IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 153

Originating Summons No 730 of 2015

In the matter of Section 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Articles 34(2) and 34(3) of the UNCITRAL Model Law (First Schedule of the International Arbitration Act)

And

In the matter of Order 69A of the Rules of Court (Cap 322, 2014 Rev Ed)

And

In the matter of the Award No 38 of 2015 (Dated 8 May 2015) in Arbitration Case No 54 of 2014 of the Singapore International Arbitration Centre, between Concord Energy Pte Ltd as the Claimants and Jiangsu Overseas Group Co., Ltd as the Respondents

Between

Jiangsu Overseas Group Co., Ltd

… *Plaintiff*

And

Concord Energy Pte Ltd

Defendant

Originating Summons No 731 of 2015

In the matter of Section 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Articles 34(2) and 34(3) of the UNCITRAL Model Law (First Schedule of the International Arbitration Act)

And

In the matter of Order 69A of the Rules of Court (Cap 322, 2014 Rev Ed)

And

In the matter of the Award No 39 of 2015 (Dated 8 May 2015) in Arbitration Case No 55 of 2014 of the Singapore International Arbitration Centre, between Concord Energy Pte Ltd as the Claimants and Jiangsu Overseas Group Co., Ltd as the Respondents

Between

Jiangsu Overseas Group Co., Ltd

… *Plaintiff*

And

Concord Energy Pte Ltd

… *Defendant*

JUDGMENT

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v
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Steven Chong J
29 June 2016

10 August 2016 Judgment reserved.

Steven Chong J:

Introduction

1 This case concerns two applications to set aside two related arbitral awards on the specific ground that the arbitral tribunal which heard both disputes lacked jurisdiction because there were no concluded contracts, and hence, no valid arbitration agreements between the parties. It arose from rather peculiar circumstances. At all times, the plaintiff was well aware of the arbitration. However, it initially elected to ignore the various arbitration notices and procedural orders by the tribunal altogether. It also refused service by courier of the pleadings and documents in relation to the arbitration which thereafter necessitated the engagement of Chinese lawyers to effect the service. Just before the commencement of the arbitration hearing, the plaintiff belatedly decided to take some interest in the arbitral process. It sought to obtain the same documents which had previously been served. It claimed to

have difficulty locating the documents due to "an unavoidable internal handover" and its "network server's problem". It also appointed solicitors who wrote to the tribunal to seek an extension of time to file its submissions to challenge the tribunal's jurisdiction. When the tribunal replied that the hearing would proceed as previously ordered with liberty to the plaintiff to apply for an adjournment at the commencement of the hearing, the plaintiff decided that it would not be able to attend the hearing as "there is little time for preparing to travel to Singapore". As a consequence, it elected to limit its participation in the arbitration by submitting a brief letter to challenge the tribunal's jurisdiction. The tribunal proceeded with the hearing and, having found that the contracts had indeed been concluded between the parties, assumed jurisdiction to hear both disputes. After due consideration of the evidence, it issued the two arbitral awards in favour of the defendant.

2 The plaintiff now seeks to present arguments which should rightly have been raised before the tribunal. Although the arguments strictly deal with the merits of the defendant's claims as regards the existence of the two concluded contracts, the plaintiff should be entitled to advance them since the determination of this issue would have a direct bearing on the tribunal's jurisdiction. However, having nailed its colours to the mast in asserting that there were no valid arbitration agreements because there were *no signed contracts* between the parties, can the plaintiff pursue other arguments to challenge the existence of the concluded contracts or should it stand or fall from such election? This decision will examine the scope and nature of the court's role in its *de novo* review of the tribunal's decision on jurisdiction. In undertaking this *de novo* review, should the court be confined to examine the tribunal's decision with reference only to the evidence before the tribunal?

Background facts

The parties

3 The plaintiff, Jiangsu Overseas Group Co., Ltd ("Jiangsu"), is a company incorporated in the People's Republic of China. Its business includes, among other things, the import and sale of raw materials such as steel, timber and chemicals.[1] The defendant, Concord Energy Pte Ltd ("Concord"), is a company incorporated in Singapore which trades in crude oil and refined products.[2]

The negotiations for shipments of green petroleum coke

4 The arbitration pertained to two contracts which had their genesis in an alleged agreement in 2013 between Concord and Jiangsu for the sale of six shipments of green petroleum coke. This was not the first time Jiangsu purchased green petroleum coke from Concord: it had also done so on various occasions in 2012 and on-sold them to its own buyers. The alleged agreement in 2013 was for the same purpose.

5 Negotiations began on 23 May 2013 when Ms Malinda Pai ("Malinda"), a broker appointed by Jiangsu, wrote to Ms Herlene Koh ("Herlene"), a trader at Concord, to convey a query from Mr Liu Lin ("Liu"), an Assistant General Manager at Jiangsu, regarding "six shipments of green coke". Liu had asked about the shipment schedule, and for Herlene to provide him with the "selling price formula" by that day.[3] Herlene replied within an

[1] Liu Lin's 1st Affidavit for OS 730 ("LL 730 (1)") , dated 12 August 2015, at para 6

[2] LL 730(1) at para 7

[3] LL 730(1) at p 133; Herlene Koh's 1st Affidavit for OS 730 ("HK 730 (1)"), dated 11 December 2015, at p 45

hour, setting out the "main terms of the deal": the quantity ("5 shipments or 6 shipments to be decided at time of conclusion of deal", each shipment being 20,000 Metric Tons (MT) +/- 10% at the seller's option), place of delivery, price, month of delivery, quality specifications of the petroleum coke, date of payment, and mode of payment (which was to be against an irrevocable documentary letter of credit).[4] Malinda replied to Herlene that Liu would consider the terms. [5]

6 It appears that, initially, the transaction for the six shipments of petroleum coke was to be split into two contracts, each for three shipments. In an internal update to her colleagues on 30 May 2013, Herlene stated that Jiangsu had "confirmed [a] deal of 3 cargoes" but "still wanted to take 6 cargoes"; she would therefore "send the contract for 3 cargoes first".[6] On 31 May 2013, Herlene sent an email addressed to Liu, stating, "[w]e are pleased to have concluded the 3 greencoke cargoes with you". The three shipments of 20,000 metric tons each were to be shipped to Tianjin, China. Herlene attached a contract for the three shipments for Liu's signature, and proposed to send the contract for the "balance 3 cargoes" once the details had been finalised.[7] Liu did not specifically respond to this email.

7 The structure of the transaction then changed. On 6 June 2013, Herlene stated in another internal update that Jiangsu had "finally confirmed the 6 cargoes".[8] About an hour later, Concord sent an email to Jiangsu enclosing a

[4] LL 730(1) at p 134; HK 730(1) at p 46

[5] LL 730(1) at pp 135–136; HK 730(1) at pp 47–48

[6] LL 730(1) at p 138; HK 730(1) at p 50

[7] LL 730(1) at p 139; HK 730(1) at p 51

[8] LL 730(1) at p 145; HK 730(1) at p 57

revised contract ("the 6 June contract"), which was for all six shipments:[9] three shipments bound for Tianjin and the remaining three shipments bound for Rizhou, China. The preamble to this contract read: "We are pleased to have concluded the deal on 30th May 2013 and 6th June 2013 with your good company with the following terms and conditions".[10] In a further email, Concord noted that this revised contract was to supersede all previous contracts.[11] Malinda replied on 10 June 2013 that, due to the holiday period in China, Liu would provide an answer on 13 June 2013.[12] However, Liu again did not reply specifically to Concord's email.

