IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 193

Originating Summons No 15 of 2017

Between

GD Midea Air Conditioning Equipment Co Ltd

… *Plaintiff*

And

Tornado Consumer Goods Ltd

… *Defendant*

Originating Summons No 43 of 2017
(Summons No 720 of 2017)

Between

Tornado Consumer Goods Ltd

… *Plaintiff*

And

GD Midea Air Conditioning Equipment Co Ltd

… *Defendant*

GROUNDS OF DECISION

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

[Arbitration] — [Enforcement] — [Singapore award] — [Refusal of enforcement]

TABLE OF CONTENTS

GD Midea Air Conditioning Equipment Co Ltd
v
Tornado Consumer Goods Ltd and another matter

[2017] SGHC 193

High Court — Originating Summons No 15 of 2017, Originating Summons No 43 of 2017 (Summons No 720 of 2017)
Chua Lee Ming J
18 April 2017

7 August 2017

Chua Lee Ming J:

Introduction

1 This dispute concerned an arbitral award dated 14 November 2016 ("the Award") that was issued in Singapore International Arbitration Centre Arbitration No 65 of 2014 ("the Arbitration"). Tornado Consumer Goods Ltd ("Tornado") was the claimant in the Arbitration; GD Midea Air Conditioning Equipment Co Ltd ("Midea") was the respondent.

2 In Originating Summons No 15 of 2017 ("OS 15/2017"), Midea applied to set aside the Award in part. In Originating Summons No 43 of 2017 ("OS 43/2017"), Tornado obtained leave to enforce the Award ("the Enforcement Order"). Summons No 720 of 2017 ("SUM 720/2017") was Midea's application in OS 43/2017 to (a) set aside the Enforcement Order and (b) dismiss the originating summons.

3 I decided in favour of Midea in OS 15/2017 and set aside the Award in part. Consequently, the Enforcement Order was set aside in part and OS 43/2017 was dismissed in part. Tornado has appealed against my decision.

Background

4 Midea is a company incorporated in the People's Republic of China ("PRC"). It is in the business of manufacturing air-conditioners and other electrical products. Tornado is a company incorporated in Israel. It is in the business of selling air-conditioners in Israel.

5 In 2004, Tornado started purchasing residential air-conditioners from Midea on an *ad hoc* basis for the purposes of sale under its own brands in Israel. Between 2005 and 2011, Midea and Tornado entered into agreements that were renewed on a yearly basis.[1]

6 In August 2011, the parties entered into the following agreements:[2]

(a) The International Exclusive Distribution Agreement on Midea Brand Home Appliances ("the MBA"),[3] which governed the supply of Midea-branded air-conditioners to Tornado; and

(b) The Exclusive Original Equipment Manufacturer Supply Agreement ("the OEMA"), which governed the supply of air-conditioners and other electrical products to Tornado under Tornado's own brands.

Both agreements were valid for three years from 1 January 2012 to 31 December 2014.

7 Clause 2.1 of the MBA required Tornado to purchase products from Midea by means of purchase orders, and achieve the following annual shipped sales volume and/or value target ("Annual Sales Target"): (a) 30,000 sets in 2012; (b) 50,000 sets in 2013; and (c) 70,000 sets in 2014.

8 Clause 2.2 of the MBA entitled Midea to terminate the MBA by giving 60 days' prior written notice "at its own discretion and option" if (a) Tornado failed to achieve the Annual Sales Target in any year, (b) Tornado failed to achieve half of the Annual Sales Target by 30 June in any year ("Half-Year Sales Target"), or (c) it seemed "obviously impossible" for Tornado to meet the Annual Sales Target before the end of the year.

9 Clause 4.1 of the MBA provided that payment for Tornado's orders "shall be made … in accordance with the payment terms stipulated in [the purchase order] confirmed by MIDEA or corresponding [pro forma invoice]" and that all payments were to be made in the form of telegraphic transfer ("TT") or letters of credit ("LC").

10 Clause 4.2 of the MBA provided that "[a]ny and all payments shall be made in full within 90 days of the date of each [marine] Bill of lading date".

11 On 6 January 2012, Tornado commenced the sale of Midea-branded air-conditioners in Israel.[4] Consistent with cl 4.1 of the MBA, Tornado would order air-conditioners from Midea by sending a purchase order ("PO") to Midea. Midea would then issue a pro forma invoice ("PI") indicating the price and payment terms, for Tornado's acceptance.[5]

12 As of 30 June 2012, Tornado had purchased and shipped only 4,464 sets of Midea-branded air-conditioners. Under cl 2.1 of the MBA, the Half-Year

Sales Target for 2012 was 15,000 sets. Tornado claimed that it met the Half-Year Sales Target by including the orders it made under pro forma invoice PI-TORNADO-1130-2 dated 23 August 2011 ("PI-TORNADO-1130-2"). Midea disagreed, arguing that PI-TORNADO-1130-2 could not be included since the MBA took effect only on 1 January 2012.

13 Between 26 and 28 November 2012, the parties met at Midea's headquarters in Beijiao, PRC. During the meeting, handwritten annotations were made to cl 2 of the MBA.[6] The effect of the annotations was to (a) lower the Annual Sales Targets and (b) postpone the commencement of the reduced Annual Sales Targets from 2012 to 2013. In the Arbitration, Midea claimed that the annotations were a non-binding record of discussions whereas Tornado claimed that they were binding amendments to the MBA.

14 For the whole of 2012, Tornado purchased and shipped 14,350 sets of Midea-branded products under the MBA, short of the Annual Sales Target of 30,000 sets. Tornado again claimed that its orders under PI-TORNADO-1130-2 should be included for 2012, bringing the figure for 2012 to 26,662 sets. Midea again disagreed on the ground that the MBA only became effective on 1 January 2012.

