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

[2022] SGHC 8

Originating Summons No 869 of 2021

Between

Sai Wan Shipping Ltd

… *Plaintiff*

And

Landmark Line Co, Ltd

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Breach of natural justice]
[Arbitration] — [Award] — [Recourse against award] — [Tribunal's powers] — [Peremptory orders]
[Arbitration] — [Award] — [Recourse against award] — [Remission]
[Arbitration] — [Award] — [Conduct of arbitration] — [Default of party]
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v
Landmark Line Co, Ltd

[2022] SGHC 8

General Division of the High Court — Originating Summons No 869 of 2021
Philip Jeyaretnam J
1 December 2021, 22 December 2021

14 January 2022 Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 Justice hurried risks justice buried, while justice delayed may be justice denied. Both these admonitions highlight how judicious setting and enforcement of timelines relate to achieving a just outcome for parties. One tool an adjudicator has is the peremptory order – an order that fixes a deadline for the provision of a submission or other case document, a default in which carries a sanction.

2 These proceedings concern an arbitrator's final and peremptory order that the respondent serve its defence submissions by a specified date and hour, with the stipulated sanction that upon non-compliance they would be barred from advancing any positive case by way of defence or counterclaim and from

adducing any positive evidence in the matter, and that it would then simply be for the claimant to prove its case.

3 In deciding whether there was a breach of natural justice in either the making or enforcing of the peremptory order, it will be necessary to consider the powers that an arbitrator in an *ad hoc* arbitration seated in Singapore has to make and enforce such final and peremptory orders.

Facts

The parties

4 The plaintiff is a Hong Kong incorporated company that was the charterer of a vessel owned by the defendant, a South Korean company. In this judgment, I will refer to the plaintiff as the Charterer and to the defendant as the Owner. In some, but not all, of the correspondence and other documents relating to the arbitration, these appellations appear in the plural. When citing them, I have left them in the plural as it is obvious to whom they refer.

The charterparty

5 The charterparty was on the New York Produce Exchange 1946 form, with amendments and additional clauses evidenced by a fixture recap. It contained an arbitration clause:[1]

> Clause 56: Arbitration
>
> All disputes arising out of this contract which cannot be amicably resolved shall be referred to arbitration in SINGAPORE

[1] Affidavit of Tanjore Sunilkumar Srinivas (dated 24 August 2021) ("1st Affidavit of Tanjore") at p 68.

> One arbitrator to be appointed by each party, and the third by the two so chosen. But if one party failing to appoint arbitrator within 7 days after another party has appointed one, then it will become sole arbitrator for the arbitration.
>
> The arbitrators and the umpire, if appointed, shall be the commercial men conversant with shipping knowledge, and the members of the London maritime arbitrators' association or otherwise qualified by experience to deal with shipping disputes.

6 The arbitration clause did not provide for any institution to administer the arbitration nor was there any choice of arbitration rules.

7 The charterparty was performed and a dispute arose, primarily over unpaid hire, and the question of whether there was any period of off-hire.

The arbitration

8 The Owner appointed Mr Alan Oakley ("the arbitrator") as its nominated arbitrator, and as the Charterer did not nominate any arbitrator, he became the sole arbitrator. The arbitrator was both a commercial man conversant with shipping knowledge and a full member of the London Maritime Arbitrators' Association.[2]

9 The Owner served claim submissions for an amount of US$248,338.24 and applied for an immediate interim award in the sum of US$48,658.74, which it said was indisputably due on the Charterer's version of the final accounting for the charter.[3]

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2 1st Affidavit of Tanjore at p 20, Second/Final arbitration award dated 27 May 2021 at para 3.

3 1st Affidavit of Tanjore at p 20, Second/Final arbitration award dated 27 May 2021 at para 5.

10 The arbitrator found that the Owner's application succeeded and made a Partial/Final Arbitration Award on 13 May 2020 (the "first award").[4] The arbitrator noted in the first award that "[t]he Charterers were not represented and failed to participate in these proceedings. Neither party requested an oral hearing."[5]

11 Ten months later, in early March 2021, the firm Brown Marine Legal Limited ("Brown Marine"), who had represented the Owner in obtaining the first award, advised that they intended to pursue the balance of the claim and served further submissions on behalf of the Owner to recover the sum of US$199,679.50. These further submissions contained a request as follows:[6]

> … Charterers are requested to serve Defence Submissions within 28 days of today's date, ie on or before Wednesday 31st March 2021, failing which Owners will seek a further default award.

12 Without inviting any submission from the Charterer on the time it would need to prepare and serve its defence submissions, the arbitrator emailed the Charterer on 4 March 2021 with his order that the Charterer provide its defence by 4.00pm London time on 31 March 2021, noting that:[7]

> … If the Charterer fails to respond to this order, the Owners may apply for a short final and peremptory order which will include a severe sanction against the Charterer in the event that it fails to comply.

