly label it as being held pursuant to cl 25.7.

84 I agree with the applicant that the respondent had to at least communicate an intention that the meeting was to be regarded as a project management level meeting under cl 25.7. Otherwise, the applicant would not know who to send to the meeting. In this case, no such intention was communicated. There had been an earlier meeting (which the respondent does not allege to be a project management level meeting under cl 25.7) and the respondent was simply following up to ask for another meeting. Therefore, I find that the 31 May 2023 meeting cannot be regarded as a project management level meeting under cl 25.7.

85 For completeness, I would add that I disagree with the applicant that the 31 May 2023 meeting could not be a project management level meeting under

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[14] Applicant's Written Submissions, at paras 70–71.

cl 25.7 because the parties' respective project managers did not attend the meeting. As the respondent points out, the Contract does not define "project management level". It was for the applicant and the defendant to decide who to send to the meeting. Besides, as the respondent points out, the meeting was being held several years after the completion of the project and the parties' project managers had moved on and were no longer involved.[15]

The 16 August 2023 meeting

86 This meeting was held following the respondent's request for a "meeting between our respective senior management pursuant to Clause 25.7 …".[16] At this meeting, the respondent was represented by the same persons who attended the 31 May 2023 meeting. The applicant was represented by its General Manager (Procurement) and lawyer (both of whom had attended the 31 May 2023 meeting) and its Director of Site Services.

87 I have held that the 31 May 2023 meeting cannot be regarded as a project management level meeting under cl 25.7 (see [84] above). It follows that the 16 August 2023 meeting cannot be regarded as a senior management level meeting under cl 25.7 since a project management level meeting had to be held before a senior management level meeting can be held.

88 In any event, the applicant argues that the 16 August 2023 meeting was not a senior management level meeting because:

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15 Ong's 1st Affidavit, at para 36(b).

16 Amir's 1st Affidavit, at pp 967–968.

(a) the respondent's representatives were the same persons who attended the 31 May 2023 meeting, *ie*, there was no escalation; and

(b) senior management refers to the defendant's directors but the defendants' representatives who attended the meeting were not directors.

89 The respondent argues that the Contract does not define "senior management level" and that as "project management level" is also not defined, the Contract allows for "potential overlap".[17]

90 I agree with the applicant's submission that cl 25.7 contemplates that any dispute would be escalated up the hierarchies of the respective parties with representatives of increasing seniority to meet to attempt resolution (see *Lufthansa* at [57]). For this reason, the 16 August 2023 meeting cannot be regarded as a senior management level meeting under cl 25.7 since the respondent's representatives were the same as those who attended the 31 May 2023 meeting. There was no escalation up the hierarchy.

91 Again, for completeness, I disagree with the applicant's submission that the phrase "senior management level" refers to directors. The phrase is not defined. Subject to there being an escalation up the hierarchy, I do not think the phrase "senior management level" must necessarily refer to directors. In fact, there is no evidence that the applicant's representatives at the 16 August 2023 meeting were directors.

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17 Respondent's Written Submissions, at para 69(a).

Whether the applicant waived compliance with cl 25.7

92 The respondent has an alternative submission. The respondent submits that by its conduct with respect to the 16 August 2023 meeting, the applicant waived strict compliance with cl 25.7. The relevant facts are as follows:

(a) On 10 August 2023, the respondent requested a senior management meeting under cl 25.7 and asked the applicant for meeting details "[i]f such proposed meeting [was] acceptable to [the applicant]".[18]

(b) The applicant did not challenge the respondent's invocation of cl 25.7. Instead, the applicant agreed to the proposed meeting, informing the respondent that an invitation for a meeting on 16 August 2023 would be sent to the respondent.[19]

(c) The respondent replied confirming its attendance for the 16 August 2023 meeting and informed the applicant that its General Manager and Manager – Contracts (*ie*, the same persons who had attended the 31 May 2023 meeting) would attend the meeting on 16 August 2023 on behalf of the respondent.[20]

(d) The applicant then circulated a calendar invite for the 16 August 2023 meeting, describing it as a "Top Management Meeting" between the applicant and the respondent.[21]

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18 Amir's 1st Affidavit, at pp 967-968.

19 Amir's 1st Affidavit, at p 967.

20 Amir's 1st Affidavit, at p 967.

21 Amir's 1st Affidavit, at p 963.

(e) The applicant's representatives and the respondent's representatives attended the 16 August 2023 meeting.

93 Waiver by election occurs when a party knowingly and unequivocally chooses not to exercise one of two inconsistent rights; he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party: *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [54].

94 I have held that the 31 May 2023 meeting cannot be regarded as a project management meeting under cl 25.7 because the respondent did not communicate any intention that it was requesting such a meeting (see [84] above).

95 However, I agree with the respondent that the applicant has waived its right to object on the ground that the 31 May 2023 meeting was not a project management level meeting under cl 25.7. Upon receiving the respondent's request which expressly asked for a senior management level meeting under cl 25.7, the applicant faced two inconsistent options: (a) reject the request on the ground that no project management level meeting had been held, or (b) agree to the request.

96 By electing to agree to the request, the applicant has waived its right to argue that cl 25.7 has not been complied with since the 31 May 2023 meeting cannot be regarded as a project management level meeting under cl 25.7.

97 Next, the respondent expressly informed the applicant that its General Manager and Manager – Contracts (*ie*, the same persons who had represented the respondent at the 31 May 2023 meeting) would attend the senior

management level meeting on behalf of the respondent. This again gave the applicant a choice between two inconsistent rights – (a) to insist that the senior management level meeting must involve representatives of a higher hierarchy than those who attended the 31 May 2023 meeting, or (b) proceed with the senior management level meeting anyway.

98 By electing to proceed with the senior management level meeting anyway, the applicant has waived its right to argue that the 16 August 2023 cannot be regarded as a senior management level meeting under cl 25.7 since the respondent's representatives were the same persons who attended the 31 May 2023 meeting (*ie*, there was no escalation in hierarchy).

99 I find therefore that although the respondent has not complied with cl 25.7, the applicant has waived strict compliance with cl 25.7. Thus, even if cl 25.7 is a condition precedent to arbitration, its compliance has been waived, and the respondent is entitled to commence the Arbitration.

Conclusion

100 For the above reasons, I find as follows:

(a) On its proper interpretation, the arbitration clause in cl 25 of the Contract allows the respondent (acting on its own) to invoke the arbitration clause where the dispute is between the applicant and respondent alone; as the dispute in the Arbitration is such a dispute, the respondent has *locus standi* to commence the Arbitration (see [38]–[39] above).

(b) To the extent that *Lufthansa* treated conditions precedent to arbitration as matters going to jurisdiction, it is *obiter*. In my view,

conditions precedent to arbitration are matters going to admissibility (see [59] and [63] above).

(c) In any event, cl 25.7 of the Contract is not a condition precedent (see [76] above). Even it is, and the respondent has not complied with it, the applicant has waived strict compliance with cl 25.7 (see [99] above).

(d) Accordingly, the Tribunal has jurisdiction with respect to the Arbitration, and the application is dismissed.

101 The applicant is to pay costs to the respondent fixed at $32,000 inclusive of disbursements.

Chua Lee Ming
Judge of the High Court

Kirindeep Singh, Ajinderpal Singh, Too Fang Yi and Yunice Kah Meiying (Dentons Rodyk & Davidson LLP) for the applicant;
Avinash Vinayak Pradhan and Jasmine Thng Khai Fang (Rajah & Tann Singapore LLP) for the respondent.