IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 101

Originating Application No 624 of 2022

Between

CYY

… *Claimant*

And

CYZ

… *Respondent*

JUDGMENT

[Arbitration — Arbitral tribunal — Jurisdiction — Section 10(3)(*a*) International Arbitration Act 1994]
[Arbitration — Agreement — Scope — Distinction between jurisdiction and admissibility]

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v
CYZ

[2023] SGHC 101

General Division of the High Court — Originating Application No 624 of 2022
Philip Jeyaretnam J
21 March 2023

18 April 2023 Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 CYY, the claimant in this application, challenges a positive jurisdictional ruling by an arbitral tribunal ("the Tribunal") dated 31 August 2022 ("the Ruling"). Pursuant to s 10(3)(*a*) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"), CYY seeks a declaration that the Tribunal does not have jurisdiction to hear certain claims brought by CYZ, the respondent.

2 CYY does so, however, only in respect of one of the jurisdictional objections that it had made before the Tribunal. Its objection is essentially that the claims made do not fall within the terms, or the scope, of one of the contractual clauses, because that clause should be interpreted narrowly. That clause is part of the body of the agreement and records or establishes an obligation to pay for certain services at a specified mark up. This raises the

question whether it is even an objection that goes to jurisdiction rather than the merits.

Facts

Background to the dispute

3 The parties, CYY and CYZ, are companies involved in the marine salvage industry. CYZ, the respondent, is the owner of a crane barge ("the Crane Barge").[1] For readability, I will refer to CYY as "the Charterer" and CYZ as "the Owner", their respective positions in relation to the Crane Barge.

4 On 24 December 2019, the Charterer was engaged to provide urgent salvage services in respect of a vessel ("the Casualty") which had run aground ("the Salvage Operation").[2] The Charterer immediately appointed a salvage master to oversee the Salvage Operation, who I shall refer to as Mr X.[3] The Charterer and Mr X share a long working history, as the Charterer had previously hired Mr X as their salvage master on "many salvage cases".[4]

5 That same day, Mr X, on behalf of the Charterer, contacted the Owner to charter the Crane Barge. The Owner was represented by its managing director, who I shall refer to as Mr Y. Unlike the Charterer, the Owner is physically established in the region of the Salvage Operation. Mr X specifically sought to hire the Crane Barge as it was purpose-built and uniquely equipped to assist with the Salvage Operation. Mr X also had prior experience working with

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1 1st Affidavit of [CYY] dated 30 September 2022 at para 12.

2 1st Affidavit of [CYY] dated 30 September 2022 at para 13.

3 1st Affidavit of [Mr X] dated 24 October 2022 at para 3.

4 2nd Affidavit of [CYY] dated 18 January 2023 at para 7.

the Crane Barge. As the salvage site was offshore, the Crane Barge was to serve as an offshore command centre for the Salvage Operation, hosting salvage personnel, equipment, and cargo. Given the urgency of the Salvage Operation, this course of action was determined to be more pragmatic than the alternative of repeatedly ferrying salvage personnel to and from the closest port.[5]

6 On 26 December 2019, Mr X provided the Owner with a preliminary list of equipment and personnel required to enable the Crane Barge to carry out its role as the offshore command centre of the Salvage Operation.[6] Given the complexity of the Salvage Operation, the Owner had to procure various permits from regional authorities, hire professional salvage specialists, logistical support staff and equipment, and arrange for visas, supplies and accommodation for personnel.[7] The list of requirements was gradually expanded as the Salvage Operation progressed.

7 Thereafter, the Charterer and the Owner entered into an agreement to charter the Crane Barge dated 3 January 2020 ("the Contract").[8] The parties used the Baltic and International Maritime Council Supplytime 2017 Contract for the Time Charter Party for Offshore Support Vessels ("BIMCO Supplytime 2017"), a standard form contract used for the hire of offshore support vessels.[9]

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5 1st Affidavit of [Mr X] dated 24 October 2022 at paras 5–6; 1st Affidavit of [Mr Y] dated 9 November 2022 at paras 8–9, 12.

6 1st Affidavit of [Mr Y] dated 9 November 2022 at para 10.

7 1st Affidavit of [Mr Y] dated 9 November 2022 at para 10; 1st Affidavit of [Mr X] dated 24 October 2022 at para 7.

8 1st Affidavit of [CYY] dated 30 September 2022 at para 14.

