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Scope of Submission to Arbitration may Include Issues not Expressly Pleaded

*CKH v CKG and another
matter [2022] SGCA(I) 4*

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LEGAL UPDATE

In this Update

The Singapore Court of Appeal recently dismissed an appeal against the Singapore International Commercial Court's decision to suspend the setting aside of an arbitration award to enable the arbitral tribunal to consider an issue that the Court found was submitted for arbitral decision (but which the tribunal failed to consider).

This update discusses *CKH v CKG and another matter* [2022] SGCA(I) 4 and its practical implications.

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INTRODUCTION

The Court of Appeal's decision in *CKH v CKG and another matter* [2022] SGCA(I) 4 brings home a key distinction between arbitration and litigation proceedings. Pleadings in arbitration proceedings are generally not determinative of the matters that have been raised for the arbitral tribunal's determination. This is unlike in litigation proceedings, where pleadings are fundamental to setting the boundaries of the issues raised for the court's decision.

The Court of Appeal held that while pleadings are the first port of call for identifying the issues submitted to arbitral decision, they are not exhaustive of the issues to be determined. They also do not preclude the inclusion of further issues to be determined. Whether a matter falls within the scope of the agreed reference depends upon what the parties, viewing the whole position and the course of events objectively and fairly, may be taken to have accepted between themselves and before the tribunal.

This case serves as a useful reminder that it is possible for matters that were not expressly pleaded in an arbitration to fall within the scope of issues submitted for arbitral decision.

BACKGROUND

The dispute centred around certain agreements between the parties relating to a three-year supply of logs from CKG to CKH ("**Agreement**"). When CKH failed to make the agreed payments, CKG reduced its log deliveries to CKH. CKG claimed that CKH's outstanding indebtedness eliminated any shortfall in log deliveries up to that date and any future obligation to deliver logs. CKH commenced arbitration proceedings against CKG, claiming damages for CKG's failure to supply it with logs under the Agreement.

The arbitral tribunal ("**Tribunal**") in its award ("**Award**") found that CKG's obligation to deliver logs under the Agreement operated independently of any payments to be made by CKH in the relevant period. The Tribunal thus held CKG liable for damages for failure to supply the logs in appropriate quantities. However, the Tribunal did not take into consideration or rule on CKH's outstanding debt claimed by CKG ("**Principal Debt**"), even though that was CKG's basis for reducing its log deliveries to CKH. CKG therefore applied to the Tribunal for an "additional award" in its favour in respect of the Principal Debt. However, the Tribunal refused to make an additional award as it considered that CKG had not pleaded a claim for the Principal Debt in the arbitration.

Before the Singapore International Commercial Court ("**SICC**"), CKG applied to set aside parts of the Award. Among other things, CKG

contended that the Tribunal had failed to consider the Principal Debt issue submitted for determination, which constitutes a breach of natural justice.

The SICC allowed the setting aside application in part. It found that the Tribunal had indeed failed to deal with the Principal Debt issue, even though it was a live issue between parties which could affect CKG's liability or the quantum of damages. This caused substantial prejudice to CKG, thereby amounting to a breach of natural justice. However, the SICC directed that the order for setting aside be suspended for a period of time, so that the Award could be remitted to the Tribunal for it to decide the Principal Debt issue.

CKH appealed against the SICC's decision. The critical issue before the Court of Appeal was whether the Principal Debt issue was a matter within the scope of the arbitration.

THE COURT OF APPEAL'S DECISION

The Court of Appeal dismissed the appeal and upheld the SICC's order for the Award to be remitted to the Tribunal so that it could take into account CKG's claim to the Principal Debt.

In doing so, the Court of Appeal provided guidance on the principles to determine what matters are within the scope of the parties' submission to arbitration.

KEYPOINT

Whether a matter falls within the scope of the parties' agreed reference depends upon what the parties, viewing the whole position and the course of events objectively and fairly, may be taken to have accepted between themselves and before the tribunal.

The Court of Appeal held that while pleadings are the first place in which to look for the issues submitted to arbitral decision, matters may arise which are within the scope of the issues submitted for arbitral decision even though they were not pleaded. As arbitration is consensual, the scope of an arbitration can be expressly or implicitly widened by the parties and changing circumstances.

To determine what matters are within the scope of the parties' submission to arbitration, the court may refer to five sources: the parties' pleadings, the agreed list of issues, opening statements, evidence adduced, and closing submissions at the arbitration. The court may also consider how a

tribunal understands the parties' submissions and their conduct before the tribunal.

On the facts, the Court of Appeal found that viewing the position and course of events objectively, the natural expectation by both parties must have been that CKG's claim to the outstanding Principal Debt should be considered an item to be set off against any claim by CKH. Notably, although CKG did not plead a counterclaim in respect of its entitlement to the Principal Debt in its Statement of Defence, it was sufficient that CKG raised the issue as a defence to CKH's claim regarding CKG's failure to supply logs, and also sought a set-off against any damages awarded in substitution of log supply to CKH. Since the Award failed to consider or rule on the appropriate set-off in respect of the Principal Debt, the Award may be set aside if not corrected.

COMMENTARY

This Court of Appeal decision is a useful reminder that the courts will not adopt a formalistic approach when determining whether a tribunal has failed to deal with issues within the parties' agreed reference in the arbitration.

It is possible for matters that were not expressly pleaded to fall within the scope of issues submitted for arbitral decision. This is significant because even if a party were to receive a favourable award, the party may not be home free. The award may yet be set aside on the basis of breach of natural justice, in the event the tribunal failed to consider an issue that could objectively and fairly have been said to have arisen for the tribunal's decision.

From the parties' perspective, when an award is first issued, it would be prudent for counsel for both parties to scrutinise the award to consider whether the award has omitted to address issues that arose for the tribunal's decision, even if such issues did not feature in the pleadings. Counsel for the losing party would undoubtedly do so as part of the usual exercise of assessing the feasibility of challenging the award. On the other hand, counsel for the prevailing party should likewise do so, for the purposes of considering whether it is necessary and advantageous to their client to request the tribunal to make any additional award as to claims presented but not dealt with in the award within the relevant timelines (see eg Rule 33.3 of the SIAC Rules 2016; Rule 39 of the UNCITRAL Arbitration Rules). Otherwise, the successful award might turn out to be a Pyrrhic victory, as the prevailing party may be compelled to expend further time and costs in resisting proceedings brought to challenge the award on the basis of the tribunal's failure to consider issue(s) raised for its decision.

From the tribunal's perspective, tribunals must be careful in considering the issues that have arisen for its decision, and should refrain from relying only on the pleadings to determine the scope of submission to the

arbitration. A useful way to ensure that the tribunal rules on all issues that may be considered to have been submitted to arbitration is to request party input and agreement on the issues for the tribunal's determination *after* the conclusion of the merits hearing and *before* the tribunal closes proceedings. This may reduce the possibility of a party subsequently successfully challenging an award on the basis of the tribunal's failure to consider issue(s) submitted for its decision.

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