8 On 17 June 2013, Malinda wrote to Concord to advise on the laycan dates for the first two shipments.[13] She stated that there was no problem for the laycan of 17–27 July for the first shipment and indicated a preferred laycan for the second half of August in respect of the second shipment. On 21 June 2013, Jiangsu advised Concord that the delivery date for the second shipment would be after 15 July 2013.[14] The email ended with this sentence: "Please confirm and thank you for cooperation!" In response, Concord duly confirmed that the delivery date to Rizhao, China would be after 15 July 2013 as requested by Jiangsu.[15]

9 Concord sent three email reminders dated 21 June, 27 June and 2 July

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[9] LL 730(1) at p 146; HK 730(1) at p 58

[10] LL 730(1) at p 147; HK 730(1) at p 59

[11] LL 730(1) at p 153; HK 730(1) at p 65

[12] LL 730(1) at p 159; HK 730(1) at p 71

[13] LL 730(1) at p 161; HK 730(1) at p 73

[14] LL 730(1) at p 165; HK 730(1) at p 77

[15] LL 730(1) at p 166; HK 730(1) at p 78

2013 for Jiangsu to return the 6 June contract which had been sent earlier for its signature.[16] Jiangsu did not react to any of the reminders. Nonetheless, on 2 July 2013, Concord sent Liu an email setting out the shipping schedule for the six shipments.[17] The discharge ports for the first two were stated to be Rizhao and Tianjin. In this email, Concord noted: "The first 2 delivery to Rizhao and Tianjin has been agreed upon." On 4 July 2013, Liu accepted the nomination of the vessel *Ken Zui* for the shipment to Rizhao[18] and, on 5 July 2013, Liu sent Concord a draft letter of credit (LC) for this shipment.[19]

The alleged Spot and Term contracts

10 The structure of the transaction thereafter underwent a further change: the six shipments were to be split into two contracts. On 15 July 2013, Concord sent two draft contracts to Liu.[20] The first shipment of petroleum coke was covered in one contract, which the parties referred to as the "Spot contract". The remaining five shipments were covered in a separate contract, referred to as the "Term contract". The contractual terms of all four contracts – the draft contract sent on 30 May 2013, the 6 June contract as well as the Spot and Term contracts of 15 July 2013 – were essentially the same except for the splitting of the six shipments and the nominated discharge ports. This change of the split was done at the request of Jiangsu to facilitate the opening of a letter of credit for the first shipment.[21] It is important to bear in mind that, at all

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[16] LL 730(1) at pp 167–168; HK 730(1) at pp 79–81

[17] LL 730(1) at p 169; HK 730(1) at p 82

[18] LL 730(1) at p 173; HK 730(1) at p 86

[19] LL 730(1) at pp 178–180; HK 730(1) at pp 87–89

[20] LL 730(1) at pp 183–184; HK 730(1) at pp 96 and 105

[21] HK 730(1) at p 168

times after 6 June 2013, the proposed agreement was always for six shipments. This remained unchanged though the structure of the transaction was amended at the request of Jiangsu.

11 In response to Concord's email requesting that Jiangsu "expedite on the LC issuance",[22] Liu sent another draft LC on 15 July 2013.[23] This was materially the same as the LC sent earlier on 5 July 2013 except for the contract reference number and the correction of the unit price. One of the documents which had to be submitted for payment under the LC was a commercial invoice indicating a specified purchase contract number. It is of significance that the contract reference number stated in this LC was that of the Spot contract: 1306/PDT/TERM/T144771.[24]

The first meeting between Jiangsu and Concord

12 When Jiangsu failed to issue the LC for the Spot contract, Concord's solicitors sent a letter dated 17 July 2013 asserting that Jiangsu had breached the Spot contract.[25] This prompted a meeting on 18 July 2013 between the two parties in Jiangsu's office in Nanjing, China. Both the General Manager and President of Jiangsu were in attendance together with Liu.[26] Concord was represented by Herlene and its China representative, Gary Li ("Gary").

13 I pause to observe that Jiangsu initially took objection to Concord

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[22] LL 730(1) at p 181; HK 730(1) at p 93

[23] HK 730(1) at p 102

[24] HK 730(1) at p 103

[25] LL 730(1) at p 187; HK 730(1) at p 113

[26] Liu Lin's 2nd Affidavit for OS 730 ("LL 730(2)"), dated 24 March 2016, at para 34

exhibiting the minutes of this meeting, on the ground that the contents were protected by without prejudice privilege.[27] However, counsel for Jiangsu, Ms See Tow, acknowledged during the hearing that the minutes of this meeting together with the minutes of the second meeting on 8 August 2013 (as discussed below) were not recorded on a "without prejudice" basis.

14 These are the salient points that were recorded in the minutes:[28]

(a) Jiangsu had "contracted [for] 6 cargoes in total which was in the form of one single term contract". However, it had asked Concord to separate the order for six shipments into the Spot and Term contracts so as to make it easier to Jiangsu to apply for an LC for the first shipment.

(b) Due to the bad market situation, Jiangsu indicated that it could only take delivery of two shipments and asked that Concord cancel the remaining four shipments. Concord responded that this was out of the question.

(c) Given that the market price for the July shipment would be lower than the agreed sale price, Jiangsu proposed to bear an additional US$10 per metric ton for the July shipment. But Concord reminded Jiangsu that, if it failed to perform the contract, it would be liable for losses flowing from any price differential.

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[27] LL 730(1) at para 44

[28] HK 730(1) at p 168

Concord terminates the Spot contract

15 On 19 July 2013, Concord's solicitors sent its first letter of demand calling upon Jiangsu to open the LC under the Spot contract.[29] In response, on 22 July 2013, Liu replied that Jiangsu "didn't sign an official contract" with Concord and had "no relationship" with Concord "to sell the products to others."[30]

16 On 25 July 2013, Concord gave notice to Jiangsu of its termination of the Spot contract.[31] It resold the cargo loaded on the *Ken Zui* and, on 7 August 2013, invoiced Jiangsu for the difference between the price in the Spot contract and the resale price.[32]

The second meeting between Jiangsu and Concord

17 On 8 August 2013, a second meeting took place between Jiangsu's and Concord's representatives. The points discussed at this meeting were set out in an email from Liu to Herlene and Gary.[33] In respect of "Concord's claim for [the] July cargo" (*ie*, the Spot contract), Jiangsu said that it was "difficult for them… to pay the claim at one go" and proposed to "compensate" Concord via the subsequent shipments under the Term contract. In respect of the balance five cargos (*ie*, under the Term contract), Concord pressed Jiangsu to load the August shipment and to issue the LC. Jiangsu stated that they were still "working on 2 customers" and would require time to issue the LC.

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[29] LL 730(1) at p 190; HK 730(1) at p 117

[30] LL 730(1) at p 193; HK 730(1) at p 119

[31] LL 730(1) at p 194; HK 730(1) at p 120

[32] LL 730(1) at pp 195–196; HK 730(1) at pp 121–122

[33] LL 730(1) at p 198; HK 730(1) at p 124

Jiangsu accepts two shipments of green petroleum coke

18 It is not in dispute that Jiangsu eventually accepted two shipments of petroleum coke from Concord – one in September 2013 and the other in November 2013. However, while Concord sought to characterise these shipments as performance of the Term contract, Jiangsu denied this and argued that each shipment was covered by separate contracts distinct from the Term contract.

