IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 45

Civil Appeal No 53 of 2020

Between

(1) CDM
(2) CDO

… *Appellants*

And

CDP

… *Respondent*

In the matter of Originating Summons No 1307 of 2019

Between

(1) CDM
(2) CDN
(3) CDO

… *Plaintiffs*

And

CDP

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

[Civil Procedure] — [Costs] — [Indemnity costs]

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CDM & anor
v
CDP

[2021] SGCA 45

Court of Appeal — Civil Appeal No 53 of 2020
Judith Prakash JCA, Steven Chong JCA and Chao Hick Tin SJ
8 April 2021

5 May 2021

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 It is axiomatic that the jurisdiction of an arbitral tribunal is, for the most part, defined by the pleadings filed in the arbitration. The arbitral process, generally speaking, commences with a Notice of Arbitration setting out the nature and scope of the dispute. This would typically be followed by the Statement of Claim shortly after the constitution of the tribunal. While the Notice of Arbitration and the Statement of Claim lay out the dispute from the claimant's perspective, it would be incorrect to treat them as *exhaustively* defining the jurisdiction of the tribunal.

2 Whether the scope of the dispute and hence the jurisdiction of the tribunal extends beyond the matters referred to in the Notice of Arbitration and the Statement of Claim must depend on the subsequent pleadings. Indeed, this

was precisely brought to the fore by the arbitration between the parties to this appeal (the "Arbitration"). While the respondent, which was the claimant in the Arbitration, had not raised arguments in relation to the "second launch" of a vessel, the appellants, in anticipation that the point might subsequently be raised, referred to the "second launch" and expressly denied it in their Defence and Counterclaim. Thereafter, the issue in relation to the "second launch" was featured in the subsequent pleadings, the agreed list of issues ("ALOI"), the evidence in the Arbitration, and the parties' respective submissions.

3 Proceeding on the flawed premise that the jurisdiction of the arbitral tribunal (the "Tribunal") was somehow defined *only* by the Notice of Arbitration and the Statement of Claim, the appellants applied to set aside the arbitral award on, *inter alia*, the basis that the Tribunal had acted in excess of its jurisdiction when it ruled on the "second launch" in favour of the respondent. The appellants might have had a case had they not introduced the "second launch" in their pleadings such that the "second launch" featured prominently in the proceedings thereafter. In that way, ironically, it was the appellants' *own* pleadings which vested jurisdiction on the Tribunal to rule on the "second launch". The mere fact that the respondent's *principal* case in the Arbitration was not based on the "second launch" is a *non-sequitur.* As long as the issue of the "second launch" was properly before the Tribunal, that would suffice to confer jurisdiction on it.

4 We heard and dismissed the appeal on 8 April 2021 with brief grounds. In our detailed grounds below, we also take the opportunity to address the point as to whether we should adopt the position of the Hong Kong courts in awarding costs on an indemnity basis as the *default* position where an application to set aside an arbitral award has been unsuccessful. For the reasons set out below, we decline to do so.

Background

5 The facts have already been eloquently set out in the decision of the Judge below (the "Judge"), and we do not propose to repeat them in any great detail. Briefly, the appellants and the respondent entered into the following agreements on 9 June 2013:

(a) A contract ("the Contract") between the first appellant and the respondent where the respondent agreed to design, build, launch, equip, commission, test, complete, sell, and deliver to the first appellant a Self-Erected Tender Rig and a Derrick Equipment Set (collectively, the "Hull"); and

(b) A company guarantee by the second appellant in favour of the respondent in respect of the Contract (the "Guarantee").

6 After having entered into the Contract, the parties entered into a number of addenda to the contract. Addendum No. 2 was entered into on 24 September 2014. Of central importance to the present appeal is Article 6(d) of Addendum No. 2, which varied the payment term in the Contract such that 10% of the total contract sum (the "Fourth Instalment") would become payable upon "launching and receipt of [the] invoice issued by the [builder, *ie*, the respondent]". A further stipulation in Addendum No. 2 provided that "launching [was] subject to prior approval by the [ship classification society], [the first appellant], and [the respondent] collectively".

7 On 20 January 2015, the respondent purported to launch the Hull into the water for the purposes of Art 6(d) of Addendum No. 2. That same day, the first appellant's project manager emailed the respondent stating, *inter alia*, that it "[did] not consider the floating as launching". Following the disputed launch

on 20 January, various meetings involving the parties' representatives were held on 21 January, 7 April, and 28 April 2015 (collectively, the "Construction and Progress Meetings"). The purpose of the Construction and Progress Meetings was, among other things, to iron out and update various outstanding items or deficiencies in the construction of the Hull that the first appellant required the respondent to remedy. It was the respondent's position that by 28 April 2015, all outstanding issues and/or deficiencies in relation to the Hull had been resolved.

8 On 3 May 2015, the Hull was launched (the "second launch"). On 5 May 2015, the respondent demanded payment of the Fourth Instalment. As payment continued to be withheld, the respondent issued a default notice on 3 August 2016 pursuant to the terms of the Guarantee requesting that the appellants pay the Fourth Instalment. As payment was still not forthcoming, the respondent commenced the Arbitration against the appellants. The Notice of Arbitration was filed on 26 September 2016. Following the usual exchange of pleadings, an oral hearing took place between 21 and 25 May 2018, where both sides called factual and expert witnesses. Thereafter, detailed written closing and reply submissions were exchanged.

9 The central issue in question at the Arbitration was, for present purposes, whether the respondent (the claimant in the Arbitration) was entitled to the Fourth Instalment. The Tribunal found that the respondent, first appellant, and the relevant ship classification society had collectively given their approval for the launch of the Hull, with the first appellant having given its approval on 28 April 2015 for the second launch on 3 May 2015. The Tribunal found that the minutes of the Construction and Progress Meetings that took place on 7 and 28 April 2015 recorded that the respondent had resolved all the remaining items which the first appellant required the respondent to remedy before the Hull was

considered to be in "[l]aunching condition". The Tribunal also found that the minutes recorded the first appellant's clear acceptance that the outstanding requirements had been met. By its acceptance that the outstanding issues had been resolved, the Tribunal found that the first appellant had also given its approval for the second launch. Even if the minutes did not show that the first appellant had given its *express* approval for the second launch of the Hull, the Tribunal was prepared to conclude that the first appellant ought to be treated as having approved it.

