IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 31

Court of Appeal / Civil Appeal No 12 of 2022

Between

COT

… *Appellant*

And

(1) COU
(2) COV
(3) COW

… *Respondents*

In the matter of Originating Summons No 482 of 2021

Between

COT

… *Plaintiff*

And

(1) COU
(2) COV
(3) COW

… *Defendants*

Court of Appeal / Civil Appeal No 13 of 2022

Between

COV

… *Appellant*

And

(1) COU
(2) COW
(3) COT

… *Respondents*

In the matter of Originating Summons No 489 of 2021

Between

COV

… *Plaintiff*

And

(1) COU
(2) COW
(3) COT

… *Defendants*

Court of Appeal / Civil Appeal No 15 of 2022

Between

COW

… *Appellant*

And

(1) COU
(2) COV
(3) COT

… *Respondents*

In the matter of Originating Summons No 492 of 2021

Between

COW

… *Plaintiff*

And

(1) COU
(2) COV
(3) COT

… *Defendants*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside]
[Arbitration — Arbitral tribunal — Jurisdiction]
[Arbitration — Conduct of arbitration — Pleadings]
[Contract — Formation]

Version No 1: 11 Oct 2023 (13:51 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

MATERIAL BACKGROUND FACTS **3**

DECISION BELOW **9**

ISSUES ON APPEAL **10**

OUR DECISION **11**

SUPERVISORY ROLE OF THE SEAT COURT 11

JURISDICTIONAL CHALLENGE 19

The appellants' arguments *20*

Our analysis *21*

(1) Applicable law 21

(2) Context 23

(3) A binding contract was concluded between the appellants and the Claimant 24

EXCESS OF JURISDICTION 35

BREACH OF NATURAL JUSTICE 38

CONCLUSION **40**

Version No 1: 11 Oct 2023 (13:51 hrs)

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COT
v
COU and others and other appeals

[2023] SGCA 31

Court of Appeal — Civil Appeals Nos 12 of 2022, 13 of 2022 and 15 of 2022
Judith Prakash JCA, Tay Yong Kwang JCA and Steven Chong JCA
11 August 2023

11 October 2023 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 The policy of minimal curial intervention in arbitral proceedings is well settled in our arbitration jurisprudence (*BLC and others v BLB and another* [2014] 4 SLR 79 at [51]). This policy is engendered by considerations of party autonomy and the finality of the arbitral process, dictating that the courts should act with a view to "respecting and preserving the autonomy of the arbitral process" (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [59]). Thus, curial intervention is warranted only on limited grounds. In Singapore, the grounds on which the seat court can set aside an arbitral award are exhaustively prescribed in s 24 of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, as adopted

in Singapore by virtue of s 3(1) read together with the First Schedule of the IAA ("the Model Law").

2 Critically, the seat court has no jurisdiction to examine the substantive merits of the arbitration. As this court stated in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [37], an integral feature and consequence of party autonomy is that parties choose their arbitrators and are bound by the decisions of their chosen arbitrators.

3 It has been observed that this minimal-intervention policy reflects the expectation that courts "should supervise with a light touch but assist with a strong hand" (Michael Hwang, "Commercial Courts and International Arbitration – Competitors or Partners?" (2015) 31 Arbitration International 193 at 194). But how, then, should the courts toe this fine line?

4 This case presents the challenge of determining the limits of curial intervention where the jurisdictional challenge bleeds into the merits of the arbitral award. When the jurisdictional challenge is raised on the premise that no arbitration agreement was concluded, it is inevitable for the seat court to conduct a limited review of the merits of the underlying dispute – in particular, the issue as regards the existence of the contract containing the arbitration agreement. Therein lies the tension in determining the line between a jurisdictional and a substantive challenge.

5 In their respective applications to set aside the arbitral award ("the Award"), the three appellants contended that the arbitral tribunal ("the Tribunal") lacked jurisdiction because there was no concluded contract and hence no binding arbitration agreement. Specifically, the appellants claimed that there was no concluded contract since there had been no *consensus ad idem* on

Version No 1: 11 Oct 2023 (13:51 hrs)

the terms of the contract. The question before this court is whether it is open to the appellants to dispute the existence of certain terms and obligations of the contract in the event the court decides that a valid arbitration agreement was reached between the parties. This issue provides a fitting opportunity for this court to expound on the tension we have identified above, and to explain where the line should be drawn and why it should be so drawn to ensure that the exercise of the seat court's supervisory jurisdiction is kept within its limited statutory remit.

6 The appellants raise three discrete bases to challenge the Award: (a) there is no valid arbitration agreement between the parties; (b) the Tribunal exceeded the scope of its jurisdiction; and (c) there was a breach of natural justice. Nevertheless, the common thread in each of the three bases is the existence or lack thereof of a contract containing an arbitration agreement. As we will explain below, our decision on this has consequences on the remaining bases of challenge.

Material background facts

7 We first summarise the material background facts.

8 To maintain the confidentiality of the arbitration, the judge below ("the Judge") used pseudonyms in place of the parties' names (including their directors and employees), their related entities and the currency by which the parties transacted. Unless otherwise stated, we adopt the same pseudonyms in this judgment.

9 The first respondent in the present appeals, COU, was the claimant in the arbitration. We refer to COU as "the Claimant" in this judgment. The

Version No 1: 11 Oct 2023 (13:51 hrs)

Claimant produces and supplies a type of technologically advanced and high-value industrial product worldwide. We refer to this product as "the Modules".

10 The appellants were the respondents in the arbitration. At the material time, the appellants were members of the same multinational group of companies, which we refer to as "the Rohan Group". The appellants are briefly described as follows:

(a) The third respondent in the arbitration and the appellant in CA/CA 12/2022 is COT. We refer to COT in this judgment as "the Project Company". The Project Company is a special purpose vehicle ("SPV") incorporated for the sole purpose of owning and operating an infrastructure project in Gondor ("the Project"). The arbitration arose out of the Project.

(b) The second respondent in the arbitration and the appellant in CA/CA 15/2022 is COW. COW is an engineering, procurement and construction ("EPC") contractor. We refer to COW in this judgment as "the EPC Company". Its business is in constructing and commissioning infrastructure projects for the Rohan Group in Gondor.

(c) The first respondent in the arbitration and the appellant in CA/CA 13/2022 is COV. We refer to COV in this judgment as "the Shareholder Company". Until late 2016, the Shareholder Company held 99.99% of the shares in both the Project Company and the EPC Company. The Project Company and the EPC Company have since been sold to an unrelated group of companies termed "the Sauron Group" and another unrelated company respectively. For this reason, each of the appellants are separately represented in the appeals.

Version No 1: 11 Oct 2023 (13:51 hrs)

11 Aside from the three appellants, another entity in the Rohan Group is of significance in this dispute. We refer in this judgment to this entity as "the Procurement Company". The Procurement Company is the Rohan Group's centralised procurement arm, and is tasked with procuring goods for the Rohan Group from vendors around the world and to supply those goods to members of the Rohan Group after applying an intragroup markup. While the Procurement Company was not a party to the arbitration and therefore not a party to the present proceedings, its role in the dispute remains salient because the subject matter of the arbitration was the appellants' liability to the Claimant for a debt owed by the Procurement Company to the Claimant.

12 The Modules needed to complete the Project were supplied by the Claimant to the Project Company through a chain of contracts entered into in 2015 and 2016. Under this chain: (a) the Claimant sold the Modules to the Procurement Company; (b) the Procurement Company in turn sold the Modules to the EPC Company; and (c) the EPC Company sold the Modules to the Project Company. Details on each link in the chain are as follows:

(a) The Claimant and the Procurement Company concluded a "Module Supply Agreement" ("the MSA") in August 2015 under which the Claimant agreed to supply Modules to the Procurement Company for use in various projects of the Rohan Group around the world, including but not limited to the Project.

