IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 126

Suit No 657 of 2017
(Registrar's Appeal Nos 46 and 47 of 2018)

Between

Nippon Catalyst Pte Ltd

… *Plaintiff*

And

(1) PT Trans-Pacific Petrochemical Indotama
(2) PT Pertamina (Persero)

… *Defendants*

JUDGMENT

[Arbitration] — [Stay of court proceedings] — [Mandatory stay under International Arbitration Act]
[Civil Procedure] — [Service] — [Leave to serve out of jurisdiction]

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v
PT Trans-Pacific Petrochemical Indotama and another

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Audrey Lim JC
11, 18 and 19 April 2018

22 May 2018 Judgment reserved.

Audrey Lim JC:

Introduction

1 The plaintiff ("Nippon") brought two appeals against the first defendant ("TPPI") and the second defendant ("Pertamina"), respectively. The subject of the two appeals are as follows:

(a) RA 47/2018 ("the Arbitration Application") is an appeal against the assistant registrar's ("the AR") decision to grant a stay of proceedings of Suit 657 of 2017 ("the Suit") against TPPI in favour of arbitration under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA").

(b) RA 46/2018 ("the Jurisdiction Application") is an appeal against the AR's decision to set aside the *ex parte* order granting Nippon leave

to serve its originating process out of jurisdiction against Pertamina on the basis that Singapore is not the proper forum for the trial of the Suit.

Background facts

Parties and facts leading up to the Suit

2 Nippon is a company incorporated in Singapore, and is in the business of selling chemical products. TPPI and Pertamina are incorporated in Indonesia, and are both involved in the energy business. At present, Nippon owns about 4.46% of the shares in TPPI (as a result of a Composition Agreement, which I will return to later), while Pertamina is the largest single shareholder of TPPI, holding approximately 48.59% of TPPI shares.[1]

3 On 6 September 2005, Nippon and TPPI executed a Lease Agreement ("the LA") pursuant to which Nippon agreed to lease various catalysts ("the Catalysts") to TPPI to be installed in TPPI's refinery in Indonesia. These Catalysts are chemical substances that convert certain compounds into petroleum.[2] In return, TPPI would pay rent in accordance with an agreed schedule in the LA, which was set to expire on 15 March 2009.[3] Clause 2.2 of the LA states that Nippon retains title to the Catalysts,[4] and cl 11.1 provides that "[u]pon the termination of the Lease Term by expiration of time or otherwise, [TPPI]… shall surrender possession of the Catalysts to [Nippon] at such place in the Republic of Indonesia as [Nippon] and [TPPI] agree…".[5] Of particular

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1 Andreas Rialas' ("Andreas") affidavit at paras 1.2.5; Basya Giawarman Himawan's ("Basya") first affidavit at para 14.

2 Basya's first affidavit at paras 15–17.

3 Basya's first affidavit at para 16.

4 Lease Agreement in Basya's first affidavit at p 20.

5 Lease Agreement in Basya's first affidavit at p 27.

note is cl 14.2, which is an arbitration agreement clause, the salient parts of which state as follows:[6]

> (a) Any disputes arising out of or in connection with this Lease or its performance, including the validity, scope, meaning, construction, interpretation or application hereof (a "Dispute") shall to the extent possible be settled amicably by negotiations and discussions between the Parties involved in the Dispute.
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> (b) Any such Dispute not settled by amicable agreement within thirty (30) days of receipt by a Party of notice of a Dispute, shall be finally and exclusively settled by arbitration in Singapore before three (3) arbitrators under the arbitration rules of the International Chamber of Commerce (the "ICC") then in effect (the "Rules"). Such arbitration shall be conducted in English.
>
> [underline in original]

4 TPPI's refinery subsequently ceased operations after February 2008, and it defaulted on the rent payments under the LA.[7] In 2009, TPPI decided to re-commence operations of the refinery, which led Nippon and TPPI to enter into a "Heads of Agreement" ("the HA") to extend the LA to 31 December 2010.[8] The HA was stated to be valid and effective from 16 March 2008.[9] It had the effect of reducing the sums due and owing from TPPI in respect of the rent payments, and also introduced an amended schedule of payment.[10] Further, cl 7 of the HA states that all the terms and conditions of the LA are to remain in full force and effect unless expressly provided.[11] As is the case of the LA, cl 11 of the HA provides that any disputes arising out of or in connection with the HA would be settled amicably, failing which the dispute would be finally and

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6 Lease Agreement in Basya's first affidavit at p 29.

7 Basya's first affidavit at para 19.

8 Basya's first affidavit at para 19.

9 Heads of Agreement in Basya's first affidavit at p 40.

10 Heads of Agreement in Basya's first affidavit at pp 39 and 42.

11 Heads of Agreement in Basya's first affidavit at p 40.

exclusively settled by arbitration in Singapore. Hereinafter, the LA and the HA will be referred to collectively as "the Lease".

5 Around December 2011, TPPI's refinery was again shut down as TPPI faced financial difficulties.[12] On 11 December 2012, TPPI entered into a Composition Agreement ("the CA") with various creditors, including Nippon. The CA is akin to a scheme of arrangement,[13] and it was endorsed by the Commercial Court of Jakarta Pusat on 27 December 2012. At that time, Nippon had a total claim of over USD$50m against TPPI. This comprised sums due and owing under the Lease, as well as rent for the Catalysts for the period from 1 January 2011 to 5 November 2012.[14] Pursuant to the CA, Nippon's claim against TPPI was converted into shares amounting to about 4.46% of TPPI's shares, which were issued to Nippon around 10 December 2014.[15] For our purposes, cl 8 of the CA is noteworthy. It provides as follows:[16]

> *Each and all agreements remaining in effect between TPPI and its creditors before the PKPU decision is to be terminated, except those strictly confirmed to remain in force by TPPI* and in respect of the creditors, the terms and conditions in the Reconciliation Plan and the supporting documents will apply.
>
> If it is considered necessary by TPPI to *re-apply* an agreement, re-arrangement will be sought on the terms and conditions subject to this Reconciliation Plan in a *new agreement*.
>
> [emphasis added]

6 In relation to this clause, Nippon and TPPI agree that there are two ways in which an agreement preceding the CA can either be resurrected or treated as subsisting.[17] First, if an agreement was still in force at the time that the CA was

12 Basya's first affidavit at para 22.

13 Basya's first affidavit at para 14.

14 Andreas' affidavit at para 2.4.2.

15 Statement of Claim at para 2.2.3.

16 Basya's first affidavit at p 56.

executed, and if TPPI strictly confirms that the said agreement remains in force, then the said agreement continues to bind the parties to it. Second, TPPI may re-apply an agreement that is no longer in force at the time that the CA was entered into, subject to the relevant parties' consent.