The September shipment

19 On 13 August 2013, Liu informed Herlene that Jiangsu had found a buyer for one shipment (which was eventually shipped in September).[34] Liu said that Jiangsu had sent "the contract" to the buyers and was awaiting confirmation. Herlene replied to thank Liu for "[performing] on the second cargo delivery".[35] According to Liu, he had asked Herlene for a fresh contract for this shipment but she refused and insisted that Jiangsu should sign the Term contract to cover the balance five shipments.[36]

20 It appears from the correspondence that, due to the urgency for the issuance of the LC before the shipment, the parties went ahead to establish the LC without resolving the issue as to which contract this was to be shipped under. On 21 August 2013, Herlene asked Liu to proceed to establish the draft LC.[37]

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[34] LL 730(1) at p 565; Herlene Koh's 1st Affidavit for OS 731, dated 11 December 2015 ("HK 731(1)"), at p 155

[35] LL 730(1) at p 566; HK 731(1) at p 156

[36] LL 730(1) at para 50

[37] HK 731(1) at p 162

21 However, there were two items in the LC which the parties disputed. The first item was the contract price. The draft LC which Liu sent on 29 August 2013 quoted a price of US$238 per MT,[38] whereas the draft in Herlene's reply stated the contract price as US$252 per MT *ie*, the price under the Term contract.[39]

22 The second item was the contract reference number. The contract number referred to in the draft LCs was the Spot contract's reference number (1306/PDT/TERM/T144771). Concord sent three email messages to Jiangsu dated 2, 3, and 4 September requesting that the contract number in the LC be amended to read "1306/PDT/TERM/T144771A" – the Term contract reference number.[40] This amendment was necessary since Concord had already terminated the Spot contract.[41] Jiangsu, however, was only willing to amend the contract number in the LC if a "new complete agreement" could be executed.[42]

23 Herlene replied that, since the September shipment was imminent, Concord would agree to use the Spot contract reference number "just for letter of credit purpose only" but would treat the September shipment as the first shipment under the Term contract. Concord would also accept the price stated in the LC as a provisional price, while reserving its right to make a claim against Jiangsu for the full contractual price under the Term contract.[43] Jiangsu

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[38] HK 731(1) at p 170

[39] HK 731(1) at p 174

[40] HK 731(1) at pp 179, 180 and 181

[41] HK 731(1) at p 181

[42] LL 730(1) at p 581; HK 731(1) at p 183

[43] LL 730(1) at p 583; HK 731(1) at p 184

did not react to this reservation. Pursuant to this express reservation, on 27 September 2013, Concord issued an invoice to Jiangsu claiming the price difference between the LC and Term contract.[44]

The November shipment

24 On 10 October 2013, Jiangsu informed Concord that it was "preparing to take delivery of the 2nd shipment of Petroleum Coke" – which was eventually shipped in November – and asked for the lowest price quote acceptable to Concord.[45] On 11 October 2013, Jiangsu asked Concord for a fresh contract for its signature.[46] Concord duly responded the same day with a contract for the second shipment dated 10 October 2013 and bearing the reference number "1306/PDT/TERM/T144771A-2/5".[47] The terms of this draft contract and the Term contract were identical. However, this draft contract contained the following preamble: "With reference to our main contractual term (1306/PDT/TERM/T144771A consisting of 5 shipment), this contract details for our 2nd shipment and is solely for your LC issuance purpose only."

25 On 11 October 2013, Jiangsu sent a draft LC for the November shipment.[48] On 14 October 2013, Concord sent a signed version of "1306/PDT/TERM/T144771A-2/5" to Jiangsu which omitted the preamble.[49] This contract was still dated 10 October 2013. However, in an earlier email,

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[44] LL 730(1) at p 589; HK 731(1) at p 192;

[45] LL 730(1) at p 594; HK 731(1) at p 198

[46] LL 730(1) at para 55

[47] LL 730(1) at p 597; HK 731(1) at p 199

[48] LL 730(1) at para 54

[49] HK OS 731at pp 212–216

Concord had made clear that it would provide an amended contract only for the purpose of issuing the LC and that all terms and conditions would remain as stated in the "main contract sent on 15 July 2013", *ie*, the Term contract.[50] On 15 October 2013, Jiangsu informed Concord that the LC would be opened that same day.[51]

26 The LC was issued and Concord accepted it solely on a provisional basis. As with the September shipment, they reserved the right to claim the difference between the LC price and Term contract price,[52] and on 22 November 2013, Concord duly issued an invoice claiming the price differential.[53]

Concord terminates the Term contract

27 Although there appeared, initially, to be some indication that it would do so, Jiangsu did not eventually take delivery of the balance three shipments under the Term contract. On 25 October 2013, Concord wrote to Jiangsu in relation to the 3rd and 4th shipments[54] in which it stated: "Understand that you will be able to lift 2 x 20kt (that will be our 3rd and 4th cargo) of green coke during the month of Nov". Concord asked for Jiangsu's confirmation so that it could start sourcing for the vessel.

28 No further word was heard from Jiangsu on the remaining shipments,

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[50] LL 730(1) at p 603; HK OS 731 at p 205

[51] LL 730(1) at p 616; HK OS731(1) at p 218

[52] LL 730(1) at p 618; HK 731(1) at p 230

[53] LL 730(1) at p 620; HK 731(1) at p 233

[54] HK 731(1) at p 224

despite reminders to nominate the discharge port and/or to open the LC. After having sent reminders on seventeen occasions between 28 October 2013 and 7 January 2014,[55] Concord notified Jiangsu on 20 January that it would be claiming damages for Jiangsu's failure to accept the remaining three shipments under the Term contract.[56] A letter of demand from Concord's solicitors followed, on 12 February 2014, giving notice of Concord's termination of the Term contract, and claiming damages under the Spot and Term contracts.[57]

Concord commences arbitration proceedings

29 On 25 March 2014,[58] Concord commenced two arbitration proceedings before the Singapore International Arbitration Centre (SIAC) claiming damages for breach of two contracts against Jiangsu. These were Arbitration No 54 in respect of the Spot contract and No 55 in respect of the Term contract.

30 Jiangsu was repeatedly invited to participate in the arbitrations but failed to do so. It did not attend any procedural hearings or file any pleadings, witness statements, or submissions. Initially, it even refused to accept delivery of the statement of claim and supporting documents via courier.[59] This prompted the tribunal to issue a procedural order directing Concord to serve the statement of claim and supporting documents on Jiangsu through

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[55] HK 731(1) at pp 225–229, 231–232, 239–244, 246–248

[56] HK 731(1) at p 249

[57] HK 731(1) at p 251

[58] Para 11 of both Award Nos 38 and 39: LL 730(1) at pp 32 and 65

[59] Para 22(5) of both Award Nos 38 and 39: LL730(1) at pp 36 and 69

Concord's Chinese lawyers.[60] On 22 October 2014, Jiangsu's Chinese lawyers confirmed receipt of the documents, but added that due to Jiangsu's "network server's problem", Jiangsu had been unable to obtain the attachments sent to it "during the whole arbitration procedure".[61] In any case, Jiangsu instructed Singapore lawyers, who informed the tribunal of their appointment on 28 October 2014.[62] When Jiangsu was unable to obtain an immediate adjournment of the arbitration hearing, it informed the tribunal through an email from its legal audit department on 29 October 2014 that it would not be able to attend the hearing on 31 October 2014 because it had little time "for preparing to travel to Singapore".[63] Jiangsu discharged its Singapore lawyers that same day.[64] The hearing before the tribunal therefore proceeded in its absence.

31 Jiangsu's participation in both arbitrations was limited to making three purported "challenges" to the jurisdiction of the tribunal.

(a) On 2 April 2014, in a letter to Concord's solicitors, Jiangsu asserted that, in respect of the Term contract, it had not signed any contract with Concord.[65] Consequently, SIAC had no jurisdiction over the Term contract. The Spot contract was not mentioned in this letter.

(b) On 24 October 2014, Jiangsu's legal audit department sent a

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[60] HK 730(1) at p 258; HK 731(1) at p 460;

[61] HK 731(1) at p 560

[62] HK 731(1) at p 581

[63] HK 730(1) at pp 427–428

[64] HK 730(1) at p 409

[65] HK 730(1) at p 202

letter to the tribunal to challenge its jurisdiction in Arbitration No 54, titled "Submission to Challenge the Jurisdiction of SIAC"[66] This was on the ground that there was no concluded contract and, hence, the requirement under Section 2A(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") for an arbitration agreement to be in writing was not satisfied. There was no challenge to the tribunal's jurisdiction in respect of Arbitration No 55. Instead, Jiangsu's legal audit department sent a letter on the same day to request for more time to prepare the defence for Arbitration No 55.[67]

(c) On 29 October 2014, in its email to the tribunal (referred to at [30]), Jiangsu attached a letter in which it submitted that the only two contracts it had signed with Concord were 1306/PDT/TERM/T144771A-2/5 and 1306/PDT/TERM/T144771; there were no other contracts "mutually confirmed and signed" by Jiangsu and Concord.