(b) No formal contract was concluded between the Procurement Company and the EPC Company. However, the Procurement Company invoiced the EPC Company for the supply of the Modules. The EPC Company accepts that it was contractually bound to pay these invoices to the Procurement Company.

Version No 1: 11 Oct 2023 (13:51 hrs)

(c) The EPC Company and the Project Company entered into an equipment and material supply contract ("the EMS Contract") in March 2016. Under the EMS Contract, the EPC Company was obliged to procure the Modules for the Project and to supply them to the Project Company.

13 By March 2016, the Claimant had received payment on only six of the invoices, and three were overdue. On or around 13 March 2016, the Claimant indicated that it would suspend all further deliveries of the Modules for the Project until it received full payment for the delivered Modules.

14 This led to the commencement of negotiations. Between 15 to 18 March 2016, representatives from the Claimant and the Rohan Group entered into negotiations to resolve the issue of the unpaid invoices and the delivery of the remaining Modules ("the March 2016 Negotiations"). The effect of the March 2016 Negotiations and in particular, whether they resulted in the formation of a contract containing a valid arbitration agreement is at the heart of the dispute.

15 Two executives from the Claimant took part in the March 2016 Negotiations:

(a) Legolas, the Claimant's Chief Executive Officer ("CEO") and General Manager; and

(b) Gimli, the Claimant's sales operation manager.

16 Five executives of the Rohan Group entities were involved in the March 2016 Negotiations:

(a) Gandalf, the President, CEO and a director of the Rohan Group's ultimate holding company;

Version No 1: 11 Oct 2023 (13:51 hrs)

(b) Aragon, a director of the Shareholder Company from June 2011 to April 2017;

(c) Boromir, a director of the Shareholder Company and the Project Company from March to October 2016, and General Counsel of the Rohan Group's business in Gondor from June 2010 to October 2016;

(d) Frodo, a director and employee of the EPC Company from February 2015 to April 2017; and

(e) Samwise, an employee of the Procurement Company and a senior director of a wholly-owned subsidiary of the Procurement Company in another country.

17 The key object of the negotiations was over a non-disposal undertaking ("NDU") drafted by Boromir and the members of his in-house legal team. As mentioned above, representatives from all three appellants were involved in the March 2016 Negotiations. The NDU was drafted as an undertaking to be provided by the Shareholder Company in favour of a "Contractor" (defined as the Claimant), not to dispose of the Shareholder Company's shares in the Project Company until payment for the Modules had been fully settled. Altogether, four versions of the NDU were exchanged during the March 2016 Negotiations. Clause 9 of each version of the NDU provided that disputes under the NDU which could not be resolved amicably were to be submitted to arbitration – this is the arbitration agreement in question. We elaborate further on each version of the NDU and its significance below. What is important to note at this juncture is that only the *third* of the four versions was signed and executed. We refer to this signed NDU as "NDU-3".

18 On 18 March 2016, the Claimant released the remaining Modules.

Version No 1: 11 Oct 2023 (13:51 hrs)

19 On 22 March 2016, the EPC Company paid ₴5.06m to the Procurement Company. On 25 March 2016, the Procurement Company paid ₴5.06m to the Claimant. Following the return of certain Modules to the Claimant, the sum of ₴7.35m remains due and owing to the Claimant.

20 In 2017, the Claimant commenced arbitration against the appellants for payment of the outstanding invoices amounting to ₴7.35m. The Tribunal allowed the Claimant's claim. The Tribunal made the following key findings, among others:

(a) First, the parties had entered into a partly written, partly oral "Modules Delivery Agreement, which included NDU-3" ("the MDA"). The MDA was entered into on 18 March 2016. Under the MDA, the appellants agreed to pay the Claimant all the unpaid invoices for the Modules, whereupon the Claimant would act to release the remaining Modules to complete the Project.

(b) Second, cl 9 of NDU-3 is a valid arbitration agreement.

(c) Third, Aragon had the authority to agree, and did agree, on behalf of the appellants jointly and severally to pay the unpaid invoices in consideration of the Claimant agreeing to release the remaining Modules. Accordingly, the appellants had collectively entered into the MDA.

21 Before the Judge, the appellants sought to set aside the Award on three grounds:

(a) First, since none of the appellants concluded any contract whatsoever with the Claimant at any time, there was no valid arbitration

Version No 1: 11 Oct 2023 (13:51 hrs)

agreement between the parties within the meaning of the second limb of Art 34(2)(*a*)(i) of the Model Law.

(b) Second, the Award should be set aside under Art 34(2)(*a*)(iii) of the Model Law because the Tribunal acted *ultra petita* and exceeded the scope of its jurisdiction within the meaning of Art 34(2)(*a*)(iii) of the Model Law. Alternatively, the Tribunal acted *infra petita* in that it failed to decide on certain matters which the parties had submitted to arbitration. The Award was therefore within the scope of Art 34(2)(*a*)(iii) of the Model Law read together with *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [34].

(c) Third, the Tribunal breached the rules of natural justice. The Award should therefore be set aside under s 24(*b*) of the IAA or Art 34(2)(*a*)(ii) of the Model Law.

Decision below

22 The Judge found that none of the appellants had established any grounds for setting aside the Award. Based on the March 2016 Negotiations, a contract on "basic or essential terms" was formed on 17 March 2016 and a contract on full terms was formed on 18 March 2016 (*COT v COU and others and other matters* [2023] SGHC 69 ("GD") at [112]). The Claimant released the Modules on 18 March 2016 in performance of its obligations under and as consideration for the concluded contract (GD at [133]–[135]). The concluded contract incorporated NDU-3. Since cl 9 of NDU-3 contained an agreement to arbitrate disputes, there was a valid arbitration agreement (GD at [136]). Moreover, all the appellants were parties to the concluded contract. It was common ground that Boromir had the Shareholder Company's authority to participate in the

Version No 1: 11 Oct 2023 (13:51 hrs)

March 2016 Negotiations and to bind the Shareholder Company to any contract that may arise as a result (GD at [140]). The EPC Company and the Project Company were also parties as Boromir, Aragon and Frodo had implied actual authority to participate in the March 2016 Negotiations and to bind those companies to the contract (GD at [149]–[151]).

23 As regards the excess of jurisdiction ground, the Tribunal's findings fell well within the terms and scope of the submission to arbitration (GD at [209]). The dispute as framed by the Claimant in the notice of arbitration was sufficiently wide to encompass a partly oral and partly written contract arising out of the March 2016 Negotiations and which was connected to or evidenced by NDU-3 (GD at [188]). The terms of reference and the Claimant's pleadings also recorded the Claimant's position that NDU-3 was *evidence of* the contract (GD at [193]–[195]).

24 As for the challenge based on a breach of natural justice, the appellants had failed to establish a single instance in which any of them was unable to present its case or denied natural justice (GD at [239]). The Tribunal did not deprive the appellants of a reasonable opportunity to be heard on the Claimant's case that a contract was concluded as evidenced by NDU-3 (GD at [227]–[228]). Moreover, the appellants' arguments that the Tribunal had erred in its quantification of the Claimant's loss and damage amounted in substance to arguments that the Tribunal had erred in its findings of fact, which was not a valid ground of challenge (GD at [231]).

Issues on appeal

25 There are three issues before this court which are relevant to the determination of the appeals:

Version No 1: 11 Oct 2023 (13:51 hrs)

(a) whether there is a valid arbitration agreement between the Claimant on one hand and the appellants on the other;

(b) whether the Tribunal exceeded the scope of its jurisdiction by dealing with a dispute not falling within the terms of the submission to arbitration or because the Award contained decisions on matters beyond the scope of the submission to arbitration; and

(c) whether the Tribunal breached the rules of natural justice.