Commencement of the Suit

7 After the CA was executed, Nippon and TPPI attempted but failed to conclude a new agreement for TPPI's continued use of the Catalysts. Nevertheless TPPI resumed operations and continued to use the Catalysts. Nippon claims that TPPI continued to use the Catalysts without its consent, and pursued the following causes of action against TPPI and Pertamina:

(a) Conversion and/or detinue (collectively, "the Conversion Claim"):[18] Nippon claims that TPPI converted the Catalysts for its own use. It averred that after the expiry of the Lease on 31 December 2010, Nippon was entitled to the re-possession of the catalysts, but TPPI had unlawfully retained them from 1 January 2011 and for its own use.

(b) Joint tortfeasor ("the Joint Tortfeasor Claim"):[19] Nippon claims against Pertamina as a joint tortfeasor for having authorised, procured or instigated the commission of the tort of conversion and/or detinue by TPPI. Nippon avers in the alternative that Pertamina participated in a joint enterprise or common design in committing those torts.

(c) Unlawful conspiracy ("the Conspiracy Claim"):[20] Nippon claims that TPPI and Pertamina participated in an unlawful conspiracy to take

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17 Minute Sheet (11 April 2018) at pp 3–4.

18 Statement of Claim at paras 3–3.1.6.

19 Statement of Claim at paras 3.2–3.2.5.

advantage of Nippon's property without providing fair value or due consideration. Nippon further avers that TPPI and Pertamina ignored Nippon's demands to cease using the Catalysts and to pay for such unauthorised use, and their continuing obligation to return the Catalysts pursuant to the Lease and/or the CA.

8 At this juncture, I pause to note that although Nippon alleges that TPPI is obliged to surrender possession of the Catalysts from 31 December 2010, Nippon claims damages only for losses from 6 November 2012 onwards. This is because Nippon and TPPI has settled Nippon's claim for the rental of the Catalysts from 1 January 2011 to 5 November 2012 under the CA.[21] In other words, the Suit concerns events that ostensibly occurred after the expiry of the Lease. As will be seen, a bone of contention between Nippon and TPPI is whether this means that Nippon's claims in the Suit fall beyond the purview of the clause enjoining them to arbitrate disputes in connection with the Catalysts.

9 As both TPPI and Pertamina are located in Indonesia, Nippon sought and obtained an *ex parte* order granting it leave to serve out of jurisdiction. Subsequently, TPPI and Pertamina took out their respective applications, both of which were granted by the AR. With respect to TPPI's Arbitration Application, the AR noted that there was a *prima facie* case that TPPI and Nippon had treated the Lease as binding on them while they attempted to negotiate a new agreement. As for Pertamina's Jurisdiction Application, the AR found that the torts took place in Indonesia, and that Indonesia was the proper forum for hearing the dispute.

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[20] Statement of Claim at paras 4–4.1.4.

[21] Statement of Claim at para 2.2.3.

10 Nippon has appealed against the AR's decision on both applications. I will first address TPPI's Arbitration Application before dealing with Pertamina's Jurisdiction Application.

TPPI's Arbitration Application

11 It is undisputed that the issue of whether a stay should be granted in favour of arbitration applies only in relation to the Conversion Claim, and not to the Joint Tortfeasor Claim and the Conspiracy Claim. Nippon and TPPI agree that the arbitration agreement clause would not cover the latter two claims.[22] In any case, Pertamina is not a party to the Lease and is thus not bound to its terms, let alone the arbitration agreement clause.

12 As a preliminary point, I note that Nippon and TPPI are divided as to whether cl 14.2 of the LA or cl 11 of the HA is the applicable provision where disputes arising from the lease of the Catalysts are concerned. Nippon submits that cl 14.2 of the LA was replaced by cl 11 of the HA, highlighting that the HA's preamble provides that Nippon and TPPI have agreed to amend the LA pursuant to the terms of the HA.[23] But as TPPI points out,[24] cl 7 of the HA states that all terms in the LA remain operative *unless* expressly amended by the HA.

13 In my judgment, whether cl 14.2 of the LA or cl 11 of the HA is the applicable provision is immaterial and does not affect my findings on the Arbitration Application. It is Nippon's position that the LA expired on 31 December 2010 as it had been extended by the HA.[25] Nippon also agreed that a dispute "arising out of or in connection with" the Lease would include a dispute

22 Minute Sheet (11 April 2018) at p 9.

23 Nippon's Written Submissions at para 3.2.1

24 TPPI's Further Submissions at para 4.

25 Minute Sheet (11 April 2018) at p 2.

as to whether the Lease was valid, and this was to be determined by an arbitral tribunal. Likewise whether or not the Lease has expired is an issue that falls within the scope of the arbitration agreement clause and is to be determined by an arbitral tribunal.[26] The courts have taken a generous approach towards construing the scope of an arbitration agreement clause (see [27] and [30] below). Therefore, although cl 11 of the HA does not include the words "including the validity, scope, meaning, construction, interpretation or application [of the lease]", such matters would fall within the provision. I will hereinafter refer to the arbitration agreement clauses under the LA and the HA as the "Arbitration Clause".

General principles on staying in favour of arbitration

14 The parties do not dispute that the question of whether a stay ought to be granted is to be determined under the IAA (as opposed to the Arbitration Act (Cap 10, 2002 Rev Ed)).[27] In this regard, the law on whether a stay should be granted under s 6 of the IAA is well-established. The Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [63] (and more recently reiterated in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 ("*Dyna-Jet*") at [11]) held that the court should grant a stay in favour of arbitration if the applicant can establish a *prima facie* case that:

(a) there is a valid arbitration agreement between the parties to the court proceedings;

(b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and

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26 Minute Sheet (11 April 2018) at pp 9–10.

27 Nippon's Written Submissions at para 3.1.1; TPPI's Written Submissions at para 12.

(c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

15 It should be emphasised that the court applies only a *prima facie* standard of review at this stage of proceedings. This does not mean that the court turns a "blind eye to obvious drawbacks in [an applicant's] case" (*Dyna-Jet* at [15]). But this also means that the court does not go into the full merits of the parties' cases. This flows from the "recognition and enforcement of the *kompetenz-kompetenz* principle", and the court will "stay the proceedings in favour of arbitration except in cases where the arbitration clause is *clearly* invalid or inapplicable" [emphasis in original] (*Tomolugen* at [68]).

16 Nippon, in arguing against a stay in favour of arbitration, contends that the Arbitration Clause is no longer valid or operative and, in any event, the dispute between it and TPPI does not fall within the scope of the Arbitration Clause.