9 1st Affidavit of [CYY] dated 30 September 2022 at paras 14 and 16; 1st Affidavit of [Mr Z] dated 24 January 2023 at para 23.

The Contract

8 The Contract is expressly governed by Singapore law and contains an arbitration clause naming Singapore as the seat of arbitration. The arbitration clause, cl 37 of the Contract, was chosen by the parties out of several alternative options offered by BIMCO Supplytime 2017 and encompasses "any dispute arising out of or in connection with this Charter Party".

9 In addition to the standard clauses of BIMCO Supplytime 2017, the Contract also includes several additional clauses agreed between the parties. One such additional clause, cl 39 of the Contract, is of central importance to the dispute:

> Clause 39
>
> All Consumables, communications and medicine on the Vessel which are used or taken by Charterers shall be charged at Cost + 15%
>
> All procurement services by Owner at the request of the Charterers shall be charged at Cost + 15%

10 According to both Mr Y *and Mr X*, the Owner was entrusted with procuring the staff and equipment necessary to enable the Crane Barge to be used as an offshore command centre, because the Owner was established in the region of the Salvage Operation and had a network of local contacts. In contrast, the Charterer did not have any physical presence in the region and essentially relied on the Owner to procure everything it needed for the Salvage Operation. Mr X therefore agreed with Mr Y that all procurement services undertaken by the Owner at the Charterer's request would be paid at cost plus a 15% margin. This agreement was then eventually reflected as cl 39 of the Contract.[10]

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[10] 1st Affidavit of [Mr X] dated 24 October 2022 at paras 7–9; 1st Affidavit of [Mr Y] dated 9 November 2022 at paras 15–17.

According to Mr Y, a clause requiring a service provider to simply procure whatever the other counterparty requests is not unusual in the context of emergency marine salvage operations.[11]

11 The Charterer *does not* dispute that Mr X and Mr Y agreed that the Owner would provide assistance for, and on behalf of, the Charterer in the Salvage Operation and does not dispute that the Owner might "potentially be entitled" to charge a 15% markup for procurement services. What the Charterer does dispute is that such an agreement was incorporated into the Contract.[12]

The Disputed Claims

12 Throughout the Salvage Operation, the Charterer requested various services, personnel, equipment, and craft, which the Owner procured (the "Disputed Claims"). Contemporaneous invoices incorporating a 15% markup were issued in respect of the Disputed Claims, which were signed by Mr X on behalf of the Charterer.[13]

13 The Salvage Operation concluded on or around 9 March 2020.[14]

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11 1st Affidavit of [Mr Y] dated 9 November 2022 at para 19.

12 2nd Affidavit of [CYY] dated 18 January 2023 at paras 9, 46; Claimant's Written Submissions dated 15 March 2023 at para 24.

13 1st Affidavit of [Mr Y] dated 9 November 2022 at paras 30–31; 2nd Affidavit of [CYY] dated 18 January 2023 at para 48.

14 1st Affidavit of [CYY] dated 30 September 2022 at para 21.

The arbitration proceedings

14 On 23 June 2021, the Owner issued a letter of demand in respect of the Disputed Claims.[15] The Charterer did not pay. Accordingly, on 6 July 2021, the Owner commenced arbitration proceedings against the Charterer.[16]

The parties' cases before the Tribunal

15 The Owner claimed that it was entitled to the cost of procuring all the services, personnel, equipment, and craft requested by the Charterer plus a 15% margin, pursuant to cl 39. Alternatively, the Owner claimed that it was entitled to damages on a *quantum meruit* basis for the procurement services rendered.[17]

16 In response, the Charterer raised a jurisdictional challenge based on two main grounds. First, the Charterer disputed the existence of the arbitration agreement. In this application, the Charterer now concedes the existence of the arbitration agreement which provides for a Singapore seated arbitration.[18]

17 Second, the Charterer took the position that the Contract and cl 39 therein are strictly limited to procurement services rendered only in relation to *the charter of the Crane Barge*, and not services rendered in relation to *the Salvage Operation generally*. Accordingly, as the Disputed Claims relate to procurement services provided in relation to the Salvage Operation generally, they fall outside the scope of the Contract and the Tribunal has no jurisdiction

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15 1st Affidavit of [Mr Y] dated 9 November 2022 at para 36.

16 1st Affidavit of [CYY] dated 30 September 2022 at para 22.

17 1st Affidavit of [CYY] dated 30 September 2022 at 221–224.

