

Singapore High
Court sets aside part
of an ICC
arbitration award
for breach of natural
justice and excess of
jurisdiction

CAI v CAJ [2021] SGHC 21

15 February 2021

LEGAL
UPDATE

In this Update

In the recent case of *CAI v CAJ* [2021] SGHC 21, the Singapore High Court took the rare step of setting aside part of an ICC arbitral award on the grounds that there had been a breach of natural justice, and that the Tribunal had exceeded its jurisdiction. This resulted in an approximately S\$20 million increase in the amount of liquidated damages awarded to the plaintiff.

Cavinder Bull, SC, Director Lin Shumin and Associate Amadeus Huang acted for the successful plaintiff in the hearing before the General Division of the Singapore High Court.

03 INTRODUCTION

03 BACKGROUND

04 THE ARBITRAL TRIBUNAL'S DECISION

04 THE HIGH COURT'S DECISION

07 COMMENTARY

INTRODUCTION

In the recent case of *CAI v CAJ* [2021] SGHC 21, the Singapore High Court took the rare step of setting aside part of an ICC arbitral award on the grounds that there had been a breach of natural justice, and that the Tribunal had exceeded its jurisdiction.

Cavinder Bull, SC, Director Lin Shumin and **Associate Amadeus Huang** acted for the successful plaintiff in the hearing before the General Division of the Singapore High Court.

BACKGROUND

The plaintiff, CAI (“**Owner**”), was the owner of a polycrystalline silicon plant (“**Plant**”). The defendants, CAJ and CAK (collectively, “**Contractors**”), were the contractors responsible for constructing the Plant pursuant to two underlying contracts.

The Contractors ran into several problems during the construction of the Plant, which included the 6 compressors in the Plant’s hydrogen unit experiencing excessive and dangerous levels of vibration. The Contractors rectified this issue in a piecemeal fashion, working on 2 compressors at each time. Ultimately, the Contractors failed to complete the construction of the Plant by the contractual deadline.

In the arbitration, the Owner sought liquidated damages from the Contractors for the delay in the construction of the Plant. The Contractors objected, arguing that:

- (a) no liquidated damages were payable because the vibrations did not materially affect the completion of the Plant; and
- (b) alternatively, any delay to the completion was due to the Owner’s instructions for the rectification works to be carried out in piecemeal fashion, and thus the Owner had waived their rights to seek liquidated damages, or were estopped from doing so (“**Estoppel Defence**”).

At no point during the pleadings stage, in their witness statements, written opening submissions, or even during the oral hearing before the Tribunal, did the Contractors argue that they should be granted an extension of time (“**EOT**”) to complete the construction of the Plant.

Following an eight-day oral hearing, the Contractors filed their written closing submissions where they argued, for the first time, that they were entitled to an extension of time of 71 days (“**EOT Defence**”).

In their written closing submissions, the Owner objected to the belated new EOT Defence. The Owner highlighted that procedural unfairness would be occasioned to them if the EOT Defence were entertained at that late stage, since that argument was not the subject of pleadings, focused document

production, witness evidence or even cross-examination. The Owner also briefly addressed certain threshold flaws with the EOT Defence.

The Owner's written closing submissions were the last set of substantive written submissions to the Tribunal. Thereafter, the Tribunal declared the proceedings to be closed, without ruling on the admissibility of the EOT Defence.

THE ARBITRAL TRIBUNAL'S DECISION

The three-member Tribunal found that the vibrations did materially affect the completion of the Plant, and the Contractors were liable to pay liquidated damages to the Owner as they had failed to achieve completion within the contractually-stipulated deadline. The Tribunal found that there was a delay of 99 days in achieving completion of the Plant. The Tribunal also rejected the Estoppel Defence.

However, the Tribunal allowed the EOT Defence. The Tribunal found that the Owner's instruction that the rectification works should not affect the commissioning schedule of the Plant had caused the Contractors to carry out rectification works in a piecemeal fashion, therefore contributing to the delay.

Despite accepting that there was no precise factual or expert evidence which would shed light on the appropriate length of the EOT that was warranted, the Tribunal concluded that taking into account "all the evidence and its experience in these matters", the Contractors were entitled to an EOT of 25 days. The Tribunal added that this period of 25 days reflected the Owner's own culpability, which the Tribunal assessed to be "around 25%".

Consequently, the Owner was only awarded liquidated damages for 74 days' delay, instead of 99 days. The Tribunal's decision to grant the extension of time reduced the liquidated damages payable by the Contractors to the Owner by around S\$20 million.

THE HIGH COURT'S DECISION

The Owner applied to the High Court to set aside the Tribunal's decision to allow the EOT Defence and grant a 25-day extension of time to the Contractors, whilst maintaining the rest of the Award.

The Owner's application was made on two key grounds, namely, that there had been a breach of natural justice and that the Tribunal had exceeded its jurisdiction.

The General Division of the High Court agreed with the Owner's submissions and granted a partial setting aside of the Award.

Breach of natural justice

The Court held that there was a breach of natural justice as the Owner had been deprived of a reasonable opportunity to respond to the EOT Defence.

The Court accepted that due to the extreme belatedness with which the EOT Defence was raised, the Owner did not have a reasonable opportunity to obtain or lead evidence on that argument and could have otherwise run its case differently.

