IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2003] SGHC 204

Originating Motion
No. 9 of 2003
11 August; 10 September 2003

In the Matter of the International Arbitration Act (Cap 143A)

And

In the Matter of Article 16(3) of the Model Law

And

In the Matter of an Arbitration between Magma Nusantara Limited and PT Tugu Pratama Indonesia in SIAC Arbitration No 019/2002

Between

PT TUGU PRATAMA INDONESIA

... Applicant

And

MAGMA NUSANTARA LIMITED

... Respondent

Coram: Judith Prakash J

Judgment reserved

JUDGMENT

Introduction

1 This is an application under Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') for the following relief:

(a) a declaration that the arbitral tribunal constituted in SIAC arbitration no. 019 of 2002 has no jurisdiction over the dispute between the applicant, PT Tugu Pratama Indonesia ('PT Tugu') and the respondent, Magma Nusantara Limited ('MNL'); and

(b) an order setting aside the Interim Award on preliminary issues dated 13 March 2003 made by the said tribunal whereby the tribunal found that it did have jurisdiction over the stated dispute.

The ground of the application is that no valid arbitration agreement was concluded between PT Tugu and MNL that referred the dispute between the parties to arbitration in Singapore.

Background

2 PT Tugu carries on business in Indonesia as an insurance company. In 1998, it issued a policy of insurance which covered MNL for, amongst other matters, Onshore Well Control in respect of the Wayang Windu Contract Area for the period 1 January 1998 to 31 December 1998 ('the Policy'). It is PT Tugu's position that the limit of its liability under the Policy is US$2.5 million whereas MNL maintains that that limit is US$10 million.

3 For the purposes of this judgment, the most important provisions of the Policy are clauses 3.15 and 3.18. These read as follows:

> 3.15 SUIT AGAINST INSURER
>
> It is a condition of this Insurance that no suit action or proceeding for the recovery of any claim hereunder shall be maintainable in any court of law or equity unless the same be commenced within two years and one day after the time a cause of action accrues provided however that if by the laws of the state or nation of the address of the Insured shown herein such limitation is invalid then any such claim shall be void unless

> such action or suit or proceeding be commenced within the shortest limit of the time permitted by the laws of such state or nation.
>
> 3.18 ARBITRATION
>
> In case the Insured and the Insurer shall fail to agree as to any matter arising under this Policy each shall, on written demand, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire, and failing for 15 (fifteen) days to agree upon such umpire, then on request of the Insured or the Insurer, such umpire shall be selected by a judge of an Indonesian Court/ Jurisdiction. The appraisers shall then appraise the loss or damage, stating separately sound value and loss or damage to each item and failing to agree shall submit their differences only to the umpire. An award in writing so itemized, of any two when filed with the Insurer shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expense of appraisal and the umpire shall be paid by the parties equally.

It is PT Tugu's position that as no court proceedings were commenced by MNL within two years and one day of the incident described below, MNL's claim under the Policy, if any, is time barred. MNL on the other hand says that cl 3.15 is not applicable to bar its claim as there is a valid arbitration proceeding afoot.

4 On 30 March 1998, one of MNL's geothermal wells blew out causing MNL to suffer a loss of more than US$12.5 million. Subsequently, MNL made a claim under the Policy for US$10 million. In December 1998, PT Tugu paid MNL US$2 million towards settlement of its claim on the basis that the Policy limit was only US$2.5 million. MNL did not accept that that was the end of the matter and on 6 October 1999 it served PT Tugu with a document entitled 'Notice of Arbitration' to which PT Tugu replied by letter on 14 October 1999. The main point at issue in this application is as to the true effect of the notice and the reply. These documents must therefore be set out in full.

5 The document sent out by MNL read:

NOTICE OF ARBITRATION

Policy of Insurance No. P-98102
Date of Policy: 10 March 1998
Nature of Incident: Geothermal Well Blowout
Place of Incident: Gunung Wayang and Gunung Windu, Pangalengan, Jawa Barat, Indonesia
Date of Incident: 30 March 1998

We refer to the above incident and our claim under the above policy first notified to you on 6 April 1998 for well control costs and redrilling expenses incurred by Magma Nusantara Limited in respect of that incident.

We acknowledge receipt of the sum of US$2,000,000 from you in part payment of our claim. We claim the further sum of US$7,900,000 representing the limit of your liability of US$10,000,000 under the policy in respect of our claim, less the deductible sum of US$100,000 and the sum of US$2,000,000 paid to date. We reserve our position to claim interest on all sums paid and payable by you in respect of our claim.