Our decision

Supervisory role of the seat court

26 It is well-established that the seat court, in discharging its supervisory role, strives to uphold arbitral awards. This general approach is guided by the policy of minimal curial intervention and is consistent with international practice (*Soh Beng Tee* at [59]–[60]). The policy of minimal curial intervention is grounded in a desire to "support, and not to displace, the arbitral process" (*Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") at [29]). This desire is in turn underpinned by two principal considerations. First, the finality of the arbitration process must be upheld, being one of the crucial considerations motivating parties to choose arbitration (*Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636 at [90], citing *Tjong Very Sumito* at [29]). Second, the seat court recognises that parties have chosen arbitration as their dispute resolution process. Having accepted the benefits of party autonomy, they must accept its consequences (*AKN* at [37]; *ASG v ASH* [2016] 5 SLR 54 ("*ASG*") at [54]). Therefore, seat courts "do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties

Version No 1: 11 Oct 2023 (13:51 hrs)

who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases" (*AKN* at [37]).

27 Thus, the grounds for curial intervention in arbitration proceedings are narrowly circumscribed. The supervisory powers of the seat court are exercised in strict adherence to statutorily prescribed grounds. In considering a setting aside application based on one of these grounds, the court must be careful not to do more than is necessary, "bearing in mind the principle of minimal curial intervention as well as the salutary reminder that the *substantive merits* of the arbitral proceedings are *beyond* the remit of the court" [emphasis in original] (*BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC*") at [3]).

28 Accordingly, the seat court takes a "generous approach" when reviewing arbitral awards. In *BLC*, this court described this approach as follows (at [86]):

> … In short, the court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written … Nor should the court approach an award with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards, with the objective of upsetting or frustrating the process of arbitration. Rather, the award should be read in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it …

29 The boundaries of the court's supervisory role come into sharper focus when a setting aside application is based on a jurisdictional challenge premised on the absence of a concluded contract, especially when the absence of this contract is the substantive issue in dispute in the arbitration. In such cases where the party seeking the setting aside remedy alleges that no contract was concluded between the parties, it is well-established that the seat court undertakes a *de novo* review. The seat court then faces the challenge of navigating the thin line between a merits examination and the policy of minimal intervention.

Version No 1: 11 Oct 2023 (13:51 hrs)

30 When we questioned the parties on how the supervisory role of the seat court should be exercised in such a jurisdictional challenge, counsel for the Claimant, Mr Lawrence Teh, referred us to the English Court of Appeal case of *Fiona Trust & Holding Corporation v Privalov* [2007] 2 Lloyd's Rep 267, which was affirmed by the House of Lords in *Fiona Trust & Holding Corporation and others v Privalov and others* [2008] 1 Lloyd's Rep 254 ("*Fiona Trust*"). In our view, *Fiona Trust* does not assist in addressing this question. *Fiona Trust* lays down the well-established separability principle which, when applied, provides that any allegation of invalidity as to the main contract does not impinge on the validity of the arbitration agreement. This is no different from the position under Singapore law that the separability principle only applies to questions of contractual validity and not to contractual formation (see *BCY v BCZ* [2017] 3 SLR 357 at [60]–[61], [88]–[89]). In other words, the separability principle only applies where there is an issue as to whether the contract containing the arbitration agreement can be invalidated due to fraud or other vitiating factors. However, if the jurisdictional challenge is premised on the absence of a contract and hence no binding arbitration agreement, the separability principle is simply not engaged. That the separability principle does not apply to the question of contractual formation was also recently affirmed by the English court in *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] 3 All ER 580 at [44]–[47].

31 We turn to consider how seat courts have navigated this fine line. The case of *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd and another matter* [2016] 4 SLR 1336 ("*Jiangsu Overseas Group*") concerned two applications to set aside two related arbitral awards on the ground that the arbitral tribunal which heard both disputes lacked jurisdiction because there were no concluded contracts, and therefore, no valid arbitration agreements between the parties. In particular, Jiangsu Overseas Group Co Ltd ("Jiangsu"),

Version No 1: 11 Oct 2023 (13:51 hrs)

the party who sought to set aside the awards, argued that it had not reached any oral agreement with Concord Energy Pte Ltd ("Concord"). The court held that Jiangsu's argument that there was no valid arbitration agreement because it had not concluded a contract with Concord fell within the rubric of Art 34(2)(*a*)(i) of the Model Law (at [46]–[47]). In respect of the standard of review, the court stated the following (at [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 … 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* … In determining whether the tribunal lacked jurisdiction, the tribunal's own view of its jurisdiction has no legal or evidential value to the court … 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 … [emphasis added]

32 According to Concord, it had entered into an oral agreement with Jiangsu for the sale and purchase of six shipments of petroleum coke. The transaction structure for the six shipments was eventually split between two contracts which the parties termed as the Spot contract and the Term contract. The Spot contract and the Term contract were reduced to writing and sent to Jiangsu for signature, but were not signed by Jiangsu. The Spot contract and the Term contract each contained an arbitration clause.

33 The court undertook a *de novo* analysis of whether an oral agreement was reached between the parties. The court considered the evidence of the parties' conduct and held that the lack of formal assent in the form of a signature could not in itself be a bar to the formation of a contract (at [79]). On the

Version No 1: 11 Oct 2023 (13:51 hrs)

evidence, Jiangsu's conduct signified its clear intention to be contractually bound. Jiangsu had, among other things, sent an e-mail to advise Concord on the dates for the shipments of the petroleum coke and informed Concord of the delivery date for the second shipment. A reasonable person in Concord's position would regard Jiangsu's conduct as indicating that it intended to be contractually bound (at [83]–[84]). Moreover, Jiangsu and Concord met on two occasions to discuss the status of shipments, whereat Jiangsu had, among other things, admitted that it was contractually liable to Concord (at [86]–[89]). The court therefore concluded that the Spot contract and the Term contract were validly concluded between Jiangsu and Concord. The arbitration agreements in both contracts were thus valid and conferred jurisdiction on the arbitral tribunal.

34 The ruling in *Jiangsu Overseas Group* was followed by the Singapore International Commercial Court ("SICC") in *CUG and others v CUH* [2022] 5 SLR 22. The SICC cited *Jiangsu Overseas Group* and held at [82] that it was to conduct a *de novo* review when reviewing the tribunal's ruling on jurisdiction. As the arbitration agreements were governed by English law, the SICC applied English contractual law principles to engage in an objective analysis of the parties' conduct in order to determine whether a binding contract had come into existence. The SICC held at [95] that the absence of a signature to a written agreement did not of itself preclude the coming into existence of a legally binding contract; the relevant conduct on the part of the parties which "crosse[d] the line" and the reasonable expectations of honest sensible businessmen might justify a finding that the parties had entered into a legally binding contract notwithstanding the absence of a signed contract. Upon review of the parties' conduct *de novo*, the SICC concluded that CUH's conduct did not necessarily convey an unspoken but unequivocal message that it had considered itself bound by the agreements (at [121]).

Version No 1: 11 Oct 2023 (13:51 hrs)

35 In *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ*"), a jurisdictional challenge was mounted on the basis that no contract was concluded between the parties on account of a "subject to contract" provision. The dispute in that case concerned agreements for the sale and purchase of coal. Negotiations between the parties culminated in a contract for a first shipment of coal by 7 December 2009 ("First Shipment Contract"). However, while the parties accepted that there was a verbal agreement on the terms of a further contract for a second shipment of the same quantity of coal on 8 December 2009 ("Second Shipment Contract"), the supplier's position was that such agreement had not resulted in a binding contract because the parties intended the agreement to be "subject to contract" before it became binding.