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4 1st Affidavit of Tanjore at p 21, Second/Final arbitration award dated 27 May 2021 at para 6.

5 1st Affidavit of Tanjore at p 175, Partial/Final arbitration award dated 13 May 2020 at para 5.

6 1st Affidavit of Tanjore at p 173.

7 1st Affidavit of Tanjore at p 21, Second/Final arbitration award dated 27 May 2021 at para 8.

13 The Charterer did not respond directly to this email, but its counsel from the Dubai law firm Fichte & Co ("Fichte") corresponded with Brown Marine, requesting an extension of time until 9 April 2021. The arbitrator learned of this correspondence at least when he received an email on 1 April 2021 from Brown Marine asking that "the tribunal review this exchange and make whatever order it considers appropriate."[8]

14 The arbitrator proceeded to issue what he described as a final and peremptory order on the same day, giving a deadline of "17:00 London time on Friday 9th April 2021" and warning:[9]

> If the [Charterer] fail[s] to comply with this order, the sanction will be that they are barred from advancing any positive case by way of defence (or counterclaim) and from adducing any positive evidence in the matter and it will then simply be for the [Owner] to prove their case.

15 I will refer to this order as the peremptory order.

16 The Charterer failed to serve its defence submissions within the time stipulated. It only did so later the same day, under cover of an email from Fichte, apologising for the slight delay and explaining that it was due to "some trouble with the internet connection".[10]

17 The next day, the arbitrator responded to this email stating that as the terms of his order were clear, he must abide by it and exclude the Charterer's

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8 1st Affidavit of Tanjore at p 199.

9 1st Affidavit of Tanjore at p 188.

10 1st Affidavit of Tanjore at p 198.

defence submissions unless the Owner was prepared to accept them into evidence.[11]

18 Two weeks later, on 24 April 2021, Brown Marine responded on behalf of the Owner that their decision was that the Charterer's defence submissions should not be admitted into evidence.[12] The arbitrator then emailed both counsel directing that the Charterer's defence submissions had not been admitted into evidence and that he awaited the Owner's evidence to prove its claim.[13]

19 Fichte immediately objected, noting that the Owner had not identified any prejudice arising from the delay, and asked that the arbitrator exercise his discretion to allow the defence submissions into evidence.[14]

20 The arbitrator responded within the hour, stating:[15]

> I refer to your email of earlier today. However the respondents (and doubtless) their legal advisers… were aware of the severity of the final and peremptory order and the sanction for non compliance. Therefore the decision of the tribunal cannot have come as a surprise and will not be revisited.

21 Thereafter, on 25 April 2021, the arbitrator invited the Owner to put in further evidence and submissions to prove its case,[16] but did not allow the Charterer to respond to them. On 5 May 2021, Fichte renewed its protest and

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11 1st Affidavit of Tanjore at p 197.

12 1st Affidavit of Tanjore at p 196.

13 1st Affidavit of Tanjore at pp 195–196.

14 1st Affidavit of Tanjore at pp 194–195.

15 1st Affidavit of Tanjore at p 194.

16 1st Affidavit of Tanjore at p 27, Second/Final arbitration award dated 27 May 2021 at para 23.

objection, complaining of "double standards"[17]. The arbitrator again referred to his duty to apply the sanction upon the failure to comply with the peremptory order and denied that there were any "double standards" even as he ended the email by saying that he would wait to hear from Brown Marine concerning when they would be ready to supply their missing evidence.[18] The arbitrator proceeded to make the Second/Final Arbitration Award dated 27 May 2021 (the "second award"), without hearing witnesses and on a documents-only basis as requested by the Owner in an email of 24 April 2021.[19]

The parties' cases

22 Both parties referred to *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") for the applicable analytical framework. In *Soh Beng Tee* (at [29]), V K Rajah JA, giving the judgment of the Court of Appeal, affirmed that a party seeking to set aside an arbitration award on the basis of a breach of natural justice had to show:

(a) which rule of natural justice had been breached;

(b) how that rule had been breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced that party's rights.

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17 1st Affidavit of Tanjore at p207.

18 1st Affidavit of Tanjore at p206.

19 1st Affidavit of Tanjore at p 210.

23 The Charterer relied on the principles that parties must be given adequate notice and opportunity to be heard (often referred to as the "fair hearing rule"), and the principle that parties must be treated with equality (often referred to as the "equal treatment rule"). I will adopt these two expressions in this judgment.