We refer to our previous correspondence and your contention, which we reject, that the limit of your liability under the policy in respect of our claim is US$2,500,000 and that the deductible sum is US$50,000 as opposed to a limit of US$10,000,000 and a deductible sum of US$100,000. The limit of your liability and the deductible to be applied under the policy in respect of our claim are therefore in dispute. In accordance with Clause 3.18 of the policy we propose to refer that dispute to arbitration for resolution.

In accordance with the terms of Clause 3.18 of the policy we hereby serve notice upon you to select an appraiser to act in the resolution of the dispute by arbitration. We require you to notify us of the name, address, telephone and facsimile number of your appointed appraiser by 5:00 p.m. local Jakarta time by Friday 15th October 1999.

Further, we would propose that the arbitration should be:

1. resolved in accordance with the Arbitration Rules of the Singapore International Arbitration Centre;

2. conducted in the English language and

3. situated in Singapore.

Please confirm your agreement to these proposals by 5:00 p.m. local Jakarta time by Friday 15th October 1999.

6 PT Tugu's reply stated:

> We refer to your 'Notice of Arbitration' dated 6 October 1999 and confirm TPI's acceptance of your proposal that this matter be resolved by arbitration in Singapore (conducted in the English language) subject to the Arbitration Rules of the S.I.A.C. For the sake of good order, we suggest that the parties' agreement on these and other matters relevant to the proposed arbitration is recorded in a formal Submission to Arbitration along the lines of the enclosed largely standard-form draft.
>
> Once the terms of the Submission to Arbitration have been agreed, we can proceed with the appointment or arbitrators and thereafter seek appropriate directions as to the service of written submissions, exchange of documents etc and the timetable of the proceedings. Since the main issue between us relates solely to the applicable policy limit and deductible, we believe that the involvement of the appraisers in this instance is unlikely to be necessary.
>
> We look forward to hearing from you with your comment.

7 The document attached to the above reply was entitled 'Submission to Arbitration'. It was signed by PT Tugu and contained a space for MNL's signature. The meat of the document is contained in the second paragraph which provides:

> We, the parties hereto now agree that the arbitration agreement set out in Section 2, item 3.18 of the Contract shall for all purposes be superceded *(sic)* and replaced by the following arbitration agreement:
>
> 1. All and any disputes and differences that have arisen or may arise out of or in connection with the Contract including any question regarding its existence, validity, termination or performance thereof shall be referred for final resolution by arbitration in Singapore in accordance with the SIAC Rules 1997 which rules are deemed to be incorporated herein.
> 2. The tribunal shall consist of 3 arbitrators: each party appointing one arbitrator and the third arbitrator to be jointly appointed by the 2 arbitrators appointed.
> 3. The language of the arbitration shall be English.
> 4. The law of the arbitration shall be the International Arbitration Act 1994 (Cap 143A).
> 5. The proper law of the Contract shall be English law.

> 6. All awards of the arbitral tribunal shall be final and binding and judgment thereon may be entered in any court of competent jurisdiction.

8 MNL did not respond to PT Tugu's letter. It did not sign the Submission to Arbitration nor did it do anything to further the arbitration for many months. More than two years later, on 11 March 2002, PT Tugu revoked the proposal contained in its October 1999 letter. The next day, MNL's solicitors responded by stating that the Submission to Arbitration had been signed by MNL. PT Tugu did not agree that such signature evidenced a valid acceptance of its proposal as the same had been revoked before receipt of acceptance. By the time the matter came for hearing before me, MNL was no longer contending that it had signed the 'Submission to Arbitration' whilst PT Tugu's offer was still open for acceptance.

9 In the meantime, on 12 March 2002, MNL had sent a request for arbitration to the Singapore International Arbitration Centre ('SIAC') thus purporting to progress the arbitration in Singapore. In the following months, MNL nominated its arbitrator and PT Tugu (without prejudice to its contention that the tribunal had no jurisdiction over the dispute) nominated a co-arbitrator. The co-arbitrators then jointly appointed a presiding arbitrator so that the tribunal consisted of three arbitrators.

10 The tribunal issued directions in October 2002 directing that three preliminary issues were to be determined first. The first of these issues was whether there was a valid arbitration agreement between PT Tugu and MNL that referred the dispute to arbitration in Singapore and conferred jurisdiction on the tribunal.