10 The Tribunal thus found that there was no valid reason for the appellants to withhold payment of the Fourth Instalment. Accordingly, in its award (the "Award"), the Tribunal ordered the appellants to, *inter alia*, pay the respondent the sum of US$13.9m (*ie*, the Fourth Instalment) with interest.

11 The appellants then applied to set aside the part of the Award relating to the respondent's claim for the Fourth Instalment under the Contract. The grounds the appellants relied on were twofold.

12 First, relying on Article 34(2)*(a)*(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") as set out in the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA"), the appellants argued that the Award had been made in excess of the Tribunal's jurisdiction:

> (a) The appellants submitted that the Tribunal had exceeded its jurisdiction in finding that the first appellant had, on 28 April 2015, approved the second launch of the Hull, thereby fulfilling the condition precedent that the respondent needed to satisfy prior to the second launch on 3 May 2015.

(b) It was also contended by the appellants that the Tribunal had *transposed* approval which had been given for the second launch in May 2015 *retrospectively* as consent for the earlier launch on 20 January 2015.

13 Second, the appellants alleged that the Award had been made in breach of the right to present their case, in violation of Article 34(2)*(a)*(ii) of the Model Law and/or in breach of the rules of natural justice, in violation of s 24*(b)* of the IAA:

(a) The appellants complained that the Tribunal had acted in breach of natural justice by deviating from the parties' pleaded cases when it determined that the Hull had been properly launched in the second launch, and that the respondent had thus satisfied the conditions for payment of the Fourth Instalment.

(b) The appellants also asserted that the Tribunal had acted in breach of natural justice by "disallowing the cross-examination of the [respondent's] expert witness regarding the Contract … contrary to his Witness Statement and Responsive Report".

14 The Judge dismissed all of the appellants' attempts to impugn the Award in their entirety, finding that they were not borne out by the record from the Arbitration. Dissatisfied, the appellants appealed.

15 On appeal, the appellants abandoned most of their arguments below. Instead, the appellants' remaining submissions were twofold:

(a) First, that the Tribunal had acted in excess of its jurisdiction in finding that there had been the requisite approval in April 2015 for the

second launch of the Hull in May 2015. Accordingly, the Tribunal had also exceeded its jurisdiction in finding that the Fourth Instalment had fallen due.

(b) Second, that the Tribunal had acted in breach of natural justice and the appellants' rights to be heard because the ground that the Tribunal had relied on, *ie* that approval had been given for the *second* launch, was not in issue in the Arbitration. Accordingly, the appellants had been denied the opportunity to present their case on that issue.

Analysis

16 At the outset, it is essential to bear in mind that while the appellants relied on (a) an excess of jurisdiction and/or (b) a breach of natural justice to justify setting aside the impugned segments of the Award, the factual matrix for *both* grounds was in fact identical. Put another way, the breach of natural justice alleged by the appellants *required* the Tribunal to have exceeded its jurisdiction, because the appellants accept that if they had the opportunity to engage the issues which had in fact been placed before the Tribunal, it would follow that the Tribunal could not have acted in breach of natural justice. Thus, as was conceded by the appellants' counsel before us, the appellants failing to establish that the Tribunal had acted in excess of its jurisdiction would necessarily be fatal to their breach of natural justice argument.

17 We turned therefore to consider the question of whether the Tribunal had acted in excess of its jurisdiction in finding that the second launch had been approved by the parties and provided a basis for the Fourth Instalment to fall due. The law in this regard is fairly well-established. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank* SA [2007] 1 SLR(R) 597 at [40] and [44],

this Court set out a two-step inquiry on an application to set aside an award under Art 34(2)(*a*)(iii) of the Model Law for excess of jurisdiction:

> (a) First, the Court must identify what matters were within the scope of submission to the arbitral tribunal; and
>
> (b) Second, whether the arbitral award involved such matters, or whether it involved a "new difference … outside the scope of the submission to arbitration and accordingly … irrelevant to the issues requiring determination".

Did the Tribunal act in excess of its jurisdiction?

18 The question of what matters were within the scope of the parties' submission to arbitration was answerable by reference to five sources: the parties' pleadings, ALOI, opening statements, evidence adduced, and closing submissions at the Arbitration. Having reference to those sources, it was clear beyond peradventure that the issue as to whether the parties had approved the second launch such that the Fourth Instalment became payable was squarely before the Tribunal. There was thus no basis to contend that the Tribunal had exceeded its jurisdiction in making that finding. We considered the five sources in turn.

The Pleadings

19 In determining the scope of a party's submission to arbitration, the pleadings filed in the arbitration provide a convenient way to define the jurisdiction of the tribunal: *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*PT Prima*") at [33].

20 The appellants argued that the Statement of Claim and Notice of Arbitration did not make any reference to the second launch as providing a basis for the Fourth Instalment becoming payable. Accordingly, it was contended that the Tribunal's reliance on the events of May 2015 concerning the second launch constituted reliance on unpleaded material. This was simply mistaken. The jurisdiction of a tribunal in deciding the dispute was *not* framed only by the Statement of Claim and Notice of Arbitration. There is ample authority for this fundamental proposition:

(a) In *PT Prima* at [34], this Court observed that:

> …in order to determine whether an arbitral tribunal has the jurisdiction to adjudicate on and make an award in respect of a particular dispute, it is necessary to refer to the pleaded case of each party to the arbitration and the issues of law or fact that are raised in the pleadings to see whether they encompass that dispute.

There was no suggestion that the "pleadings" referred only to the Notice of Arbitration and Statement of Claim. Moreover, the reference to the pleaded case "of each party" makes clear that the Defence and other such pleadings must also be included in determining the issues raised in the dispute.

(b) Similarly, the High Court noted in *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [150] that:

> It goes without saying that a particular chain of reasoning will be open to a tribunal if it arises from the party's express pleadings. Significantly, an issue raised in a party's pleadings remains in play throughout the arbitration unless [it] is expressly withdrawn, no matter how weakly the party may actually advance it …

Again, there was absolutely nothing to suggest that the reference to "pleadings" ought to be construed narrowly to *only* the Notice of

Arbitration and Statement of Claim. No authority was cited by the appellants to that effect.