The continued operation of the Lease

Whether the Lease continues to bind the parties

17 TPPI's primary case is that that the Arbitration Clause continues to bind Nippon and TPPI because cl 8 of the CA entitled it to confirm the continuation of the Lease. To that end, it avers that its confirmation can be evinced from the parties' correspondence and its conduct in entering into the tolling agreements that required the use of the Catalysts.[28] On the other hand, Nippon argues that a stay in favour of arbitration should not be granted because the Arbitration Clause is no longer in effect. Nippon's case is that TPPI could not have used

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[28] TPPI's Written Submissions at para 44; TPPI's Further Submissions at para 6; Minute Sheet (11 April 2018) at pp 6–7.

cl 8 of the CA to confirm the Lease because the clause does not have the effect of reviving a contract that has already expired.[29] Even if cl 8 of the CA does allow TPPI to do so, it requires TPPI to "strictly confirm" the continuation of the Lease, and there is no evidence of such strict confirmation.[30]

18 In my judgment, I find that TPPI has established a *prima facie* case that it confirmed the Lease and that both TPPI and Nippon treated the Lease as continuing, and that the Arbitration Clause continues to bind the parties. The CA (of which Nippon was a party) provided that TPPI was to enter into a tolling agreement so that TPPI could continue to operate its refinery, and under which Pertamina would supply feedstock to TPPI to be processed in the latter's refinery.[31] This in turn necessitated the use of the Catalysts. In total, TPPI entered into four tolling agreements between 2013 and 2017,[32] and the execution of these tolling agreements is *prima facie* evidence that TPPI has confirmed the continuation of the Lease by conduct.

19 The above must be viewed against the fact that Nippon knew that TPPI entered into the tolling agreements and did not ask for the return of the Catalysts from December 2012 to August 2016.[33] Additionally, it is noteworthy that Mr Andreas Rialas ("Mr Rialas") was on TPPI's board of directors from 25 March 2015 to 3 June 2016, and voted in favour of a board resolution approving TPPI's entry into a fresh tolling agreement in October 2015.[34] This is significant because Mr Rialas is the chief investment officer of The Argo Group Ltd, and

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29 Nippon's Written Submissions at para 3.3.4.

30 Nippon's Written Submissions at para 3.4.1.

31 Basya's first affidavit at paras 25 and 28.

32 Basya's first affidavit at paras 25–27.

33 Basya's second affidavit at paras 6–7.

34 Basya's second affidavit at para 7.

is the fund manager of various Argo funds that control all of Nippon's shares.[35] That he voted in *favour* of TPPI entering into a tolling agreement supports the inference that Nippon was content to let TPPI use the Catalysts under the Lease while the parties negotiated a new lease agreement.

20 But Nippon objects to this analysis, averring that Mr Rialas was not Nippon's nominee director. They contend that he was instead the nominee director of Argo Capital BV and Argo Fund Ltd, neither of which owns Nippon.[36] They also seek to downplay the significance of Mr Rialas voting in favour of TPPI entering into a fresh tolling agreement by pointing out that he had a duty to vote in the best interests of TPPI.[37] I do not think that these submissions bring Nippon very far. It may be true that Mr Rialas was not strictly speaking Nippon's nominee director in TPPI. But one cannot ignore the fact that he was the manager of funds that controlled all of Nippon's shares. Further, while I accept that Mr Rialas had a duty to act in TPPI's best interests, the point remains that Nippon did not demand the return of the Catalysts at that time. Therefore, the *prima facie* evidence is that Nippon knew and acquiesced to TPPI using the Catalysts.

21 TPPI's act of entering into the tolling agreements must also be assessed against the backdrop of the parties' correspondence during the material period. From the correspondence, it appears that Nippon itself took the position that the Lease continued to operate while the parties negotiated a new lease agreement. In this regard, the following correspondence between the parties as they negotiated on a new lease are noteworthy:[38]

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35 Andreas' affidavit at para 1.1.1.

36 Nippon's Further Submissions at paras 3.1.1–3.1.2.

37 Nippon's Further Submissions at para 3.1.5.

38 TPPI's Written Submissions at para 48.

(a) On 8 November 2013, Nippon stated in an e-mail to TPPI that the existing Lease was "*still in full force and effect* and will remain so until the [CA] has been implemented" [emphasis added].[39] The CA was executed in December 2012, and it is clear from this e-mail that Nippon treated the Lease as still being operative notwithstanding that the CA had ostensibly terminated all of the parties' pre-existing agreements.

(b) On 18 February 2014, in another e-mail from Nippon to TPPI about the parties' then-ongoing negotiations, Nippon again treated the Lease as still being in effect. It made extensive reference to an "existing lease" and referred to provisions under the Lease that it sought to incorporate into the new lease that was being negotiated.[40]

(c) On 13 August 2014, Nippon sent to TPPI a letter captioned "Catalyst Lease". The letter sought from TPPI payments for use of the Catalysts during the "Pertamina tolling period from November 2013 to May 2014".[41] As no new lease had been entered into between the parties at that time, the title "Catalyst Lease" can only refer to the Lease.

(d) On 8 August 2016, Nippon sent to TPPI another letter captioned "Catalyst Lease – Notice of Cessation of use of Catalyst".[42] Once again, no new lease had been agreed upon by the parties when this letter was sent. The phrase "Catalyst Lease" can hence only refer to the Lease. In this letter, Nippon threatened to take legal action against TPPI if the latter continued to use the Catalysts. It is also clear from this letter that

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39 Basya's first affidavit at p 95.

40 Basya's first affidavit at pp 98–99.

41 Andreas' affidavit at p 190.

42 Basya's first affidavit at pp 102–103.

Nippon took the position that *TPPI* had confirmed the continuation of the Lease under the CA:

> [Nippon] notes that *TPPI has elected* since the PKPU and the subsequent tolling arrangement beginning November 2013 to utilize the Catalyst. *By doing so TPPI has impliedly consented to the continuation of the Lease on all its applicable commercial terms until such time as any other written agreement is made between TPPI and [Nippon].* [emphasis added]

(e) On 31 January 2017, Nippon issued an invoice to TPPI for "arrears" and "rent" due to Nippon for the "Lease of Catalyst" for the period "November, 2013 up to and including May 21, 2013 and November 2015 to January 2017".[43] Again, the "Lease of Catalysts" can only refer to the Lease since the parties have not executed a new lease.