15 The payment terms for the Midea-branded products supplied in 2012 were "1 MILLION USD ROLLING DEPOSIT BY TT, 100% BY LC AT 90 DAYS AFTER B/L DATE".[7] The reference to the "1 MILLION USD ROLLING DEPOSIT" was a reference to a US$1m deposit which Tornado had placed with Midea ("the Deposit").

16 In January 2013, Midea returned the Deposit to Tornado at Tornado's request. This resulted in a change to the payment terms. Between January and

September 2013, the payment term for orders made by Tornado was 5% by TT upon confirmation of the order and the remaining 95% by LC payable within 90 days from the date of each bill of lading.[8]

17 On 16 July 2013, Midea entered into a supply agreement with Tornado's competitor, Electra Consumer Products (1951) Ltd, for a five-year term, starting from 2014 ("the Electra Agreement").[9] In the Arbitration, Tornado claimed that Midea's actions were calculated to end its relationship with Tornado so that it could move ahead with the Electra Agreement. Midea contended that the Electra Agreement excluded all Midea-branded products; Tornado disputed Midea's contention.

18 On 29 August 2013, Tornado sent Midea a purchase order for 13,170 sets of Midea-branded air-conditioners. On 25 September 2013, Midea sent Tornado pro forma invoice 1325 ("PI-1325")[10] for the order. The payment term stated in PI-1325 was "30% TT + 70% LC at sight".

19 By 31 December 2013, Tornado had purchased and shipped 17,673 sets of Midea-branded products under the MBA for 2013[11], short of the Annual Sales Target under the MBA.

20 On 10 and 12 January 2014, Tornado placed two orders for a total of 55,292 sets of Midea-branded products.[12]

21 On 13 January 2014, Tornado sent Midea a letter of credit for US$3,201,441.50 (which was the full amount for the order under PI-1325) payable 90 days after shipment, and informed Midea to start the production in respect of the products in PI-1325 immediately. Tornado also requested Midea to send the pro forma invoices for its 10 and 12 January 2014 orders.

22 On 14 January 2014, Midea replied, declining to produce the sets covered in PI-1325 as Tornado's confirmation of PI-1325 was more than three months after it was first sent by Midea. Midea also stated that the prices set out in PI-1325 were no longer applicable.[13]

23 On 28 January 2014, Midea gave Tornado 60 days' written notice of termination of the MBA, pursuant to cl 2.2 of the MBA ("the Termination Notice"). The grounds for termination were stated as Tornado's failure to achieve its Annual Sales Target for 2013 and Tornado's refusal to do so after several rounds of communication.[14]

24 On 29 January 2014, Tornado placed further orders for 54,494 sets of Midea-branded products. Midea stated that it could not accept the orders based on the old prices and conditions. Midea also referred Tornado to the Termination Notice.[15]

25 On 12 March 2014, at Tornado's request, Midea sent Tornado a revised price list. On 13 March 2014, Tornado placed orders using the new prices (while reserving its rights). On 20 March 2014, Midea sent a pro forma invoice for 6,095 sets ("PI-2014") with the payment term stated as "100% TT before delivery, 30% TT in 3 days after confirmati[on] of the PI, 40% TT before production, and the remaining 30% TT before delivery of the products".[16] Tornado accepted PI-2014 under protest.

The Arbitration

26 On 3 April 2014, Tornado commenced the Arbitration against Midea pursuant to cl 15.1 of the MBA. Clause 15.1 of the MBA provided as follows:

> All disputes in connection with this Agreement or the execution thereof shall be settled through amicable negotiations. In case

> no settlement can be reached through negotiation within sixty days after the date such negotiation was first requested in writing by a Party, the dispute shall then be submitted for arbitration in Singapore before Singapore International Arbitration Centre in accordance with its Arbitration Rules.

The Arbitration concerned only the termination of the MBA by Midea. The OEMA had been terminated earlier by Midea in August 2013 and was the subject of a separate arbitration for which a separate arbitral award dated 3 February 2017 had been issued.[17]

27 Tornado's Notice of Arbitration included the following claims:

(a) It was agreed during the meeting on 26 November 2012 that the payment terms for future orders under the MBA and OEMA would be for 5% of the order to be paid via TT upon confirmation of the order and the remaining 95% to be paid by LC within 90 days from the date of each bill of lading ("the alleged Agreed Payment Terms")[18]

(b) The Termination Notice was invalid because (i) in issuing PI-1325, Midea had breached the alleged Agreed Payment Terms and but for Midea's breach of the alleged Agreed Payment Terms, Tornado would have achieved the Annual Sales Target for 2013, (ii) Midea did not attempt good faith discussions with Tornado prior to issuing the Termination Notice, and (iii) Midea failed to give Tornado 60 days' notice to remedy the alleged breach.[19]

28 In its statement of claim in the Arbitration, Tornado repeated the claim made in its Notice of Arbitration that the Termination Notice was invalid because, among other things, PI-1325 was in breach of the alleged Agreed Payment Terms.[20]

29 In its statement of defence in the Arbitration, Midea denied the alleged Agreed Payment Terms and pointed out that the annotations to the MBA (see [13] above) did not reflect any changes to cl 4.1 on payment terms.[21] Midea claimed that it was entitled to terminate the MBA pursuant to

(a) clause 2.2 of the MBA because Tornado failed to meet all of its Annual and Half-Year Sales Targets under the MBA;[22] and