11 The parties agreed that Indonesian law was the substantive law of the Policy. Subsequently, the parties filed the reports of their respective experts on Indonesian law who were one Mr Umar for PT Tugu and one Mr Timbuan for MNL. A hearing took place in January 2003 and the experts gave oral evidence and were cross-examined. In the course of the hearing, it was conceded and agreed by the parties that the tribunal was properly constituted and had jurisdiction to determine the three preliminary issues. At the same time, counsel for PT Tugu reserved its right on the issue of the composition of the tribunal to preside during the arbitration of the substantive issue, should the tribunal find that it had jurisdiction to determine the three preliminary issues. The award on the preliminary issues was made on 13 March 2003. Apart from finding that it had jurisdiction, the arbitral tribunal found that Singapore law was the arbitral law, that Indonesian law was the substantive law of the Policy and that the proceedings were not time barred by reason of cl 3.15 of the Policy. The tribunal ordered PT Tugu to pay MNL's costs of arbitrating the preliminary issues.

Application and issues

12 The Model Law, when it comes to questions relating to the jurisdiction of the arbitral tribunal, gives a party who is questioning such jurisdiction two opportunities to challenge the jurisdiction. The first is before the appointed arbitral tribunal itself. The second opportunity, which can only be taken after the first challenge before the tribunal has failed in that the tribunal has given a ruling that it has jurisdiction, is an application to the High Court to decide on the matter. This is the right given to parties to an arbitration by Article 16(3) of the Model Law and this is the right that PT Tugu invoked by filing this application. PT Tugu also wishes the court to determine whether the tribunal should have ordered it to pay MNL's costs of arbitrating the preliminary issues.

13 PT Tugu's case that the tribunal has no jurisdiction over the dispute is based on the assertion that there was never any agreement between PT Tugu and MNL to refer the dispute to arbitration before the tribunal in Singapore. It does not accept that cl 3.18 of the Policy was an agreement to arbitrate a dispute of this nature. It further contends that, in any event, the arbitration did not take place under cl 3.18. The second main point is that there was no agreement between PT Tugu and MNL in their exchanges of 6 and 14 October 1999 or at all to amend cl 3.18 and refer the dispute to arbitration in Singapore since PT Tugu's letter was a counterproposal and not an acceptance of MNL's offer.

14 MNL's reply is straightforward. It asserts that cl 3.18 of the Policy is an arbitration clause and that it covers the substantive matter in dispute between the parties. Clause l 3.15 does not impact the applicability of cl 3.18. It further says that by its letter of 6 October 1999, it commenced arbitration proceedings pursuant to cl 3.18 and in addition made three proposals in relation to the conduct of the arbitration. The reply PT Tugu gave on 14 October was an acceptance of these proposals to modify the arbitration proceedings and as a result it was agreed between the parties that what was actually a cl 3.18 proceeding would take place in Singapore in accordance with the rules of the SIAC and be conducted in English.

15 The two main issues that I have to consider therefore involve determining:

(1) the nature and effect of cl 3.18 and 3.15 of the Policy and how they affect each other;

(2) the nature and effect of MNL's letter of 6 October 1999 and PT Tugu's reply of 14 October 1999.

First issue: Construction of cl 3.18 and 3.15 of the Policy

16 It is PT Tugu's submission that cl 3.18 provides for arbitration in a highly limited situation. It contemplates the appointment of appraisers, whose function relates to stating the sound value and loss or damage to any item insured under the Policy in the event that the insurer and the insured are unable to agree upon the value of such loss. The clause is confined to valuation of claims and does not purport to extend to defining the nature or extent of cover under the Policy. The subject dispute which is whether PT Tugu's maximum liability is US$10 million or US$2.5 million, clearly does not fall within cl 3.18.

17 Instead, says PT Tugu, the dispute falls within cl 3.15 which sets out the time period during which suits can be maintainable in courts of law or equity. PT Tugu's expert, Mr Umar, opined that cl 3.15 was in fact the general regime for the resolution of disputes under the Policy. PT Tugu's argument is that the construction given to cl 3.18 by the tribunal ie that it (and not cl 3.15) provided the general regime for resolution of disputes arising under the Policy, is a construction that could render cl 3.15 redundant. As accepted by the tribunal, under Indonesian law, specifically Articles 3 and 11(1) of Law No. 30 of 1999, the courts have no jurisdiction to try disputes between parties bound by an arbitration agreement. If all disputes against the insurer were to be referred to arbitration by appraisers under cl 3.18, the courts would have no jurisdiction over any disputes by the insured against the insurer under the Policy.

18 MNL puts up a procedural objection to this argument. MNL says that PT Tugu cannot make the argument because it was not raised in the statement of defence filed in the arbitration. MNL did not push this contention in its oral arguments and rightly so because I see no reason why my consideration of the

issue is to be limited by what was pleaded by the parties in the arbitration proceedings. This hearing under Article 16(3) is not by way of appeal against the decision of the tribunal. The relevant portion of Article 16(3) reads:

> If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request ... the court ... to decide the matter.