24 The Charterer contended[20] that as the arbitration was seated in Singapore, the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") applied by virtue of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), and relied particularly on Article 18 of the Model Law which provides:

> Article 18. Equal treatment of parties
>
> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

25 The Charterer broadly focused on the apparent unfairness of denying it the opportunity to defend the proceedings based on what it contended was a trivial delay. Its first point was that Brown Marine and Fichte had in fact agreed to an extension of time to the deadline originally set by the arbitrator, pushing it back to 9 April 2021, without any specification of the time. What follows from this is that there was no default of that original deadline. According to the Charterer, Brown Marine unfairly engineered the situation when it falsely stated that there had been no agreed extension.[21]

26 The Charterer's second point was that it was the arbitrator who then specified "17:00 London time" as the deadline on 9 April 2021, when the extension had been agreed without any stipulated time of day, so that under the

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[20] Plaintiff's Written Submissions dated 25 November 2021 at para 15.

[21] Plaintiff's Written Submissions dated 25 November 2021 para 31.

agreement (as understood by the Charterer) its defence submissions could be filed any time on 9 April 2021 (which they in fact were).[22]

27 The Charterer's third point was that when its defence submissions came in after the deadline of "17:00 London time" on 9 April 2021, the arbitrator did not inquire into the Charterer's explanation that the delay was due to internet connectivity issues, nor into whether there was any prejudice to the Owner from what was a mere delay of less than six hours.[23] The Charterer argued that the principle under Singaporean procedural law is that expressed in the decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*"), at [2], that because unless orders "are draconian in nature and effect… courts will enforce such orders only if the party breaches the order both intentionally and contumeliously or contumaciously…"[24]

28 The Charterer's fourth point was that the arbitrator should have reviewed his decision upon receiving Fichte's email of 5 May 2021 and considered the explanation provided by Fichte and the absence of prejudice to the Owner.[25]

29 The Charterer made a further argument that the arbitrator had wrongly considered that he was clothed with powers under the Arbitration Act 1996 (c 23) (UK) ("the UK Arbitration Act"), perhaps not keeping in mind that the arbitration was seated in Singapore.[26]

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22 Plaintiff's Written Submissions dated 25 November 2021 at para 25.

23 Plaintiff's Written Submissions dated 25 November 2021 at paras 35 and 41.

24 Plaintiff's Written Submissions dated 25 November 2021 at para 36.

25 Plaintiff's Written Submissions dated 25 November 2021 at paras 45 and 46.

26 Plaintiff's Written Submissions dated 25 November 2021 at paras 57 and 58.

30 Additionally, building on Fichte's complaint of "double standards", the Charterer contended that there was a breach of the equal treatment rule, contrasting the expansive time afforded to the Owner with the restricted time allowed to the Charterer.[27] Moreover, while the Owner was given time to put in additional submissions, the Charterer was not permitted to reply to them.

31 The Charterer argued that the arbitrator's refusal to admit its defence submissions led to the making of the second award. It relied on the arbitrator's own statement that, as the Charterer bore the burden of proving claims for off-hire, its failure to adduce any evidence meant that it was not necessary for the Owner to prove its case.[28] To briefly explain, a charterer may defend a claim by an owner for hire by proving periods of off-hire, namely days on which the vessel could not be worked for reasons specified in the contract, such as deficiency of crew or breakdown of machinery.

32 The Charterer repeated the same points to show prejudice, namely the arbitrator disregarding its case, including on bottom-fouling and cleaning, on deductions made to the final accounting and on the issue of off-hire.[29]

33 The Owner's case was that the arbitrator had power under Singapore law to make a peremptory order of the kind he did. The Owner relied on the decision in *Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd* [2005] 3 SLR(R) 512 ("*Yee Hong*") where the court held, in relation to an arbitration under the Arbitration Act (Cap 10, 2002 Rev Ed) conducted under the Singapore Institute of Architects Arbitration Rules, that the arbitrator acted within his powers in

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27 Plaintiff's Written Submissions dated 25 November 2021 at paras 64–66.

28 Plaintiff's Written Submissions dated 25 November 2021 at para 69, in particular 69(h).

29 Plaintiff's Written Submissions dated 25 November 2021 at para 71.

making a peremptory order that failing the respondent making exchange of its witness statements within a specified period he would not consider them and would proceed to make his decision after the scheduled hearing without regard to them.[30] In *Yee Hong* at [25], the court described the "situation where in acting fairly to both parties, [the arbitrator] had to balance the consideration of progressing the reference against the need to afford [the respondent] a fair opportunity to test the case of the claimant and put forward its own defence", noting at [26] that "an arbitrator plainly has a wide discretion in reaching his decisions as to what the duty of acting fairly demands in the circumstances of a given case".

34 The Owner also relied on the Court of Appeal decision in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*CMNC*") for the following propositions:[31]

(a) The threshold for a finding of breach of natural justice is a high one.