21 On the facts, it was not in contention that the initial claim (based on the Notice of Arbitration and Statement of Claim) in the Arbitration was "premised on [the first] launch of 20 January [2015]", and did not make reference to the second launch in May 2015. However, ironically and presumably in anticipation of the respondent's full case, the Statement of Defence and Counterclaim expressly addressed the issue of whether the first appellant had granted its approval on 28 April 2015 for the second launch. Of particular note is the *repeated* reference to the second launch on 3 May 2015, and the appellants' attempts to deny that approval for launch had been granted *at all*, rather than merely in relation to the January launch:

> […]
>
> 50 Prior to the alleged 1st Launch, and on 20 January 2015 itself, being the date of the alleged launch, [CDM] had made it known to [CDP] that [CDM] did not agree and/or consider [the Hull] to be ready for launch. It is and was therefore [CDM]'s position that [CDP] did not launch [the Hull] in accordance with the terms of [the Contract] on 20 January 2015, **or at all to qualify for the fourth instalment**, being 10% of the contract price.
>
> […]
>
> 53 [CDP] had agreed to make the necessary modifications and/or rectifications to [the Hull], and had subsequently arranged for a launch to take place on 3 May 2015 (the "2nd Launch").
>
> 54 Despite [CDP]'s attempt at the 2nd Launch, [CDM] was still not satisfied with the quality and workmanship of the construction of [the Hull], and still did not consider the launch to have been effectively carried out. Numerous Non-Conformance Reports and Punch Lists were still outstanding, and the **defects had not been rectified by [CDP] as at 20 January 2015 and/or 3 May 2015, or at all**. It was therefore unacceptable for [CDP] to proceed for the launch of [the Hull],

> and inconceivable for [CDP] to believe that [CDM] agreed to the same.
>
> 55 Given that the Contracts Addendum No. 2 clearly stipulates that payment of the fourth instalment is subject to the quality of workmanship and system being in conformance with [the Contract], and the approval by [the classification society], [CDM] and [CDP] collectively coupled with the fact that [CDM] had refused to consider the [the Hull] as being launched on **20 January 2015, 3 May 2015, or at all,** it is evident that [CDM] is not obliged to make payment for the fourth instalment …
>
> […]
>
> 57 If [CDP] truly considered that [the Hull] launched on 20 January 2015, **or on 3 May 2015, which is wholly denied**, [CDP] ought to have (but did not) engaged [*sic*] third party inspectors to verify and confirm [CDP]'s compliance with the design, construction and performance capabilities …
>
> [References omitted, emphasis added in bold and bold underline]

22 In the respondent's Reply and Defence to the Counterclaim ("RDCC"), the respondent unambiguously joined issue over whether the first appellant had granted approval before the second launch on 3 May 2015:

> 11 Subsequently [to the first launch in January 2015], [CDM] informed [CDP] that it did not accept [the Hull] as launched. Without prejudice to [CDP]'s contractual rights to enforce [CDM]'s payment of the Fourth Instalment, [CDP] engaged with [CDM] to resolve the outstanding issues.
>
> 12 At that time, [CDM] limited the outstanding issues for [the Hull]'s launch as follows:
>
> […]
>
> 13 Between January and April 2015, [CDP] **managed to resolve the outstanding issues highlighted by [CDM] in relation to [the Hull]'s launch**. During the same time, [CDP] kept [CDM] updated on the progress of its works on [the Hull].
>
> 14 On 7 April 2015, the Parties met again and the only unresolved issue was expressed to be the "coating system to the hull, Keel and the five sea chests including ships markings and UWILD markings":

> […]
>
> 15 **On 28 April 2015, the Parties met again and reached an understanding that all outstanding issues related to [the Hull]'s launch were resolved**:
>
> […]
>
> 16 **On 5 May 2015, [CDP] informed [CDM] that it had resolved all the outstanding issues related to [the Hull]'s launch and demanded for payment of the Fourth Instalment.**
>
> […]
>
> 19 By the foregoing, **the [appellants'] position that [CDP] had not obtained [CDM]'s approval for the launch of [the Hull] should be rejected.** The contemporaneous documentary record demonstrates that:
>
> > 19.1. The third party Classification Society … had confirmed that [the Hull] was launched on 20 January 2015;
> >
> > **19.2. In any event, [CDP] had cooperated with [CDM] in resolving all outstanding issues relating to [the Hull]'s launch. [CDM]'s conduct as evidenced by the minutes of meetings also showed that [CDM] had accepted that all outstanding issues relating to [the Hull]'s launch had been resolved.**
>
> [Emphasis added in bold underline]

It was clear from the RDCC that the respondent *itself* argued that, by 28 April 2015, all outstanding issues relating to the launch of [the Hull] had been resolved such that the second launch in May 2015 would trigger payment of the Fourth Instalment.

23 In their Rejoinder to the RDCC, the appellants continued to take issue with this precise point. The appellants' Rejoinder was telling in three aspects:

(a) First, the segment of the Rejoinder from [68] to [76] was headed:

> (iii) There was no agreement at the meetings held on 21 January 2015, 7 April 2015 and/or 28 April 2015

> that **all the launch [*sic*] of [the Hull]** was subject to the outstanding issues raised
>
> [Emphasis added in bold underline]

The heading above is telling in that it refers to "all" the launches of the Hull, indicating the appellants' recognition that there was in fact more than one launch, *ie* the first launch in January and the second launch in May.