32 After the conclusion of oral hearings, the transcripts, exhibits, and Concord's written submissions were served on Jiangsu. The tribunal declared the proceedings closed on 22 January 2015.[68] Despite Jiangsu's limited participation in the arbitrations, the tribunal was satisfied that it had full opportunity to present its case. Jiangsu does not dispute this in the present proceedings.

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[66] HK 730(1) at pp 362–364

[67] HK 731(1) at p 565

[68] Para 37 of Award No 38 and para 38 of Award No 39: LL 730(1) at pp 41 and 74

The arbitral awards

33 On 8 May 2015, the tribunal issued two final awards: Award Nos 38 and 39 in respect of Arbitration Nos 54 and 55 respectively.[69]

34 In both Awards, the tribunal first dealt with the issue of whether it had jurisdiction to hear the disputes. In this regard, it referred to the arbitration clauses in the Spot and Term contracts, which were both numbered "Clause 19" and identical in wording:

> **19. Applicable Law**
>
> Settlement of dispute and applicable law this agreement shall be governed by and construed in accordance with the laws of the Republic of Singapore.
>
> Any dispute or claim arising out of or in connection with this agreement shall to the extent possible be settled amicably by negotiation and discussion between the parties.
>
> In the event the parties cannot settle the dispute above within thirty (30) days since negotiation and discussion began both parties agree to settle such dispute by arbitration through Singapore International Arbitration Centre (SIAC) in Singapore and in accordance with the arbitration rules and regulation of SIAC. The award of such arbitration shall be final and binding upon the parties hereto.

35 Two sub-issues arose in connection with Clause 19: first, whether the requirement under s 2A(3) of the IAA that an arbitration agreement be in writing (the "in-writing requirement") was satisfied, and second, whether compliance with the condition precedent in Clause 19 – for the parties to settle the disputes amicably before referring the dispute to arbitration – was necessary.

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[69] LL 730(1) at pp 27–59 and pp 60–97

36 The tribunal ruled that it had jurisdiction to hear both Arbitration Nos 54 and 55. First, based on the negotiations between Jiangsu and Concord, as well as their "affirming conduct", the tribunal found that there was a concluded and binding contract for one shipment, the terms of which were evidenced by the provisions of the Spot contract, and a concluded and binding contract for five shipments, the terms of which were evidenced by the provisions of the Term contract. Therefore, the in-writing requirement was satisfied for the arbitration agreements under the Spot and Term contracts. Second, the tribunal held that the condition precedent in Clause 19 was not enforceable.[70]

37 On the merits of Concord's claims, the tribunal found that Jiangsu had breached the Spot contract in failing to open the LC within the stipulated time, and had also breached the Term contract by failing to pay the contract price for the first and second shipments, and failing to open the LCs within the stipulated time for the balance third, fourth, and fifth shipments.

38 Accordingly, the tribunal awarded Concord the following reliefs:

(a) In Award No 38, damages amounting to US$365,449.23 for breach of the Spot contract, interest, and costs.

(b) In Award No 39, damages amounting to US$2,622,783.91 for breach of the Term contract, interest, and costs.

Procedural history

39 On 6 August 2015, Jiangsu filed Originating Summonses 730

[70] LL 730(1) at pp 47–50 and pp 81–84

("OS 730") and 731 ("OS 731") to set aside Award Nos 38 and 39 on the basis that the tribunal had no jurisdiction to determine or adjudicate on the claims arising out of the Spot and Term contracts.

40 I should mention that Jiangsu applied in Summonses 6054 and 6056 of 2015 for OS 730 and OS 731 to be heard partly on oral evidence, with cross-examination of the witnesses for both Jiangsu and Concord.

41 Under O 28 r 4(3) of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC"), where there is a dispute of fact, the court *may* hear an originating summons on oral evidence if doing so would secure a just, expeditious and economical disposal of the proceedings. It *may* also order the attendance of deponents for cross-examination (O 28 r 4(4) of the ROC). Jiangsu argued that cross-examination of witnesses was necessary to resolve what, in its view, were fundamental disputes of fact: whether an oral agreement for six shipments was ever reached, and whether the Spot and Term contracts were evidence of the oral agreement.[71]

42 I dismissed the applications. In my view, there must be good reasons beyond the existence of factual disputes to allow oral evidence and cross-examination. The court, in deciding whether to set aside an arbitral award, is fully competent to sift through the transcripts of oral evidence before the tribunal (see *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ*") at [54]). I agree with the view expressed by Judith Prakash J that the existence of substantial disputes of fact as to whether a party had entered into the relevant arbitration agreement is

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[71] 2nd affidavit of Xie Tingting (OS 730), dated 11 December 2015 at para 13; 2nd affidavit of Xie Tingting (OS731), dated 11 December 2015, at para 5

not *per se* a sufficient reason to allow oral evidence and/or cross-examination (*AQZ* at [55]).

43 Nor is it a sufficient reason that, in this case, Jiangsu was not represented before the tribunal. Allowing the arbitration to proceed in its absence was entirely Jiangsu's own choice and doing. Jiangsu would have had the chance to cross-examine Herlene and other material witnesses had it participated in the arbitration hearings. Ample notices and reminders were sent to Jiangsu. Having deliberately chosen not to do so, they should stand or fall by that strategy. I was also mindful that findings of fact by the tribunal are generally indisputable and, consequently, cross-examination is generally not resorted to in applications under O 69A of the ROC (see *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [52]). Besides, there is a substantial body of objective evidence including the exchange of correspondence between the parties to assist the court to determine this factual inquiry. The objective evidence speaks for itself. I did not think that cross-examination would be helpful in the limited context of the setting aside applications.

44 Nevertheless, I granted Jiangsu's alternative prayers for leave to file additional affidavits to deal with two specific points: (a) the minutes of the two meetings at Jiangsu's office on 18 July 2013 and 8 August 2013; and (b) Jiangsu's internal regulations for approving contracts with third parties. As explained in [63]–[71] and [89] below, I considered the fresh documentary and affidavit evidence adduced by Jiangsu for the purposes of the hearing though ultimately I did not find them to be material or relevant.

Jiangsu's application to set aside the Awards

45 Jiangsu's applications to set aside the Awards were based on s 24 of the IAA read with Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration set out in the First Schedule of the IAA ("Model Law"). Article 34(2) of the Model Law provides that an arbitral award may be set aside if:

> (*a*) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State…

46 It is open to a party seeking to set aside an arbitration award on the ground that the arbitration agreement was invalid to argue that no arbitration agreement was formed between them. This is because "the question of the existence of an arbitration agreement can be subsumed within the issue of the validity of an arbitration agreement" (see *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*First Media*") at [156]). There, the Court of Appeal was referring to Art 36(1)(*a*)(i) of the Model Law, which is a ground for refusing enforcement of an arbitral award, but its holding applies with equal force to a setting-aside application brought under Art 34(2)(*a*)(i) given that both provisions are similarly worded. This was also the view adopted by Prakash J in *AQZ*, where she followed *First Media* and accepted that an applicant can seek to set aside an award under Art 34(2)(*a*)(i) on the basis that no valid arbitration agreement had been formed (at [72]).

47 Jiangsu's argument that there was no valid arbitration agreement because it had not concluded the Spot or Term contracts with Concord therefore falls within the rubric of Art 34(2)(*a*)(i).

Standard of review

48 It is uncontroversial that, in an application to set aside an arbitral award on the ground that the tribunal had no jurisdiction to hear the dispute, the court undertakes a *de novo* hearing of the arbitral tribunal's decision on its jurisdiction (*AQZ* at [49]). If the arbitration agreement is contained in the contract itself, and the validity of the arbitration agreement is challenged on the basis that no binding contract had been concluded, the validity of the arbitration agreement and the existence of a binding contract "stand or fall together" and the court can determine *both* issues on the basis of a full rehearing (see *Hyundai Merchant Marine Co. Ltd v Americas Bulk Transport Ltd* [2013] EWHC 470 (Comm) at [35]–[36]). In determining whether the tribunal lacked jurisdiction, the tribunal's own view of its jurisdiction has no legal or evidential value to the court (*First Media* at [163]), though this should not be taken to mean that "all that transpired before the [t]ribunal should be disregarded, necessitating a full re-hearing of all the evidence", only that there is no fetter on the court's fact-finding abilities (*AQZ* at [57]).