18 1st Affidavit of [CYY] dated 30 September 2022 at para 9.

to determine the Disputed Claims.[19] To elucidate this distinction, the Charterer gives examples of inspections and surveys of the Crane Barge and the provision of food and supplies to it as services that would fall within the scope of cl 39.[20] As the Charterer has already paid all sums owed in relation to the charter of the Crane Barge, there are no claims over which the Tribunal has jurisdiction.[21] As for the *quantum meruit* claim, the Charterer similarly submitted that the arbitration clause was strictly limited to matters relating to the charter of the Crane Barge. Thus, the Tribunal has no jurisdiction to determine the *quantum meruit* claim.[22]

The Ruling

18 In the Ruling, the Tribunal found that it had the jurisdiction to determine the Disputed Claims.

19 In relation to the first objection, the argument that there was no arbitration agreement sprang from how the box layout that forms Part I of the BIMCO Supplytime 2017 standard form had been filled out. This box layout when filled out provides the brief particulars of the contract. Part II of the BIMCO Supplytime 2017 contains the full standard terms. Box 33, which concerns dispute resolution, provides for a choice between several alternative forms for cl 37.[23] Although parties filled in "(c)** Singapore law, Singapore arbitration" in Box 33, alternative (c) was deleted in Part II and alternative (d)

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19 Claimant's Written Submissions dated 15 March 2023 at paras 24–25, 46; 1st Affidavit of [CYY] dated 30 September 2022 at paras 27–28.

20 Claimant's Written Submissions dated 15 March 2023 at para 52.

21 1st Affidavit of [CYY] dated 30 September 2022 at paras 24–25.

22 1st Affidavit of [CYY] dated 30 September 2022 at para 58.

23 1st Affidavit of [CYY] dated 30 September 2022 at 26.

was retained.[24] The Tribunal held that parties' intention for "Singapore law, Singapore arbitration" was clear.[25] Before me, the first objection is not pursued as it is accepted that the insertion of the letter (c) was merely a typographical error and alternative (d) applied.

20 In relation to the second objection, the Tribunal observed that the scope of cl 39 was uncertain when considered in a vacuum. The Tribunal thus adopted a contextual interpretation and determined that cl 39 encompassed all procurement services rendered by the Owner in relation to the *entire Salvage Operation*. This was an interpretation that the express words of cl 39 could reasonably bear. The Contract had been concluded in the context of an emergency and the "overall commercial purpose of the [Contract] was to urgently salvage [the Casualty]". The Charterers had no presence, equipment, or resources in the locality, and it was thus "intended that the [Owner] was to play an important role in procuring and providing resources, equipment and personnel to support the Salvage Operation". Although the Contract was a standard form contract, the fact remained that cl 39 was an additional clause specifically added by the parties and was therefore intended to address matters not covered by BIMCO Supplytime 2017. The Tribunal did not take into consideration any purported oral agreement reached between Mr X and Mr Y prior to the Contract. Having reached this conclusion, the Tribunal found that it was unnecessary to determine whether it had jurisdiction to determine the *quantum meruit* claim. Nevertheless, the Tribunal concluded that, considering the aforementioned context of the Contract and the fact that the Contract expressly named the Casualty as the area of operation of the Crane Barge, the

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24 1st Affidavit of [CYY] dated 30 September 2022 at 49–50.

25 1st Affidavit of [CYY] dated 30 September 2022 at 622–623.

quantum meruit claim also fell within the scope of the arbitration clause.[26] The Tribunal thus concluded that it has jurisdiction to determine the Disputed Claims on the basis of cl 39 or as a *quantum meruit* claim.

The parties' cases

21 In this application, the crux of the dispute as presented by the parties is the interpretation of cl 39 of the Contract. The Charterer submits that cl 39 must be strictly limited to procurement services rendered in relation to the charter of the Crane Barge, and not services rendered in relation to the Salvage Operation generally. Conversely, the Owner submits that cl 39 should encompass all procurement services requested by the Charterer.

The Charterer's case

22 In a nutshell, the Charterer submits that because cl 39 is contained in a contract based on BIMCO Supplytime 2017, a standard form contract for the charter of offshore support vessels, cl 39 must be construed to apply only to procurement services rendered in relation to the charter of the Crane Barge.