(b) Second, [76] of the Rejoinder illustrated that the appellants were fully aware of and were responding to the respondent's case that there *was* a second launch scheduled for May, and that the May launch (for which it was uncertain whether it "would be successful") followed from the appellant's approvals in the Construction and Progress Meetings:

> In any event, it was merely agreed from a technical perspective that the following outstanding issues raised were to be completed prior to [the Hull] being considered [to be in] *launching condition*, instead of *floating condition*. There was no agreement and/or understanding reached between the technical teams at the meeting that [the Hull] **would be validly launched** after the outstanding issues were resolved. The project managers who had attended the meetings, had at no point in time ever represented that **the launch would be successful, and/or that [CDP] would obtain the Respondents' approval after the outstanding issues raised at the meeting on 21 January 2015 were closed … In no way did the [appellants'] Supervisors and/or the [appellants] agree that [the Hull] was in fact to be considered launched once aforesaid defects had been rectified or closed.** [CDP]'s understanding was and is clearly misconceived.
>
> [Original emphasis in italics, emphasis added in bold underline]

Not only does this extract reflect the appellants' acknowledgment of the respondent's case concerning the second launch, it demonstrates that the

appellants joined issue over the validity (or otherwise) of that second launch.

(c) Third, [77] of the Rejoinder made clear that:

> In addition, the simple fact of the matter remains that [CDP] had not, **as at the date of the repudiation of the Contract**, obtained the [appellants'] prior approval for the launch of [the Hull], and/or met the conditions precedents set out in Article 6(d) of the Contracts Addendum No. 2 ...
>
> [Emphasis added in bold underline]

The appellants alleged that the repudiation of the Contract had occurred on 27 October 2016, and it is clear from the reference to that date that the appellants were specifically arguing that even *after* the *second* launch, the conditions precedent for payment of the Fourth Instalment had *still* not been satisfied. It thus cannot be said that the appellants were in any way not engaged on the issue of whether the alleged approval by the first appellant on 28 April 2015, and the second launch on 3 May 2015, sufficed to trigger the payment obligation for the Fourth Instalment.

24 In sum, the pleadings made clear that the respondent **was** relying on the approval granted by the first appellant on 28 April 2015, and that the appellants were *denying* that approval had *ever* been granted by the first appellant, whether in January 2015, or in the lead-up to May 2015, or ever. Similarly, the respondent **was** relying on *both* the first launch in January *and* the second launch in May, while the appellants argued that approval had not been granted for *any* launches up to the repudiation on 27 October 2016. It thus cannot be said that the question of whether the first appellant had approved the launch of the Hull

after the first launch in January 2015 was not in issue, nor can it viably be contended that the Tribunal had exceeded its jurisdiction.

The Agreed List of Issues

25 Given how extensively it was canvassed in the parties' pleadings, it is unsurprising that the question of whether the second launch had been approved by the parties such that the Fourth Instalment became payable featured in the parties' ALOI. The parties' ALOI took the form of broad overarching questions, under which the parties' headline claims relating to those questions were briefly summarised.

26 The second issue in the ALOI is particularly instructive as to what was placed in issue before the Tribunal:

> 2. Did [CDP] satisfy the conditions necessary for payment of US$13.9 million pursuant to Article 6(d) of the Contracts Addendum No. 2?
>
> 2(a) [CDP] takes the position that [CDP] satisfied the conditions necessary for payment of US$13.9 million because:
>
> (i) […]
>
> (b) The [appellants] take the position that [CDP] did not satisfy the conditions necessary for payment of US$13.9 million because:
>
> […]
>
> (iii) CDP], [CDM] and the Classification Society had not collectively approved the launch of [the Hull]. In particular, [CDP] had not obtained [CDM]'s approval for the launch of [the Hull] …;
>
> (iv) [CDP] did not launch [the Hull] **on 20 January 2015, or 3 May 2015, or at all**. …
>
> […]
>
> [Emphasis added in bold underline]

27 This was made even clearer under the third issue in the ALOI:

> 3. Is there any valid reason for [CDM] to withhold payment of US$13.9 million?
>
> (3a) [CDP] takes the position that there is no valid reason for [CDM] to withhold payment of US$13.9 million because [CDP] has satisfied the abovementioned conditions.
>
> (3b) The [appellants] take the position that there are valid reasons that [CDP] was not entitled to payment of their invoice amounting to US$13.9 million, namely: -
>
> […]
>
> (iv) [CDP] did not launch [the Hull] on **20 January 2015, or 3 May 2015, or at all**.
>
> […]
>
> […]
>
> [Emphasis added in bold underline]

28 Based on the ALOI, both (a) whether the Hull was launched on 20 January 2015 or on 3 May 2015; and (b) whether prior to each of these launch dates, the first appellant's approval had been obtained, had been identified and *agreed* by *both* parties as issues for the Tribunal's determination. Therefore, the Tribunal's finding that the first appellant had, on 28 April 2015, approved the second launch cannot be said to have been made in excess of jurisdiction.

29 Granted, the respondent had itself, in response to issue 2 of the ALOI (see above at [26]), indicated that it was relying on the launch of the Hull on 20 January 2015. However, this could hardly be said to be decisive, and was in many senses unsurprising given that the respondent's case pertaining to the approval for the second launch was its *secondary* case. The respondent's *primary* case, as the appellants themselves recognised, was that the Hull had been properly launched in January 2015. The mere fact that the full panoply of the respondent's alternative and secondary case had not been reflected in the very brief and limited outlines in the ALOI cannot be taken to undo the fact that

extensive reference had been made in relation to the second launch and the grant of approval in April 2015 in the parties' pleadings.

The Parties' Opening Statements

30 Our conclusion above that the parties *had* in fact joined issue over the approval granted on 28 April 2015 for the second launch on 3 May 2015 was buttressed by the extensive arguments concerning these developments in the parties' opening statements. In the respondent's opening statement (as the claimant in the Arbitration), it was expressly averred that:

> 1. The [respondent] claims as a debt the following unpaid instalments under the Contracts:
>
> > 1.1 Against [the first appellant], the Fourth Instalment of $13.9 million under [the Contract] because [the Hull] was launched on 20 January 2015 (as confirmed by the [Classification Society]), and **in any event no later than 3 May 2015 when the [respondent] had satisfied all of the [appellants'] outstanding conditions in respect of the launch**;
> >
> > […]
>
> […]
>
> 24. On **28 April 2015**, the Parties reached an understanding that **all outstanding issues related to the launch of [the Hull] were resolved** and accordingly **planned undocking for 3 May 2015**.
>
> [Emphasis added in bold and bold underline]