(b) The parties' right to be heard is impliedly limited by considerations of reasonableness and fairness.

(c) The parties' right to be heard does not mean a tribunal must sacrifice all efficiency to accommodate unreasonable procedural demands by a party.

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30 Defendant's Written Submissions dated 25 November 2021 at paras 63– 64.

31 Defendant's Written Submissions dated 25 November 2021 at paras 60–61.

(d) Where there is a reasonable basis for the arbitrator's decision not to grant an extension of time or the postponement of a hearing, the court should be reluctant to interfere.

(e) A party need be given only a reasonable opportunity to present its case, with tribunals balancing that opportunity against efficiency.

(f) Fairness of the procedure adopted must be judged against what parties agreed and expected, including by their contemporaneous communications with the tribunal.[32]

35 The Owner broadly argued that the arbitrator had a reasonable basis to make the peremptory order. The Owner contended that not only was the time allowed for filing of the defence submissions sufficient, but also that the Charterer had not objected to the deadline imposed of "17:00 London Time" on 9 April 2021 and understood that its submission was late. Moreover, the Charterer had known of the severe sanction for non-compliance for some five weeks beforehand.[33] According to the Owner, Fichte should have raised the difficulties with internet connectivity prior to the expiry of the deadline and before sending in its submissions some six hours late.[34]

36 The Owner also relied on what it described as the Charterer's "repeated delays in the entire arbitration proceedings".[35]

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32 Defendant's Written Submissions dated 25 November 2021 at para 61.

33 Defendant's Written Submissions dated 25 November 2021 at para 79.

34 Defendant's Written Submissions dated 25 November 2021 at para 88.

35 Defendant's Written Submissions dated 25 November 2021 at para 86.

37 The Owner did not accept that the alleged breaches were connected to the making of the second award, contending that the second award was made on the basis of the Owner's proving its case.[36]

38 Lastly, it argued that there was no evidence of prejudice. The Charterer had not put before the court its defence submissions that it furnished late to the arbitrator, and so there was no material upon which to judge that the outcome of the arbitration might have been different.[37]

Issues to be determined

39 I will consider the issues in the following order:

(a) what the powers of an *ad hoc* arbitrator are to make and enforce peremptory orders and how such powers should be exercised;

(b) whether the arbitrator acted within his powers, and exercised them in accordance with the principles of natural justice; and

(c) whether any breach of natural justice was connected to the making of the second award and caused prejudice to the Charterer.

Issue 1: Powers of an *ad hoc* arbitrator to make and enforce peremptory orders and how such powers should be exercised

40 The powers of an arbitrator derive from the arbitration agreement between the parties. The choice of seat may clothe the arbitrator with powers provided by a statute in force at the seat. The choice of arbitral rules to govern

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36 Defendant's Written submissions dated 25 November 2021 at para 100.

37 Defendant's Written Submissions dated 25 November 2021 at paras 107–108.

the arbitration may also clothe the arbitrator with powers provided under those chosen rules.

41 The seat was Singapore, and it is obvious that the arbitrator was wrong to refer to and rely on powers to make peremptory orders under the UK Arbitration Act. It is not clear why he referred to the position under the UK Arbitration Act. I would presume in the arbitrator's favour that this was simply a mistaken assumption on his part that probably flowed from his practice being principally in London-seated arbitrations. It does mean that the arbitrator adopted the wrong procedural law. If he did, and as a result he followed an arbitration procedure such as invoking a power to make a particular peremptory order on a basis or in a way not available to an arbitrator in a Singapore-seated arbitration, that would not be in accordance with the agreement of the parties and so would be amenable to challenge under Art 34(2)(*a*)(iv) of the Model Law.

42 Continuing with the inquiry into what his powers in fact were, the next point is that there were no arbitral rules chosen by parties.

43 The inquiry thus proceeds to consideration of what powers an arbitrator has in a Singapore-seated arbitration for which no arbitral rules have been agreed. For this, I turn to the IAA. Section 3 of the IAA gives the Model Law (other than Chapter VIII thereof, and all subject to the other provisions of the IAA) the force of law. Its English text is set out in the first schedule to the IAA. Accordingly, it is the Model Law to which the arbitrator should have looked before considering whether to make or enforce any peremptory orders.

44 The phrase peremptory order is not to be found in the Model Law. Instead, reading Arts 23 and 25 together, the Model Law provides that where a

respondent fails to communicate his statement of defence within the period of time agreed by the parties or determined by the arbitral tribunal, without showing sufficient cause, then the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegation.

45 Articles 23 and 25 read together break down into three elements:

(a) The respondent has a period of time to communicate his statement of defence that depends on what is agreed by the parties, or if not, then as determined by the tribunal.