(b) Article 94(4) of the Contract Law of the PRC ("the PRC Contract Law") because Tornado's failure to meet the Annual Sales Targets made realization of the aim of the MBA impossible. Article 94(4) of the PRC Contract Law entitled a party to dissolve a contract if the other party has delayed performance of an obligation or committed a breach which makes the objective of the contract unachievable.[23]

30 Midea counterclaimed, seeking a declaration that it had validly terminated the MBA and damages for Tornado's breaches of the MBA.[24]

31 In its opening submissions, Tornado claimed that the parties reached consensus on the alleged Agreed Payment Terms and that the payment term in PI-1325 was "contrary to the parties' prior agreement and practice".[25] Tornado subsequently abandoned its claim based on the alleged Agreed Payment Terms. Tornado's case in its closing submissions was that the payment term in PI-1325 was in breach of the parties' prior practice.[26]

32 On 14 November 2016, the tribunal constituted for the Arbitration ("the Tribunal") issued the Award.[27] The Tribunal found largely in favour of Tornado and dismissed Midea's counterclaim.

Midea's challenges against the Award

33 In the present proceedings, Midea challenged the following findings made by the Tribunal:

(a) Paragraph 8.25 of the Award: Midea had breached cl 4.2 of the MBA by imposing the payment term "30% TT + 70% LC at sight" in PI-1325.

(b) Paragraph 8.29 of the Award: As a result of Midea's breach of cl 4.2 of the MBA, Tornado was excused under Art 67 of the PRC Contract Law from performing its own obligation to achieve the 2013 Annual Sales Target set out in cl 2.1 of the MBA as allegedly amended during the November 2012 meeting.

(c) Paragraph 8.30 of the Award: Following from the finding in para 8.29 of the Award, Midea was not entitled to rely on Tornado's failure to achieve the 2013 Annual Sales Target as a ground for termination, and hence had no right to terminate the MBA under cl 2.2 of the MBA.

(d) Paragraph 8.31 of the Award: Midea had imposed the payment term in PI-1325 in breach of cl 4.2 of the MBA in order to prevent Tornado from achieving the 2013 Annual Sales Target, thereby hastening the fulfilment of the condition for termination under cl 2.2 of the MBA. Under Art 45 of the PRC Contract Law, a party cannot rely on a condition if it improperly and for its own benefit facilitated the fulfilment of that condition. Therefore, Midea was precluded by Art 45 of the PRC Contract Law from relying on Tornado's failure to achieve the 2013 Annual Sales Target in the Notice of Termination.

(e) Paragraph 9.11 of the Award: As Midea was not entitled to terminate the MBA, Midea was under an obligation to supply Tornado the sets that Tornado had ordered under PI-1325) and in the further orders placed between 10 and 29 January 2014. Midea therefore breached the MBA by refusing to supply the sets ordered (save for the 6,095 sets that Midea did supply under PI-2014).

(f) Paragraph 9.12 of the Award: Midea breached cl 4.2 of the MBA in imposing the payment term that it did in PI-2014.

(g) Paragraph 11.3 of the Award: In the light of the Tribunal's finding that the Termination Notice was invalid because the payment term in PI-1325 was in breach of the MBA, Midea was not entitled to terminate the MBA pursuant to Art 94(4) of the PRC Contract Law which entitled a non-breaching party to terminate a contract if the other party's breach has rendered the objective of the contract unachievable.

(h) Paragraphs 13.4–13.5 of the Award: In the light of the Tribunal's findings, in particular in paras 8.29, 8.30 and 8.31 of the Award, Midea breached the principle of good faith by entering into the Electra Agreement whilst the MBA was still in force.

(i) Paragraphs 21.19 and 21.26 of the Award: In the light of the Tribunal's findings in paras 8.25 and 8.29–8.31 of the Award, Midea was liable for the loss of profits suffered by Tornado in 2013 as a result of Midea's breach of cl 4.2 of the MBA, and Tornado was entitled to recover from Midea its loss of profits in the sum of US$9,380,221.

(j) Paragraph 23.3 of the Award: Tornado suffered loss as a result of Midea's wrongful termination and Tornado was entitled to recover

additional expenses incurred in having to purchase stock at higher prices in the sum of US$324,202.

(k) Paragraph 24.3 of the Award: Midea was to pay Tornado compensation in the sum of US$520,791 for the damage caused by Midea's imposition of the new prices in respect of PI-2014.

(l) Paragraph 28.9 of the Award: As Tornado had succeeded to a large part in its claims, in particular its largest claim for loss of profits, Midea was to bear the costs of the arbitration as set out in para 28.9.

(m) Paragraph 29.10 of the Award: Midea was to pay post-award interest at 5.33% per annum on all sums awarded to Tornado.

34 Midea submitted that the Tribunal's finding in para 8.25 of the Award, *ie*, that Midea had breached cl 4.2 of the MBA by imposing the payment term "30% TT + 70% LC at sight" in PI-1325 ("the Tribunal's finding on cl 4.2"), should be set aside because in arriving at its decision on cl 4.2 the tribunal had acted:

(a) in excess of the Tribunal's jurisdiction (Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") read with s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"));

(b) in breach of the agreed procedure (Art 34(2)(*a*)(iv) of the Model Law read with s 3 of the IAA); and

(c) in breach of Midea's right to present its case (Art 34(2)(*a*)(ii) of the Model Law read with s 3 of the IAA) and/or in breach of the rules of natural justice (s 24(*b*) of the IAA).

35 Midea further submitted that the rest of the Tribunal's findings set out at [33] above should also be set aside as they were all tainted by the Tribunal's finding on cl 4.2.

36 Finally, Midea submitted that the Enforcement Order should also be set aside to the extent the findings set out at [33] are set aside.