31 By contrast, the appellants expressly argued in their opening statement (as the defendants in the Arbitration), that "the [respondent] did not launch [the Hull] on 20 January 2015, or at all", and that:

> 15.27 The [respondent] also [relies] on meetings held with the [appellants'] supervisors on 21 January 2015, 7 April 2015, and 28 April 2015 to allege that all the outstanding issues related to [the Hull's] launch had been resolved by 5 May 2015. This allegation is again erroneous **as there was no such agreement reached at any of the aforesaid meeting[s] or on 5 May**

> **2015, and no approval was given to the [respondent] for the launch of the Hull.**
>
> […]
>
> 15.30 More importantly, the [appellants] submit that the meetings which the [respondent] relies on are Project and Construction Meetings which were held between the parties' technical teams and dealt primarily with the technical aspects of the construction. **There was therefore no commercial or contractual agreement reached at any of the aforesaid meetings** … The [appellants] therefore submit that it is obvious from the foregoing that the Project and Construction Meetings **did not import any contractual significance**.
>
> [Emphasis added in bold underline]

It is readily apparent that the appellants sought to (a) deny that agreement to launch was of "contractual significance" in triggering the Fourth Instalment, and that in any event (b) no such agreement had arisen as of 28 April 2015 for the second launch on 3 May 2015.

32 Given the foregoing, it simply does not lie in the appellants' mouths to claim that the question of whether the parties had agreed to the second launch in May 2015 was not in issue before the Tribunal. In any event, and perhaps decisively, counsel for the appellants accepted, at the oral hearing before the Judge, that by the time the respondent had filed its opening statement in the Arbitration, the respondent had made known its position, *ie* that an agreement or understanding had been reached on 28 April 2015 for the second launch on 3 May 2015. The relevant extract of the transcript is as follows:

> Court: Mr Singh, do you accept that at least by the time the [respondent's] Opening Statement had been filed, the point about the vessel being launched on 20 Jan and if not by 5 May (being the date of the invoice following the launch on 3 May 2015) and that there was agreement from [the first appellant] for that subsequent launch was raised in the [respondent's] Opening Statement?
>
> [Counsel for the appellants]: Yes, they do say it.

This exchange entirely puts paid to the notion that the second launch in May 2015 fell outside the scope of the Tribunal's jurisdiction and took the appellants by surprise. On the contrary, the appellants *knew* the case they had to meet – which was the case the Tribunal eventually accepted as the basis for its decision – *at the latest* by the filing of the respondent's opening statement.

The Evidence Adduced by the Parties

33 Following on from the parties' opening statements, it is scarcely surprising that the evidence adduced by the parties at the Arbitration *also* engaged with the question of whether approval had been granted for the second launch in May 2015 such that the payment obligation for the Fourth Instalment was triggered.

34 In the second witness statement of Mr [AA], the respondent's Project Manager, dated 19 December 2017, he made the following statements from [60] to [65]:

> 60 Between January 2015 and April 2015, [CDP] kept [CDM] updated on the progress of its works on [the Hull] and managed to resolve the outstanding issues highlighted by [CDM] in relation to [the Hull]'s launch.
>
> […]
>
> 63 Furthermore, despite Mr [BB's] generalised allegation that [the Hull] had not been launched **by 3 May 2015** because of [CDP]'s unsatisfactory workmanship and lack of co-operativeness, no such alleged deficiency was recorded in the 7 April 2015 MOM **as a condition for [CDM] accepting [the Hull] as launched**. The allegation, in any event, is groundless.
>
> 64 On **28 April 2015**, the Parties met again and reached an understanding that **all the outstanding matters related to [the Hull]'s launch had been resolved**. This is set out in the minutes of meeting dated 28 April 2015.
>
> 65 As stated in my first witness statement … [CDP] informed [CDM] on **5 May 2015 that it had resolved all the outstanding matters related to [the Hull]'s launch and**

> **demanded for payment of the Fourth Instalment**. However, no payment was forthcoming.
>
> [Emphasis added in bold and bold underline]

The references at [63] to the second launch on 3 May 2015, and at [64] to approval having been granted on 28 April 2015 as all outstanding matters had been resolved, were particularly revealing.

35 It was not only the respondent's witness who engaged with the grant of approval on 28 April 2015 and the second launch on 3 May 2015. Rather, the appellants' witnesses were also alive to that issue. In the second witness statement of Mr [CC], a director of both appellants, dated 9 February 2018, Mr [CC] made the following points:

> 63 … In light of the concerns raised by the Respondents [at] the relevant time, [CDP] agreed to carry out the necessary rectification works, **and did in fact attempt to launch [the Hull] again on 3 May 2015. Notwithstanding that the 2nd attempt of [the Hull]'s launch was yet again not approved by the [appellants]**, it is clear from [CDP]'s conduct at the relevant time that they had themselves acknowledged that [the Hull] was not built and constructed in accordance with the General Specifications and terms of the [Contract] …
>
> 64 … Mr. [AA] subsequently **alleges that on 28 April 2015, parties had met again and reached an understanding that all the outstanding matters related to [the Hull]'s launch had been resolved. I disagree.** There was no contractual understanding with me that the [appellants] **would provide their approval and/or would make payment of the 4th instalment once the outstanding issues raised at the meeting on 7 April 2015 were resolved.**
>
> [Emphasis added in bold underline]

The references not only to the second launch on 3 May 2015, but also to the alleged approval on 28 April 2015, are difficult to reconcile with the appellants' contrary assertion that those precise issues had not been placed before the Tribunal.

