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Limits, Latitude, and Lacunae: Rare Set-aside of Award in *CBX v CBZ*

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The Singapore Court of Appeal (“CA”) recently handed down *CBX and anor v CBZ and ors* [2021] SGCA(I) 3 (“*CBX*”), setting aside, exceptionally, the awards.¹⁾ Significantly, the law was clarified, to a certain extent, in three key areas:

1. The risk of an issue which arises late in an arbitration, or is not properly pleaded, falling outside the terms or scope of submission to arbitration, rendering an award (or part of an award) which determines the issue liable to be set aside under [Article 34\(2\)\(a\)\(iii\) of the Model Law](#).
2. Whether the parties’ agreement on a point can exclude the tribunal’s jurisdiction to determine that point.
3. Whether a costs award can survive the setting aside of elements of an award, and if not, how costs may then be determined.

Facts

CBX arose from two sale and purchase agreements governed by Thai law for the sale and purchase of shares in a company which indirectly owned windfarm projects (the “*SPAs*”), some of which were incomplete.

Disputes between the parties gave rise in June 2016 to two Singapore-seated ICC arbitrations (the “*Arbitrations*”). The Arbitrations were heard together by the same Tribunal, and led to, *inter alia*, two Phase II Partial Awards (“*PAs*”) and a Final Award (Costs) (the “*Costs Award*”) in 2019 in favour of the sellers under the SPAs (the “*Sellers*”). The buyers under the SPAs (the “*Buyers*”) then applied to set aside parts of the PAs and, consequentially, the whole of the Costs Award.

The impugned parts of the PAs concerned the Tribunal’s decisions that (i) the Buyers pay the Sellers certain amounts described as the “*Remaining Amounts*”; and (ii) 15% compound interest p.a. should run on those amounts (the “*Compound Interest Orders*”).

The Remaining Amounts had originally been claimed in the Arbitrations on the basis that they were due because their due dates had been accelerated by the Buyers’ defaults or conduct. The Tribunal did not accept this claim, but instead ordered that the Buyers make payment of the Remaining Amounts when they became due in any event, without acceleration *ie.* on the

Completion of Development dates of the windfarm projects which were incomplete, and other dates thereafter, none of which had occurred at the time of post-hearing briefs but some of which occurred before the PAs were issued (the “**Future Dates**”).

The Compound Interest Orders were for 15% compound interest p.a. to apply to the Remaining Amounts. They were made following what the Tribunal later described as a “*regrettable oversight*” on its part as the parties had in fact agreed during the Arbitrations (and prior to the end of the evidentiary hearing) that the compounding of interest was unlawful and unenforceable under Thai law.²⁾

The applications to set aside were made on the grounds that the Tribunal had exceeded its jurisdiction and/or failed to afford the Buyers a reasonable opportunity to present their case in relation to whether they were obliged to pay the Remaining Amounts on the Future Dates, and that the awards contravened Singapore’s public policy. Anselmo Reyes IJ dismissed the applications in full. The Buyers appealed.

CA’s Judgment

The CA allowed the appeal.

The CA observed in relation to the Remaining Amounts that while the arbitration clauses in the SPAs had provided that “[t]he [Terms of Reference] (“ToRs”) shall not include a list of issues to be determined”, the ToRs themselves indicated that they were subject to [Article 23\(4\) of the ICC Rules](#), which provides as follows:

“After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.”

The CA held that Article 23(4) clearly contemplated “*express consideration and determination*” by the Tribunal of whether a new claim should be permitted. However, the Tribunal had failed to determine whether the Sellers should be permitted to pursue any claim to the Remaining Amounts other than on an accelerated basis, and had ignored the Buyer’s objections in their post-hearing briefs to the Tribunal taking jurisdiction over this dispute.

As for the Compound Interest Orders, they fell away given the decision on the Remaining Amounts, but the CA nonetheless observed that they too would have been set aside because the parties had agreed that as a question of Thai law, compounding was unenforceable. The CA held that the parties’ agreement had restricted the scope of the matters which they needed and agreed to submit to the decision of the Tribunal, and that the Compound Interest Orders, which were contrary to the parties’ agreement, were necessarily in excess of jurisdiction.

The CA found that, as well as falling outside the scope of the submission to arbitration, the Tribunal’s decision on the Remaining Amounts and the Compound Interest Orders both involved breaches of the rules of natural justice – given the absence of a sufficient opportunity afforded to the parties to present their case – warranting the decisions being set aside under section 24(b) of

Singapore's International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA").

The CA also set aside the Costs Award.

Analysis

Limits of a Tribunal's Jurisdiction

The most important takeaway of *CBX* is likely to be its treatment of issues which arise late in the day and/or are not properly pleaded. The CA was unequivocal that any new claim or cause of action must be clearly identified and admitted by the tribunal, even if that were to occur only by conduct rather than by express words or a pleading amendment.³⁾ Future tribunals and parties may thus wish to expressly identify such late-arising issues and the extent to which they fall within the terms and scope of the submission to arbitration.