Whether the Tribunal acted in excess of its jurisdiction

The law

37 Under Art 34(2)(*a*)(iii) of the Model Law, an arbitral award may be set aside if it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".

38 The applicable principles were not in dispute. While Singapore courts infrequently exercise their power to set aside arbitral awards, they will not hesitate to do so if a statutorily prescribed ground is clearly established. Article 34(2)(*a*)(iii) applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. See *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [27] and [31].

39 Assessing whether an arbitral award ought to be set aside under Art 34(2)(iii) of the Model Law involves a two-stage inquiry:

(a) first, 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*" [emphasis in original].

See *CRW* at [30], citing *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [40] and [44].

40 Thus, the determination of an issue which has not been submitted to arbitration will render that part of the award liable to be set aside. The arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination. See *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [51], citing *PT Asuransi* at [37].

Whether the Tribunal's finding on cl 4.2 was within the scope of the Arbitration

41 Paragraph 8.25 of the Award sets out the Tribunal's finding on cl 4.2 as follows:

> 8.25 The Tribunal finds that [Midea] by imposing in PI-1325 payments terms of "*30% TT + 70% LC at sight*", breached the [MBA]. This is because pursuant to Clause 4.2 of the [MBA], which provides as follows:
>
> …
>
> the Parties had agreed that payment shall be made in full within 90 days of each "*Marian* [*sic*] *Bill of lading*". Accordingly, [Midea] was not entitled to a LC 'at sight' but only to a LC which was payable [within] 90 days of the bill of lading date. Prior to issuing PI-1325, it is not in dispute that [Midea] had complied with Clause 4.2 of the [MBA]. However, since [Midea] in PI-1325 imposed payments terms which required a LC 'at sight', i.e. a letter of credit which was not payable within 90 days of the bill of lading date, [Midea] breached Clause 4.2 of the [MBA].
>
> [emphasis in original]

42 Midea's case was that the parties' submission to the Tribunal did not include the issue whether Midea breached cl 4.2 of the MBA.

43 It was indisputable that the Notice of Arbitration, pleadings and submissions in the Arbitration did not allege any breach of cl 4.2 of the MBA. There was also no reference to any breach of cl 4.2 in the parties' "Agreed List of Issues" ("ALOI") which was submitted to the Tribunal.[28] Issue (6) of the ALOI described the relevant issue as whether "Midea [was] in breach of the *alleged Agreed Payment Terms* in respect of the payment terms set out [in PI-1325]" [emphasis added]. However, the issue submitted by the parties for the Tribunal's determination, in relation to PI-1325, was whether the payment term imposed by Midea breached the parties' prior practice.

44 Further, the Tribunal's interpretation of cl 4.2 was clearly inconsistent with the position taken by the parties on cl 4.2. First, both Midea and Tornado were in agreement that Midea had the discretion under cl 4.1 of the MBA to fix the payment terms, although Tornado also submitted that the discretion had to be exercised reasonably and in accordance with prior agreement or established practice.[29]

45 Second, neither Tornado nor Midea took the position that cl 4.2 meant that Midea was only entitled to payment by LC that was payable within 90 days of the date of the bill of lading. Instead, both Midea and Tornado were in agreement that the effect of cl 4.2 was to require Tornado to make full payment within 90 days of the date of the bill of lading *in any event*. In its opening submissions, Tornado stated that cl 4.1 left the precise payment method "to be stated in [POs] and [PIs], as confirmed by the parties… subject to an overriding obligation [under cl 4.2] that Tornado must make full payments within 90 days

of the date of the bill of lading".[30] Midea described cl 4.2 as fixing the "long stop date" by which the purchase price had to be paid in full.[31]

46 Before me, Tornado tried to explain that its use of the word "overriding" in its opening submissions was not intended to mean the same thing as the "long stop date" stated by Midea. According to Tornado, it had meant that if no agreement was reached on payment terms in the PO or PI, then cl 4.2 would apply as the default payment term. In my view, Tornado's explanation was an afterthought and I rejected it. There would have been no agreed sale if no agreement had been reached on the payment terms in the PO or PI. The terms in the PI (including the payment term) were subject to Tornado's acceptance. Further, Tornado' own conduct contradicted its explanation. Tornado did not agree with the payment terms stated in PI-1325 and PI-2014. These payment terms became matters of dispute. Yet, Tornado never claimed that cl 4.2 applied as the default payment term. No sale took place in respect of PI-1325 and Tornado accepted PI-2014 under protest.

47 I should add that in its closing submissions in the Arbitration, Tornado did submit that cl 4.2 "at the very least, implies that parties did not envisage the situation where payments would be made 100% upfront/before delivery or shipment".[32] However, this clearly fell short of being a submission that Midea was only entitled to payment by LC which was payable within 90 days of the date of the bill of lading or that the payment term in PI-1325 was in breach of cl 4.2.

48 Before me, Tornado did not dispute that its case in the Arbitration did not include any allegation that Midea had breached cl 4.2. However, Tornado submitted that the Tribunal's finding on cl 4.2 did not exceed its jurisdiction for two reasons.

49 Tornado's first reason was that the Tribunal's letter dated 11 November 2015 with respect to post-hearing submissions "made the payments under PI-1325 (the proper interpretation of Clauses 4.1 and 4.2 of the MBA) and the materiality of the refund of the US$1m Deposit (Clause 5.1 of the OEMA) a central issue in the Arbitration".[33] I disagreed with Tornado.

50 In its letter dated 11 November 2015[34], the Tribunal requested each party to:

(a) summarise the evidence in support of its respective case regarding PI-1325;

(b) summarise the legal effect, if any, in respect of the handwritten annotations to the MBA made at the November 2012 meeting; and

(c) address the relevance of the Deposit to the issue of what, if any, the payment terms were to be for PI-1325.