22 The above suggests that Nippon viewed the Lease as still being in effect, and that it saw itself as being entitled to payments under the Lease. Nippon, however, contends otherwise, arguing that its correspondence to TPPI does not support a finding that it treated the Lease as being operative. Among other things, it highlights an e-mail dated 24 April 2014 wherein it wrote that it was "quite outrageous that TPPI [was] using the Catalysts *without a formal agreement*" [emphasis added].[44] Nippon also points out that its invoice dated 31 January 2017 seeks payment from TPPI for the use of the Catalysts at a rate of US$875,000 per month, which is less than the rental rate under the Lease. This is not disputed by TPPI, and according to Nippon, this shows that it was not claiming rent under the Lease.[45]

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43 Basya's first affidavit at pp 105–106.

44 Andreas' affidavit at p 187; Nippon's Written Submissions at para 3.4.11(d).

45 Minute Sheet (11 April 2018) at p 5.

23 While the e-mail dated 24 April 2014 does suggest that Nippon did not treat the Lease as being operative, one has to analyse the evidence holistically and consider all the other pieces of correspondence where it treated the Lease as subsisting. In particular, I note its letter dated 8 August 2016 (see [21(d)] above) wherein it set out clearly its position that TPPI had "impliedly consented to the continuation of the Lease" under the CA. Further, although the rate of US$875,000 per month was lower than the rental rate under the Lease, it is equally impossible to ignore the fact that the invoice was for the "Lease of Catalyst" and for "arrears" and "rent" (see [21(e)] above). Indeed, there is no evidence to show that "arrears' and "rent" can reasonably mean anything else except the rent due under the Lease.

24 Accordingly, when examined against the fact that TPPI continued to use the Catalysts pursuant to the tolling agreements that it had entered into with Nippon's knowledge, Nippon's correspondence to TPPI constitutes *prima facie* evidence that the parties treated the Lease (and hence the Arbitration Clause) as binding on them. It also shows *prima facie* that there was an understanding between the parties that the existing Lease would continue to govern TPPI's use of the Catalysts until a new agreement was put in place. Nippon took the position that the Lease continued to operate, and that it was entitled to claim rent under the Lease. It cannot now come to court and blow hot and cold, deciding that the Lease is no longer operative simply because it does not wish to arbitrate.

25 At this juncture, I pause to address Nippon's contention that TPPI was not entitled to confirm the continuation of the Lease under the CA because the Lease had expired in December 2010 and was no longer "remaining in effect" when the CA was executed.[46] This argument ignores the evidence which *prima*

facie shows that the parties treated the Lease as continuing up to the point that the CA was entered into. First, as I have examined above, Nippon's argument runs against the grain of its correspondence to TPPI, where it took the position that TPPI had elected to continue the Lease even after the CA had been executed. Second, Nippon has adduced no evidence contradicting TPPI's averment that the parties envisioned that TPPI would continue using the Catalysts even after the Lease had formally expired.[47] On the contrary, I observe that cl 15.2 of the LA (which was not modified by the HA) provides for the possibility of TPPI holding on to the Catalysts after the Lease period had expired, and that the terms of Lease would continue to apply in such a situation.[48] Third, although Nippon claims that the Lease expired on 31 December 2010,[49] the evidence is that it did not demand the return of the Catalysts until 28 September 2012,[50] which is almost two years after the Lease had formally expired.

26 For the above reasons, I find that the Lease and the Arbitration Clause *prima facie* continue to operate to bind the parties. The parties do not dispute that whether the Lease remained valid is matter which fell within the provision of the Arbitration Clause and is to be determined by an arbitral tribunal. I reiterate – at this point, the court is not tasked to examine the full merits of the parties' case but applies only a *prima facie* standard of review.

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46 Nippon's Written Submissions at para 3.3.4.

47 Basya's first affidavit at para 18.

48 Lease Agreement in Basya's first affidavit at p 30.

49 Andreas' affidavit at para 2.3.6.

50 Andreas' affidavit at para 2.3.8; Minute Sheet (11 April 2018) at p 3.

Whether the dispute falls within the scope of the Arbitration Clause

27 I now examine whether the present dispute (*ie*, the Conversion Claim) falls within the scope of the Arbitration Clause. The Court of Appeal in *Tomolugen* at [108] set out a two-stage process in considering whether a dispute is covered by an arbitration agreement. First, the court must determine what the matters are in the court proceedings. Second, the court must ascertain whether the matters fall within the scope of the arbitration clause on its true construction. As for the approach to be taken in construing arbitration clauses, the Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen Oil*") noted at [20] that the court takes a "generous approach towards construing the scope of an arbitration clause".

28 It is common ground that the Arbitration Clause captures disputes concerning the validity of the Lease. The parties also agree that the question of whether and when the Lease expired is also caught by the clause.[51] I add only that Art 16 of the UNCITRAL Model Law on International Commercial Arbitration (which has the force of law in Singapore by virtue of s 3 of the IAA) confers on an arbitral tribunal the jurisdiction to "rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement".

29 Nippon maintains that the Conversion Claim falls beyond the ambit of the Arbitration Clause because the Conversion Claim is in tort and the relief it seeks are unconnected to the Lease. For instance, it highlights that it is claiming damages at the rate of only US$1.25m a month, whereas the Lease provides for rent at the rate of US$2.25m a month.[52] It also notes that the Lease does not

[51] Minute Sheet (11 April 2018) at pp 9–10.

entitle it to claim the market value of the Catalysts, which it seeks from TPPI in the alternative.[53]

30 In my judgment, Nippon's action against TPPI is in substance intricately tied to the Lease, and it is irrelevant that its causes of action are framed in tort rather than contract. The Court of Appeal in *Larsen Oil* at [12]–[14] and [19] (and referring to its previous decision in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732) recognised that in construing arbitration clauses generously, words such as "any dispute" are wide enough to include any matter related to the contract even if the underlying action is based in tort. As the Court of Appeal stated in *Tomolugen* at [125] and [126], "the court must consider the underlying basis and true nature of the issue or claim, and is not limited solely to the manner in which it is pleaded" and emphasised the importance of identifying the "substance of the controversy".

31 The fact that Nippon's claim is intrinsically tied to the Lease is apparent from its Statement of Claim ("the SOC"), where it is clear that it is relying on its rights under the Lease in its Conversion and Conspiracy Claims. For instance, in paras 2.1.6 and 3.1.2 of the SOC, Nippon claims that it was the owner of the Catalysts and that it is entitled to immediate possession of them "since the expiry of the Lease Agreement on 31 December 2010". Additionally, in para 3.1.3 of the SOC, Nippon states that "[f]rom 1 January 2011" TPPI has unlawfully retained the Catalysts and used them as if they were its own without Nippon's consent. In para 3.1.4 of the SOC, Nippon claims that TPPI is under a continuing legal obligation to return the Catalysts "following the expiry of the [Lease]". The references to Nippon's rights under the Lease are repeated in the

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52 Nippon's Further Submissions at paras 2.2.5–2.2.6.