(b) If he fails to do so, unless otherwise agreed by parties, the arbitrator must consider whether the party in default has shown sufficient cause for the failure; then

(c) the arbitrator shall continue with proceedings without treating such failure as an admission of the claimant's allegations.

46 I would also observe that Art 25 does not mandate general peremptory or unless orders. It differs from the provisions for judgment in default of defence or for striking out of a defence and consequent judgment for non-compliance with discovery orders that one finds in court rules. It is those sorts of consequences that might be described as draconian and which were the subject of consideration by the court in *Wellmix*, a decision relied on by the Charterer as described at [27] above. Continuing with the proceedings in the absence of a defence but without any admission of the claim is a simple and necessary provision to enable claimants to obtain an arbitration award where the respondent does not participate in the proceedings. There is no requirement under Art 25 that the arbitrator first find that the order has been breached

intentionally, contumeliously or contumaciously, although the defaulter's conduct would be relevant to the inquiry into whether there was sufficient cause for the default.

47 It would have been open to the arbitrator to raise with parties at an appropriate stage of the arbitration the possible adoption of arbitral rules, or indeed to construct a bespoke procedure for parties' agreement. In this way, his powers could have been enlarged by agreement. This, however, did not happen. There does not seem to have been any procedural meeting at all, nor any general procedural timetable issued, nor any proposal made to parties of steps and timelines with any invitation to comment. Often, the first action of an arbitrator would be to convene a procedural meeting, even if only by telephone or other remote means, for the purpose of consulting parties on an appropriate procedure and timetable for the conduct of the arbitration. If anything, this is all the more important in an *ad hoc* arbitration where there are no arbitral rules chosen by parties.

48 That consulting parties on procedure is expected, usual, and hardly onerous, is obvious. Whether not consulting parties breaches the fair hearing or the equal treatment rule is a further question.

49 The first point to make is that what procedure is adopted and how long parties are to be given for each step does bear on the question of reasonable opportunity to present one's case on the merits. Indeed, it has been said that "a sound procedural architecture is *necessary* if we are to transform a set of *laws* into a system of *justice*." [emphasis in original]: per Sundaresh Menon, Chief Justice, "Gateway to Justice: The Centrality of Procedure in the Pursuit of Justice", 36th Annual Lecture of the School of International Arbitration in Dispute Resolution (30 November 2021), at para 9.

50 It follows from the relationship of procedure to the delivery of justice on the merits that giving parties a fair opportunity to present their case includes consulting them on procedural steps and timelines. As for the obligation of equal treatment, this applies both to how consultation must take place, as well as to the steps and timelines adopted following such consultation.

51 Thus, at the first stage, before determining the period of time for communicating the statement of defence in the absence of agreement, an arbitrator must consult both parties, not just one of them. If for any reason an arbitrator does not consult both parties and simply fixes the period of time by himself, he must be open to reconsidering the time fixed upon request by either party, but especially the party bound by the timeline he has fixed unilaterally.

52 At the second stage, when considering whether the party in default has shown sufficient cause for the failure to communicate the statement of defence within the period fixed, the arbitrator must hear both parties. If he gives both parties the reasonable opportunity to be heard on the question of sufficiency of cause, then it is for him to determine the sufficiency, or otherwise, of that cause.

53 That sufficiency is a matter for the arbitrator to determine after hearing from parties is supported by the learned authors of Halsbury's Laws of Singapore vol 1(2) (LexisNexis, 2021), who say at para 20.086 in relation to Art 25 of the Model Law:

> … In the case of a respondent, if he fails to serve his statement of defence, the tribunal may proceed with the arbitration and make an award on the evidence before it. The failure to serve the statement of defence is however not to be treated as an admission of the claim.
>
> …
>
> The power to proceed in default is exercisable if the tribunal is satisfied that the defaulter has not shown 'sufficient cause' for

> its failure. This requirement also carries with it the implication that the tribunal should give a reasonable opportunity for the defaulting party to explain its failure to comply. The sufficiency or insufficiency of the reasons is a matter to be determined by the tribunal and not the court.

54 However, that the court does not determine the sufficiency of cause does not mean that the arbitrator's decision on sufficiency is wholly immune from review. The proper approach a court should take to procedural decisions of a tribunal has been authoritatively stated by the Court of Appeal in *CMNC* at [98] and reiterated by it in *CBS v CBP* [2021] 1 SLR 935 at [51]. That approach is to ask whether "what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done."

55 I now turn to assess what the arbitrator did against the backdrop of his procedural powers under the Model Law, asking myself whether what he did or decided not to do falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.