36 Judith Prakash J (as she then was) undertook a *de novo* review of the evidence and concluded that there was a binding contract. Prakash J found that a valid and binding contract for the second shipment was concluded and consequently, there was a valid arbitration agreement. In arriving at this conclusion, Prakash J considered all the evidence – both the contemporaneous correspondence and the written statements of the witnesses and their evidence on cross-examination. Prakash J held that from 8 December 2009 onwards, both parties acted as if there was a binding contract in place, notwithstanding that no formal document was signed (at [91]–[92]). This was due to, among other things, the fact that the First Shipment Contract provided a written record of the agreed terms of the second shipment. Based on the parties' conduct and the circumstances at the material time, such as the lack of urgency to procure a formal contract for the second shipment, Prakash J held that the terms of the second shipment were, apart from the laycan, identical to the terms of the First Shipment Contract (at [104]). Therefore, a valid and binding contract for the second shipment was formed on 8 December 2009 (at [121]). Accordingly, the arbitration agreement as recorded in the First Shipment Contract would apply

Version No 1: 11 Oct 2023 (13:51 hrs)

since the parties had agreed on 8 December 2009 that all the terms of that contract would remain applicable. Further, she was also of the view that the draft contract for the second shipment also served as a record of the arbitration agreement (at [120]). Crucially, given the doctrine of separability and having found that there was a valid arbitration agreement, Prakash J held that she did not need to concern herself with the issue of whether the underlying contract for the shipment of coal was subsequently varied and what the terms of the varied contract were. All those matters fell within the jurisdiction of the tribunal (at [121]).

37 In *Hyundai Merchant Marine Company Limited v Americas Bulk Transport Ltd* [2013] 2 All ER (Comm) 649, the parties disagreed over whether they had entered into any binding legal agreement based on a series of e-mail exchanges. The defendant averred that the e-mail exchanges merely evidenced pre-contractual negotiations. While it was common ground between the parties that the jurisdictional challenge involved a full rehearing (at [31]), the parties disagreed over what this rehearing entailed. While the defendant submitted that the rehearing was limited to whether there was an arbitration agreement and not whether there was a binding contract for the charter of the vessel (*ie*, the main contract), Eder J disagreed. Eder J held that whether there was a binding fixture and/or a binding arbitration agreement stood or fell together, because a lack of consensus regarding the main contract would also prevent any arbitration agreement from coming into existence (at [35]–[36]). Eder J then undertook a *de novo* review of the parties' correspondence, such as the evidence of the persons who took part in the negotiations and their telephone logs, and concluded that there was no *consensus ad idem* between the parties, and consequently no binding contract or arbitration agreement was reached (at [62]).

Version No 1: 11 Oct 2023 (13:51 hrs)

38 Finally, we turn to the case of *Erdenet Mining Corporation LLC v ICBC Standard Bank plc and others* [2018] 1 All ER (Comm) 691 ("*Erdenet*"), which sheds light on this precise question of where the seat court's *de novo* inquiry *should end*. *Erdenet* concerned a challenge against an arbitral award on the ground of, *inter alia*, lack of jurisdiction under s 67 of the English Arbitration Act 1996 (UK). The claimant contended that it did not have legal capacity to enter into a surety agreement and a facility agreement, and that its general director, G, who purportedly signed the facilities did not have actual or ostensible authority to enter into the surety agreement on its behalf or to approve the conduct which bound it to the facility agreement. Cooke J held at [48] that the questions which arose in relation to the legal capacity of the claimant or the authority of G for the purposes of the setting aside application were limited to the question of capacity or authority to conclude an arbitration agreement, as opposed to the financial obligations undertaken in the surety and facility agreements, *ie*, the substantive terms of those agreements. The claimant, however, failed to grapple with this distinction. Moreover, just as the ambit of the obligations undertaken under the surety and facility agreements "raise substantive and not jurisdictional issues, so also do questions of capacity of [the claimant] and the authority of its officers, since both of these relate to the power to conclude certain types of financial obligation and not to conclude an agreement to arbitrate" (at [52]). Thus, Cooke J found the claimant's jurisdictional challenge to be "flimsy and lacking in substance".

39 It is evident from the above cases that the standard of review undertaken by the seat court is *de novo*. That said, the seat court must be aware of the limits of its supervisory role. Based on the above authorities, a court hearing a setting aside application premised on the absence of a binding contract need only concern itself with whether such a contract *existed*. In answering this question, the court may consider whether the parties conducted themselves in a manner

Version No 1: 11 Oct 2023 (13:51 hrs)

which shows they considered themselves bound. The court need not engage in a comprehensive interpretation exercise as to the terms of the contract and the parties' liability under those terms – that is a question of the merits and a task for the arbitral tribunal. While some analysis of the terms may be necessary to determine which parties were parties to the contract, the court hearing the setting aside application only needs to determine such terms on a *prima facie* basis for this precise purpose. Questions of authority to enter into the contract (which is distinct from the authority to enter into an arbitration agreement which is a term of the contract) are likewise circumscribed and do not require the seat court's substantive examination of the parties' obligations under those contracts. In short, the seat court does not need to identify the full scope of the terms and obligations contained in the contract and the parties' liability under those terms; those are questions reserved for the tribunal.

40 With these principles in mind, we turn to examine the appellants' jurisdictional challenge.

Jurisdictional challenge

41 Article 34(2)(*a*)(i) of the Model Law provides that an arbitral award may be set aside if a party to the arbitration agreement was under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Singapore.

42 An application to set aside an award on the basis that no valid arbitration agreement was *formed* can be brought under Art 34(2)(*a*)(i) of the Model Law (*AQZ* at [72]; *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 ("*PT First Media*") at [156]).

Version No 1: 11 Oct 2023 (13:51 hrs)

The appellants' arguments

43 The main plank of the appellants' cases before the Tribunal, in the proceedings below and on appeal, is that no contract or arbitration agreement was concluded during the March 2016 Negotiations. The appellants contend that there was no *consensus ad idem* as to the terms of the NDU, as can be gleaned from the exchange of correspondence during the March 2016 Negotiations. In particular, the only version of the NDU that was signed (*ie*, NDU-3) was rejected by the Claimant. The revisions in the fourth version of the NDU ("NDU-4") proposed by the Claimant were not accepted by the Rohan Group's representatives. Accordingly, none of the four versions of the NDU constitute a binding contract. The arbitration agreement contained in cl 9 of the NDU therefore does not bind the parties.

44 Even if a binding contract had been concluded, the Project Company and the EPC Company contend that they are not parties to the contract. The Shareholder Company is the only named signatory to NDU-3. Moreover, NDU-3 only imposes an obligation on the Shareholder Company not to dispose of its shares in the Project Company. Neither the Project Company nor the EPC Company owe any obligations – whether payment obligations or otherwise – to the Claimant. Therefore, these two companies could not be said to be parties to the concluded contract.

45 The Project Company and the EPC Company further aver that they are not parties to any contract concluded during the March 2016 Negotiations because the representatives who purported to represent the Rohan Group during the negotiations did not have the authority to bind them to a contract. Under the law of Gondor and the companies' internal corporate governance procedures, any person (including individual directors) has to be granted specific

Version No 1: 11 Oct 2023 (13:51 hrs)

authorisation to bind the companies by way of a board resolution and cannot do so in the absence of any such authorisation.