49 Jiangsu sought to adduce evidence to rebut the tribunal's finding that the Spot and Term contracts had been validly concluded. As will be referred to later, this included Jiangsu's internal regulations that contracts for multiple shipments needed board approval, which would allegedly go towards demonstrating that Jiangsu could not have entered into such a contract with Concord for six shipments. Having elected not to participate in the arbitration proceedings despite numerous reminders, should Jiangsu be precluded from

putting forth such evidence which could and should have been brought before the tribunal? Counsel for Concord, Mr Jeya Putra, did not object to the *admissibility* of Jiangsu's fresh evidence though he reserved his position as regards both weight and relevance. But I raised this question to both counsel at the start of the hearing because I thought this issue merited closer examination.

50 Whether there is any bar to adducing new evidence before a court tasked with reviewing an arbitral tribunal's finding on jurisdiction is a question which has met with somewhat differing views in recent cases. In Singapore, two decisions of the High Court appear to have taken different positions. In *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 ("*Sanum*"), the court rejected the notion that a party has full latitude to adduce new evidence. I should observe that *Sanum* involved a challenge to an arbitral tribunal's jurisdiction though not in the context of a setting-aside application. The plaintiff referred the issue of the tribunal's jurisdiction to the High Court under s 10 of the IAA and sought a declaration that the arbitral tribunal had no jurisdiction to adjudicate on the claims brought by the defendant. In support of this, it applied to adduce two diplomatic letters which had not been adduced before the tribunal. The defendant objected to their admission on the basis that they had not satisfied the conditions of admissibility in *Ladd v Marshall* [1954] 1 WLR 1489. Edmund Leow JC noted that although the *Ladd v Marshall* principles did not strictly apply, a party did not have "full unconditional power to adduce fresh evidence at will" (at [43]–[44]). Applying a modified *Ladd v Marshall* test, he held that fresh evidence would only be admitted if:

(a) the party seeking to admit the evidence demonstrated sufficiently strong reasons why the evidence was not adduced at the arbitration hearing;

(b) the evidence if admitted would probably have an important influence on the result of the case though it need not be decisive; and

(c) the evidence had to be apparently credible though it need not be incontrovertible.

On the facts, all three conditions were satisfied.

51 On the other hand, Prakash J observed in *AQZ* that there was nothing in O 69A r 2(4A)(*c*) of the ROC to restrict parties from adducing new materials which had not been placed before the arbitrator (at [59]). She held that O 69A r 2(4A)(*c*) only required an applicant seeking to set aside an award to file an affidavit setting out the supporting evidence. Delay in adducing fresh evidence did not preclude its admissibility though it might affect the weight to be given to it, in addition to adverse costs orders (see [59], referring to *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2003] 1 Lloyd's Rep 190). However, her comments were strictly *obiter* because in that case, there was in fact no attempt to rely on fresh evidence (at [60]).

52 The English decision in *Central Trading & Exports Ltd v Fioralba Shipping Company* [2014] EWHC 2397 is also germane to this issue. It involved a challenge to the jurisdiction of an arbitral tribunal under s 67 of the Arbitration Act 1996 (c 23) (UK). Having reviewed a series of decisions, Males J arrived at the conclusion that a court would not normally exclude

relevant and admissible evidence even if it might cause prejudice to the other party in the context of a challenge to the arbitrator's jurisdiction (at [29]). He found that a party's right to adduce evidence would be subject to the court's control *via* the rules of procedure, and that such control would have to be exercised in accordance with established principles, "in particular the overriding objective and the interests of justice" (at [30]). A court did not have "unfettered discretion" to exclude relevant evidence, but might refuse to allow a party to produce documents selectively where that would prejudice the other party or if the evidence did not comply with the court's rules for ensuring that evidence is presented in a "fair manner" (at [32]). In this regard, any failure by the parties to comply with the tribunal's procedural orders on disclosure of documents might be a relevant consideration (at [33]). On the facts, Males J declined to allow the claimant to rely on evidence which it had failed to produce in response to the tribunal's disclosure orders (at [41]). He also declined to allow evidence, such as hearsay evidence, which would not have been admissible under the English Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) (at [44]–[47]).

53 The cases above illustrate that in the context of a setting-aside application, there appears to be no *absolute* rule to exclude the admission of fresh evidence. The court has the discretion to rule on its admissibility or attach the appropriate weight to such evidence, and/or to make an adverse costs order against the applicant. However, it is important to bear in mind that the jurisdictional challenges in those cases arose from *contested* arbitration proceedings. Should the same principles apply in the context of an uncontested arbitration in circumstances where the applicant who seeks to adduce fresh evidence had deliberately elected not to participate in the entire arbitral process? This is an interesting point. Since this point was not actively argued

by the parties and more importantly, since Mr Jeya Putra did not object to the admissibility of the fresh evidence adduced by Jiangsu, it is perhaps prudent to leave this point to be decided when the issue is properly contested in a subsequent case. I should add that the appeal against the decision in *Sanum* (which applied a modified *Ladd v Marshall* test) is currently pending decision by the Court of Appeal. No doubt, this issue will receive some explicit exposition when the decision is eventually handed down by the Court of Appeal.

54 I will now address the merits of Jiangsu's challenge proper.

Applicable law as regards the validity of the contracts

55 For the purposes of a challenge under Article 34(2)(*a*)(i) of the Model Law, the validity of the arbitration agreement is to be determined by "the law to which the parties have subjected it", failing which it is to be determined by "the law of this State", *ie*, the law of Singapore (see s 3(2) IAA). The first limb applies the parties' choice of law. The second is a default rule mandating the application of the law of the forum where the award is sought to be set aside. It applies only "in cases where the parties have neither expressly nor impliedly chosen the law governing the arbitration clause" (see Gary B. Born, *International Commercial Arbitration Vol III* (Wolters Kluwer, 2nd Ed, 2014) ("Born, *International Commercial Arbitration*") at 3201).

56 Neither Concord nor Jiangsu disputed that Singapore law is the applicable law to determine the validity of the arbitration agreement. That having been said, it may be useful to understand the proper basis for the application of Singapore law in this case – whether by the parties' choice of law or by default.

57 Concord submitted that where parties are in dispute as to the existence (or validity) of a contract, the dispute is to be construed in accordance with the law of the putative contract – the law of the contract as if it were valid.[72] Concord relied on the Court of Appeal's holding in *CIMB Bank Bhd v Dresdner Kleinwort* [2008] 4 SLR(R) 543 at [30]:

> In our opinion, a distinction ought to be drawn between a case where the parties are agreed that there is no agreement at all, and a case where the parties are in dispute as to the existence or validity of the agreement (*eg*, due to fraud or misrepresentation). It is settled principle that, in the latter situation, the dispute as to the existence or the validity of the contract would be construed in accordance with the law that governs that contract as if the contract were valid … Such a rule makes good practical sense because otherwise it would mean that a mere allegation on the part of the defendant that there was fraud would suffice to neutralise the effect of the jurisdiction or choice of law clause in the agreement.

58 It has been observed that "a choice-of-law agreement is effective to select the law governing the arbitration agreement under [Article] 34(2)(*a*)(i) … even if the validity or existence of any agreement between the parties is denied" (Born, *International Commercial Arbitration* at 3200). An arbitration agreement is typically separable from the main contract – it is an agreement "independent of the other terms in the contract" (Article 16(1) of the Model Law). Ordinarily, therefore, if the main contract is invalidated by some vitiating factor, the arbitration agreement (and in this case the choice of law clause) is not invalid unless the vitiating factors directly impeach on the validity of the arbitration agreement.