Issue 2: Whether the arbitrator acted within his powers, and exercised them in accordance with the principles of natural justice

56 The first aspect to consider is how the period of time for communicating the defence submissions was fixed. The arbitrator took the period of time suggested by the Owner in its claim submissions provided on 3 March 2021 for the Charterer's defence submissions and simply incorporated that in his order of 4 March 2021 with one tweak: stipulating a time on 31 March 2021, *ie* "16:00 London time". The arbitrator did not invite the Charterer's input on the question of how much time it might need, whether before fixing that time nor in his order issued to the Charterer. Nor does the arbitrator appear to have even asked himself whether a period of 28 days would be sufficient in the circumstances,

especially given that the Owner had taken ten months after the first award to provide its claim submissions and that, as he far as he would be aware, the Charterer was not necessarily expecting the service of the claim submissions at that time.

57 I find that there was a breach of natural justice in not giving the Charterer any opportunity to provide input on the time needed to serve its defence submissions.

58 The order made on 4 March 2021 was not itself a peremptory order. What it did was to warn the Charterer that if it did not serve its defence submissions, the Owner might "apply for a short final and peremptory order which will include a severe sanction against the Charterer in the event that it fails to comply". Thus, it envisaged that if the Charterer failed to serve its defence submissions, there could then be an application by the Owner for a peremptory order. It must be read in favour of the arbitrator that at this point he had not decided that a short final and peremptory order would follow regardless of the reasons for non-compliance, nor that there would definitely be a severe sanction attached, notwithstanding that the tone of the order suggests to a fair-minded reader a degree of predetermination.

59 In any event, the Charterer seems to have been able to appoint Fichte, and Fichte was able to put together a draft of its defence submissions by 31 March 2021. At this point, apparently at "13:31 London time" on 31 March 2021 (about two and a half hours before the deadline), Fichte reached out to Brown Marine seeking a one-week extension until 9 April 2021, asking for a prompt reply so that they would not have to bother the tribunal.

60 Brown Marine came back to say that they could only recommend agreement if it was on a final and peremptory basis and sought confirmation that this was the case. Fichte responded to give that confirmation, but for some reason Brown Marine appears to have misread this as a withdrawal of the request for an extension, and when "16:00 London time" came and went, they wrote the next day to the arbitrator, copying Fichte, informing the arbitrator that the defence submissions had not "materialised" and wrongly stating that the Charterer's representatives had "decided they did not need" any extension of time and concluded that they looked forward to hearing from the arbitrator. Fichte replied to Brown Marine, copying the arbitrator, saying that they "believe there might have been a misunderstanding to our communication of yesterday, and … [were] under the impression we had indeed agreed a short extension until Friday 9 April." These emails were not originally included in these proceedings but upon my enquiry concerning certain references made by the arbitrator on the face of the second award they were put into evidence by agreement.[38] Brown Marine then wrote to ask that the arbitrator review the exchange between it and Fichte and make whatever order he considered appropriate.[39]

61 The arbitrator did not invite any further input from Fichte, and proceeded within the day to make the peremptory order.

62 There are five distinct difficulties in the arbitrator's having taken this course of action:

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38 Letters to court dated 22 and 28 December 2021 from Robert Wang & Woo LLP and letter to court dated 29 December 2021 from Oon & Bazul LLP.

39 1st Affidavit of Tanjore at p 199.

(a) After receiving the email from Brown Marine asking him to make whatever order he considered appropriate, he did not offer the Charterer any opportunity to be heard.

(b) There is no evidence that he considered or made any decision on whether there was sufficient cause shown for the failure to serve the defence submissions by "16:00 London time" on 31 March 2021.

(c) If he had considered sufficiency, he should have given consideration to at least three points that appear from the exchange of emails between Brown Marine and Fichte, namely:

(i) Fichte believed that an extension of time had been agreed.

(ii) Fichte had explained to Brown Marine that they had been recently instructed.

(iii) Fichte had said that they needed more time to have the draft checked by the Charterer.

(d) A review of the emails exchanged on 31 March 2021 shows that, in substance, Brown Marine and Fichte had agreed that the defence submissions did not have to be filed that day, although Brown Marine was seeking to impose a condition that it be final and peremptory (without specifying any sanction). This means that as of 1 April 2021 the Charterer had not yet failed to serve its defence submissions within the time agreed by parties. It would only be after 9 April 2021 that the Owner could apply for a peremptory order (and of course at that time the Charterer would still have been entitled to be heard).

(e) Brown Marine had not made an express application for a peremptory order nor specified any desired sanction. It only asked for whatever order the arbitrator considered appropriate. It was the arbitrator who made the leap to a peremptory order.