Accordingly, the court makes an independent determination on the issue of jurisdiction and is not constrained in any way by the findings or the reasoning of the tribunal. In the same way, parties are not limited to rehearsing before the court the contentions put before the tribunal but are entitled to put forward new arguments on the issue and the court is entitled to consider these.

19 On the substantive point, MNL submits that cl 3.18 is a valid arbitration clause which deals with '*any matter*' in dispute '*under the Policy*'. Further, the clause is clearly headed '*Arbitration*' and there is no interpretation clause in the Policy negating reliance on headings. Clause 3.18 requires MNL to refer any matter in dispute to arbitration and there is no requirement to read cl 3.18 as subservient to cl 3.15 or to link the two clauses. In contrast, cl 3.15 cannot be 'the general regime for the resolution of disputes under the Policy'. It is headed '*Suit against Insurer*', and is expressly a time-bar clause applying only to litigation. It does not say that all claims have to be filed in court, merely that no claims can be filed in court after a certain period. The clause also does not address the situation of a 'Suit by Insurer' against the insured under the Policy, for example, non-payment of premium or a declaration of no liability. Such a dispute would have to be brought by PT Tugu in arbitration under the 'any matter' provision in cl 3.18.

20 I find the arguments of MNL on this issue persuasive. The first sentence of cl 3.18 does not limit the type of dispute that the clause governs. The phrase 'any matter arising under this Policy' is in the widest possible terms and although the sentence then goes on to provide that the parties must each appoint an 'appraiser' to determine the dispute between them, the use of the word 'appraiser' cannot by itself mean that the proceedings that the appraisers conduct will not be arbitration proceedings. The strongest support for PT Tugu's argument comes from the third and fourth sentences of the clause. They read:

> The appraisers shall then appraise the loss or damage, stating separately sound value and loss or damage to each item and failing to agree shall submit their differences only to the umpire. An award in writing so itemized, of any two when filed with the Insurer shall determine the amount of sound value and loss or damage.

It might appear from those sentences that the function of the appraisers would be merely that of valuers apportioning a monetary value to the loss or damage allegedly sustained. That, however, cannot be the case. Bearing in mind the business of the insured and the type of risk covered by the Policy, not all the disputes that the insured and the insurer might have with each other regarding loss or damage could be anticipated to be merely monetary. Whilst the appraisers may in some instances perform merely a valuation function, there may very well be situations in which, in respect of a particular claim before the monetary value of the same can be assessed, it will have to be decided whether that claim actually falls within the cover provided by the policy and the appraisers would therefore have to determine that point first before going on to value the loss. It is, therefore, clearly within the contemplation of the clause that in order to decide what the loss or damage claimed is and to appraise it in monetary terms, the appraisers could well be called upon to act as arbitrators to determine whether the particular claim was even covered by the Policy and if it was, to what extent it was covered.

21 The language of cl 3.18 is, accordingly, wide enough to cover both a valuation function and an arbitral function on the part of the appraisers. As MNL pointed out, *Halsbury's Laws of England* (4th Ed) vol 49(1), 1996 makes it clear that the terms 'valuer' and 'appraiser' have similar meanings and that someone who is called a valuer and is appointed to resolve a dispute between two parties may act as an arbitrator in reaching his decision (at ¶ 401 and 410). It is also relevant that Mr Umar, PT Tugu's expert, stated in his evidence that the process that is contemplated under cl 3.18 is an arbitration leading to an enforceable award.

22 Whilst the opening sentence of cl 3.18 makes it plain that that clause is intended to cover any sort of argument that the insured and the insurer might have with each other in relation to the Policy and the later sentences of the clause are capable of a wide enough interpretation so as not to undermine the purpose disclosed by the first sentence, the same is not the case with cl 3.15. That clause plainly serves only a limited purpose. It does not say that all claims have to be filed in court but merely that no claims can be filed in court after a certain period. Secondly, it applies only to suits brought against the insurer by the insured, indeed it is entitled 'Suit Against Insurer'. It does not apply to a situation in which the insured wishes to commence action for non-payment of premium or a declaration of no liability. Clause 3.15 is too limited to be read as a clause that is intended to provide a general regime for dispute resolution.

23 Finally, on this issue, there is the argument that cl 3.15 would be rendered redundant if cl 3.18 is found to be the general dispute resolution clause. The response is two-fold. First, cl 3.15 may be interpreted as applying the time bar of two years and one day to arbitration proceedings as well. Secondly, even if it

does not have that effect and thus would truly be rendered redundant in the circumstances mentioned, as it is a time bar clause and one drafted by the insurer for its protection, it has to be approached from the *contra proferentum* perspective and the court must therefore still give it a strict interpretation notwithstanding that to do so will emasculate it entirely. In this connection it is relevant that Mr Tumbuan's evidence was that the *contra proferentum* principle is part of Indonesian law in the form of Article 1349 of the Indonesian Civil Code which provides that:

> In the event of ambiguity, an agreement shall be interpreted to the disadvantage of the one who stipulated something, and to the advantage of the one who has bound himself to it.