In ICC arbitrations, this consideration is all the more acute given that ToRs require the issues in dispute to be expressly set out, yet it is very common for tribunals and parties to not fully elucidate the issues in their ToRs and instead to insert a "catch-all" phrase defining the issues as "*those contained in the parties' pleadings and submissions*" including "*such other issues as may arise during the course of the arbitration*".⁴⁾ *CBX* has starkly demonstrated the risks of the "catch-all" approach, in that the absence of clear definitions may lead to issues being so fluid that parties/tribunals lose sight of Article 23(4) of the ICC Rules 2017 (and 2021).

A closely allied observation is that, in practice, tribunals will have to grapple with striking a balance between deciding the real issues in dispute between the parties – which may well evolve and crystallise only during the final merits hearing, or even thereafter – and ensuring that the parties have had a reasonable opportunity to present their cases. *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*PT Prima*") marked an instance where the Court pointed to a plethora of factors illustrating that, unlike in *CBX*, the late-arising issue had been fully addressed by both parties, who had not in any event raised any jurisdictional objections. *CBX* squarely addresses *PT Prima*, and points to a number of relevant considerations in determining whether the new claim has been admitted and/or if parties have had a reasonable opportunity to address it. These include, *inter alia*, precisely when the new development in question arose,⁵⁾ whether the new cause of action relates to matters arising only *after* the award, if at all,⁶⁾ the conduct of the parties in having "*embraced*" (or otherwise) the new issue(s), whether expressly or by conduct,⁷⁾ and the opportunity the parties had to address that issue.⁸⁾ Ultimately, this will be highly fact-specific, and tribunals may be incentivised to expressly clarify potential new points of dispute which arise late in the day.

The Latitude Afforded by Agreement

In relation to the CA's observations that the parties' agreement can, in effect, exclude certain matters from the tribunal's jurisdiction altogether,⁹⁾ the CA's conclusion on the Compound Interest Orders is no doubt sound, but the bold affirmation of the centrality of the parties' consent is also significant. In particular, the CA left open the question of how far the parties' agreement can

curtail the tribunal's jurisdiction. For instance, can parties legitimately agree on an obvious falsehood for the purposes of an arbitration, and would the tribunal be bound by such agreement? On one hand, an answer in the affirmative would accord with the resounding emphasis placed on consent in the arbitral context, but the lines do get blurred where the parties' agreement entails, for instance, a legal nullity (such as assuming the existence of a discretion which does not exist) or an illegal position (such as ignoring that certain criminal transactions are void). In the latter context in particular, there may also be a real risk of the resulting arbitral award being set aside on public policy grounds. Parties' agreed positions may also have effects on separate proceedings by virtue of the doctrine of *res judicata*.

Ultimately, the CA acknowledged that the effect of the parties' agreement was not absolute, particularly where the said agreement conflicts with some overriding mandatory provision of the law governing the parties' transaction.¹⁰⁾ This hints at the limits of parties' consent in contouring the ambit of a tribunal's jurisdiction, and, together with the other complications on this point raised above, will no doubt be expounded on in future cases.

A Lacuna in the Law

The third observation we make concerns the Costs Award. As a preliminary point, there may be questions over when, if ever, costs awards may survive the setting aside of part or all of a substantive award, particularly following the CA's observations that, when considering whether a costs award can survive the setting aside of an element or elements of the substantive award, "[j]ustice will commonly require" that the costs award be set aside.¹¹⁾ Nonetheless, the more pressing point arising from *CBX* relates to what happens after a costs award is set aside. The CA concluded that it was for the parties to "*advise themselves and to agree or decide how to proceed*",¹²⁾ potentially by having the tribunal sit to issue a fresh costs award.


This arose because the CA found that it did not have the power to award costs for the arbitration in this context *suo motu*. Section 10 of the IAA enables an arbitral tribunal's own ruling on jurisdiction to be appealed to the Court, and section 10(7) specifically provides that in making a ruling or decision under that section that the arbitral tribunal has no jurisdiction, the arbitral tribunal or the Courts may make an award or order of costs of the proceedings, including the arbitral proceedings. However, and crucially, there is no equivalent provision for that in the general provisions relating to setting aside in section 24 of the IAA and Article 34 of the Model Law.¹³⁾ The CA also noted that its decision in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 "*may indicate that, as a matter of law... the issue of an invalid or partially invalid award renders a tribunal functus officio even in respect of matters such as costs*",¹⁴⁾ which would again preclude the remitting of the question of costs to the tribunal (absent an express provision akin to section 10(7) of the IAA). This gives rise to the unsatisfactory position where there is no real recourse if parties are unable to agree how costs should be determined following the setting aside of an award of costs. To that end, it is hoped that the legislature will act on the CA's invitation set out in *CBX* to enact the relevant reforms.¹⁵⁾

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References

- ?1 The views expressed in this article are solely the views of the authors, and are not representative of the organisations they are affiliated with.
- ?2 *CBX* at [7].
- ?3, ?5, ?6 At [51].
- ?4 See, for example, *CBX* at [45].
- ?7, ?8 At [52].
- ?9, ?10 At [93].
- ?11 At [75].
- ?12 At [80].
- ?13 At [82].
- ?14 At [84].
- ?15 At [85].

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