23 Although it is undisputed that cl 39 was an additional clause included by the parties and extraneous to BIMCO Supplytime 2017, the Charterer submits that a restrained interpretative approach should be adopted because BIMCO Supplytime 2017 is a standard form contract. The predictability of standard form contracts, and hence their value, will be damaged if the interpretation of standard terms is inconsistent. Thus, the Charterer submits that the background context and factual matrix should have little relevance to the interpretation of cl 39. Instead, the choice of BIMCO Supplytime 2017, a time charter, evinces

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[26] 1st Affidavit of [CYY] dated 30 September 2022 at 625–627.

the objective intention to confine the scope of cl 39 to the procurement of services relating only to the charter of the Crane Barge.[27]

24 Further and in any event, the Charterer submits that the relevant context demonstrates that the parties intended for cl 39 to be circumscribed in scope.

25 The Charterer emphasises that BIMCO Supplytime 2017 is not an appropriate form to use for an entire salvage operation as it is merely a time charter. Instead, it would have been more appropriate to use a broader master agreement such as the Wreckhire 2010, another BIMCO standard form contract designed to govern entire salvage operations. The Wreckhire 2010 explicitly contemplates matters that must be addressed when dealing with an entire salvage operation, such as daily rates and third-party expenses, and is better able to accommodate requests for additional services as an operation progresses. As both parties are experienced industry players familiar with the available standard forms, the choice of BIMCO Supplytime 2017 must have been a conscious decision to limit the scope of their agreement. Furthermore, the Contract does not *explicitly* state that the Contract is for the purpose of the Salvage Operation. Thus, the Contract is no more than a time charter for the Crane Barge. It is commercially inconceivable and there is no indication that the parties intended that the entire costs incurred by the Salvage Operation would be covered by a single line in cl 39 rather than by an appropriate master contract.[28] However, I note that both the Owner and Charterer agree that it is not strictly speaking necessary, even as a matter of practice, for the parties to have entered into a further contract for the Salvage Operation in addition to the

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27 Claimant's Written Submissions dated 15 March 2023 at paras 36–39, 43, 52–53.

28 Claimant's Written Submissions dated 15 March 2023 at paras 9, 31–33, 48–58, 103.

Contract.[29] During the oral hearing, the Charterer also placed considerable emphasis on email correspondence regarding the additional clauses. The Charterer points to this as contemporaneous evidence that cl 39 pertains only to the charter of the Crane Barge, because the correspondence does not *explicitly* state that cl 39 relates to the entire Salvage Operation.[30] The Charterer submits that the foregoing should provide all the context necessary to objectively ascertain the parties' intention at the time of contracting. As it did before the Tribunal, the Charterer submits that this interpretation should equally apply to constrain the scope of the arbitration clause and exclude the *quantum meruit* claim from arbitration.[31]

26 The Charterer submits that the Tribunal over-stated the effect of urgency, as salvage operations inherently involve a degree of urgency which salvage operators are accustomed to dealing with.[32] Although the Charterer accepts that it has no physical presence in the region of the Salvage Operation, it asserts that it would have no difficulty conducting the Salvage Operation and would not necessarily have intended that the Owner would play an important role. The Charterer therefore submits that the Tribunal erred in giving weight to this fact.[33] Additionally, the fact that the Casualty was named as the area of operation of the Crane Barge and the fact that the Crane Barge was hired for the purpose of aiding in the Salvage Operation should not change the Contract's essential nature as a mere time charter.[34]

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29 1st Affidavit of [Mr Y] dated 9 November 2022 at para 18; 2nd Affidavit of [CYY] dated 18 January 2023 at para 36.

30 Claimant's Written Submissions dated 15 March 2023 at paras 89–96.

31 Claimant's Written Submissions dated 15 March 2023 at para 106.

32 Claimant's Written Submissions dated 15 March 2023 at para 103.

33 Claimant's Written Submissions dated 15 March 2023 at paras 72–76.

34 Claimant's Written Submissions dated 15 March 2023 at para 108.

27 As the Charterer's propounded interpretation would mean that the Disputed Claims do not fall under any written agreement, the Charterer suggests (but does not admit) that it remains open to the Owner to base its claim on a separate oral agreement or other non-contractual cause of action.[35] The Charterer suggests that the arbitration is an attempt by the Owner to shoehorn the Disputed Claims into the Contract because of foreseeable difficulties in pursuing a claim on the basis of an oral agreement.[36]

28 The Charterer also alleged that it entered into several other separate agreements with the Owner and other third parties for the charter of other vessels to assist in the Salvage Operation.[37] The Charterer submits that the fact that it entered into multiple other separate contracts in relation to the Salvage Operation shows that the Contract could not have been intended to cover the entire Salvage Operation, as the other contracts would then be otiose.[38]

The Owner's case

29 The Owner contends that the Disputed Claims fall within the ambit of cl 39 of the Contract, which encompasses all procurement services rendered by the Owner at the Charterer's request. Even if the Disputed Claims do not fall within the ambit of cl 39, the Owner submits that the *quantum meruit* claim nevertheless falls within the scope of the arbitration clause.