Our analysis

(1) Applicable law

46 It is undisputed that Singapore contractual law principles apply to determine *de novo* the question of whether the parties had entered into a binding contract for the purpose of the setting aside applications (see [26]–[39] above). This standard of *de novo* review applies equally to the appellate court (see, *eg*, *PT First Media* at [162]–[164]).

47 In determining whether a binding contract was concluded between the parties, the court adopts an objective approach towards the question of contractual formation (*R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") at [51]). Once the parties have outwardly agreed in the same terms on the same subject matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had *appeared* to have agreed (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [56], citing *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440 at [30]). The primary test when analysing the totality of the evidence is to find if there was an intention to enter into a binding contract. The test of a person's intention is an *objective* one. In other words, the intention which courts will attribute to a person is always that which that person's conduct and words amount to when *reasonably construed* by a person in the position of the offeree, and not necessarily that which was present in the offeror's mind (*Gay Choon Ing* at [58], citing *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin née Tan and others* [2004] 4 SLR(R) 330 at [43]). In

Version No 1: 11 Oct 2023 (13:51 hrs)

Tribune Investment Trust Inc v Soosan Trading Co Ltd [2000] 2 SLR(R) 407, this court explained at [40] that when inferring parties' assent in circumstances of protracted negotiations, the court must ensure that the reasonable expectations of honest men are not disappointed:

> … Indeed the task of inferring an assent and of extracting the precise moment, if at all there was one, at which a meeting of the minds between the parties may be said to have been reached is one of obvious difficulty, particularly in a case where there has been protracted negotiations and a considerable exchange of written correspondence between the parties. Nevertheless, *the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring consensus ad idem is objective. Thus, the language used by one party, whatever his real intention may be, is to be construed in the sense in which it would reasonably be understood by the other*. [emphasis added]

48 The court will consider the entire course of negotiations to determine whether there was a single point in time when the requisite *consensus ad idem* was reached (*Day, Ashley Francis v Yeo Chin Huat Anthony and others* [2020] 5 SLR 514 at [46]–[48]). Similarly, in *China Coal Solution (Singapore) Pte Ltd v Avra Commodities Pte Ltd* [2020] 2 SLR 984, this court held at [26] that "the whole course of the parties' negotiations, both before and after the alleged date of contracting, must be considered" when determining whether a contract was formed. In this way, "evidence of subsequent conduct has traditionally been regarded as admissible and relevant" to determine whether a contract has been formed, though "there is some instability in this rule" (*Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [78]). In that regard, the English courts have held that the facts that services were rendered, work undertaken, or payment made are relevant factors in deciding whether a binding contract was concluded (*TTMI Sarl v Statoil ASA (The Sibohelle)* [2011] 2 All ER (Comm) 647 at [43], citing *RTS Flexible*

Version No 1: 11 Oct 2023 (13:51 hrs)

Systems Ltd v Molkerei Alois Müller GmbH & Co KG [2010] 1 WLR 753 at [45]–[55]).

(2) Context

49 The following points provide the relevant context in examining the appellants' jurisdictional challenge:

(a) First, at the time of the March 2016 Negotiations, the Claimant was unwilling to deliver the remaining Modules due to the substantial outstanding invoices.

(b) Second, although the invoices were due from the Procurement Company, the ultimate party responsible for the payment of the invoices was the Project Company as the owner of the Project. This was ensured through a series of back-to-back supply contracts as described at [15]–[19] of the GD and [12] above.

(c) Third, the Project Company required the Modules to complete the Project in order to receive payment under the Project and to resolve its cashflow issues.

50 It was in this context that the Claimant was approached to release the remaining Modules for the Project. The Claimant was clearly not willing to deliver based on personal assurances only. There can be no dispute that the Claimant was looking for additional security to ensure payment of the outstanding invoices. The exchange of correspondence starting from 15 March 2016 to the time when the Claimant agreed to release the Modules should therefore be examined with the above context in mind.

Version No 1: 11 Oct 2023 (13:51 hrs)

51 Bearing in mind this context, it is clear that during the March 2016 Negotiations, the intention of the parties was to enter into a binding contract to address the outstanding invoices *beyond* the Procurement Company's existing liability. There would have been no reason to engage in the negotiations if it were otherwise. For this reason, there is no substance to the Shareholder Company's argument that the release of the Modules was to maintain goodwill with the Rohan Group on the strength of its CEO's personal assurance. Such an argument is contrary to the objective facts. By this time, the Claimant had already crossed the bridge to insist on a separate commitment to address the Procurement Company's liability for the outstanding invoices. Personal assurances were clearly not sufficient, and this was precisely the reason for the exchange of correspondence in relation to the NDU and which involved representatives from all three appellants.

(3) A binding contract was concluded between the appellants and the Claimant

52 In our judgment, the Tribunal's finding as regards the concluded MDA is eminently correct. We say this for three reasons.

53 First, the very purpose of the March 2016 Negotiations was to arrive at an agreement for the Claimant to release the remaining Modules in exchange for improved payment terms to assure the Claimant of payment *beyond* the terms contained in the MSA. This purpose was achieved and the agreement came to be the part-oral, part-written MDA. In that regard, the NDU – in particular, the signed NDU-3 – was intended to operate as an appendage of the MDA as it provided additional assurance that the Claimant would be paid for its outstanding invoices. This assurance was provided through the negative covenant contained in cl 2.1 that the Shareholder Company would not dispose an agreed percentage of its shares in the Project Company until all outstanding

Version No 1: 11 Oct 2023 (13:51 hrs)

invoices had been settled in full. Indeed, this purpose of the NDU was attested to by Boromir, its drafter. Boromir gave evidence that he and a member of his in-house legal team drafted the NDUs intending that the NDUs would be granted to various vendors who had supplied goods and services to SPVs of the Rohan Group which were incorporated in Gondor in order to give the vendors "payment comfort". The Claimant was one such vendor. Seen in this context, the Claimant's release of the Modules immediately following the conclusion of the March 2016 Negotiations was clearly done pursuant to the agreement formed during the March 2016 Negotiations, *ie*, the MDA.

54 Second, that NDU-3 is an appendage of the MDA is precisely why NDU-3 does not expressly stipulate the Claimant's obligation to release the Modules. In short, NDU-3 was not intended to comprehensively cover all the terms of the MDA. Its purpose was merely to *supplement* the original payment terms as encapsulated in the MSA, given that the Procurement Company was unable to meet its original obligations under the MSA. As such, taking the appellants' case at its highest, the absence of an express term in the NDU placing liability on each of the appellants to pay the outstanding invoices is neither here nor there. Equally, it is unremarkable that NDU-3 did not expressly provide for the delivery of the remaining Modules. Yet, it cannot be seriously disputed that the very purpose for entering into the NDU was to secure the Claimant's agreement to release the Modules.

55 The Procurement Company's non-payment of the invoices owed to the Claimant must be seen in context. We highlight that the appellants – in particular the Project Company and the EPC Company – are also ultimately liable for payment of the Modules under the back-to-back contracts. While counsel for the Project Company, Ms Koh Swee Yen SC ("Ms Koh"), contended during the hearing that the Project Company had paid for the

Version No 1: 11 Oct 2023 (13:51 hrs)

Modules under the back-to-back contracts, there was no evidence whatsoever to support this. The auditors' certificate which Ms Koh referred to only certifies that the Project Company has no outstanding liability under the invoices to the Claimant. That is because the outstanding invoices were made out to the Procurement Company. As such, the certificate does not constitute evidence that the Project Company had paid the outstanding amount to the EPC Company. Indeed, the Tribunal found as a fact that the Project Company had not made full payment for the unpaid invoices to the EPC Company. The Tribunal further noted at [193] of the Award that the Sauron Group had offered to settle the Claimant's claim on the basis that this amount remained unpaid by the Project Company. Considering the payment structure described at [12] above *and* the offer by the Sauron Group, it is clear that the reason why the Procurement Company did not pay the outstanding invoices to the Claimant was that the parties upstream did not pay under the back-to-back supply contracts. Samwise also confirmed that the Procurement Company fell behind on payments to the Claimant as it had not received payment from the EPC Company due to cashflow issues in the Rohan Group. It is thus clear why additional payment comfort in the form of the MDA was required from the *appellants* beyond the Procurement Company.