53 Nippon's Further Submissions at para 2.2.10.

paragraphs concerning the Conspiracy Claim (see *eg*, para 4.1.3(c)–(d) of the SOC).

32 In the same vein, that Nippon is limiting its claim to the period *after* 5 November 2012[54] does not change the *premise* of Nippon's cause of action, which is that TPPI failed to return the Catalysts after the expiry of the Lease period. In seeking to make a claim only from 6 November 2012, Nippon was merely limiting its *relief*. Indeed, it had no choice but to do so because the debt owed to it by TPPI from 1 January 2011 and 5 November 2012 already had been compromised and settled by way of the CA (as Nippon acknowledged in para 2.2.3 of the SOC).

33 I therefore find that the Conversion Claim falls within the scope of the Arbitration Clause.

The survival of the Arbitration Clause

34 The above is sufficient to dispose of the question of whether there was a valid arbitration agreement. Nevertheless, for completeness, I proceed to examine TPPI's alternative case that even if the Lease had expired on 31 December 2010, the Arbitration Clause nevertheless applies to capture Nippon's claim (particularly the Conversion Claim) against TPPI.

35 In this regard, TPPI submits that the Arbitration Clause is applicable even if the Lease is found to have been terminated by the CA. To this end, it argues that Nippon's claim is in substance one of TPPI "holding over" the Catalysts from the expiry of the lease period. It points out that cl 15.2 of the LA expressly provides that the terms under the LA continue to apply during any

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[54] Statement of Claim at para 3.2.6.

"holding over" period, and thus the Arbitration Clause continues to apply till today because it continues to hold on to the Catalysts.[55]

36 I start by noting that an arbitration clause can survive the termination of the main contract. As noted in Gary Born, *International Commercial Arbitration, Vol I* (Wolters Kluwer, 2nd Ed, 2014) at pp 888–889:

> The separability presumption is also a cogent explanation for an arbitration clause's survival, as a substantive matter, after mutually-agreed termination of the underlying contract. As the Swiss Federal Tribunal has reasoned:
>
> > "[T]he arbitration agreement does not necessarily share … the outcome of the main contract … [T]his also applies where the parties terminate the principal contract by mutual agreement, but in that case, as a general rule, one should accept that insofar as the parties have not expressly provided otherwise, they also intend to retain their arbitration agreement for disputes concerning the consequences of the termination of the contract."
>
> That is, as a substantive matter, the arbitration agreement not only might not, but virtually always will not, terminate with the termination of the underlying contract… Rather, the parties' intention will presumptively be that they do not intend to terminate their arbitration agreement, or to permit unilateral termination of that agreement, but rather to leave the arbitration agreement in place to resolve *whatever disputes that may subsequently come to light concerning the past performance* of their contract or the *termination* of that contract.
>
> … As a practical matter, commercial parties virtually never intend to terminate an arbitration agreement that they have concluded; *they instead intend to terminate their underlying contract while leaving their agreed dispute resolution mechanism in place for any disputes that may in the future emerge from their contract while it was in effect.*
>
> [emphasis added]

37 Nippon does not dispute this principle and its applicability to the present case.[56] Certainly, it is noteworthy in this connection that cl 14.2(f) of the LA

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55 TPPI's Further Submissions at paras 7–13.

provides that the Arbitration Clause "shall survive the termination of [the Lease] by whomsoever and due to whatsoever reason".[57]

38 However, Nippon also submits that a surviving arbitration agreement can only apply to disputes that arises during the period that the main contract was still in force.[58] Nippon thus contends that the Arbitration Clause can only cover disputes concerning events that occurred before the Lease ceased to have effect. According to Nippon, the Arbitration Clause is inapplicable in this case because its claim in the Suit pertains to the period after 5 December 2012, which is about two years after the Lease had expired.

39 I disagree. As TPPI notes, Nippon's claim is at heart about TPPI's retention of the Catalysts immediately after the Lease period had expired or terminated. Put another way, it is about TPPI's failure to meet its obligations under cl 11 of the LA to return the Catalysts "upon the termination of the Lease Term".[59] TPPI further points out that cl 15.2 of the LA provides for such a situation, and the provision states that "[TPPI's] obligations under [the Lease] (whether express or implied) bind [TPPI] during the Lease Term for each item of the Catalysts and *any period of holding-over*" [emphasis added].[60] It thus follows that the current dispute is one that arose from when the Lease was still in effect, and is one that is intricately connected to the Lease. Here, I note Nippon's objection that the term "holding over" is typically applied to leases of real property.[61] But it is clear that the phrase "holding over" is not used as a term

56 Nippon's Written Submissions at para 3.2.3.

57 Lease Agreement in Basya's first affidavit at p 29.

58 Nippon's Written Submissions at para 3.2.3.

59 Lease Agreement in Basya's first affidavit at p 27.

60 Lease Agreement in Basya's first affidavit at p 30; TPPI's Further Submissions at para 10.

61 Nippon's Further Submissions at para 2.2.12.

of art under cl 15.2 of the LA, but is instead used to refer to the situation where TPPI holds on to the Catalysts after the expiry of the Lease period.

40 The cases relied upon by Nippon for the proposition that disputes arising after the expiry of the main contract are beyond the reach of an arbitration clause can be distinguished.[62]

(a) In *Linglong Americas, Inc v Horizon Tire, Inc* 666 Fed Appx 445 (6th Circuit, 2016), the parties entered into a "Collaboration Agreement" under which it was agreed that the defendant ("Horizon") would be the sole distributor in America of tires produced by the plaintiff ("Linglong"). The Collaboration Agreement contained an arbitration clause, and it subsequently expired in 2011. Despite its expiry, the parties continued their collaboration until a dispute arose around 2014 when it was discovered that Linglong was selling its own tires in America. Horizon brought a suit against Linglong, which sought to compel arbitration under the Collaboration Agreement. The Sixth Circuit dismissed Linglong's application (to dismiss or stay for arbitration Horizon's counterclaim to a separate claim filed by Linglong) as Horizon's claims were not based on any rights created by the Collaboration Agreement. This is because Horizon had unequivocally and irrevocably waived any claim based on a continuing obligation created by that agreement. After the Collaboration Agreement had expired, the parties' dealings, and the ensuing dispute, were not based on the Collaboration Agreement. Hence Horizon's claim against Linglong was not caught by the arbitration clause.

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62 Nippon's Written Submissions at paras 3.2.4–3.2.5.