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35 Claimant's Written Submissions dated 15 March 2023 at paras 60–61.

36 Claimant's Written Submissions dated 15 March 2023 at para 102.

37 1st Affidavit of [CYY] dated 30 September 2022 at para 20; Claimant's Written Submissions dated 15 March 2023 at para 21.

38 Claimant's Written Submissions dated 15 March 2023 at paras 63–71.

30 Textually, the parties did not expressly confine the scope of "procurement services" in the second proviso of cl 39 to the Crane Barge, unlike the first proviso, which is limited to "[c]onsumables, communications and medicine *on the Vessel* which are used or taken by the Charterers" [emphasis added] (see above at [9]).[39]

31 Contextually, the Owner submits that the choice of BIMCO Supplytime 2017 is neither here nor there, as it is undisputed that parties can and did in fact supplement the standard terms. Indeed, cl 39 is precisely one such additional term. The context supports the Owner's interpretation of cl 39. The Contract had been concluded in the context of an emergency, where the Charterer had to rely on the resources of the Owner as a local operator. In the circumstances, cl 39 was left open ended to ensure that the Crane Barge could be properly staffed and equipped as the needs of the Salvage Operation evolved.[40] The commercial purpose of the Contract was for the Crane Barge to operate as the offshore command centre for the Salvage Operation. Even on a narrower interpretation of cl 39, the Disputed Claims remain linked to the charter of the Crane Barge, as they concern procurement services requested for the purpose of properly equipping the Crane Barge to act as the offshore command centre.[41] If cl 39 did not cover the Disputed Claims, the Contract would have been pointless as the Crane Barge would not have been able to serve its intended purpose.[42]

32 Importantly, the direct evidence of Mr Y *and Mr X*, the representatives who actually negotiated and witnessed the conclusion of the Contract,

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39 Respondent's Written Submissions dated 14 March 2023 at paras 29–31, 43.

40 Respondent's Written Submissions dated 14 March 2023 at paras 34–36, 61–67.

41 Respondent's Written Submissions dated 14 March 2023 at para 45, 53–55.

42 Respondent's Written Submissions dated 14 March 2023 at paras 53–55.

unequivocally supports the Owner's propounded interpretation of cl 39.[43] The Charterer had never (until the oral hearing) raised any issue regarding Mr X's authority to act on their behalf.[44] In contrast, the Charterer provides no direct evidence of the circumstances surrounding the execution of the Contract. Instead, the Charterer relies on the affidavit of a broker, who I shall refer to as Mr Z. Mr Z only provides post-hoc subjective opinions based on hypothetical situations as he was not personally involved in the negotiation of the Contract. Mr Z's hypothetical views were not disclosed to any other party and are therefore irrelevant to the construction of the Contract.[45]

33 The Owner submits that the court generally accords a generous interpretation to the scope of arbitration agreements, unless there is good reason to conclude that the claim should fall outside its scope. As the purpose of the Contract was to charter the Crane Barge to assist in the Salvage Operation, and the procured services were in relation to the Salvage Operation, the Disputed Claims clearly arise "in connection with" the Contract. Accordingly, the *quantum meruit* claims fall within the scope of the arbitration clause.[46]

34 The Owner takes the view that the Charterer makes the present application in bad faith and for the purpose of delaying the resolution of the Disputed Claims.[47]

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43 Respondent's Written Submissions dated 14 March 2023 at paras 50–51, 56–57.

44 Respondent's Written Submissions dated 14 March 2023 at para 50, 60.

45 Respondent's Written Submissions dated 14 March 2023 at paras 71–74.

46 Respondent's Written Submissions dated 14 March 2023 at paras 86–91.

47 Respondent's Written Submissions dated 14 March 2023 at paras 4–6.

Issues to be determined

35 Parties therefore agree that the key issue is whether the Disputed Claims fall within the scope of cl 39 of the Contract. If the Disputed Claims do not fall within the scope of cl 39, the next issue is whether a claim in *quantum meruit* falls within the scope of the arbitration clause.