59 Here, I would observe that Jiangsu and Concord never disputed the existence of Clause 19. It encompasses both the choice of Singapore law and

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[72] Concord's submissions at paras 53–54

the arbitration agreement. This clause was the very same clause which featured in the 6 June contract as well as the Spot and Term contracts. In substance, Jiangsu was denying any agreement to accept the six shipments of petroleum coke; it was not denying any intention to be bound by Clause 19. Significantly, when Jiangsu accepted the September shipment, it was content to use the Spot contract which likewise contained Clause 19. It is clear that the validity of the arbitration agreement is to be determined by Jiangsu and Concord's choice of Singapore law.

60 I turn therefore to examine whether the arbitration agreements were valid under Singapore law.

Contractual validity under the applicable law

61 I understood Jiangsu to be challenging the existence of the Spot and Term contracts on two discrete grounds:

(a) First, Jiangsu did not reach any oral agreement with Concord for the purchase of the six shipments as evidenced by the Spot and Term contracts.

(b) Second, and in any event, there could not have been any oral agreement for the six shipments as this was contrary to Jiangsu's internal rules and regulations, which Concord was aware of.

62 I will address the arguments in reverse order since, when asked what her strongest argument was, Ms See Tow submitted that it was the second.

Jiangsu's internal regulations

63 There are two "internal rules and regulations" which Jiangsu relied on (collectively "the internal regulations").

The internal regulation requiring approval by senior management

64 Liu alleged in his affidavit filed on 24 March 2016 that under Jiangsu's Regulations on the Execution of Business Contracts ("the approval regulations"),[73] he was required to report to and obtain the approval of the General Manager, Mr Zhang Xuexiang, before making major decisions such as entering into contracts on behalf of Jiangsu.[74] In particular, he would be required to submit every proposed deal or contract, along with a cost and profit estimate, to a review committee.[75] The composition of the review committee would depend on the value of the proposed contract.[76]

65 On the face of the approval regulations, it seems plausible that Liu would not be authorised to conclude any contract on behalf of Jiangsu until he had obtained the requisite approval from senior management. First, the preamble of the approval regulations stated that "[a]ll relevant external business contracts of the company must undergo the formalities of review, examination & approval and signing according to the limit of authorization".[77] Second, Jiangsu had purchased petroleum coke from Concord on three occasions in 2012, and each time, there would be a form titled "Budget Sheet

[73] LL 730(2) at pp 29–32

[74] LL 730(2) at para 11

[75] LL 730(2) at para 13

[76] LL 730(2) at para 19

[77] LL 730(2) at p 29

for Foreign Trade" containing the breakdown of costs and signed by Liu and the relevant department managers including the General Manager, Zhang Xuexiang.[78] This same form was also used for the September and November shipments in 2013 which Jiangsu accepted.[79] This point, in itself, does not assist Jiangsu's case. It deals, at best, with the internal procedure for Liu to *obtain* authority. It does not follow that such authority was not obtained. For reasons as explained at [69]–[73] below, the evidence suggests that Liu had the authority to conclude the contracts on behalf of Jiangsu.

The internal regulation against entering into contracts for multiple shipments

66 Jiangsu submitted that it could not have agreed to a single contract with Concord for the six shipments because it was against their "internal rules and regulations to have a single contract governing multiple shipments" ("the single-shipment regulation").[80] I note that this alleged regulation is not supported by any documentary evidence. Rather, Jiangsu merely asserted that it had been their "practice" to have separate contracts to govern each shipment of goods. In this regard, Jiangsu relied on the fact that for the 2012 shipments, a separate contract was concluded for each shipment.[81]

The relevance of the internal regulations

67 Jiangsu purported to rely on these two internal regulations to show that Jiangsu could not have had the intention to enter into the Spot and Term contracts with Concord. This is because both contracts had their genesis in an

[78] LL 730(2) at pp 60, 67 and 81

[79] LL 730(2) at pp 81 and 88

[80] Jiangsu's submissions at para 51

[81] LL 730(2) at paras 15–16

agreement for six shipments, which was contrary to the single-shipment regulation. Further, Liu would have exceeded his authority in entering into the Spot and Term contracts, either because he did not obtain the requisite approval forms, or because his mandate was limited to entering into a contract for a single shipment at a time. These arguments in essence suggest that Jiangsu was under some "incapacity" at the time the contracts (and therefore the arbitration agreement) were entered into. Ms See Tow did not specifically pursue the "incapacity" argument during the hearing to set aside the Awards.

68 In any event, the argument, regardless of which form it takes, is premised on Concord being aware of the internal regulations.[82] Unless Concord was aware of them, the internal regulations would operate as no more than the subjective reservations of Jiangsu as to whether it could have intended to conclude the contracts with Concord. Such subjective reservations cannot deny the existence of a contract if, to all outward appearances, the parties have concluded the contracts (see [76] below). Furthermore, under Singapore law, even if Liu had acted outside his scope of authority, Jiangsu would still be bound by the contracts unless Concord had notice of Liu's lack of authority (see *Banque Bruxelles Lambert and others v Puvaria Packaging Industries (Pte) Ltd (in liquidation)* [1994] 1 SLR(R) 736 at [21]–[22] and Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 7-086). Therefore, the internal regulations would only assume relevance if Concord was cognisant of them.

Concord was not aware of the internal regulations

69 In my view, Jiangsu is incorrect in alleging that Concord was aware of

[82] Jiangsu's submissions at para 51

the internal regulations. First, there is simply no mention of the internal regulations in the correspondence between Jiangsu and Concord from May 2013 to November 2013. Nor is there any evidence that Herlene, who also negotiated the 2012 contracts, was aware of the approval forms at that time, which might make her failure to request such approval for the 2013 contracts questionable. There is also neither any factual nor legal basis for Jiangsu to suggest that because a separate contract was entered into for each of the 2012 shipments, it must follow that Jiangsu is somehow precluded by the internal regulations from entering into a contract for multiple shipments. As explained in [72] below, the evidence is to the contrary. Interestingly, the very first correspondence for this transaction began with an inquiry from Jiangsu for six shipments. Consistent with the initial inquiry, the subsequent correspondence between the parties in the period May–November 2013 also proceeded on the basis that Liu had the authority to contract for six shipments on behalf of Jiangsu. He was after all an Assistant General Manager of Jiangsu.

70 Jiangsu sought to rely on Herlene's witness statement in the arbitration in aid of its submission. Herlene recounted that, on or around 17 July 2013 when Concord had not yet received Jiangsu's LC for the Spot contract, Liu informed her that Jiangsu's management could not "approve a letter of credit with a US$5 million limit without an onbuyer in place."[83] I fail to see how this could possibly assist Jiangsu to make good its case that Concord was aware of the internal regulations *at the time when the contracts were entered into*. First, this information was only mentioned to Herlene on 17 July 2013 *after* Concord had sent Jiangsu the Spot and Term contracts. Second, it purported to

[83] LL 730(1) at p 221; HK 730(1) at p 41

explain Liu's difficulty in obtaining approval for the LC. This is in fact consistent with the conclusion of the Spot and Term contracts. Why would Liu be seeking approval for the LC if there were no concluded contracts?

71 It did not escape my attention that Jiangsu conspicuously omitted to mention the internal regulations at the meeting of 18 July 2013 or 8 August 2013. If the internal regulations precluded such transactions or if Liu had failed to comply with the internal regulations or had no such authority, the meetings would have been the perfect setting to raise them particularly at the 18 July 2013 meeting which was attended by both the President and General Manger of Jiangsu.

72 Even if there was any restriction on the part of Liu to enter into the contracts for multiple shipments, it should not be assumed that Liu did not have the requisite authority to do so. In fact, the evidence before me suggests otherwise. Right from the outset of the negotiations on 23 May 2013 (see [5] above), multiple shipments were expressly contemplated in the email which emanated from Jiangsu's broker. Further, throughout the entire negotiation process, multiple shipments were repeatedly mentioned and yet at no time did Liu hint that multiple shipments in a single contract were not permitted or that he had no such authority under Jiangsu's internal regulations.