36 Beyond the contrasting positions set out in the relevant witness statements, the appellants' Mr [CC] was specifically cross-examined on the 28 April 2015 Construction and Progress Meeting. The relevant extract of the transcript reads:

> Q [Counsel for the respondent]: … You have before you a minutes of meeting dated 28 April 2015, 13:40. You will again see that who is in attendance is […]. Prepared by […], approved by […]. Can you turn to item 11 at page 292 of that Bundle.
>
> Under item 11, "Launching condition", you will then see four items …
>
> You will then see in the next column, the [respondent's] comments that item 1 has been completed, item 2, the sea chest anodes have been checked and accepted by [the first appellant's] site inspector … Therefore, since all of this is complete, there will be **undocking on 13:30, 3 May 2015, and if you go back to the owner's column, you also see undocking is also planned for 3 May**. Can you see that?
>
> A: I can see that.
>
> Q: Were you aware that as of 28 April 2015, there were no more issues for the conditions of launch because they had been closed out by [the respondent]?
>
> A: Not that I can recall.
>
> […]
>
> **Q: And that they had agreed, therefore for undocking on 3 May 2015?**
>
> **A: I'm not sure what they have agreed.**
>
> […]
>
> Q: Let me jog your memory. Can you turn to page 382 of the bundle. You will see an email dated 5 May 2015 from Mr [DD] …
>
> […]
>
> Q: Mr [DD] sends you an email on 5 May 2015:
>
> "Dear [CC],
>
> We refer to memorandum number … for the meeting of 7 April 2015.

> As recorded in the [minutes of meeting], the buyer has confirmed that the vessel **can be considered as launched** once the vessel has been redocked and the 5 coating system to the external hull, keel and the 5 sea chests including the vessel's markings and UWILD markings has been completed".
>
> He then goes on to say:
>
> "Please see attached the completion of the redocking work signed by the buyer's supervisor on site. Therefore, the vessel should now be **considered by the buyer as launched for the purpose of clause 6(d) of the addendum** …"
>
> Can you see that?
>
> A: I can see that.
>
> Q: Am I right to say that **as of 5 May 2015, you must have been aware that there were conditions that had been set for the launch, and those conditions had been met? Am I right?**
>
> A: **I agree that the email is sent to me.**
>
> Q: Are you saying you didn't receive this email?
>
> A: I cannot recall it. But I'm not saying I have not received it.
>
> [Emphasis added in bold and bold underline]

This extract powerfully demonstrates that cross-examination on the issues of (a) the alleged grant of approval on 28 April 2015; (b) the second launch on 3 May 2015; and (c) the Fourth Instalment falling due by virtue of Article 6(d) of the Contract Addendum No. 2 *did* in fact take place. It was thus simply indefensible for the appellants to contend, given the totality of the evidence, that *none* of those points were in issue or even live throughout the Arbitration.

The Parties' Closing Submissions

37 The appellants' closing submissions made it all the more apparent that the second launch, and whether the requisite approvals had been procured, was in issue in the Arbitration:

> 244 The [respondent] has also raised an argument that in the meetings held after 20 January 2015, the [appellants] had limited the outstanding issues for [the Hull's] launch to the matters listed in the said meetings, and that between January 2015 and April 2015, the [respondent] had managed to resolve the outstanding issues highlighted and were accordingly entitled to payment …
>
> […]
>
> 246 … Just on the aforesaid basis, the [appellants] submit that the [respondent's] reliance **on the meetings subsequent to the floating [on 3 May 2015] should be disregarded. Nevertheless, the [appellants] will proceed to show that there was no agreement between the parties to the effect that [the Hull] would be considered launched for the purposes of payment of the 4th milestone [*ie*, the Fourth Instalment], once the said issues in the meeting had been resolved.**
>
> 247 … **Any agreement or decision or understanding reached at such meetings were [*sic*] purely technical in nature and would not be contractually binding** on the [appellants] …
>
> [Emphasis added in bold underline]

38 The respondent's closing submissions directly clashed with the appellants' submissions above on the points emphasised, as follows:

> 140 It is the [respondent's] position that the conduct of the [appellants'] representatives [*sic*] evidence an agreement that [CDM] would consider [the Hull] properly launched if the alleged outstanding issues were rectified to the [appellants'] satisfaction … On 5 May 2015, the [respondent] informed Mr [CC] that **all the outstanding issues have been resolved, including the completion and approval of the redocking work**. The [appellants] did not raise any objections. The [respondent] reiterated its request for payment of the Fourth Instalment, but the [appellants] still did not make payment of the Fourth Instalment.
>
> [Emphasis added in bold underline]

39 Even in the reply submissions before the Tribunal, the parties adopted diametrically opposed positions, joining issue over (a) whether there had been approval as of the 28 April 2015 meeting; and (b) whether that approval,

coupled with the second launch in May 2015, sufficed to trigger payment of the Fourth Instalment. In the respondent's reply closing submissions, it argued that:

> 11 [CDP] validly launched [the Hull] on 20 January 2015 as confirmed by the [Classification Society] Statement of Fact, which is conclusive evidence that [the Classification Society] assented to the launch. **Further**, the [appellants] agreed that [the Hull] would be in launching condition when [CDP] resolved its outstanding issues, which it did by 5 May 2015. **Alternatively**, the [appellants] are estopped from arguing that [the Hull] was not launched by 5 May 2015 because [CDP] had resolved the outstanding issues raised by the [appellants].
>
> [Emphasis added in bold underline]

Tellingly, the appellants did in fact acknowledge, at [88] of their Appellants' Case, that this extract *did* cover the basis upon which the Tribunal eventually made its key findings. The appellants' only argument in response was that "it was far too late for the [respondent] to be raising a new point in submission … which was neither pleaded nor foreshadowed". Setting aside the fact that the pleadings, ALOI, opening statements, and evidence adduced illustrate that it cannot viably be said that the arguments over the second launch were "neither pleaded nor foreshadowed", the appellants did not raise *any* jurisdictional objections *whatsoever* about the respondent's reply closing submissions. The appellants' silence in this regard was deafening.

40 This absence of any jurisdictional objections was perhaps unsurprising given the appellants' *own* reply closing submissions at [52]:

> … Even if the [respondent] say[s] they [*sic*] **launched [the Hull] correctly in May 2015**, after having completed all the outstanding works, the [respondent] had still **failed to request and obtain the [appellants'] consent to launch**, and **compliance with all the conditions precedent under Article 6 of Addendum No. 2** had still not been satisfied.
>
> [Emphasis added in bold underline]

In a single sentence, the appellants succinctly and, ironically given their case, summed up the entire basis upon which the Tribunal eventually decided this issue. For the appellants to claim that these points had not been raised over the course of the Arbitration flies in the face of reality.