63 I pause here to observe that the arbitrator at para 10 of the second award stated that the Charterer had written to him on 1 April 2021 explaining that there was a misunderstanding. As confirmed by the Owner's counsel,[40] this was a reference to an email[41] on which the arbitrator was copied at 1:44pm just before he received at 1:48pm the email from Brown Marine asking that he review the email exchange and make whatever order he considered appropriate. The email was in fact addressed to Brown Marine and sought to clear up any misunderstanding by explaining to Brown Marine that Fichte's reference to not needing any further extension was to an extension beyond 9 April 2021. It was not a submission to the arbitrator concerning the making of the peremptory order. It preceded Brown Marine's email to the arbitrator sent at 1:48pm and hence the application such as it was. Brown Marine responded to it denying any misunderstanding at 4:37pm. It is obvious that these exchanges between Brown Marine and Fichte about whether an extension of time had been agreed could not obviate the need for there to be notice of what was sought and an opportunity to submit on whether what was sought should be given. Up until the peremptory order was made there was no specific notice concerning what was sought, and in particular the sanction sought, and no opportunity for Fichte to address the arbitrator on it, including on whether there was a default at all or, if there was one, whether there had been sufficient cause for it.

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40 Defendant's Further Written Submissions dated 22 December 2021 at para 3.

41 1st Affidavit of Tanjore at p 189.

64 In these circumstances, I make three separate and cumulative findings:

(a) There was in fact an agreement in substance to extend time, and there was no failure to serve the defence submissions within the time period as extended. Consequently, there was no default of the original order, and so no basis for any order to be made premised on such default.

(b) Even if there had been a default, the arbitrator failed to determine insufficiency of cause or, to put it more simply, that the default was not excusable. Thus, for this reason as well, there was no basis for any order to be made premised on a default without sufficient cause.

(c) In any event, by failing to give the Charterer an opportunity to address him orally or in writing before making his peremptory order, including on the question of sufficiency of cause, the arbitrator acted in breach of natural justice.

65 I then turn to the content of the peremptory order, namely its sanction. The sanction did not track the wording of Art 25 of the Model Law but instead barred the Charterer from raising any positive case by way of defence or counterclaim and from adducing any positive evidence in the matter. While on its face it seemed to leave open the possibility of the Charterer running a negative case, *ie* challenging the evidence of the Owner without providing its own contrary evidence, as things turned out the arbitrator accepted the Owner's request to proceed on a documents only basis, and did not offer the Charterer the opportunity even to respond to the Owner's additional evidence and submissions. The sanction imposed thus operated in practice not just as a bar to a positive defence but as an effective exclusion even of a negative defence. In all the circumstances, I find that the sanction imposed by the arbitrator exceeded his powers under Art 25 of the Model Law.

66 Moving forward to 9 April 2021, the arbitrator again did not give the Charterer the opportunity to address him orally or in writing on the reasons for the short delay in communicating its defence submissions. That opportunity would have potentially included addressing him on the applicable procedural law, whether he had a discretion not to enforce the sanction, and the relevance of the absence of prejudice to the Owner arising from the short delay.

67 The arbitrator appears to have believed that he had no discretion in the matter, and that the decision on whether to allow the late submission was entirely for the Owner to make. Thus, after receiving the Charterer's defence submissions at 11:26pm on 9 April 2021, he wrote to parties at 10:39am the next morning stating:[42]

> Given that the terms of the [peremptory] order were clear, I must abide by those terms and the submissions are now excluded unless the [Owner is] prepared to accept them into evidence.
>
> No doubt Brown Marine will let us know the [Owner's] decision in this regard.

68 It took Brown Marine fourteen days to take instructions on the Owner's decision and respond to the arbitrator with it. Unsurprisingly, the Owner decided not to accept the defence submissions into evidence.[43]

69 I hold that the arbitrator breached natural justice in making his decision on 10 April 2021 without giving the Charterer the opportunity to be heard. Further, his view that he had no discretion in the matter and had to exclude the Charterer's defence submissions unless the Owner agreed to their admission into evidence was wrong and did not accord with his powers under the Model

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42 1st Affidavit of Tanjore at p 211.

43 1st Affidavit of Tanjore at p 210.

Law. This error concerning his powers and how they should be exercised seems to have caused or contributed to his refusal to give the Charterer an opportunity to be heard. He perpetuated this error in his adamant assertions that he was bound to apply the sanction in his responses to Fichte's repeated objections. Natural justice required that he consider the reasons for non-compliance and hear Fichte on the question whether he should apply the sanction notwithstanding those reasons.