73 Finally, at the meetings at Jiangsu's office on 18 July and 8 August 2013, Jiangsu expressly acknowledged that it had contracted for six shipments in a single contract but requested the contract to be split into the Spot and Term contracts (see [88]–[89] below). These admissions by Jiangsu at the two meetings effectively demolished the allegation that Liu had no authority or that multiple shipments in a single contract were not permitted under the

internal regulations. There is simply no merit or legal content whatsoever in Jiangsu's ill-conceived reliance on the internal regulations.

Whether the parties concluded the Spot and Term contracts

74 It may be useful to set out again Concord's case on the two concluded contracts. Concord claimed that it had entered into an oral agreement on or about 30 May 2013 with Jiangsu for the sale and purchase of six shipments each of 20,000 metric tons of petroleum coke for shipment from Dumai, Indonesia to various ports in China. Initially, the transaction was to be split into two contracts, with three shipments of 20,000 metric tons each. This structure changed on or about 6 June 2013 into the 6 June contract for all six shipments. Finally, on or about 15 July 2013, at the request of Jiangsu, the structure underwent a further change, *ie*, the six shipments were split between the Spot contract and the Term contract. The Spot and Term contracts were reduced to writing and sent to Jiangsu for signature by an email dated 15 July 2013. It is common ground that Jiangsu did not sign either the Spot or Term contracts.

Legal principles

75 Under Singapore law, an objective test is to be applied in deciding whether the parties have reached an agreement. In applying this objective test, the language used by one party, whatever his real intention may be, is to be construed in the sense in which it would be reasonably understood by the other (see *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40]).

76 The objective intention of the parties can be gleaned from their correspondence and relevant background, which includes the industry the parties are in, the character of the document containing the terms, and the course of dealing between the parties (see *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") at [51]). It follows that the subjective reservations of one party as to whether it is contractually bound cannot prevent the formation of a contract if, to outward appearances, parties have reached an agreement (see *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440 at [30] and *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 ("*Lim Koon Park*") at [66]).

77 If parties are involved in continuing negotiations, it may be less useful to analyse the existence of the agreement in terms of whether an offer was made and accepted. It may be more appropriate to examine the whole of the documentary evidence and decide whether the parties did reach an agreement on all material terms (see *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 798 at [16], following *Port Sudan Cotton Co v Govindaswamy Chettiar & Son*s [1977] 2 Lloyd's Rep 5 at 10). If one approaches the issue of contract formation in this holistic manner then it follows, as the Court of Appeal has held, that lack of clarity on the exact circumstances surrounding the conclusion of the contract would not be an impediment to discerning that one was in fact concluded in the course of the parties' continuing negotiations (*Lim Koon Park* at [75]).

78 Another important principle is that as long as there is "a set of essential terms which the parties may be bound by as a matter of law and on the basis of which they may act", a contract may be formed even if parties are still negotiating some of the terms in the contract (*R1 International* at [52]). The

crucial question is whether the parties, by their words and conduct objectively ascertained, have demonstrated that they intend to be bound despite the unsettled terms (see *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 at [27]).

That Jiangsu did not sign the Spot and Term contracts does not prevent their formation

79 I should first dispose of Jiangsu's initial defence to the claim, *ie*, that Jiangsu did not formally indicate its assent by signing the Spot and Term contacts. The non-signing of the contracts cannot in itself be a bar to the formation of contract, for "the sterile formality of a signature is not always necessary in law to breathe life into contractual undertakings" (see *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [55]). In *R1 International*, the Court of Appeal found that the fact that a party did not counter-sign and return the contract note did not mean that the unsigned contract note was not contractually binding (at [76]). Jiangsu's allegation that it would not consider itself bound until its company seal had been applied fails for the same reason. Here, Jiangsu had refused to sign the Spot and Term contracts because it had not received any confirmed purchase orders from its own customers.[84] That is strictly a point between Jiangsu and its customers and has no bearing on the contractual relationship between Jiangsu and Concord. Jiangsu cannot have it both ways. If it shows objectively by its conduct *vis-a-vis* Concord that it was intending to perform the contracts, it cannot then rely on the unsigned contracts to evade the consequences of the contracts when it suits them. This brings me to the question of whether the

[84] LL 730(2) at para 35(d)

conduct of the parties, objectively construed, showed that they had concluded a contract for six shipments at least by 6 June 2013.

Jiangsu and Concord concluded the 6 June contract

80 The negotiations began with an email inquiry dated 23 May 2013 from Jiangsu's broker, notably for six shipments of 20,000 metric tons of petroleum coke each. On 31 May 2013, Concord replied to Jiangsu's broker to confirm a concluded deal for three shipments and attached the contract for the three shipments for Jiangsu's signature. It added that a contract for the balance three shipments would be sent once the details were finalised. There was no denial by Jiangsu that a contract for the three shipments had been concluded.

81 Concord's position, both before the tribunal[85] and before me, was that an oral agreement for six shipments was concluded on 30 May 2013. But in Herlene's internal email of the same date, she noted that while Jiangsu "wanted to take 6 cargoes", Concord could not "relax until the final confirmation".[86] Jiangsu had accepted three shipments but there was a possibility that it might not agree to the remaining three shipments (see [6] above). Hence, there may well have been a concluded oral agreement on 30 May 2013 for three shipments but perhaps not for six shipments.

82 The correspondence between the parties did not end with Concord's email of 31 May 2013. A revised contract for six shipments was sent to Jiangsu's broker on 6 June 2013, *ie,* the 6 June contract, for Jiangsu's signature. The preamble to this contract clearly stated that Concord had

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[85] Concord's Submissions at para 83

[86] HK 730(1) at p 50

"concluded the deal" with Jiangsu on 30 May 2013 and 6 June 2013. Further, and consistently with this, in Herlene's internal update, she reported that Jiangsu had "confirmed the 6 cargoes" (see [7] above). Jiangsu said it would reply on 13 June 2013. At this point there is a gap in the email chain. Although it may not be possible to point to a precise moment when Jiangsu indicated its assent to the 6 June contract, its conduct after that date is entirely consistent with the inference that it had indeed given its assent.

Jiangsu's conduct after 6 June 2013 is consistent with the 6 June contract

83 The following instances of Jiangsu's conduct are consistent with the conclusion of the 6 June contract (see [8]–[9] above)

(a) On 17 June 2013, Jiangsu's broker sent an email to advise Concord on the laycan dates for the first two shipments.

(b) On 21 June 2013, Jiangsu informed Concord of the delivery date for the second shipment. In its email, Jiangsu invited Concord to confirm this. This showed that Jiangsu was intending to perform the second shipment.

(c) On 2 July 2013, Concord proposed the delivery dates for all six shipments, noting that the dates for the first two shipments had been agreed upon. Concord proposed the delivery dates for all six shipments following the 6 June contract.

(d) On 4 July 2013, Jiangsu accepted Concord's nomination of the *Ken Zui* for the first shipment.

(e) On 5 July 2013, Liu forwarded the first draft LC. There would be no reason to do so if Jiangsu was not intending to accept the first shipment pursuant to the 6 June contract.

84 Although the laycan dates and discharge ports for the 3rd to 6th shipments had not been finalised, that was simply a matter for Jiangsu's nomination and could not in itself preclude the conclusion of the 6 June contract. Jiangsu's conduct signified its clear intention to be bound by the 6 June contract. A reasonable person in Concord's position would regard Jiangsu's conduct as indicating that it intended to be bound by the 6 June contract.

85 In my judgment, the intention on both sides to be bound by the 6 June contract was still present when, on 15 July 2013, Concord sent the Spot and Term contracts for Jiangsu's signature. Jiangsu had requested that the first shipment be governed by a single contract and the remaining five be governed by another contract. Concord acceded to Jiangsu's request. The Spot and Term contracts superseded the 6 June contract and became the final landing point of the contractual arrangement for the six shipments. It bears mention that the Spot and Term contracts were the contracts which formed the subject matter of the arbitrations. However, as noted above at [10], the essential terms such as the quantity of each shipment, the quality of the petroleum coke, and the price had already been agreed, and remained the same throughout. Significantly, an amended LC was resent on 15 July 2013. As noted at [11] above, the contract reference number for the LC was in fact the Spot contract reference number: 1306/PDT/TERM/T144771. This supports Concord's case that the 6 June contract was split into the Spot and Term contracts on 15 July 2013 at the request of Jiangsu to facilitate the issuance of the LC.