The appellants' arguments on the Tribunal's alleged excess of jurisdiction

41 In support of their assertion that the Tribunal had exceeded its jurisdiction in considering whether approval had been granted for the second launch of the Hull in May 2015, the appellants made three arguments. First, it was contended that the Tribunal had erred in finding that the Hull had been "launched", as was required in Contract Addendum No. 2, as the Hull had only been "floated" or "undocked and later docked again". Second, the appellants argued that the respondent's *only* alternative argument made at the Arbitration, apart from the respondent's primary case that the Hull had been launched in January 2015, was one arising out of estoppel. On this argument, any reference to the second launch in May 2015 pertained only to the context of estoppel, and did not provide a basis for the Tribunal to make its finding that the obligation to pay the Fourth Instalment had been triggered. Third, the appellants claimed that even if there had been reference made to the second launch and approval for the second launch, such reference was not the "crux" or "focus" of the parties' cases in the Arbitration.

42 With respect, we did not find any of these arguments persuasive. Turning to the appellants' first argument, it is trite that a Court determining an application to set aside an arbitral award on the basis of an alleged excess of jurisdiction is not concerned with the merits of the dispute, but only with the *process*. The correctness or otherwise of the tribunal's decision is not in issue. Rather, the key question lies in determining the ambit of the tribunal's

jurisdiction. As Judith Prakash J (as she then was) observed in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ("*Sui Southern Gas*") at [37]:

> Article 34(2)(*a*)(iii) … is **not concerned with the substantive correctness of the arbitral tribunal's … decision** on a matter that was properly within its jurisdiction. **If an issue is firmly within the scope of submission to arbitration, I fail to see how it can be taken outside the scope of submission to arbitration simply because the arbitral tribunal comes to a wrong, even manifestly wrong, conclusion on it** …
>
> [Emphasis added in bold underline]

43 As for the appellants' second argument, that the *only* alternative case pursued by the respondent in the Arbitration was one of estoppel, this was simply untrue. As is evident from the extracts above, the second launch was squarely before the Tribunal and issue had been joined by both parties on it. Moreover, the respondent's arguments on estoppel were in an altogether different and separate segment of the relevant pleadings. Perhaps this fact is best manifested by the appellants' counsel's *own* acknowledgment (see [32] above) that the respondent's case on the second launch had become clear from the respondent's opening statement in the Arbitration, and the respondent's reply closing submissions in the Arbitration (see [39] above), which unequivocally distinguished between the respondent's alternative submission that launch had in any event occurred by May 2015, and the respondent's *further* alternative case on estoppel.

44 The appellants' third argument is similarly untenable. The fact that a party to arbitration has formed the view that the tribunal had decided the dispute on a matter which it perceived as not being the "focus" or "crux" of the dispute is not a basis for asserting that the tribunal had acted in excess of jurisdiction. Put simply, whether or not a particular facet of a dispute is identified by a party

as being the nub of a dispute may come down to the competence and ability of counsel to sift through material and identify the central issues. Moreover, even the best-intentioned and most able counsel may find themselves blinkered in focusing only on areas which they and their clients deem to be the most significant. Accordingly, a tribunal deciding a dispute based on an issue which is allegedly not the "crux" or "focus" of the proceedings is neither here nor there so long as that issue does in fact fall within the scope of parties' submission to arbitration.

45 As was observed in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [51] in the context of the requirement for parties to have the opportunity to present their cases, such a requirement does *not* shield a party from its own failures or strategic choices not to utilise the opportunity afforded. Further, and again in the context of the requirement for parties to have the opportunity to present their cases, the English High Court in *Terna Bahrain Holding Company WLL v Al Shamsi & ors* [2012] EWHC 3283 (Comm) made clear at [106] that a tribunal does not act unfairly in deciding a case on a point which was not emphasised by the party raising it, or which is not the subject matter of any great exposition. Provided the issue is raised, however briefly, the opposing party can avail itself of the opportunity it has to address the issue at whatever length and in whatever detail it so decides. We see no reason why this reasoning should not also apply where an award is challenged for excess of jurisdiction – if an issue has been submitted to the tribunal for adjudication, the fact that parties might not have made extensive submissions on it does not somehow remove that issue from the tribunal's jurisdiction.

46 On the facts of this case, the extracts from the pleadings, ALOI, opening statements, evidence adduced, and closing submissions all speak with one voice in establishing that the issues upon which the Tribunal based its decision were

categorically within the ambit of the Tribunal's jurisdiction. The appellants' arguments were thus uniformly rejected.

Did the Tribunal act in breach of natural justice?

47 Given our conclusion that the Tribunal had not exceeded its jurisdiction, and the appellants' own acknowledgment that the breach of natural justice alleged was entirely dependent on the Tribunal having in fact exceeded its jurisdiction (see [16] above), there was no need to consider the breach of natural justice alleged by the appellants in any detail. That argument was rendered unsustainable and fell *in limine* given that the appellants had ample opportunity to address the second launch, and did in fact do so.

Costs

48 A significant question of law as to costs had been broached in this case. The respondent contended at first instance that it, having been successful in resisting the appellants' attempt to set aside the Award, should be entitled to costs on an indemnity basis. While the respondent later abandoned this position at the hearing before us, following the recent decision in *BTN and another v BTP and another* [2021] SGHC 38 ("*BTN*"), we nonetheless take this opportunity to set out our brief views on whether there should be a presumption of indemnity costs in the event of an unsuccessful application for setting aside an arbitral award.

49 In support of its position below and in its written submissions on appeal, the respondent placed reliance on two Hong Kong decisions. The first was *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd (No 2)* [2012] 6 HKC 40, which held that a party who was unsuccessful in an application to set aside an arbitral award should, in the absence of special circumstances, be

ordered to pay costs on an indemnity basis. The second was *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKC 149 ("*Chimbusco*"), where the Hong Kong Court of First Instance stated at [10] that the basis of awarding costs on an indemnity basis was that parties had consensually agreed to submit their dispute to arbitration and accept the arbitral award as final and binding on them, but one party was going back on this. The respondent contended that given Singapore's pro-arbitration policy, the courts here should adopt the Hong Kong position and award costs on an indemnity basis as the *default* position where an application for setting aside has failed.