(b) In *Local 703, International Brotherhood of Teamsters v Kennicott Bros Co* 771 F.2d 300 (7th Circuit, 1985), the defendant ("*Kennicott*") and the plaintiff, a union, entered into a collective-bargaining agreement that expired in October 1981. The parties entered into negotiations for a replacement agreement but failed to reach an agreement before a dispute arose due to the discharge of one of Kennicott's employees. Relying on the arbitration clause in the expired collective-bargaining agreement, the union sought to compel arbitration of the dispute. The Seventh Circuit court dismissed the union's application, noting that the "events triggering the grievances… occurred more than six months after the [collective-bargaining agreement] expired".

(c) In *BCY v BCZ* [2017] 3 SLR 357, the issue there was that the arbitration agreement remained subject to contract, and the court found that no binding arbitration agreement was formed before the main contract was concluded.

41 In the present case, neither party is relying on a contract that has not been executed or concluded (*ie*, a new lease agreement). Moreover, even if the Lease did not continue to have effect after 31 December 2010, Nippon's Conversion Claim emerges from the Lease and concerns the immediate consequences of the termination of the Lease. Nippon's right to immediate possession of the Catalysts was a right borne out of cl 11.1 of the LA, which survived the expiration of the Lease itself. Unlike *Kennicott*, this was not a case in which there were months between the expiration of the main contract and "the events triggering the grievances". In the present case, "the events triggering the grievances" (*ie*, the right to immediate possession and any unpaid rent) arose

when Nippon claimed that the Lease had expired, even if Nippon may have chosen to sue or bring an action only in 2017.

42 For the above reasons, even if the Lease has been terminated and is no longer binding on the parties, I find that the Arbitration Clause has *prima facie* survived the termination and continues to apply. Nippon argues that such a conclusion means that it would have to arbitrate *every* dispute arising from TPPI's continued possession of the Catalysts, even if legal proceedings are initiated years after the expiry of the Lease period. This argument is neither here nor there. Nippon and TPPI negotiated the wording of the Arbitration Clause as commercial parties with equal bargaining power. It does not lie in Nippon's mouth to argue that it should not be bound to the effect of the said clause.

Conclusion on TPPI's Arbitration Application

43 In the premises, I find that TPPI has established a *prima facie* case that there was a valid arbitration agreement between Nippon and TPPI on the Conversion Claim, and that the claim fell within the scope of that agreement which was not null and void, inoperative or incapable of being performed. The Conversion Claim is thus subject to the mandatory stay under s 6 of the IAA. I add that although the Conspiracy Claim and Joint Tortfeasor Claim are not covered by the Arbitration Clause, and Nippon had joined Pertamina in the Joint Tortfeasor Claim and brought the Conspiracy Claim against both TPPI and Pertamina, this would not take the Conversion Claim outside the ambit of the Lease and Arbitration Clause (see *Tomolugen* where a similar situation arose with regard to a suit with various claims and multiple defendants).

Pertamina's Jurisdiction Application

44 Pertamina's Jurisdiction Application comprises three grounds.[63] First, it seeks to discharge the *ex parte* order granted to Nippon to serve out of jurisdiction. Second, and in the alternative, it seeks to stay Nippon's action against it on the basis that Singapore is not the proper forum for the dispute. Third, and also in the alternative, it urges the court to stay proceedings on the basis of the court's inherent power of case management. The AR granted Pertamina's Jurisdiction Application on the first ground and discharged the *ex parte* order granting Nippon leave to serve out of jurisdiction.

General principles

45 I begin by considering whether the *ex parte* order granting Nippon leave to serve out of jurisdiction should be set aside or whether a stay of proceedings should be granted on the basis that Singapore is not the proper forum. The requirements for service out of jurisdiction are well-established (*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26]. First, the plaintiff's claim must come within one of the heads of claim in O 11 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). Second, it must have a sufficient degree of merit. Third, Singapore must be the proper forum for the trial of the action.

46 With respect to the last requirement, it is trite that the applicable test is the *Spiliada* test as laid down in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. In *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("*Accent Delight*"), the Court of Appeal noted at [68] that there are two stages to the *Spiliada* test. First, the court determines whether there is *prima facie* some other available forum that is more appropriate

63 HC/SUM 4115/2017.

for the case to be tried. Second, if so, the court will stay the action (or not grant leave to serve out of jurisdiction, as the case may be) unless justice requires that the Singapore courts exercise their jurisdiction. In determining whether Singapore is the most appropriate forum, the court looks at the following incidences or connections (*Accent Delight* at [71]):

> [F]irst, the personal connections of the parties and the witnesses; second, the connections to relevant events and transactions; third, the applicable law to the dispute; fourth, the existence of proceedings elsewhere (that is, *lis alibi pendens*); and fifth, the "shape of the litigation", which is shorthand for the manner in which the claim and the defence have been pleaded.

47 It should be emphasised that none of these factors are determinative, and the court does not engage in a box-checking exercise to see which jurisdiction has the largest number of "points of contact" with the dispute (*Accent Delight* at [70]). The court ultimately seeks to determine the "forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends" (*Accent Delight* at [72]).

48 On this note, the Court of Appeal in *Zoom Communications* has held at [77] that "the substance of the *Spiliada* test does not differ regardless of whether the inquiry on the proper forum takes place as part of a challenge to the existence of the local court's jurisdiction, or as part of an application for a stay of proceedings on improper forum grounds". The difference lies in the burden of proof. Where a plaintiff seeks leave to serve out of jurisdiction, the burden lies on him to prove that Singapore is the proper forum. This is so even when the defendant challenges the jurisdiction of the Singapore courts in setting aside an order granting leave to serve out of jurisdiction. However, where a defendant seeks to stay proceedings on improper forum grounds, the burden is on him to show that Singapore is *not* the proper forum. That being said, in the final

analysis, the court will "collapse the issue of proper forum into one question considered in the round" (*Zoom Communications* at [71], [77] and [80]).

Whether Nippon's claims fall within O 11 r (1)(f)(ii) and (p)

49 Nippon argues that the *ex parte* order should not have been set aside because it falls within O 11 r (1)(*f*)(ii) and (*p*) of the ROC.

50 I start with O 11 r (1)(*f*)(ii), which provides that service out of Singapore is permissible with leave if:

> the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission where occurring

51 Nippon argues that its claim fails within this rule (*ie*, that there is "damage suffered in Singapore") because it is a Singapore entity with a bank account in Singapore, and because all payments by TPPI were to be made to its Singapore bank account.[64] In my judgment this, in itself, is insufficient to bring it within O 11 r (1)(*f*)(ii). The fact that a plaintiff has a bank account in Singapore that it uses to transact with a defendant, which then fails to make payments into that bank account, does not necessarily lead to the conclusion that the plaintiff thus suffers damage in Singapore.