The two meetings between Jiangsu and Concord confirm the existence of the oral agreement

86 As alluded to at [12] and [17] above, two meetings were held in Jiangsu's office to discuss the status of the six shipments. It is of note that the meeting on 18 July 2013 was preceded by (a) a letter dated 17 July 2013 from Concord that Jiangsu was in breach of the Spot contract; and (b) an email dated 18 July 2013 from Concord to Jiangsu setting out the agenda for the meeting which included Jiangsu's "clear position for the first shipment", Jiangsu's "steps to prepare the letter of credit" and Jiangsu's advice as regards the "balance 4 cargoes".[87]

87 The salient points which were discussed at the 18 July 2013 meeting have been summarised at [12] above. Jiangsu expressly acknowledged that it had "contracted [for] 6 cargoes in total" with Concord. It is indeed very telling that Jiangsu proposed to bear US$10 per metric ton as compensation to Concord. Given the volume of the contracted cargo, this would effectively translate into a proposal by Jiangsu to bear US$800,000 to US$1,200,000 of the losses.[88] At the very least, even if the proposed compensation was only for the Spot contract, it would still be a substantial sum of US$200,000. There is no reason why Jiangsu would propose this generous compensation unless it accepted that it was bound by, and liable under, the Spot and/or the Term contracts. Liu's explanation was that although Jiangsu was not contractually bound to accept the first shipment, it offered to bear the loss to "maintain the cordial business relationship" between the parties.[89] Such an offer strikes me as highly improbable in the commercial context between the parties.

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[87] LL 730(1) at p 188, HK 730(1) at p 114

[88] Concord's submissions at para 131

88 At the meeting on 8 August 2013, Jiangsu admitted that it was liable to Concord under the Spot contract, and was taking steps to perform the Term contract (see [17] above). Further, consistent with the 18 July 2013 meeting, at the 8 August meeting, Jiangsu again acknowledged its difficulty to pay Concord's claim for the Spot contract "at one go" and instead proposed compensation "via subsequent cargoes loading August to December" under the Term contract. It also proposed to Concord to "vary the premium for the cargoes loading in different months to reflect prevailing market conditions", instead of having the same premium "apply for all 5 cargoes". The purpose of this proposal was to average the premium to "+ 120", which can only be a reference to the contract price (PACE + US$120) under the Term contract. To my mind, Jiangsu was attempting to ensure that the contract price for each of the five remaining shipments would approximate the contract price under the Term contract because it acknowledged its obligation to perform all five shipments under the Term contract. Jiangsu was trying to vary the terms of the Term contract. Crucially, Jiangsu informed Concord that the proposal to "vary" the premium came from its end customer, "Surun". This indicated that Jiangsu was trying to vary the terms of the contracts with Concord in order to comply with the requests from its own end customer.

89 The two meetings plainly showed that Jiangsu accepted that it was contractually bound to take delivery of the six shipments, as much as it tried to persuade Concord to release it from four of the shipments under the Term contract by offering some compensation. Liu claimed that, at the two meetings, he denied that Jiangsu had agreed to the six shipments.[90] But both

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[89] LL 730(2) at para 35(e)

[90] LL 730(2) at para 35(b)

Liu and Zhang Xuexiang signed the minutes of the 18 July meeting. Notably, no denial of the Spot and Term contracts was recorded. In fact, it was the very opposite – the minutes recapped how Jiangsu had contracted for six shipments in a single contract at first but requested the contract to be split into the Spot and Term contracts (see [12] above). Moreover, it was Liu himself who sent the notes of the 8 August meeting to Herlene and Gary. It is certainly not open to Jiangsu to disclaim its own recording of the discussion at the 8 August meeting.

Jiangsu accepted the September and November shipments pursuant to the Term contract

90 There is no dispute that Jiangsu accepted and paid Concord for two shipments of petroleum coke each of 20,000 metric tons in September and November 2013. Undoubtedly, these shipments would have been made in performance of some contracts. According to Concord, these two shipments were part of the Term contract while Jiangsu claimed that they were shipped pursuant to two separate contracts independent of the Term contract. These are the two competing case theories for the acceptance of the two shipments. It must follow that if Jiangsu is unable to prove that there were two other contracts which were distinct from the Term contract, it stands to reason that the two shipments must have been performed pursuant to the Term contract which would in turn render it clear beyond peradventure that the Term contract was concluded between the parties.

91 When Jiangsu wrote to the tribunal on 29 October 2014 to challenge the jurisdiction of the tribunal, it claimed that the contracts for the September and November shipments were the only two contracts which it had entered into with Concord. Although the contract reference numbers were provided to

the tribunal, these two alleged contracts were not attached to the letter. Implicit in its letter to the tribunal is that it denied entering into the Spot and Term contracts with Concord. Liu, in his affidavit filed on 12 August 2015, claimed to have faxed the contract for the September shipment to Concord on 29 August 2013.[91] He also alleged that the contract for the November shipment was also sent to Concord, without specifying any date.[92] Concord denied ever receiving these two alleged contracts. When pressed at the hearing whether Jiangsu was able to produce the fax transmission reports or any other evidence to support Liu's allegation, Ms See Tow conceded that none could be produced. It is curious for Jiangsu to accuse Concord of deliberately withholding the disclosure of these two alleged contracts to mislead the tribunal, when it omitted to disclose them in its own letter to the tribunal to challenge its jurisdiction. I find this allegation all the more egregious since there is no evidence that they were ever sent to Concord in the first place. Accordingly, I reject Liu's evidence that he had faxed over the alleged contracts for the September and November 2013 shipments to Concord.

92 It would appear (from [22]–[23] above) that Liu had unilaterally adopted the Spot contract previously sent on 15 July 2013 in order to obtain the LC for the September shipment. As for the November shipment, Jiangsu used the contract dated 10 October 2013 which Concord had sent for Jiangsu's use in obtaining an LC (see [25] above). Both contracts were solely for the purpose of procuring the issuance of LCs. Jiangsu has exhibited the contracts for the September and November shipments which it claims to have signed and sent to Concord. The September contract is dated 15 July 2013 while the

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[91] LL 730(1) at para 50

[92] LL 730(1) at para 56

November contract is dated 10 October 2013. These are identical to the contracts it had used to obtain the LCs, save that both contain Jiangsu's company's seal and that the 15 July 2013 contract is signed. It seems therefore that Jiangsu signed and applied its seal to these contracts, which it had received for the purpose of opening the LCs, before supposedly sending them to Concord. However, I have found that they were in fact never sent to Concord. In my view, the September and November shipments were accepted pursuant to Jiangsu's obligations under the Term contract. Even if I am wrong in treating these two shipments as shipments under the Term contract, it does not follow that the shipments were made pursuant to the two separate contracts as alleged by Jiangsu since these two contracts were never sent to Concord. At best, they would be of neutral probative value in deciding between the two competing case theories.

Conclusion

93 I find that the Spot and Term contracts were validly concluded between Jiangsu and Concord. Consequently, the arbitration agreements (Clause 19) in both contracts were valid and the tribunal had jurisdiction to hear the disputes in respect of Jiangsu's breaches of the Spot and Term contracts.

94 I therefore dismiss the applications in OS 730 and OS 731 with costs. As both applications cover the same facts and legal issues, I fix the costs for each application at $10,000 plus reasonable disbursements to be agreed if not taxed.

Steven Chong
Judge

See Tow Soo Ling and Chia Shengyou, Edwin (Colin Ng & Partners) for the plaintiff;
Pancharatnam Jeya Putra and Thuolase d/o Vengadashalapathy (AsiaLegal LLC) for the defendant.