51 Nothing in the letter suggested that the Tribunal was considering the question whether Midea had breached cl 4.2 of the MBA. Further, neither Tornado nor Midea understood the Tribunal's letter to mean that breach of cl 4.2 was an issue in the Arbitration. The closing submissions and reply closing submissions made by both Tornado and Midea contained no reference to any breach of cl 4.2. Instead, the submissions dealt with the issue whether the payment term in PI-1325 was in breach of the parties' prior practice.

52 Tornado's second reason was that the Tribunal's finding on cl 4.2 was just one aspect of the ultimate issue which was whether the Termination Notice was valid.[35]

53 Tornado referred me to *TMM*. In that case, the buyer signed two agreements for the purchase of two vessels. The seller issued a Notice of Readiness ("NOR") for both vessels. The NOR meant that the buyer had to take delivery of the vessels. The buyer rejected the NOR on the ground that the vessels were not physically ready for delivery. The buyer then commenced arbitration against the seller seeking the refund of the deposits it had paid for the vessels. In the arbitration, the buyer argued that the NOR was not valid because the vessels were not certified by the American Bureau of Shipping ("ABS") with dynamic positioning system 1 ("DP-1") class notation and the DP-1 system was not functioning and operational, as required under the agreements. The seller referred to cl 11 of the agreements which required the vessels to be delivered physically ready. The seller contended that it was not required to deliver the vessels in a fully operational condition and that it was only required to deliver the vessels in the same condition and with the same certificates as when the vessels were first inspected. The seller further submitted that in any event, its failure to deliver the vessels with the requisite class certificate and fully functioning DP-1 systems amounted at most to a breach of an intermediate term, not a condition. Accordingly, the buyer might be entitled to damages but it was not entitled to refuse to take delivery of the vessels. The arbitrator held that cl 11 was not a condition or condition precedent, but a collateral warranty. Accordingly, the arbitrator held that the buyer was not entitled to rely on cl 11 to reject the NOR.

54 Before the High Court, the buyer argued that whether cl 11 was a condition which if breached entitled the seller to terminate the agreements, was not an issue before the arbitrator. The buyer submitted that the arbitrator had exceeded his authority in finding that cl 11 was not a condition. The court disagreed with the buyer as it was clear from the parties' submissions in the arbitration that the nature of cl 11 was in issue (at [57]). The buyer had conceded

in its submissions before the High Court that whether cl 11 was a condition or an innominate term was an issue before the arbitrator (at [67]). The seller's submissions in the arbitration made it clear that its case was that cl 11 was not a condition but either a warranty or an innominate term which had the effect of a warranty (at [68]). Thus, it was expressly part of the seller's case that the breach of cl 11 did not entitle the buyer to terminate the contracts because cl 11 was a warranty (at [69]).

55 However, the court also reasoned that since the parties had asked the arbitral tribunal to determine whether the buyer's refusal to accept the NOR was a repudiatory breach, it was open to the arbitrator to "take the view that he ought to determine whether cl 11 was a condition because that would have a bearing on the question whether [the buyer] had repudiated the [agreements]" (at [57]). In the present case, Tornado sought to rely on this alternative ground in *TMM*. Tornado's argument went as follows:

> (a) The parties had, pursuant to Issues (5) and (8) of the ALOI, asked the Tribunal to determine whether Midea was entitled to terminate the MBA by reason of Tornado's failure to achieve the 2013 Annual Sales Target under the MBA. Issue (5) was whether Tornado was in breach of its Half-Year Sales Target and Annual Sales Target for 2013. Issue (8) was whether Midea was entitled to terminate the MBA.
>
> (b) Therefore, it was open to the Tribunal, in reading Issues (5) and (8) of the ALOI, to take the view that it ought to determine the "antecedent/underlying question" as to whether Tornado was excused from performing its obligation to achieve the 2013 Annual Sales Target.[36]

56 I disagreed with Tornado's submission. Implicit in Tornado's submission was the proposition that the Tribunal was free to decide Issue (8) (*ie*, whether Midea was entitled to terminate the MBA) on any ground that it could find regardless of the issues expressly submitted to it by the parties. Such a broad proposition was untenable. The policy of minimal curial intervention has to be balanced against the parties' right to define the jurisdiction of the arbitral tribunal. Parties have the right to define the jurisdiction of the arbitral tribunal at any level of specificity.

57 Such a broad proposition was also not supported by *TMM*. The alternative ground in *TMM* was not as broad as Tornado suggested. In my view, the reason for the alternative ground in *TMM* was that determining the question whether cl 11 was a condition was a necessary step in determining whether the buyer had repudiated the agreements. The seller had relied on cl 11 in support of its case that the NOR was valid. In the present case, the Tribunal's finding on cl 4.2 was completely unnecessary for the determination of Issues (5) and (8) of the ALOI. The relevant issue submitted by the parties to the Tribunal in respect of PI-1325 was whether Midea had breached prior practice in imposing the payment term that it did in PI-1325. The parties had defined the Tribunal's jurisdiction by reference to this issue. Tornado did not rely on cl 4.2 for its submission that the Termination Notice was invalid.