52 In *Metall Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, which Nippon relies on, the English Court of Appeal stated (at 437) that whilst it is not necessary that all the damage must be sustained within the jurisdiction, there must be some "significant" damage that is suffered in the jurisdiction. In that case, the Court found (at 449) that the plaintiff had suffered significant damage within the jurisdiction (*ie*, London). Not only did it not

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64 Nippon's Letter dated 19 April 2018 at para 9.

receive the ledger credit payment which should have been made in London, it also did not receive warrants which should have been delivered in London and suffered the detrimental closing out of its accounts in London. Moreover, security that should have been available to the plaintiff in London was wrongly charged in London and paid out of London. In the present case, Nippon has not explained in any of its affidavits how it has suffered damage, let alone significant damage, just because TPPI had failed to make the payments to its Singapore bank account.

53 In this regard, Pertamina refers to *Alfred Dunhill Ltd v Diffusion Internationale de Maroquinerie de Prestige SARL and others* [2001] 1 All ER (Comm) 950 at 962, to support its case that it is insufficient to show that a plaintiff has a bank account within the jurisdiction:

> [T]he fact that the ultimate financial loss may have been felt by the claimant in his principal place of business, where his bank accounts are located, does not mean that that damage had occurred at that place for the purposes of art 5(3) – otherwise, in most cases of financial loss, the exception would establish jurisdiction at the place of the domicile of the claimant, a result which these cases made clear a court should lean against.

Although that case was concerned with Art 5(3) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (where jurisdiction can be founded in a state where, in relation to a tort, the "harmful event occurred"), the reason undergirding the holding there applies with equal force to O 11 r (1)(*f*)(ii) of the ROC.

54 As for O 11 r (1)(*p*), service out of Singapore is permissible with leave if "the claim is founded on a cause of action arising in Singapore". It has been noted by commentators that there remains some uncertainty as to the proper test to be applied (*Singapore Civil Procedure 2018, Vol I* (Sweet & Maxwell, 2018) (Foo Chee Hock, gen ed) at para 11/1/40), but it appears that the prevailing test

is to ask "where in substance did the cause of action arise" (*Kishinchand Tiloomal Bhojwani v Sunil Kishinchand Bhojwani and another* [1997] 1 SLR(R) 518 at [23]; *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another* [2005] 2 SLR(R) 568 at [15]). To answer this question, one has to look at the place of the torts alleged by Nippon. As I examine below, the place of the torts is Indonesia, not Singapore.

Whether Singapore is the most convenient forum

55 In any event, even if Nippon is able to bring itself within O 11 r (1)(*f*)(ii) and (*p*), I find that it has failed to show that Singapore is the most convenient forum. Given that Nippon's claims against Pertamina are tortious in nature, the starting point of analysis is to ascertain where the torts took place. As noted in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*") at [37], it is a general rule that "the place where a tort occurred is *prima facie* the natural forum for determining the claim". As for how the place of a tort is to be determined, the test to be applied is the "substance of the tort" test. To that end, the court examines the events undergirding the elements of the tort to ascertain where, in substance, the cause of action arose (*EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [53]).

56 Nippon relies on the torts of conversion, detinue, and conspiracy. In my view, the torts took place in Indonesia, where TPPI continues to hold on to the Catalysts. Starting with the tort of conversion, it has been observed that "The *essence* of conversion lies in the unlawful appropriation of another's chattel, whether for the defendant's own benefit or that of a third party" [emphasis added] (*Faith Maritime Co Ltd v Feoso (Singapore) Pte Ltd and another action* [2002] 2 SLR(R) 1088 at [114], citing *Clerk and Linsell on Torts* (18th Ed,

2000)). In this case, it is indisputable that the Catalysts are being held on to by TPPI in Indonesia. It naturally follows that the essence of Nippon's claim in the tort of conversion is in Indonesia.

57 As for Nippon's action in detinue, the elements of the tort are: (a) wrongful detention; and (b) the refusal to deliver (Gary Chan and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 11.067). Any wrongful detention of, and any refusal to return, the Catalysts is in Indonesia. Nippon contends otherwise. It relies on the case of *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 at 649 for the proposition that the demand for delivery of the chattel is an essential requirement of an action in detinue, and points out that it seeks to have the Catalysts delivered up to Singapore. Therefore, according to Nippon, the place of the tort is Singapore.[65] In my view, this argument is insufficient to tilt the analysis in Nippon's favour. By itself, that Nippon has requested for the Catalysts to be delivered to it in Singapore cannot mean that the tort took place in Singapore. To reach such a conclusion is to ignore the flipside of the analysis, which is that TPPI's *refusal* to deliver the Catalysts is rooted in Indonesia, and that the delivery of the Catalysts would be *from* Indonesia.[66] Nippon's argument also ignores the fact that any wrongful detention of the Catalysts is in Indonesia. Accordingly, I find that the place of the tort of detinue is Indonesia.

58 Lastly, with respect to the tort of conspiracy, the Court of Appeal in *EFT Holdings* held at [53] that the key factors of consideration in identifying the place of the tort are the "identity, importance and location of the conspirators, the locations where any agreements or combinations took place, the nature and places of the concerted acts or means, the location of the plaintiff and the places

65 Nippon's Written Submissions at paras 6.2.2–6.2.3.

66 Pertamina's Written Submissions at para 43.

where the plaintiff suffered losses". Both TPPI and Pertamina (the alleged conspirators) are located in Indonesia, and it naturally follows that any agreement forming the alleged conspiracy took place in Indonesia. Indeed, in its SOC, Nippon identifies the entry by TPPI and Pertamina into the tolling agreements as being part of the alleged conspiracy. The first tolling agreement was entered as part of the CA, which was endorsed by the Indonesian court. The conclusion that Indonesia is the place of the tort is further reinforced by the analysis above that the place of the alleged torts of conversion and detinue (both of which form the basis of Nippon's Conspiracy Claim) is Indonesia. Nippon has not adduced any evidence suggesting that the conspirators or the salient agreements are based in Singapore. Accordingly, it stands to reason that the place of the alleged conspiracy is Indonesia.