70 I have thus far assessed the arbitrator's conduct by reference to the Model Law, and that is sufficient for this matter. However, even for a London-seated arbitration under the UK Arbitration Act, the arbitrator would be expected to seek input from both parties before issuing any order and would have to consider the reasons for any default. In this connection, The Chartered Institute of Arbitrators, or CIArb as it is commonly referred to, has issued a helpful set of guidelines titled "Practice Guideline 14: Guidelines for Arbitrators on how to approach an application for a Peremptory and 'Unless' Orders and related matters" ("the Practice Guideline"). It explains how an arbitral tribunal seated in the UK should approach the issue of peremptory orders. Among the observations made in the practice guideline, two are relevant:

> 2.2.1 A "peremptory order" cannot be made initially at the time of the first procedural order of the tribunal dealing with a particular procedural step. Section 41(5) contemplates three stages; namely (i) an order or direction made by the tribunal; (ii) a failure by a party to comply with that order or direction "without showing sufficient cause" and (c) that then, and only then, should the tribunal make a peremptory order.
>
> …
>
> 2.2.3 The failure to comply must be without "sufficient cause". … This may require an arbitrator to give an opportunity to the party in apparent default to explain the reasons for its non-compliance…"

71 I conclude that the Charterer has succeeded in establishing that the peremptory order was made and enforced in breach of the fair hearing rule.

72 While it is not necessary to my decision to consider the equal treatment rule, I also find that this was breached. The arbitrator heard the Owner but not the Charterer when fixing the original timeline for the defence submissions, and only gave the Charterer 28 days to file its defence submissions, when the Owner had taken ten months from the first award to communicate its claim submissions. How he handled timelines thereafter also did not demonstrate even-handedness between the parties.

73 It may be that the arbitrator had already formed the view that the Charterer did not intend to participate in the second phase of the arbitration because it did not participate in the first phase. He should not have held onto this view once it became clear that the Charterer wished to participate, as shown by the appointment of Fichte. While it may not have been expressly explained to him why there was a difference of approach between the two phases, it should in any event have been obvious to him that the first phase and first award concerned an undisputed balance due to the Owner, while the second phase concerned claims that were very much disputed. Certainly, there was no reasonable basis on which to consider that the Charterer was seeking to delay proceedings in March and April of 2021 (although, to be fair to the arbitrator, he did not make any such finding, and it has only been in these proceedings that the Owner has argued that the Charterer's non-participation in the first phase justifies an inference that they were deliberately delaying the second phase).[44]

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[44] Defendant's Written Submissions dated 25 November 2021, at para 86.

Issue 3: Whether any breach of natural justice was connected to the making of the award and caused prejudice to the Charterer

74 It is obvious that the making of the peremptory order led to the arbitrator making the second award without receiving any evidence or submissions from the Charterer, not even in response to the Owner's further and additional submissions and evidence. It is also obvious that had the arbitrator given the Charterer the opportunity to address him on whether there had as yet been any default, or whether any default was with sufficient cause, he might well have not made the peremptory order.

75 The award on its face shows how the absence of submissions and evidence from the Charterer, all excluded by reason of the peremptory order, was connected to the making of the award: see in particular paras 26 to 42 of the second award.

76 The Owner has contended that the Charterer's failure to exhibit in these proceedings its defence submissions that were excluded by the arbitrator means that I am not able to find that their admission might have made a difference to the outcome. While the Charterer should have exhibited them for completeness, the absence from the record before me of those defence submissions does not lead to the inference that they were not material. Indeed, if they were obviously flimsy or immaterial one would imagine that the Owner would not have refused their admission into evidence when the arbitrator made it their decision and not his. I am fortified in my view that they were material by the evidence before me of Fichte repeatedly asking the arbitrator to reconsider their exclusion.

77 Accordingly, I also find that the breach of natural justice prejudiced the Charterer's rights.

Conclusion

78 The Owner invited me to remit this matter to the arbitrator under Art 34(4) of the Model Law as an alternative to setting aside. The Charterer did not agree to this course of action. I decline to exercise my power to remit. I do not exercise my discretion to remit because this is hardly a case of mere oversight in failing to give a party a reasonable opportunity to be heard on some aspect of a dispute. Rather, the peremptory order and the exclusion of the defence submissions seems to have been the product of a haste quite out of keeping with the time accorded to the Owner for its submissions. It is striking that not once did the arbitrator either ask for or consider input from the Charterer on the procedure to be adopted, the timetable to be imposed, reasons for any non-compliance or the content and application of any sanction. The Charterer's lack of confidence in the arbitrator to decide the matter fairly if remitted is not without reasonable basis.

79 In this case, hurry (demanded of one side but not the other) has indeed buried justice.

80 I therefore grant an order setting aside the entire second award, pursuant to s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law.

81 I will hear parties on costs.

Philip Jeyaretnam
Judge of the High Court

Ong Sing Huat, Kok Jia An Alwyn and Chia Kia Boon (Robert Wang & Woo LLP) for the plaintiff;
Bazul Ashhab, Chan Cong Yen Lionel (Chen Congren) and Chang Guo En Nicholas Winarta Chandra (Oon & Bazul LLP) for the defendant.