36 However, the parties' focus on the interpretation of cl 39 raises the preliminary issue of whether its interpretation truly goes to jurisdiction or to the admissibility of the claims. I posed this question to counsel at the oral hearing.

Jurisdictional review under s 10(3)(*a*) IAA

37 It is established that a review on jurisdiction pursuant to s 10(3)(*a*) IAA is conducted *de novo* with no deference granted to the Tribunal's findings, though the court is entitled to consider what the Tribunal has said: *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41]–[43]. Nevertheless, the court must guard against ingenious attempts to disguise substantive challenges as challenges to jurisdiction: *BTN and another v BTP and another* [2020] 5 SLR 1250 at [45].

38 In this case, the Ruling is expressly framed as a determination of the jurisdiction challenge and the Tribunal appears to refrain from addressing the merits. However, cl 39 imposes a substantive obligation on the Charterer and is the basis upon which the Owner brings its claim. I therefore directed the Charterer to clarify why the interpretation of a substantive clause of the Contract is appropriate for jurisdictional review under s 10(3)(*a*) IAA.

The Charterer's arguments

39 The Charterer submits that the Tribunal's jurisdiction stems from the arbitration clause contained in the Contract. As the arbitration clause refers to disputes arising out of or in connection with the Contract, the Tribunal's jurisdiction therefore depends on the scope of the Contract. If a matter falls outside the scope of the Contract, the Tribunal has no jurisdiction. The argument therefore goes that a determination by the Tribunal on the scope of the Contract is necessarily a jurisdictional decision which is subject to review. According to the Charterer, the Tribunal erred in finding that the overall commercial purpose of the Contract was to urgently salvage the Casualty. Instead, the Contract is limited to matters relating to the Charter of the Crane Barge. This means that cl 39 is similarly limited to procurement services rendered only in relation to the charter of the Crane Barge. This issue of interpretation is, in the Charterer's submission, appropriate for jurisdictional review under s 10(3)(*a*) IAA.

Whether the interpretation of cl 39 goes to jurisdiction

40 In my judgment, the interpretation of cl 39 is a matter that comes within the merits of the dispute referred to arbitration. The Charterer has now accepted that there was a binding arbitration agreement. Thus, the question of whether the Owner's claims in respect of procurement services fall within cl 39 is a matter for the Tribunal to determine as part of the dispute referred by parties. Questions of what a clause within the body of a contract applies to are common. For example, in a sale of goods contract there is often an issue of whether the goods delivered are of the type contracted for. Sometimes, this depends on how the clause is interpreted. I gave the example during the oral hearing of a contract for sale of English apples. This could mean apples of any traditional English variety wherever grown, or apples of any variety grown in England. If there is

an arbitration clause applying to the contract and the arbitrator decides on one of the two possible interpretations of the clause concerning the nature of the goods to be sold and delivered, and thus either allows or rejects the claim, she would be acting within her jurisdiction: precisely deciding an issue that has been submitted to her. It is an error to recast this question as her having jurisdiction only to allow claims that come within the clause as properly interpreted. The effect of this error would be to change the decision maker for a question of contractual interpretation concerning a substantive obligation of parties from the arbitrator appointed by agreement of the parties to the court upon a jurisdictional challenge.

41 Interpretation of a substantive clause within the contract ordinarily concerns the admissibility of the claim made. This differs from interpretation of the arbitration agreement contained within the contract. Interpretation of the arbitration clause might go to jurisdiction where the difference between the parties relates to the scope of the arbitration agreement. As the Court of Appeal explained in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 at [207]:

> Jurisdiction is commonly defined to refer to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it": *Waste Management, Inc v United Mexican States* ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet (8 May 2000) at [58]. To this, Zachary Douglas adds clarity to this discussion by referring to "jurisdiction" as a concept that deals with "the existence of [the] adjudicative power" of an arbitral tribunal, and to "admissibility" as a concept dealing with "the exercise of that power" and the suitability of the claim brought pursuant to that power for adjudication: *Douglas* at paras 291 and 310. Finally, in Chin Leng Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (Cambridge University Press, 2018) ("*Chin Leng Lim*"), it is usefully observed that there are two ways of drawing the distinction between jurisdiction and admissibility (at p 118):

> … The more conceptual reading would focus on the legal nature of the objection: is it directed against the tribunal (and is hence jurisdictional) or is it directed at the claim (and is hence one of admissibility)? The more draftsmanlike reading would focus on the place that the issue occupies in the structure of international dispute settlement: is the challenge related to the interpretation and application of the jurisdictional clause of the international tribunal (and hence jurisdictional), or is it related to the interpretation and application of another rule or instrument (and is hence one of admissibility)?