56 Third, based on the plain wording of the NDU and the events that occurred during the March 2016 Negotiations, it is clear that the parties reached an agreement that included NDU-3, and that NDU-3 was binding on all the appellants.

57 We begin with the terms of NDU-3. It is undisputed that the Shareholder Company is a signatory to NDU-3 and therefore a party to NDU-3. Significantly, NDU-3 acknowledged that the EPC Company or the Shareholder Company are liable to pay the outstanding invoices notwithstanding that the

Version No 1: 11 Oct 2023 (13:51 hrs)

invoices were made out to the Procurement Company. Clause 2.3 of NDU-3 expressly states:

> All obligations under this Undertaking shall automatically terminate upon receipt of the complete payment of the Invoices by [the EPC Company] or [the Shareholder Company].

Clearly, cl 2.3 contemplates that payment could be made by the EPC Company or the Shareholder Company.

58 The remaining provisions of NDU-3 also expressly mention the appellants and even impose certain rights and obligations on each of the appellants:

(a) Clause 4.2, the notice provision in NDU-3, provides for both the EPC Company and the Project Company to receive notices in relation to NDU-3, in addition to the Shareholder Company, as the case may be.

(b) Clauses 4.4 to 4.7 state the contact details of each of the four entities named in Clause 4.2 (*ie*, all three appellants and the Claimant).

(c) Clause 4.8(a) further stipulates that the Project Company is irrevocably appointed as the Shareholder Company's agent to receive and acknowledge on its behalf, service of any writ, summons, order, judgment, notice or other legal process in connection with the NDU.

(d) Clause 9(c), the dispute resolution clause in NDU-3, provides that the appellants shall jointly appoint an arbitrator.

59 As explained at [49(b)] above, ultimately both the Project Company and the EPC Company were already liable for the payment of the outstanding invoices in a sequential way via the back-to-back supply contracts. The NDU supplemented the original payment arrangement by imposing a non-disposal

Version No 1: 11 Oct 2023 (13:51 hrs)

obligation on the Shareholder Company in order to provide the Claimant with improved payment comfort. It was therefore unsurprising that the arbitration clause conferred a right on the three appellants to collectively appoint an arbitrator. It would make no sense to confer such a right if the appellants had no obligation under the MDA or the NDU that could give rise to a dispute.

60 The above also puts paid to the appellants' argument that the Modules were released pursuant to the original MSA and not pursuant to the MDA which was concluded subsequently. The terms of NDU-3 clearly contradict this argument. Moreover, as we have explained at [54] above, the release of the Modules was an *oral* term of the part-oral, part-written MDA. This must be so as none of the parties dispute that the very purpose of the March 2016 Negotiations was to secure the release of the remaining Modules.

61 In our view, the exchange of correspondence and the parties' conduct during the March 2016 Negotiations lead to the necessary inference that a valid contract was concluded between the Claimant and the appellants.

62 The March 2016 Negotiations commenced on 15 March 2016, when Aragon of the Shareholder Company sent an e-mail to Legolas of the Claimant ("the 15 March E-mail") attaching, among other things, the first version of the NDU ("NDU-1"). Also attached to the 15 March E-mail was an extract of a Facility Agreement between the Project Company and a syndicate of lenders to demonstrate that the Project Company had obtained bank financing that would be released upon completion of the Project. Notably, the 15 March E-mail assured Legolas that "we will pay as soon as we drawdown from the loan". Aragon also requested that Legolas release the paperwork for all the remaining shipments of Modules, and he signed off as "President" of the Rohan Group's operations in Gondor. Why would Aragon provide an extract of the Facility

Version No 1: 11 Oct 2023 (13:51 hrs)

Agreement to the Claimant if there was no liability on the part of the Project Company or the Shareholder Company?

63 Having reviewed NDU-1, Gimli e-mailed Aragon with a second version of the NDU containing the Claimant's proposed amendments ("NDU-2"). One significant amendment was to the percentage of shares which would be subject to the non-disposal undertaking; the Claimant sought to increase the percentage of shares from 24% to 57%. Later that day, Gimli and Samwise of the Procurement Company discussed NDU-2 over a call, where Samwise explained to Gimli that the percentage of shares could not be increased because the majority of the shares in the Project Company had already been pledged to another lender. Later, on 17 March 2016, Gimli e-mailed Samwise, and agreed to keep the original percentage of shares in NDU-1 (*ie*, 24%) but insisted that the rest of the amendments be accepted. Gimli further requested that Samwise send the Claimant "the signed & sealed NDU in digital version and the original one by post".

64 Thereafter, on 17 March 2016, Frodo of the EPC Company sent a scanned copy of NDU-3 to Gimli and Samwise. NDU-3 was signed and executed by Boromir of the Shareholder Company and the Project Company. NDU-3 stated that at least 24% of the shares in the Project Company was subject to the non-disposal undertaking, and incorporated a few amendments in relation to the venue of arbitration and the governing law. Some of the proposed amendments to NDU-2 were not incorporated in NDU-3. These included: (a) cl 2.2, which provided for the Claimant to have priority of payment out of any funds raised from the project finance lenders; and (b) cl 2.3, which specified when the non-disposal undertaking would be terminated.

Version No 1: 11 Oct 2023 (13:51 hrs)

65 After reviewing NDU-3, on 18 March 2016, Gimli responded to Frodo and Samwise that NDU-3 was not what was agreed on the phone, and requested further amendments. Gimli then incorporated those amendments in a fourth version of the NDU (*ie*, NDU-4), which he sent that same day to Samwise, with Frodo and Legolas on copy. After NDU-4 was sent, Samwise called Legolas to inform him that the amendments which Gimli had requested in NDU-4 were *unnecessary* because: (a) the language in NDU-3 was sufficiently clear that the Claimant's invoices to the Procurement Company would be paid in full; and (b) the Claimant would be entitled to the benefit of the non-disposal undertaking over 24% of the shares in the Project Company until the Claimant received full payment. Samwise also conveyed Gandalf's personal promise in his capacity as the CEO of the Rohan Group's ultimate holding company that the Claimant would be fully paid. Following this phone call, Legolas agreed not to pursue the proposed amendments in NDU-4. The Claimant released the remaining Modules shortly thereafter.

66 In our judgment, a binding contract was concluded between the parties at this point on 18 March 2016, following the telephone discussion between Samwise and Legolas. Key to this conclusion is Legolas' agreement to dispense with the amendments set out in NDU-4; this agreement was subsequently confirmed by the Claimant's conduct in releasing the remaining Modules shortly thereafter on the same day. These two facts lead us to conclude that there was *consensus ad idem* as to the key term of the NDU – *ie*, the percentage of shares subject to the non-disposal undertaking, the purpose of which was to assure the Claimant that it would be paid for the outstanding invoices. Once this key term was settled, it was understood between the parties that the Claimant would release the Modules on the assurance of payment as encapsulated by NDU-3. In that sense, a binding contract was indeed formed, and NDU-3 was a part of this contract. NDU-3 governed the portion of the parties' contractual

Version No 1: 11 Oct 2023 (13:51 hrs)

obligations relating to the non-disposal undertaking. It did not explicitly cover the Claimant's obligation to release the Modules as we have explained at [54] above.