58 Tornado also referred me to *Grant Thornton International Ltd v JBPB & Co (A Partnership)* [2013] HKCFI 523, in which the High Court of the Hong Kong Special Administrative Region stated as follows (at [44]):

> In my view, the words "decisions on matters beyond the scope of the submission to arbitration" under s 89(2)(d)(ii) [of the Arbitration Ordinance (Cap 609)] should be construed narrowly to only include those decisions which are *clearly unrelated to* or not reasonably required for the determination of the subject

> disputes, matters or issues that have been submitted to arbitration.
>
> [emphasis added]

59 In my view, the use of the words "clearly unrelated to" may be too narrow because the converse – that any decision "related" to an issue that has been submitted to arbitration would then fall within the scope of the arbitration – would seem to be too broad. In any event, in my view, the Tribunal's finding on cl 4.2 was clearly unrelated to and not reasonably required for the determination of Issues (5) and (8) of the ALOI for the same reasons set out at [57] above.

Whether there was a need to show prejudice

60 I agreed with Midea that as the Tribunal had exceeded its jurisdiction by addressing matters beyond the scope the submission to arbitration, there was no further requirement for Midea to show that it had suffered "real or actual prejudice". The observation in *CRW* (at [32]) that "real or actual prejudice" has to be shown was made in the context of a tribunal failing to address matters properly before it for determination. See *Arbitration in Singapore: A Practical Guide* (The Honourable the Chief Justice Sundaresh Menon editor-in-chief) (Sweet & Maxwell, 2014) at para 14.041.

61 In any event, as will be seen later (at [67]–[71] below), I was of the view that there was real prejudice to Midea.

Conclusion

62 I concluded that the Tribunal's finding on cl 4.2 should be set aside on the ground that the Tribunal had exceeded its jurisdiction in making this finding.

The question whether there was a breach of cl 4.2 had clearly not been submitted for its determination.

Whether the Tribunal acted in breach of the agreed procedure

63 A party seeking to set aside an arbitral award on the ground of breach of agreed procedure under Art 34(2)(*a*)(iv) of the Model Law must show that (a) there was an agreement between the parties on a particular arbitral procedure; (b) the tribunal failed to adhere to that agreed procedure; (c) the failure was causally related to the tribunal's decision in the sense that the decision could reasonably have been different if the tribunal had adhered to the parties' agreement on procedure; and (d) the party mounting the challenge is not barred from relying on this ground by virtue of its failure to raise an objection during the proceedings before the tribunal: *AMZ v AXX* [2016] 1 SLR 549 ("*AMZ*") at [102].

64 In essence, Midea submitted that the Tribunal breached the agreed procedure when it departed from the ALOI by making its finding on cl 4.2. I agreed with Midea that the ALOI constituted a part of the parties' agreed arbitral procedure. The ALOI was prepared and submitted by the parties pursuant to Procedural Order No 1 ("PO1") issued by the Tribunal. PO1 stated (at para 8.5) that "[a]s a general principle, no Party shall be permitted to advance any new factual allegations or any new legal arguments at the Oral Hearing, unless expressly permitted by the Tribunal".[37] It was clearly envisaged that the dispute would be decided within the framework of the ALOI. The Tribunal's finding on cl 4.2 was a radical departure from the ALOI. In my view, the first three requirements set out in *AMZ* had been met. The fourth requirement was irrelevant; Midea had no opportunity to object during the proceedings since the

issue of a breach of cl 4.2 did not arise at all during the arbitral proceedings. I concluded that the Tribunal had acted in breach of the agreed procedure.

Whether the Tribunal acted in breach of the rules of natural justice

65 A party seeking to set aside an arbitral award under Art 34(2)(*a*)(ii) of the Model Law or s 24(*b*) of the IAA must establish (a) which rule of natural justice was breached; (b) how that rule was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced the party's rights: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29].

66 The crux of Midea's case was that the Tribunal's finding on cl 4.2 breached the fair hearing rule because Midea was denied a full opportunity to present its case. As stated earlier (see [62] above), the issue of a breach of cl 4.2 did not arise in the Arbitration; the Tribunal made its finding on cl 4.2 without giving notice to the parties. The Tribunal's breach was clearly connected to the making of the Award as its finding on cl 4.2 was the basis upon which the impugned findings in the Award (including the finding that Midea was not entitled to terminate the MBA) were made. I agreed with Midea that the Tribunal's finding on cl 4.2 was in breach of the rules of natural justice.

Whether there was prejudice to Midea

67 An arbitral award will not be set aside on the ground of breach of natural justice unless it can be shown that some actual or real prejudice will be caused by the breach: *Soh Beng Tee* at [91]. The test is whether the arbitral tribunal could reasonably have arrived at a different result if not for the tribunal's breach: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54]. This test applies whenever prejudice needs to

be shown in an application to set aside an arbitral award, regardless of whether the ground relied upon is Art 34(2)(*a*)(ii), Art 34(2)(*a*)(iii) or Art 34(2)(*a*)(iv) of the Model Law, or s 24(*b*) of the IAA: *AMZ* at [103]–[104].

68 Tornado argued that there was no prejudice to Midea. Tornado submitted that even if the Tribunal had not made its finding on cl 4.2, the Tribunal would have found *by implication* that Midea's imposition of the payment term in PI-1325 was in breach of the parties' prior agreement and practice.[38] Tornado referred to para 8.24 of the Award, which stated as follows:

> 8.24 Whilst Clause 4.1 of the [MBA] does not set out in what proportion payment is to be made by TT or LC or whether an initial deposit is required and if so, in what amount, it is clear from the record of [the Arbitration] that [Midea] in the course of the Parties' approximately ten year relationship, had at no time prior to 25 September 2013 requested that payment be made on a "*30% TT + 70% LC at sight*" basis as it had in respect of PI-1325 … The Tribunal notes that [Midea] does not dispute that prior to 25 September 2013 (i.e. when PI-1325 and OEM PIs 1326 to 1328 had been issued), it had only requested an initial deposit of up to 10% of the amount involved with the balance to be paid by letter of credit payable within 90 days of the bill of lading date.
>
> [emphasis in original]

69 I disagreed with Tornado. There was no finding made by the Tribunal in para 8.24. If, as Tornado suggested, the Tribunal would have found a breach of the parties' prior agreement and practice, it would have been easy for the Tribunal to make that finding in its Award. After all, that was the issue expressly submitted to the Tribunal for its determination. However, the Tribunal did not deal with Tornado's claim that Midea had breached the parties' prior agreement and practice. Instead, the Tribunal chose to make its finding on cl 4.2 despite the fact that a breach of cl 4.2 was never an issue in the Arbitration. In my view, it could not be said that the Tribunal could not reasonably have arrived at a different result.