24 It therefore appears to me on a consideration of the Policy that it contained an arbitration clause capable of applying to the dispute between PT Tugu and MNL on the monetary limit of the cover provided by the Policy and that therefore MNL was entitled, and indeed bound, to invoke that clause in order to resolve the dispute on this issue.

Second issue: (a) what was the nature and effect of the correspondence exchanged on 6 and 14 October 1999?

25 In respect of the second issue, PT Tugu has a number of contentions. The first main one is that its letter of 14 October 1999 was only a counter proposal and not an acceptance of MNL's proposals of 6 October 1999 and neither piece of correspondence resulted in an enforceable arbitration agreement.

26 In this connection, PT Tugu takes the position that MNL's letter was a proposal to it to refer the dispute to arbitration in accordance with the terms stated. These were that:

(1) arbitration take place under cl 3.18 and that PT Tugu select its own appraiser; and

(2) the arbitration be resolved in accordance with the SIAC Rules, conducted in the English language and situated in Singapore.

PT Tugu says it did not accept these proposals but by its reply of 14 October counter proposed the terms under which it would refer the dispute to arbitration. PT Tugu's specific counter proposal was that any reference to arbitration be based on the enclosed document entitled 'Submission to Arbitration' which was to supersede and replace cl 3.18. The differences between MNL's proposal and PT Tugu's were that the tribunal was to consist of three arbitrators (instead of the two appraisers and umpire specified by cl 3.18), the law of arbitration was to be the International Arbitration Act (under cl 3.18 Indonesian law governed the arbitration) and that the proper law of the Policy was to be English law.

27 PT Tugu further submits that in the exchanges of 6 and 14 October, MNL and itself were still negotiating on the terms of a new Submission to Arbitration. On the face of PT Tugu's letter, it had rejected MNL's proposed terms and made a significantly different counter proposal. There was a accordingly no agreement to arbitrate the dispute following PT Tugu's letter. PT Tugu relies on the evidence of Mr Umar that its letter of 14 October was not an acceptance of MNL's proposals but was instead a counter proposal and rejects Mr Tumbuan's evidence to the opposite effect. It also relies on two Singapore decisions *The Benja Bhum* [1994] 1 SLR 88 and *Star Trans Far East Pte Ltd v Norske-Tech Ltd & Ors* [1996] 2 SLR 409 for the principle that where parties are still negotiating

the terms of any reference to arbitration, there can be no valid agreement to arbitrate.

28 I start by considering MNL's letter of 6 October. The first important point about this letter is that it is headed 'Notice of Arbitration'. It then goes on to give the details of the Policy, the nature, place and date of the incident and to refer to the claim under the Policy that was first notified on 6 April 1998, and the payment received of US$2 million and to state that MNL claims a further sum of US$7.9 million representing the limit of PT Tugu's liability under the Policy less the deductible and the amount already paid. In the third paragraph of the letter, MNL states that the limit of the liability and the deductibility to be applied under the Policy were in dispute and 'in accordance with clause 3.18 of the Policy we propose to refer that dispute to arbitration'. In the fourth paragraph of the letter, MNL referring to cl 3.18 serves notice on PT Tugu to select an appraiser to act in the resolution of the dispute by arbitration.

29 From the first four paragraphs of MNL's letter, it is plain to me that what it was seeking to do was to commence an arbitration under cl 3.18 of the Policy. It specifically gave notice of such intention by the heading of the letter, it then identified the arbitration clause and the dispute between the parties and the fourth paragraph was unequivocal: PT Tugu was asked to appoint its appraiser by 5pm on Friday, 15 October 1999. Since, as I have held, cl 3.18 was a valid arbitration clause that applied to the dispute between the parties, in my view, by these paragraphs, MNL effectively commenced arbitration proceedings under cl 3.18 of the Policy on 6 October 1999.

30 I note from the submissions that under Indonesian law arbitration can only be commenced if the party who wants to do so follows Article 8 of Law No. 30 of 1999. This law (as translated) provides:

> **Law No. 30 of 1999**
>
> **Article 8**
>
> (1) In the event that a dispute arises, the Claimant shall inform the Respondent by registered letter, telegram, telex, fax, e-mail, or by courier that the conditions for arbitration to be entered into by the Claimant and Respondent are applicable
>
> (2) The notification of Arbitration, as contemplated in paragraph (1), shall expressly state at least the following:
>
> (a) The names and addresses of the parties;
>
> (b) Reference to the applicable arbitration clause or agreement;
>
> (c) The agreement or matter being the subject of the dispute;
>
> (d) The basis for the claim and the amount claimed, if any;
>
> (e) The method of resolution desired; and
>
> (f) The agreement entered into by the parties concerning the number of arbitrators or, if no such agreement has been entered into, the Claimant may propose the total number of arbitrators, provided such is an odd number.