67 We note the Judge's finding that the basic and essential terms of the contract were agreed on 17 March 2016 and the full terms on 18 March 2016. The appellants submit that this is at odds with the Tribunal's finding that the MDA was concluded on 18 March 2016. This seeming inconsistency between the Judge's decision and the Tribunal's decision formed a significant part of the appellants' arguments during the appeal hearing. The Judge's decision in drawing a distinction between the basic/essential terms and full terms of the contract was based on the Claimant's case in the proceedings below. The Claimant argued that its case "has always been that parties concluded an agreement 'by words and/or conduct', first on basic/essential terms (on 17 March 2016) and then on full terms after discussions on 18 March 2016" [emphasis in original omitted]. However, we do not think it was necessary for the Judge to draw this fine line between the basic/essential terms and full terms of the contract. A finding that a binding contract was concluded on 18 March 2016 would have been sufficient for the Tribunal to be seized of jurisdiction. In any case, the differences between the Judge's and the Tribunal's findings are more apparent than real. The ultimate inquiry is whether an enforceable contract was concluded. Both the Judge and the Tribunal found that a full and binding contract was reached between the parties during the phone call on 18 March 2016. The EPC Company also accepts that the Judge and the Tribunal arrived at the same conclusion.

68 In our view, there is no substance in the appellants' argument that Gimli had rejected NDU-3 by stating that NDU-3 was not what was agreed and by transmitting NDU-4; and accordingly, NDU-3 is not a binding contract. Gimli's

Version No 1: 11 Oct 2023 (13:51 hrs)

actions cannot be seen in isolation and must be viewed in its proper context. As highlighted above at [65], after Gimli transmitted NDU-4, Samwise called Legolas and convinced him to accept NDU-3 on the basis that the amendments being sought in NDU-4 were unnecessary.

69 In our judgment, it was no coincidence that the decision to release the Modules was made following Legolas' decision to accept the signed NDU-3 without further revisions. Equally, it was no coincidence that shortly after the March 2016 Negotiations ended, the EPC Company made part payment of the invoices to the Procurement Company, who in turn paid the Claimant. All of this leads to the irresistible conclusion that a binding contract which included the terms of NDU-3 was concluded on 18 March 2016 following the March 2016 Negotiations.

70 It is against this background that the wording of the 15 March E-mail assumes significance – in particular, the line from Aragon that "*we* will pay as soon as *we* drawdown from the loan" [emphasis added]. In our judgment, "we" must *include* (though it is not limited to) the party who *could* draw down on the loan. The only entity who could do this was the Project Company – the entity ultimately liable for the outstanding invoices. It is undisputed that the Project Company had entered into financing arrangements with various banks and lenders. As we mentioned at [62] above, attached to the 15 March E-mail was an extract of a Facility Agreement between the Project Company and a syndicate of lenders to demonstrate that the Project Company had obtained bank financing that would be released upon completion of the Project. In these circumstances, it was eminently reasonable for Legolas to understand "we" as a reference to the Project Company drawing down on the loan under the Facility Agreement to pay the Claimant. Indeed, Legolas gave evidence that this was his

Version No 1: 11 Oct 2023 (13:51 hrs)

understanding. Any reasonable person in Legolas' position would have concluded as such.

71 Further, it bears emphasising that all three appellants had an interest in receiving the remaining Modules. The Project Company and the EPC Company were the parties who directly benefitted from the release of the Modules, since obtaining the Modules enabled them to complete the Project. The completion of the Project would also have benefitted the Shareholder Company, which had a direct financial interest in both the Project Company and the EPC Company at the time of the March 2016 Negotiations. It is therefore incongruous for the appellants to claim the March 2016 Negotiations had nothing to do with them. The commercial reality is that those negotiations had everything to do with them.

72 Moreover, as explained at [55] above, the only reason why the Procurement Company did not pay the Claimant was because payment was not forthcoming from either the Project Company or the EPC Company down the chain. It was therefore unsurprising for Aragon to warrant on behalf of "we", which would reasonably refer to all the parties who were involved in the March 2016 Negotiations and who in turn were under an existing liability to pay for the Modules in the chain of contracts.

73 The above also puts paid to the appellants' arguments that the various executives who purported to represent them in the March 2016 Negotiations lacked authority to bind them. Having regard to all the facts, including the payment structure, the 15 March E-mail and NDU-3, it is clear to us that Aragon intended to, and did indeed, bind all three appellants to the MDA. As we stated at [72] above, this explained why the parties identified in the NDU are the very same parties who are liable to pay or to ensure payment for the Modules to the

Version No 1: 11 Oct 2023 (13:51 hrs)

Claimant. In any event, consistent with the decision in *Erdenet* (see [38] above), issues relating to authority or capacity to enter into a contract would engage the merits of the dispute. For this reason, the Judge's analysis of Aragon's implied actual authority to enter into the MDA on behalf of the EPC Company and the Project Company (GD at [143]–[153]) was unnecessary.

74 With that, there is no need for us to further address the question of whether the Rohan Group executives who took part in the March 2016 Negotiations had the requisite authority to bind the appellants to the MDA. That is a question on the merits for the Tribunal.

75 For completeness, we should add that we see no merit in the Project Company's argument that the Tribunal erred in law by relying on the "group of companies" doctrine. This argument is misplaced because the Tribunal did not rely on this doctrine to arrive at its decision. The Tribunal made this clear at [173] of the Award:

> Having said that, the Tribunal would also say that in the present case, ***it is not necessary for the Tribunal to rely on the single economic unit doctrine***, although the [Rohan Group] business model and the evidence in this case supports the intention of [Aragon] to treat the [appellants] as a single economic unit for the purpose of implementing its business model in relation to the … Project. *The Tribunal has found as a fact that [Aragon] … had corporate authority to represent the [appellants] jointly and severally in concluding the broader agreement, including NDU-3, with the Claimant.* [emphasis added in italics and bold italics]

76 From the above passage, it is plain that the Tribunal did not rely on the "group of companies" doctrine to find that the appellants were parties to the MDA. The Tribunal was merely describing the commercial reality where: (a) all three appellants had an interest in securing the release of the Modules; (b) the Project Company and the EPC Company were already under a liability to pay

Version No 1: 11 Oct 2023 (13:51 hrs)

for the Modules under the back-to-back contracts; and (c) all three appellants and the Rohan Group executives who took part in the March 2016 Negotiations were working towards achieving the common goal of completing the Project. The Tribunal's reference to the "group of companies" doctrine was therefore merely to reflect the commercial reality of the situation confronting the appellants.

77 Essentially, the parties who are denying the existence of the MDA are the very parties who offered to enter into the contract to persuade the Claimant to release the Modules. The appellants were the ones who proposed a separate contract to assure the Claimant that the outstanding invoices owed to the Claimant would be fully settled. Having obtained the release of the Modules, it is disingenuous of the appellants to turn around and disavow the existence of the MDA that caused the Claimant to release the Modules. In the circumstances, it is plainly untenable for the appellants to contend that no contract was concluded. If that were the case, there would be no commercially sensible explanation to account for the Claimant's decision to release the Modules to enable the completion of the Project.

78 We turn to the two remaining bases raised by the appellants.

Excess of jurisdiction

79 Article 34(2)(*a*)(iii) of the Model Law provides that an award may be set aside if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

80 The appellants argue that the Tribunal exceeded the scope of its jurisdiction when it found that the contract between the parties was a part-

Version No 1: 11 Oct 2023 (13:51 hrs)

written, part-oral MDA of which NDU-3 was an appendage (Award at [163]). The appellants argue that this was not how the Claimant had pleaded and presented its case in the arbitration.