70 Tornado also submitted that even if Midea had full opportunity to make its arguments on the construction of cll 4.1 and 4.2 of the MBA, it would not have made a difference to the Tribunal's finding on cl 4.2. I disagreed. The interpretation that the Tribunal gave to cl 4.2 and the question of a breach of cl 4.2 were never raised or argued in the Arbitration. As noted earlier (see [44]–[47] above), the Tribunal's interpretation of cl 4.2 was contrary to the parties' own interpretation of cl 4.2. Tornado's submission that it would not have made a difference was highly speculative. In my view, it could not be said that the Tribunal could not reasonably have arrived at a different result.

71 In the circumstances, I concluded that Midea had suffered real or actual prejudice.

Other findings tainted by the Tribunal's finding on cl 4.2

72 Midea submitted that the rest of the Tribunal's findings set out in [33] were tainted by the Tribunal's finding on cl 4.2 and should be set aside as well. Tornado argued that the Tribunal's findings in three paragraphs in the Award did not depend on the Tribunal's finding on cl 4.2.

73 First, Tornado submitted that the Tribunal's finding in para 8.31 of the Award – that Midea's termination of the MBA was invalid – was supported by its "alternative finding" that Midea hastened fulfilment of the condition for termination under cl 2.2 of the MBA.[39] I disagreed. The relevant sentence in para 8.31 reads:[40]

> … The Tribunal considers it is therefore clear that [Midea] had imposed the payment terms in PI-1325 in breach of Clause 4.2 of the [MBA] in order to prevent [Tornado] from achieving the 2013 annual sales target thereby hastening fulfilment of the condition for termination under Clause 2.2. …"

It was clear that the finding that Midea hastened the fulfilment of the condition for termination was inextricably linked to the Tribunal's finding on cl 4.2.

74 Second, Tornado submitted that the Tribunal's finding in para 9.11 of the Award – that Midea breached the MBA by refusing and/or failing to supply the sets ordered under PI-1325 and in the further orders placed between 10 and 29 January 2014 – was not a consequence of its finding on cl 4.2.[41] I disagreed. Para 9.11 of the Award reads:[42]

> In light of the Tribunal's findings in paragraphs 8.30 and 8.31 above that the Termination Notice was invalid as [Midea] was not entitled to terminate and had not validly terminated the [MBA], the Tribunal finds further that [Midea] was under an obligation to supply to [Tornado] the sets [Tornado] had ordered in its order dated 29 August 2013 (in respect of which [Midea] had issued PI-1325) and in the further orders placed between 10 and 29 January 2014. The Tribunal finds that [Midea], by refusing and/or failing to supply the sets ordered (save for 6,095 sets), has breached the [MBA] …

The Tribunal's finding in para 9.11 was clearly linked to its finding on cl 4.2.

75 Third, Tornado submitted that the Tribunal's finding in para 13.4 of the Award – that Midea breached the principle of good faith by entering into the Electra Agreement whilst the MBA was still in force – did not depend on the Tribunal's finding on cl 4.2.[43] I disagreed. Para 13.4 of the Award reads:[44]

> In light of the Tribunal's findings in respect of Issues 1, 2, 3, 4, 5, 7 and 8 above and in particular in paragraphs 8.29, 8.30 and 8.31 above, the Tribunal is of the view that the Respondent, by entering into the Electra Agreement whilst the [MBA] was still in force, breached the principle of good faith …

The Tribunal's finding on cl 4.2 was an important part of the findings in paras 8.29, 8.30 and 8.31 of the Award. In addition, the MBA was still in force because of the Tribunal's finding on cl 4.2. It was clear that the Tribunal's finding in para 13.4 was linked to its finding on cl 4.2.

76 I was satisfied that the other findings made by the Tribunal as set out at [33] above were linked to and flowed from its finding on cl 4.2, with the exception of para 24.3 of the Award. The finding in para 24.3 was that Midea was to pay Tornado compensation for the damage caused by Midea's imposition of the new prices stated in PI-2014. Midea did not show how this finding was linked to the Tribunal's finding on cl 4.2. Accordingly, I set aside the Tribunal's findings as set out at [33] above save for the finding in para 24.3 of the Award. The finding in para 29.10 of the Award on interest was set aside to the extent the interest related to any of the awards that were set aside.

Whether the tainted parts of the Award should be remitted

77 Tornado submitted that the impugned findings need not be set aside and should be remitted to the Tribunal under Art 34(4) of the Model Law. I disagreed with Tornado, and declined to remit the Award to the Tribunal. This was not a case where the Tribunal had failed to make a determination on an issue that had been submitted to it. In making its finding on cl 4.2, the Tribunal had exceeded its jurisdiction by deciding on an issue that had not been submitted for its determination. The other findings were set aside because they were tainted by the Tribunal's finding on cl 4.2. I agreed with Midea that in the circumstances, it was not appropriate to remit the Tribunal's finding on cl 4.2 and the other tainted findings, to the Tribunal. Whether there was a breach of cl 4.2 was never an issue before the Tribunal in the first place.