31 A simple comparison between the contents of the 6 October letter and the contents of Article 8 is sufficient to satisfy one that the letter meets all the requirements of Article 8 in relation to starting an arbitration. No submission was made on behalf of PT Tugu that any requirement of Article 8 had not been met by the letter. That being the case, it appears to me that under Indonesian law, quite apart from my own interpretation of it, the 6 October letter effectively gave notice of arbitration under cl 3.18.

32 The last two paragraphs of the letter are, in effect, what led to all the later difficulties. In the penultimate paragraph, MNL proposed what were later referred to as the 'three add-ons' which were that the arbitration should be resolved in accordance with the Rules of SIAC, conducted in English and situated in Singapore. The question is whether by making this proposal MNL was proposing a new arbitration agreement to take the place of that contained in cl 3.18 or whether it was simply proposing a change of seat. Having regard to the explicit nature of the first four paragraphs of the letter in particular the specific references to cl 3.18 and the care that had been taken to ensure that the requirements of Law No. 30 were complied with, I cannot regard the last two paragraphs as a proposal to jettison cl 3.18 entirely in favour of a new arbitration agreement. Those paragraphs must be read as a proposal to change the seat of arbitration only from Jakarta to Singapore under the SIAC Rules.

33 That being the case, what was PT Tugu's position when it received the 6th October letter? As arbitration proceedings pursuant to the arbitration agreement contained in cl 3.18 had been properly started, PT Tugu had the choice of either stating that it did not accept the three add-ons but required the arbitration to proceed in strict accordance with cl 3.18 or of stating that it accepted the change of seat proposal. It could not reject the commencement of the proceedings completely as it was bound by cl 3.18. What did PT Tugu in fact do by its response of 14 October?

34 The first sentence of this letter stated:

> We refer to your 'Notice of Arbitration' dated 6 October 1999 and confirm TPI's [PT Tugu's] acceptance of your proposal that this matter be resolved by arbitration in Singapore (conducted in the English language) subject to the Arbitration Rules of the S.I.A.C.

As MNL submits, a plain reading of this sentence would lead one to believe that PT Tugu accepted that *this matter* (namely the dispute identified in the Notice of Arbitration) be resolved by *arbitration in Singapore* (conducted in the English language) *subject to* the Arbitration Rules of the SIAC. These were the three add-ons proposed by MNL. They were specifically expressed in the first sentence of the letter and accepted. It appears that by the first sentence itself there was a concluded agreement for the change of seat since the three add-ons were accepted without any condition. Does the next sentence of the letter make a difference? This reads:

> For the sake of good order, we suggest that the parties' agreement on these and other matters relevant to the proposed arbitration is recorded in a formal Submission to Arbitration along the lines of the enclosed largely standard-form draft.

If PT Tugu had intended by the second sentence to detract from the unconditional acceptance conveyed by the first sentence, it chose the wrong words to reflect such an intention. The usual interpretation of words like 'for the sake of good order' is that they convey a pleasantry and have no adverse impact on what has gone before. What is being suggested by this phrase and the rest of the sentence is that the agreement on the three add-ons and on other matters relevant to the proposed arbitration be *recorded* in a formal document. Such a recording of what had been agreed may be helpful but is not necessary to make the agreement legally effective. All that was required was an unconditional acceptance of an offer. This had occurred in the first sentence and there was nothing in the second sentence to detract from this acceptance. There was not even a suggestion that the contents of the draft Submission to Arbitration were in any way substantially different from what had been proposed by MNL in its 6 October letter.

35 The first paragraph of PT Tugu's letter does not suggest a rejection and a counter proposal. It is only the second paragraph that may be read as a counter

proposal since it says that once the terms of the Submission to Arbitration have been agreed parties could proceed with the appointment of arbitrators and then seek appropriate directions. Since, however, there was an unequivocal acceptance of the change of seat proposal in the first paragraph, on a true analysis of the second paragraph, as MNL submits, the proposal it contained was a separate and collateral matter and could not prejudice what had been agreed in the first paragraph. MNL therefore had the option of accepting or not accepting the collateral proposal contained in the draft Submission to Arbitration and its failure to exercise this option before the collateral proposal was withdrawn did not affect the preceding change of seat agreement.