42 In my view, the interpretation of cl 39, and specifically what was meant to be covered by the phrase "all procurement services" is a matter of admissibility. The objection is directed at the claim rather than the Tribunal's authority under the arbitration agreement. Consequently, its interpretation is not a matter for this court, even if the Tribunal reached what the court might consider to be the wrong conclusion on it.

43 Nonetheless, as counsel and the Tribunal appear to have proceeded on the basis that the interpretation of cl 39 goes to jurisdiction, I will now consider its interpretation.

The correct interpretation of cl 39

Context

44 The Charterer contended before me that its filing of affidavits in these proceedings has provided me with more of the relevant context than had been available to the Tribunal. However, it is readily apparent that the Charterer is not relying upon any direct evidence of the negotiations and context surrounding the execution of the Contract. This is because Mr X, who represented the Charterer at all material times during the negotiations, has filed an affidavit on behalf of the Owner in this application. The relationship between Mr X and the

Charterer broke down after the Salvage Operation.[48] According to the Charterer, this was due to their dissatisfaction with Mr X's performance in the Salvage Operation, specifically in the quantity of craft, equipment and personnel requested from the Owners, which resulted in "excessive costs" being claimed by the Owners.[49]

45 The Charterer instead relies on the affidavit of a broker, Mr Z, which contains statements of opinion that support the Charterer's views on the use of master agreements.[50] Mr Z did not give evidence in the arbitration. In their written submissions, the Charterer refers to Mr Z as the broker who was contacted by Mr X to liaise with the Owner for the charter of the Crane Barge.[51] The Charterer also submitted that Mr Z was a "neutral party in these proceedings", such that his evidence ought to be accorded greater weight than that of Mr X and Mr Y.[52] However, during the oral hearing, counsel for the Charterer gave a drastically different description of Mr Z's role, submitting that Mr Z was the main person representing the Charterer and negotiating on its behalf. As Mr Z was never informed that the 15% markup would apply to procurement services provided in relation to the Salvage Operation generally,[53] the Charterer submitted that the evidence of Mr X and Mr Y should be disregarded for the purpose of interpretation. Instead, the context should be limited to Mr Z's opinion and understanding of the email correspondence as the true representative of the Charterer. The Charterer also sought to downplay Mr

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48 Claimant's Written Submissions dated 15 March 2023 at para 85.

49 2nd Affidavit of [CYY] dated 18 January 2023 at para 7.

50 Claimant's Written Submissions dated 15 March 2023 at paras 79–82.

51 Claimant's Written Submissions dated 15 March 2023 at paras 4 and 79.

52 Claimant's Written Submissions dated 15 March 2023 at para 88.

53 1st Affidavit of [Mr Z] dated 24 January 2023 at para 36.

X's involvement and suggested that Mr X did not have the authority to represent the Charterer. However, when I invited them to do so, the Charterer declined to take a firm position on the issue of actual or apparent authority.

46 These allegations, which were first made at the oral hearing, are not supported by the evidence. Mr Z's own affidavit states that he was brought on to "finalise" the Contract only *after* Mr X had already commenced negotiations with Mr Y. Critically, Mr Z explicitly confirms that he *did not* negotiate the Contract, as its terms were agreed by Mr X locally on behalf of the Charterer. Mr Z's role was therefore confined, in his own words, to "finalis[ing] the contract" and "[commenting] on the wording of the contract and [making] suggested additions/corrections".[54] Rather than a leading role, it appears from the email correspondence that Mr Z instead took instructions from Mr X on the form and drafting of the Contract. Mr Z described his own role as "suggest[ing]" the appropriate contractual form and "advis[ing]" Mr X.[55] Other than representing the Charterer in two separate agreements with other third-parties, Mr Z states that he "had no involvement in chartering any other craft, equipment or personnel" for the Salvage Operation.[56] Indeed, Mr Z told the Owners to liaise directly with Mr X, who was on the ground, and deferred to Mr X's decision on cl 39.[57]

47 In fact, when cl 39 in its current form was first suggested by the Owner in an email, Mr Z simply replied "Agreed proposed Additional Clause 39

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54 1st Affidavit of [Mr Z] dated 24 January 2023 at paras 5 and 10.