59 Accordingly, Indonesia is *prima facie* the natural forum to determine Nippon's claims. However, Nippon maintains that the place of torts is Singapore for the following reasons. First, it suggests that the court should look at where the damage was suffered and refers to *Tolofson v Jensen* (1994) 120 DLR (4th) 289, which was cited extensively in *Ang Ming Chuang v Singapore Airlines Ltd (Civil Aeronautics Administration, third party)* [2005] 1 SLR(R) 409, for the proposition that "where an act occurs in one place but the consequences are directly felt elsewhere… it may well be that the consequence would be held to constitute the wrong".[67] While that may certainly be true for some torts, Nippon itself acknowledges that it is not a universal rule.[68] It also has not referred me to any authorities showing that that is the case for the torts of conversion, detinue and conspiracy. Indeed, a full reading of the relevant passage in *Tolofson v*

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67 Nippon's Written Submissions at para 6.1.5.

68 Nippon's Written Submissions at para 6.1.6.

Jensen at [43] makes clear that the place of a tort is *prima facie* where it took place:

> [I]t seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place *where the activity occurred*, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it *may* well be that the consequences would be held to constitute the wrong. [emphasis added]

60 Second, it purports to rely on the "double actionability rule" to argue that Singapore law applies to its claims and that the proper forum is thus Singapore.[69] But as Pertamina points out, Nippon's reliance on the double actionability rule is misplaced.[70] The rule simply states that in order for a tort to be actionable in Singapore, it must be actionable not only in the law of the forum, but also under the law of the place where the wrong was committed (*Rickshaw Investments* at [53]). The rule is conceptually distinct from the question of whether Singapore is the proper forum. The rule is not intended to assist the court in locating the proper forum; the object of the rule is one of fairness. As the Court of Appeal explained in (*EFT Holdings* at [61]):

> In our judgment, the primary rationale for the double actionability rule lies in the consideration that an alleged tortfeasor who commits an act or omission in one jurisdiction should not be liable to suit in another without being afforded the opportunity to contend that for one reason or another, whether it be the lack of such a head of liability or the availability of a defence in the place where the alleged tort was committed, he would not have been liable there and so should not be liable in the forum (see also *Halsbury's Singapore* at para 75.372).

61 Third, citing *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [63], Nippon argues that Pertamina has failed to adduce

69 Nippon's Written Submissions at paras 7.3.1–7.3.3.

70 Pertamina's Written Submissions at paras 37–42.

evidence that foreign witnesses would at least arguably be relevant to its defence, and that Pertamina has only made a "bare assertion" that the relevant witnesses are likely to be located in Indonesia.[71] In the same vein, Nippon also alleges that there are "few, if any substantial disputes of fact".[72] I address both contentions in turn.

62 It is undisputed that both Pertamina and TPPI are located in Indonesia. Without evidence to the contrary, it follows logically that their witnesses would also be based in Indonesia. Indeed, I observe that the affidavits in support of Pertamina's and TPPI's applications were affirmed in Indonesia, and it is clear from the affidavits that their representatives are based in Indonesia. Hence I find that Pertamina has made an arguable case that the witnesses relevant to its defence are likely to be based in Indonesia. Next, I disagree that there are no substantial disputes of fact underlying Nippon's claims. It is clear from the face of the parties' affidavits and arguments that there are vast disagreements over issues such as whether the parties had treated the Lease as continuing, and whether Nippon had acquiesced to the use of the Catalysts under the tolling agreements. Further, in both the Joint Tortfeasor Claim and Conspiracy Claim, various factual issues would have to be established including whether Pertamina did authorise, procure or instigate the commission of the tort of conversion and/or detinue, and whether there was any agreement between Pertamina and TPPI to do certain acts which were unlawful.

Conclusion on Pertamina's Jurisdiction Application

63 For the above reasons, I find that Indonesia is *prima facie* the more appropriate forum for the action to be tried. I also add that this applies to the

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71 Nippon's Written Submissions at paras 7.1.1–7.1.4.

72 Nippon's Written Submissions at para 7.1.3.

Conspiracy Claim against TPPI for the same reasons as it applies in relation to Pertamina. The question that remains is whether justice requires that the Singapore courts exercise jurisdiction over the matter. Nippon has not shown me why that would be so, and I find that there is no reason for the Singapore courts to exercise jurisdiction in this case. Consequently, there is no need for me to consider a stay on the basis of the court's inherent power of case management.

Conclusion and orders

64 It leaves me to decide whether I should discharge the *ex parte* order or to stay the proceedings vis-à-vis Pertamina. This has to be assessed in the light of the stay to be granted to TPPI in favour of arbitration on the Conversion Claim but not on the Conspiracy Claim. Although I have found that the Conversion Claim falls within the Arbitration Clause, this does not apply to the Joint Tortfeasor Claim and Conspiracy Claim. Further, unlike Pertamina, TPPI has neither challenged the *ex parte* order granting Nippon leave to serve out of jurisdiction nor sought a stay on the basis that Singapore is not the appropriate forum.

65 In this regard, I note the Court of Appeal's observation in *Tomolugen* at [186] that "the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the dispute as a whole". In taking the lead, the court must strike a balance between: (a) a plaintiff's right to choose whom and where to sue; (b) the desire to prevent a plaintiff from circumventing an arbitration clause; and (c) the court's inherent power to manage its processes to prevent an abuse of process and to ensure the efficient and fair resolution of disputes (*Tomolugen* at [188]).

66 In the round, I am of the view that this is a case in which it is appropriate to grant Pertamina a stay of proceedings. Further, as the parties accepted,[73] in the event the Conspiracy Claim is stayed against Pertamina, that claim should also be stayed against TPPI as it ideally ought to be determined against TPPI and Pertamina together. Having regard to the above, I order as follows:

(a) The Conversion Claim vis-à-vis TPPI is stayed in favour of arbitration pursuant to s 6 of the IAA.

(b) The Joint Tortfeasor Claim against Pertamina is stayed. I find that Singapore is not the proper forum for the dispute and that Indonesia is the more appropriate forum.

(c) The Conspiracy Claim against both TPPI and Pertamina is also stayed, for the same reasons as the Joint Tortfeasor Claim. Both Nippon and TPPI have agreed that, in the event that the Conspiracy Claim against Pertamina is stayed, that claim against TPPI should also be stayed and litigated in the same forum as it would be litigated against Pertamina.[74]

(d) Parties are at liberty to apply.

67 I also award the costs of the appeals to TPPI and Pertamina, fixed at $8,000 and $6,000 respectively, and inclusive of disbursements.

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73 Minute Sheet (11 April 2018) at pp 12–13.

74 Minute Sheet (11 April 2018) at pp 12–13.

Audrey Lim
Judicial Commissioner

Joseph Tay, Lee Ping and Lin Ruizi (Shook Lin & Bok LLP) for the plaintiff;
Chew Kei-Jin and Mabelle Tay (Ascendant Legal LLC) for the first defendant;
Nandakumar Ponniya, Michelle Lee and Kong Xie Shern (Wong & Leow LLC) for the second defendant.