36 The English Court of Appeal case of *Society of Lloyds v Twinn* [2000] EWHC Admin 308, demonstrates that the situation that arose in this case of having to construe when an agreement had been concluded is far from unusual. The judgment of the Vice-Chancellor, Sir Richard Scott, is instructive on the approach that the courts take when faced with such issues. He observed:

> 48. The contractual principles of offer and acceptance that have to be applied to resolve the acceptance issue are not in doubt. An offer must be accepted unconditionally. A conditional acceptance is not an effective acceptance but may be a counter-offer which, in turn, may or may not be accepted by the original offeror. Jacob J., cited a passage from the judgment of Hirst J. in ***Lark-v-Outhwaite (1991) 2LCR 132 at 135***. The passage is as follows:-
>
> "The principles are elementary and very well established. The acceptance must correspond with the offer and must be clear and unqualified and would fail to take effect if it attempts to vary the terms of the offer or to add new terms. On the other hands, statements which are not intended to vary the terms of the offer or to add new terms do not vitiate the acceptance ...".
>
> I respectfully agree that this passage correctly expresses the law.
>
> 49. Two situations must be distinguished from one another. An offeree who purports to accept an offer must accept unconditionally. An acceptance which adds a new term to the contract is not an

> unconditional acceptance. But there is, conceptually at least, no reason why an offeree should not accept an offer unconditionally and, at the same time, make a collateral offer to the original offeror. The original offeror may or may not accept the collateral offer but, whether he does or does not do so, the unconditional acceptance will stand as having concluded the contract on the terms of the original offer.
>
> 50. ...
>
> 51. Whether an acceptance is truly unconditional, with the counter-offer being collateral to the concluded contract, or whether the counter-offer is a condition of the acceptance is an issue which will depend on the facts of the particular case. The intended effect of a purported acceptance must be judged objectively from the language used and the surrounding circumstances.

37 The position under Indonesian law, as explained by Mr Tumbuan, is similar. He said that under Indonesian contract law what has been agreed to is binding but if subsequently thereto parties want to go further by adding additional provisions and making additional agreements then it is up to them to agree on these further points. If they do not reach agreement on the additional points, such failure would not in itself torpedo what had already been agreed to unless both parties have expressly agreed to make the original contract conditional on the conclusion of an agreement in relation to the additional points proposed.

38 Thus, there is nothing in Indonesian law which prevents me from giving to the correspondence the construction that I have given to it above ie that there was an acceptance of MNL's proposal by PT Tugu and at the same time a collateral proposal open for acceptance or rejection.

39 PT Tugu's next point is that when parties are still negotiating the terms of any reference to arbitration, there can be no valid agreement to arbitrate. Two Singapore cases were cited in support of that point. The principle itself is

unexceptional. It is a question of fact whether parties have reached an agreement or are still negotiating. In this case, I have found that an agreement was reached. The fact that a counter proposal was on the table did not mean that the parties were still negotiating their terms of reference. These were additional points for consideration only. The facts of the cited cases were different from the facts which are before me. On the facts in those cases, the finding made was that the parties had not come to agreement and were still negotiating. The exchange of correspondence between the negotiating parties there were not and could not be identical to the exchange of correspondence here and I really do not see any purpose in rehearsing the facts of those two cases in this context.

(b) Article 9 of Law No. 30 of 1999

40 The second main point which PT Tugu makes is that the exchange of correspondence in October 1999 failed to satisfy the requirements of Article 9 of Law No. 30 of 1999 with respect to the conclusion of a valid arbitration agreement. Sub-paragraph (1) of this Article provides that in the event the parties choose resolution of the dispute by arbitration after a dispute has arisen, the designation of arbitration as the means of resolution of such dispute must be given in a written agreement signed by the parties. Sub-paragraph (3) of the Article contains a list of the details that must be included in the agreement like for example, the subject matter of the dispute, the names and addresses of the parties and the full name and place of residence of the arbitrator or arbitrators. There is no doubt that the exchange of correspondence did not meet all the requirements of Article 9(3). PT Tugu says that even if any agreement was reached by that exchange, it is null and void since Article 9(4) states that will be the consequence of not complying with sub-paragraph (3).

41 PT Tugu further submits that there was no basis for the tribunal's view that the exchange of correspondence could have resulted in an amendment of cl 3.18. PT Tugu had made it clear in its letter of 14 October that any arbitration would be under a different basis from cl 3.18. Significantly, when MNL purported to commence arbitration by writing to SIAC on 12 March 2002, it enclosed the signed Submission to Arbitration and proceeded on the basis of a new arbitration agreement whereby three arbitrators were to be appointed. MNL was not proceeding on an amended cl 3.18 which covered the dispute with two appraisers and an umpire.