55 1st Affidavit of [Mr Z] dated 24 January 2023 at paras 15–17.

56 1st Affidavit of [Mr Z] dated 24 January 2023 at paras 18–19.

57 1st Affidavit of [Mr Z] dated 24 January 2023 at paras 27, 40–41.

(subject [Mr X] has agreed the 15 pct mark-up)".[58] Although there was no express explanation concerning the scope of cl 39 communicated on behalf of the Owner to Mr Z at that time, it is evident that Mr Z simply accepted it provided that Mr X had agreed to it.

48 Consequently, the context as it appears in the evidence before me is drawn from the objective evidence of what "crossed the table" between Mr X and Mr Y as representatives of the parties. I accept that the Contract was concluded under circumstances of urgency, and that the Charterer had to rely on the resources of the Owner as a local operator. These facts would support the broader reading of cl 39 as they would be consistent with the need for the Crane Barge to be properly staffed and equipped as the needs of the Salvage Operation evolved. I also accept that parties envisaged that the Crane Barge would operate as the offshore command centre for the Salvage Operation. This also supports the broader reading of cl 39 in that it would make sense to consider the Contract (which was for charter of the Crane Barge) as the key contract and thus bring ancillary and broadly related procurement services within it.

49 There is logic in the Charterer's submissions that ordinarily additional clauses inserted into the charterparty for one vessel should be read as relating to that vessel. There might conceivably have been more appropriate or more logical ways of organising the contractual provisions, including by entering into a contract based instead on Wreckhire 2010 or having some other form of master agreement. But this argument effectively concedes the point that parties needed to place their agreement on general procurement services relating to the Salvage Operation somewhere. Once that is accepted, there is nothing illogical about including that agreement in the Contract.

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58 1st Affidavit of [Mr Z] dated 24 January 2023 at 149–150.

Text

50 Turning to the text of cl 39, the second sentence is drafted broadly (see above at [9]). There is no reason to restrict the meaning of the word "all". The controlling requirement is that the procurement services so chargeable must have been "at the request of the Charterer". Thus, whatever procurement services were requested by the Charterer and supplied by the Owner had to be paid for.

51 Moreover, the first and second sentences of cl 39 concern different matters and can and should be read independently. The second sentence is not subsidiary or ancillary to the first. What unites the two sentences is that they both concern things that the Charterer will have to pay for. The first is what the Charterer might take or use on board the Crane Barge, while the second is what the Charter might request the Owner to supply. The fact that the first sentence includes the limiting words "on board" does not suggest that similar limiting words should be read into the second sentence. The control that the Charterer could exercise over what it had to pay was via what it chose to request from the Owner.

52 Accordingly, even if the interpretation of cl 39 went to jurisdiction, I agree with the Tribunal's interpretation. In fact, I would add that in my view the clause is phrased plainly and clearly, and there is little need to consider the context to interpret it. It reads as a free-standing obligation to pay at the specified mark up for procurement services requested. In any case, the context supported this plain meaning of the clause.

A further point

53 There is a further point. Before me, the submissions of both parties delved into how related to the Crane Barge the various services supplied were, as set out in the invoices that formed the Disputed Claims. A cursory review of the invoices established that there were indeed many items that on their face appeared to be linked to the Crane Barge. As noted at [12] above, they were issued contemporaneously and countersigned by Mr X on behalf of the Charterer.

54 This reinforces my view that the application of cl 39 went to the merits and not to the jurisdiction of the Tribunal. It is obviously a merits question whether all the invoiced items or only some of them should be recoverable. This question remains to be decided by the Tribunal.

Conclusion

55 I dismiss the Charterer's application and hold that the Tribunal has jurisdiction. Parties are to file and exchange within 14 days of the date of this judgment submissions on costs limited to ten pages each exclusive of any schedules or breakdown of time spent or disbursements incurred. Parties are to seek to agree costs within 7 days after exchange of submissions, failing which either party may write in for a hearing before me.

Philip Jeyaretnam
Judge of the High Court

25Vergis S Abraham SC and Leo Zhi Wei (Liang Zhiwei) (Providence Law Asia LLC) (instructed), Cai Jianye Edwin and Tay Xi Ying (Dai Xiying) (Clasis LLC) for the claimant; Tham Lijing and Lim Qiu Yi, Regina (Tham Lijing LLC) (instructed), Parhar Sunita Sonya (S.S Parhar Law Corporation) for the respondent.