50 Before we outline our views on the respondent's contention, we pause to set out the Hong Kong position more fully. The Hong Kong courts adopt a default rule that indemnity costs will be granted when an award is unsuccessfully challenged in Court, unless special circumstances can be shown. This approach was first elucidated in *A v R* [2010] 3 HKC 67 ("*A v R*"), a decision of Anselmo Reyes J (as he then was) in the Hong Kong Court of First Instance. As Reyes J explained, there were three considerations animating this approach:

(a) First, at [67], Reyes J opined that a person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that a court will enforce the award as a matter of course. Hence, applications by an award debtor to appeal against or set aside an arbitral award should be regarded as exceptional events, and where such applications are unsuccessful, indemnity costs should be warranted, absent special circumstances.

(b) Second, an unmeritorious challenge against an award was said (at [69]) to be incompatible with the award debtor's duty to assist the court in the just, cost-effective, and efficient resolution of a dispute.

(c) Third, the award debtor should bear the full costs consequences of bringing an unsuccessful application, and the award creditor should not be made to incur costs arising from the losing party's attempt to challenge the award, particularly when the award creditor had already won at arbitration. To illustrate this third point, Reyes J explained at [70] that "[i]f the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award", and would be out of pocket for the remaining amount.

51 *A v R* was approved by the Hong Kong Court of Appeal in *Gao Haiyan and another v Keeneye* Holdings *Ltd and another* [2012] HKCU 226 at [13]. The Hong Kong Court of Appeal also adopted the reasons set out by Reyes J. *A v R* was also subsequently applied in *Chimbusco* at [10].

52 The Hong Kong position notwithstanding, we were not persuaded that there should be a default position that an unsuccessful application to set aside will attract indemnity costs. In this regard, we noted the recent decision of Belinda Ang J (as she then was) in *BTN*, where the High Court had been invited to award indemnity costs following an unsuccessful application to set aside an arbitral award. Ang J declined to award indemnity costs, noting at [8] that it was well established in Singapore that the imposition of costs on an indemnity basis was "dependent on there being exceptional circumstances to warrant a departure from the usual course of awarding costs on a standard basis".

53 We agreed with Ang J's reasoning. While the category of "exceptional circumstances" attracting indemnity costs is not closed (see, for instance, *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 ("*Airtrust*") at [22]–[24]), it would do violence to the notion of such circumstances having to be "exceptional" if *every* instance of an award being challenged unsuccessfully could be said to, at least presumptively, be an "exceptional" circumstance warranting indemnity costs. More fundamentally, such an approach is not reflective of Singapore's approach to indemnity costs. While the Court has a broad discretion to award costs, particularly in exceptional circumstances (under O 59 r 5 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC")), there is nothing in both the case law and the ROC which suggests that an entire *area* should be presumptively hived-off as attracting costs on an indemnity basis *purely* because of the subject matter it concerns. Rather, the assessment of whether indemnity costs are warranted turns on a highly fact-specific assessment of the *totality* of the facts and circumstances: *Airtrust* at [18]. This is, after all, a corollary of the circumstances having to be "exceptional" before indemnity costs are warranted. Thus, rather than create a presumption that indemnity costs apply in *every* instance where an application to set aside has been unsuccessful, the setting-aside context should be merely one of the factors the Court takes into consideration – as it is already empowered to under O 59 r 5 of the ROC – when deciding whether or not to order indemnity costs.

54 This reasoning was underpinned by strong conceptual reasons as well. While arbitration is a distinct species of dispute-resolution, applications for setting aside, enforcement, or other relief before the courts would engage the courts' jurisdiction. It would be neither appropriate nor permissible for parties to seek to engage the jurisdiction of the courts to set aside an award, but at the

same time insist on different treatment from other cases before the courts in terms of costs. There was simply no justification for this treatment of arbitration as an altogether separate category. A party seeking relief from the Court, even if in the context of an application to set aside an arbitral award, was, like any other litigant, a party before the Court, and bound by the Court's rules.

55 The Hong Kong position proceeded on the reasoning that (a) parties to arbitration recognise arbitral awards as final and binding; (b) any challenge to arbitral awards in court would therefore be tantamount to going back on this recognition by the parties; and (c) indemnity costs should thus be ordered. With respect, we disagreed with this reasoning. It fails to recognise that the limited avenues available to challenge an arbitral award are *statutorily* provided for in the same way as a right of appeal against a decision of the court below. There is no principled reason to draw any distinction between the two in assessing whether exceptional circumstances exist for the purpose of awarding indemnity costs.

56 We emphasise that in deciding whether to order indemnity costs, the Court should have regard to all the circumstances of the case, and whether a party has behaved *unreasonably* (see *Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm) at [25]). Critically, "[c]osts on an indemnity basis should only be ordered in a special case or where there are exceptional circumstances" (*Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2011] 1 SLR 582 at [29]).

57 For context, a case which fell within such an exceptional category was this Court's recent decision in *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36, where we found that there had been "deliberate material

non-disclosure" (at [28]) contrary to the duty of full and frank disclosure in an *ex parte* application. Worse, the non-disclosing party had completely failed to provide any explanation for the non-disclosure, save a perfunctory assertion that it was not deliberate. That party had also not been forthcoming in conceding that there had been material non-disclosure, with such acknowledgment only emerging at the end of the hearing before the Judge below. It was in such circumstances that this Court found that the non-disclosing party's "conduct was incontrovertibly beyond the pale". Had the respondent maintained its submission for indemnity costs, we would have found that the instant facts disclosed behaviour far less egregious than that in *Tecnomar*, and that the threshold for awarding costs on an indemnity basis had not been crossed. In fact, this was fairly conceded by the respondent's counsel at the hearing before us.

Conclusion

58 For the reasons set out above, we dismissed the appeal. Having regard to the parties' respective costs schedules, we awarded the respondent costs on the standard basis of S$40,000 (all-in). The usual consequential orders were also made.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

Navinder Singh and Farah Nazura Binte Zainudin (KSCGP Juris LLP) for the appellants;
Daniel Chia Hsiung Wen and Ker Yanguang (Ke Yanguang) (Morgan Lewis Stamford LLC) for the respondent.