42 PT Tugu's criticisms of the tribunal's findings are without foundation. These criticisms depend entirely on one agreeing with PT Tugu's own interpretation of the effect of its letter of 14 October. That was a subjective, not objective, interpretation. The tribunal approached the letter objectively and took into consideration Indonesian law when interpreting it. It came to the conclusion that by that letter PT Tugu had accepted that there be an arbitration between the parties of the dispute referred to in the Notice of Arbitration pursuant to cl 3.18 of the Policy with the three add-ons. I cannot quarrel with that conclusion.

43 In my view, Article 9 of Law No 30 did not apply to what actually happened although it would have applied had the Submission to Arbitration taken effect. When MNL wrote its letter of 6 October it was invoking an existing arbitration agreement and its proposal was limited to a change of seat. It was not suggesting an entirely new arbitration agreement. Article 9 of Law No 30 applies to an arbitration agreement that is only entered into after the dispute in question has arisen. In this case, cl 3.18 constituted an arbitration agreement which had been concluded before the dispute arose. Therefore the applicable article of Law

No 30 was Article 8 rather than Article 9. I agree that it was an error on the part of MNL to send the SIAC the signed Submission to Arbitration and to proceed on the basis that three arbitrators were to be appointed rather than two appraisers and one umpire. In that respect, the arbitral tribunal was incorrectly constituted. PT Tugu has, however, agreed to accept the constitution of the tribunal for the purpose of the determination of the preliminary issues and therefore nothing turns on the incorrect constitution of the tribunal. When the substantive arbitration takes place, however, the tribunal will have to be differently constituted. Be that as it may, the error made in 2002 could not change the effect of the letters written in 1999.

Third issue: Costs

44 The tribunal directed PT Tugu to pay MNL's costs of arbitrating the preliminary issues. PT Tugu contends that the tribunal had no basis to make such an order since cl 3.18 expressly requires that 'each appraiser shall be paid by the party selecting him and the expense of appraisal and the umpire shall be paid by the parties equally'. It wants this order to be set aside.

45 MNL puts forward three points in response. First, that this court has no power to set aside the costs order since the application was brought under Article 16(3) of the Model Law and the court's function pursuant to that article is simply to determine whether the tribunal had jurisdiction. The court, submits MNL, has no jurisdiction to deal with any other point. Secondly, by agreeing to the SIAC Rules without reservations, the parties agreed to follow the SIAC Rules with regard to costs. Rule 30.3 gives the tribunal authority to order that all or any part of the costs of a party be paid by another party. The final point is that even if PT Tugu can rely on cl 3.18, the preliminary hearing before the tribunal was not an

'expense of the appraisal' as contemplated by that clause but was a separate hearing which does not deal with the dispute. What cl 3.18 contemplated was that the arbitrators would be doing their job of looking at the actual claim. In the event of an ambiguity in the application of cl 3.18, the principle of *contra proferentum* operates in favour of MNL's interpretation.

46 I am persuaded that the tribunal went beyond its jurisdiction in awarding the costs of the preliminary hearing to MNL. In my judgment, the power given to the court by Article 16(3) to decide the issue of jurisdiction after the tribunal has made its preliminary ruling must necessarily encompass any ancillary orders made by the tribunal in relation to that ruling. The court's power of determination must also relate to interpreting the jurisdiction conferred on the tribunal by the arbitration clause in question. In this case, cl 3.18 specifically prescribed how the costs of the 'appraisement' must be borne. Therefore the tribunal was bound to follow that dictate and its jurisdiction to decide the substantive issue in dispute did not extend to empowering it to make any costs order that was not in accordance with cl 3.18. I do not accept the argument that the preliminary hearing was not an 'expense of the appraisal'. That phrase is wide-ranging and capable of covering the costs of both substantive and procedural issues connected with the appraisal. Finally, the agreement of the parties to shift the seat of the arbitration to Singapore under the SIAC Rules would not permit those rules to overrule the express terms of the arbitration clause except as expressly assented to.

Conclusion

47 For the reasons given above, the only order that I make in respect of the interim award issued by the arbitral tribunal on 13 March 2003 is to set aside the

award on costs. The parties must bear those costs in accordance with cl 3.18. Apart from that, this application must be dismissed. The applicant shall pay the respondent its costs of these proceedings as the respondent has succeeded on all issues except the comparatively minor one of the costs award.

Judith Prakash
Judge

Kenneth Tan, SC, with Wang Wei Chi (Kenneth Tan Partnership) for the Applicant
Michael Hwang, SC, with Ernest Wee (Michael Hwang SC) for the Respondent

Certified true copy

Private Secretary to Judge
Court No. 22
Supreme Court, Singapore