SUM 720/2017 in OS 43/2017

78 It was common ground that the result in SUM 720/2017 in OS 43/2017 should follow that in OS 15/2017. Accordingly, I set aside the Enforcement Order in OS 43/2017 and dismissed OS 43/2017 to the same extent that the Award had been set aside in OS 15/2017.

Conclusion

79 For all of the reasons set out above, I granted Midea's application in OS 15/2017 and set aside paras 8.25, 8.29–8.31, 9.11, 9.12, 11.3, 13.4, 13.5, 21.19, 21.26, 23.3, 28.9 and 29.10 (to the extent the interest awarded related to any of the awards set aside) of the Award. I ordered costs in respect of OS 15/2017 to be paid by Tornado to Midea, fixed at S$14,500 plus disbursements to be fixed by me if not agreed.

80 I also granted Midea's application in SUM 720/2017 to set aside the Enforcement Order and dismiss OS 43/2017 to the same extent that the Award had been set aside in OS 15/2017. I ordered costs in respect of SUM 720/2017 to be paid by Tornado to Midea, fixed at S$1,500 plus disbursements to be fixed by me if not agreed.

Chua Lee Ming
Judge

Tan Beng Hwee Paul and Devathas Satianathan (Rajah & Tann Singapore LLP) for the plaintiff in HC/OS 15/2017 and the defendant in HC/OS 43/2017;
Chan Hock Keng, Ang Shunli Alanna Suegene Uy and Goh Wei Wei (WongPartnership LLP) for the defendant in HC/OS 15/2017 and the plaintiff in HC/OS 43/2017.

[1] OS 15/2017, Yang Tai Ming's 1st Affidavit dated 22 December 2016, exh EY-3, p 291.
[2] OS 15/2017, Yang's 1st Affidavit, exh EY-3, p 292.
[3] OS 15/2017, Yang's 1st Affidavit, exh EY-2.
[4] OS 15/2017, Yang's 1st Affidavit, exh EY-3, p 292.
[5] OS 15/2017, Yang's 1st Affidavit, exh EY-18, para 47.
[6] OS 15/2017, Yang's 1st Affidavit, exh EY-4, p 304.
[7] OS 15/2017, Yang's 1st Affidavit, exh EY-5.
[8] OS 15/2017, Yang's 1st Affidavit, exh EY-3, p 295.
[9] OS 15/2017, Yang's 1st Affidavit, exh EY-3, p 296.
[10] OS 15/2017, Yang's 1st Affidavit, exh EY-6.
[11] OS 15/2017, Yang's 1st Affidavit, exh EY-3, p 297.
[12] OS 15/2017, Yang's 1st Affidavit, exh EY-3, p 298.
[13] OS 15/2017, Yang's 1st Affidavit, exh EY-3, p 298.
[14] OS 15/2017, Yang's 1st Affidavit, exh EY-7.
[15] OS 15/2017, Yang's 1st Affidavit, exh EY-3, p 299.
[16] OS 15/2017, Yang's 1st Affidavit, exh EY-8.
[17] OS 15/2017, Yang's 2nd Affidavit dated 27 February 2017, exh EY-23.
[18] OS 15/2017, Yang's 1st Affidavit, exh EY-9, para 33.
[19] OS 15/2017, Yang's 1st Affidavit, exh EY-9, para 36.
[20] OS 15/2017, Yang's 1st Affidavit, exh EY-18, paras 50–53, 57–69.
[21] OS 15/2017, Bazazi Ezer Ronen's 1st Affidavit dated 6 February 2017, exh BER-3, para 51.
[22] OS 15/2017, Bazazi's 1st Affidavit, exh BER-3, paras 85–89.
[23] OS 15/2017, Bazazi's 1st Affidavit, exh BER-3, paras 90–91.
[24] OS 15/2017, Bazazi's 1st Affidavit, exh BER-3, para 188.
[25] OS 15/2017, Yang's 1st Affidavit, exh EY-19, paras 65 and 112.
[26] OS 15/2017, Yang's 1st Affidavit, exh EY-21, para 110.
[27] OS 15/2017, Yang's 1st Affidavit, exh EY-1.
[28] OS 15/2017, Yang's 1st Affidavit, exh EY-13.
[29] OS 15/2017, Yang's 1st Affidavit, exh EY-15, para 219; exh EY-16, para 92; exh EY-19, para 19; exh EY-21, para 95; exh EY-17, para 24.
[30] OS 15/2017, Yang's 1st Affidavit, exh EY-19, para 19.
[31] OS 15/2017, Yang's 1st Affidavit, exh EY-19, para 19; exh EY-16, para 93.
[32] OS 15/2017, Yang's 1st Affidavit, exh EY-21, para 96.
[33] Tornado's Written Submissions in OS 15/2017, para 86.
[34] OS 15/2017, Yang's 1st Affidavit, exh EY-14.
[35] Tornado's Written Submissions in OS 15/2017, para 88
[36] Tornado's Written Submissions in OS 15/2017, paras 102–103.
[37] OS 15/2017, Yang's 1st Affidavit, exh EY-10, paras 8.2(d) and 8.5.
[38] Tornado's Written Submissions in OS 15/2017, paras 138–140.
[39] Tornado's Written Submissions in OS 15/2017, paras 141–144.
[40] OS 15/2017, Yang's 1st Affidavit, exh EY-1.
[41] Tornado's Written Submissions in OS 15/2017, paras 145–148.
[42] OS 15/2017, Yang's 1st Affidavit, exh EY-1.
[43] Tornado's Written Submissions in OS 15/2017, paras 149–150.
[44] OS 15/2017, Yang's 1st Affidavit, exh EY-1.