The fact that the Owner had pointed out, cursorily, three threshold flaws with the EOT Defence did not change this conclusion. The Court explained that the Owner was entitled to be given a reasonable opportunity to respond, not perfunctorily, but in a fulsome manner. There was nothing inherently inconsistent with briefly pointing out obvious flaws with the EOT Defence, while simultaneously objecting in principle to its late introduction.

The Court held that having already objected to the EOT Defence, the Owner was not required to follow-up on its objection or make any further application in respect of the EOT Defence, where the Tribunal had declared proceedings to be closed. The Owner was entitled to assume that by declaring the proceedings closed without any further indication on the new EOT Defence, the Tribunal would either disallow it from being raised, or would allow it but only after re-opening proceedings and affording the Owner a reasonable opportunity to challenge the EOT Defence.

The breach of natural justice only occurred when the Award had been delivered. The Owner therefore had no chance to object to the manner in which the Tribunal had proceeded because it was too late to do anything once the Award had been published.

KEYPOINT

A party must be given a reasonable opportunity to respond, not perfunctorily, but in a fulsome manner.

The Court found that a further breach of natural justice arose from the Tribunal's reliance on its own experience (rather than evidence) without informing parties it would be doing so.

The Court noted that the length of the EOT was a highly fact-specific issue. The Tribunal's approach to the EOT Defence was problematic as it was not backed by any evidence, and the Tribunal did not explain how and on what evidential basis it arrived at that decision. Given the Tribunal's recognition of the lack of critical evidence, a substantial part of its decision-making process must have been based on its professed "experience". By not allowing parties to comment on this unarticulated "experience", the Tribunal had adopted a chain of reasoning in its Award which it did not give the Owner an opportunity to address.

Excess of jurisdiction

The Court also found that the Tribunal had exceeded the scope of its jurisdiction by ruling on the EOT Defence.

Pleadings were an important reference point in determining the issues placed before the Tribunal. The Court explained that the pleadings, the Terms of Reference, and all other steps taken in the arbitral process had to be considered in determining whether an issue had been submitted to arbitration by the parties.

On the facts of the case, the Contractors themselves admitted that they had not pleaded or contemplated the EOT Defence until their written closing submissions. Thus, the reasonable inference was that all parties had proceeded in the arbitration on the basis that the EOT Defence was not among the issues submitted to the Tribunal for its consideration.

KEYPOINT

In determining whether an issue was submitted to the Tribunal, all the pleadings, Terms of Reference and other steps taken in the arbitral process must be considered before determining in substance whether the issue had been submitted.

The Court also rejected the Contractors' submission that the Owner had failed to raise these objections before the Tribunal, holding that the Owner did *in substance* object to the Tribunal's jurisdiction to entertain the EOT Defence. Whilst the Owner did not specifically use the phrases "outside the scope of submission" or "excess of jurisdiction" during the arbitration, there was no requirement in law for a jurisdictional objection to follow any formulaic incantation.

Recourse against the Award

Having concluded that the Tribunal had exceeded its jurisdiction by ruling on the EOT Defence (a matter that it was never supposed to consider in the first place), the Court found that it would be inappropriate to suspend the setting aside proceedings and remit the Award back to the Tribunal for its determination.

The Court held that while it had no powers to vary an arbitral award, the Court has the power to set aside an offending part of an arbitral award, and built into that power is the ancillary power to also set aside or remove parts of the award which are infected by the decision concerned.

KEYPOINT

The Court is empowered to make ancillary or consequential orders to give effect to its setting aside orders.

The Court therefore set aside the part of the Award pertaining to the 25-day extension of time, and consequently ordered that the number of days of delay set out in the Award for which liquidated damages are payable was to read as 99 days, and not 74 days.

COMMENTARY

The High Court's clarification that it is equipped with the power to make ancillary or consequential orders to give effect to any setting aside of an award is important. This pragmatic decision avoids situations of a successful applicant being hamstrung by technicalities.

The High Court's decision is also a reminder that although the threshold for setting aside an arbitral award may be high, the Court will not hesitate to do so in appropriate cases.

In scrutinising the arbitral process, the Court will take a holistic, considered approach. The Court will consider the cases which the parties were running during the arbitration, rather than belated attempts to recast facts and arguments at the stage of the setting aside application. The Court will consider all the documents and steps taken in the arbitral process to determine the issues submitted to the Tribunal, and the Court will not be impressed by attempts to reshape the facts retrospectively.

This case serves as a reminder that parties must carefully consider all potential arguments and raise them in a timely fashion during the arbitration. In the event that a new argument is raised late in the day, it is critical to ensure that the other side is afforded a chance to respond in a fulsome manner, in order to avoid any award being later set aside.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances. Copyright in this publication is owned by Drew & Napier LLC. This publication may not be reproduced or transmitted in any form or by any means, in whole or in part, without prior written approval

If you have any questions or comments on this article, please contact:



Cavinder Bull, SC
Chief Executive Officer

T: +65 6531 2416
E: cavinder.bull@drewnapier.com



Shumin Lin
Director, Dispute Resolution

T: +65 6531 2332
E: shumin.lin@drewnapier.com

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906

 **DREW & NAPIER**