81 In *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 at [69(a)], this court affirmed that a two-stage enquiry applies when determining a challenge brought under Art 34(2)(*a*)(iii) of the Model Law, citing *CRW* at [30]. The court first determines what matters are within the scope of the submission to the arbitral tribunal. Next, the court determines whether the arbitral award involved such matters or whether it involved a new dispute outside the scope of the submission to arbitration and that was, accordingly, irrelevant to the issues requiring determination.

82 The scope of the submission is determined with reference to five sources: the parties' pleadings, agreed list of issues, opening statements, evidence adduced, and closing submissions (*CDM and another v CDP* [2021] 2 SLR 235 at [18]). In *CKH v CKG and another matter* [2022] 2 SLR 1, this court made clear at [16] that the exercise of determining whether a matter falls or has come within the scope of the agreed reference is a holistic one, which "depends ultimately upon what the parties, viewing the whole position and the course of events objectively and fairly, may be taken to have accepted between themselves and before the Tribunal".

83 In our judgment, the Tribunal's finding that the parties had concluded a part-oral, part-written MDA of which NDU-3 was an appendage is well within the scope of the parties' submission to arbitration. The Claimant's case was clear from as early as 2017 in its notice of arbitration dated 11 April 2017:

Version No 1: 11 Oct 2023 (13:51 hrs)

> The Claimant's claim arises out of or is connected with legal obligations assumed by the [appellants] that are *contained in or evidenced by an NDU dated 17 March 2016* issued to the Claimant in the context of construction of [the Project], in which [the Project Company] was the project company (and 99.99% owned by [the Shareholder Company]), and [the EPC Company] was the main contractor. [emphasis added]

The words "contained in or evidenced by" are broad enough to encapsulate an oral contract outside of and on terms broader than the NDU.

84 The Claimant's case is reflected in the terms of reference as drafted by the Tribunal and dated 10 April 2019 (at paras 38–39):

> 38. *The Claimant and [the appellants] eventually reached an agreement, and pursuant to that agreement, the NDU was issued in favour of [the Claimant].* Under the NDU, [the Shareholder Company] undertook to legally and beneficially hold and retain at least 24% of the equity in [the Project Company] free from any Security Interest (as defined in the NDU) ("Equity"), until the complete discharge of obligations assumed by [the EPC Company] to pay sums outstanding under invoices issued by [the Claimant] for the supply of [the Modules] for the Project.
>
> 39. In accordance with, and in reliance on, the agreement reached between the Claimant and all [the appellants], the Claimant proceeded to make further shipment of the [Modules] to the Project.
>
> [emphasis in original omitted; emphasis added]

85 Terms of reference must be "given a liberal construction in keeping with the purpose of arbitration to provide a flexible and effective means of resolving disputes and providing redress" (*Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) v MatlinPatterson Global Opportunities Partners (Cayman) II LP and others* [2022] 2 All ER (Comm) 841 at [119]). The terms of reference, construed liberally, clearly encompass the Claimant's case of a part-oral and part-written MDA which NDU-3 was evidence of.

Version No 1: 11 Oct 2023 (13:51 hrs)

86 The Claimant's case remained consistent in its statement of claim, where the Claimant pleaded in the following terms (at para 106):

> The email exchanges referred to above, taking place on 17th March 2019 and *culminating in the transmission by [Frodo] to [Gimli] of an executed NDU evidences the conclusion of a contract* between [the Claimant], [the Shareholder Company], [the EPC Company] and [the Project Company] not only on the same basic and/or essential terms just mentioned but *also on other terms evidenced by the NDU* which were not the subject of any discussion or negotiation between the parties. [emphasis added]

87 The above demonstrates that from 2017 to 2019, the Claimant's case consistently stated that NDU-3 was *evidence* of the agreement reached by the parties, *ie*, the MDA. It is therefore plainly incorrect that the Claimant only pleaded its case for the first time in its draft list of issues which was circulated in August 2020.

88 Therefore, in our judgment, there is no merit in the appellants' challenge on the excess of jurisdiction ground.

Breach of natural justice

89 Section 24(*b*) of the IAA provides that the court may set aside an award if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

90 Article 34(2)(*a*)(ii) of the Model Law provides that an award may be set aside if a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

91 On appeal, the appellants raise the same arguments as they did before the Judge. The appellants' arguments are essentially twofold:

Version No 1: 11 Oct 2023 (13:51 hrs)

(a) First, the appellants contend that the Tribunal did not afford the appellants an opportunity to submit on whether the Claimant should be allowed to amend its pleadings to include its new case.

(b) Second, the appellants contend that the Tribunal failed to exercise the authority conferred upon it to decide on matters submitted to it, which included, *inter alia*, the issue as to how the purported breach of NDU-3 had caused the Claimant to suffer ₴7.35m in loss and damage.

92 In our judgment, there is no merit in either argument.

93 First, as we have already found at [87] above, the Claimant's case (that the NDU was evidence of a concluded contract) was pleaded from the outset. The appellants' argument, which rests on the premise that the Claimant did not plead as such, must fail. In any case, we find that the Tribunal did not breach the rules of natural justice. Even taking the appellants' case at its highest and assuming that the Claimant's case only became clear after the evidential hearing, the appellants did not suffer any prejudice as they were able to mount a positive case that there was no agreement whatsoever in any event. As prejudice is a necessary element for setting aside awards for breach of natural justice under s 24(*b*) of the IAA (see *CRW* at [37]), we reject the appellants' argument.

94 Second, we agree with the Judge that the appellants' argument that the Tribunal had failed to decide on matters submitted to it is a non-starter as it is in substance an argument that the Tribunal had erred in its findings of fact. This is not a valid ground of challenge. The law is clear that the court does not sit as an appellate court to re-examine the tribunal's award on its merits (see [26]–[28] above). Moreover, like the Tribunal, we have found that there was a binding

Version No 1: 11 Oct 2023 (13:51 hrs)

contract containing a valid arbitration agreement. There is no basis in the appellants' contention that the Tribunal had breached natural justice in arriving at its conclusion.

Conclusion

95 For all of the above reasons, we dismiss the appeals.

96 The appellants are to pay the following costs to the Claimant:

(a) the Project Company is to pay costs in the sum of $80,000 (inclusive of disbursements);

(b) the Shareholder Company is to pay costs in the sum of $50,000 (inclusive of disbursements); and

(c) the EPC Company is to pay costs in the sum of $70,000 (inclusive of disbursements).

97 In our view, the midpoint range of about $70,000 in Appendix G of the Supreme Court Practice Directions 2013 is a useful starting point to assess the costs payable by each of the appellants. The appeals were factually complex and raised important issues as to how the courts should navigate the tension between a jurisdictional and a substantive challenge. The appellants were separately represented and each appellant raised three grounds to set aside the Award.

98 The Project Company filed an Appellant's Reply under O 57 r 9A(5A) of the Rules of Court (2014 Rev Ed). A slightly higher costs award of $80,000 against the Project Company is therefore justified.

99 We note that the Shareholder Company did not dispute that it is a party to the MDA if it is indeed found that NDU-3 was part of the MDA. To us, a

Version No 1: 11 Oct 2023 (13:51 hrs)

costs award of $50,000 appropriately balances the complexity of the case and the scope of the Shareholder Company's arguments.

100 Finally, we find that a costs award of $70,000 is appropriate as against the EPC Company.

101 The usual consequential orders apply.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Koh Swee Yen SC, Hannah Lee Ming Shan and Claire Lim (WongPartnership LLP) for the appellant in CA/CA 12/2022;
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Version No 1: 11 Oct 2023 (13:51 hrs)