Kluwer Arbitration Blog

Delimiting the Limits of an Arbitrator's Mandate: Submission and Remission

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When determining what matters fall within the scope of submission to arbitration, five sources are relevant: the parties' pleadings, the agreed list of issues, opening statements, evidence adduced, and closing submissions: *CDM v CDP* [2021] 2 SLR 235 at [18]. If a court, on an analysis of these five sources, finds that an award should be set aside (in full or in part), it can temporarily suspend the setting aside proceedings and remit the matter back to the tribunal for an opportunity for the tribunal to eliminate the grounds for setting aside. This is statutorily provided for under Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").

This was the situation in *CKG v CKH* [2021] 5 SLR 84. In this case, CKG entered into agreements to supply timber logs to CKH. In addition to the agreed price of the logs, CKH was to bear responsibility for all taxes, levies, and freight charges incurred by CKG (the "Charges") in supplying the logs. CKH failed to reimburse the Charges to CKG and, consequently, CKG reduced its subsequent deliveries of timber logs to CKH: at [13] to [21].

In the Singapore-seated arbitration commenced by CKH, the tribunal found CKG liable for its failure to supply appropriate quantities of timber logs to CKH. In its award, the tribunal accepted CKH's submissions that, pursuant to an agreement between the parties, it was incumbent on CKG to have attempted to settle any outstanding claim in an amicable manner before reducing its log supply. The tribunal, however, did not take into consideration CKG's argument that it had reduced its deliveries due to CKH's outstanding debt (the "Principal Debt") from the Charges that had not been reimbursed, and interest thereon. Indeed, the tribunal did not make any findings in relation to the Principal Debt issue: *CKH v CKG* [2022] SGCA(I) 4 at [6] to [7].

CKG applied to the Singapore International Commercial Court ("SICC") to set aside parts of the award. The court ruled that the tribunal had in its award failed to determine and take into account the Principal Debt. This failure amounted to a breach of the rules of natural justice, for which setting aside would *prima facie* be the appropriate remedy under both Singapore's International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and the Model Law. However, the court instead chose to exercise its discretion to suspend the setting aside proceedings and remit the award back to the tribunal, on the basis that the tribunal could be trusted to decide the Principal Debt issue in an open-minded manner and should be given the opportunity to put right the breach of natural justice: *CKG v CKH* [2021] 5 SLR 84 at [61] and [69].

This resulted in two separate appeals: *CKH v CKG* [2022] SGCA(I) 4 ("First Appeal") and *CKH v*

CKG [2022] SGCA(I) 6 ("Second Appeal"). The First Appeal was against the SICC's order that the setting aside proceedings be suspended and the award remitted back to the tribunal. The Second Appeal addressed two critical issues: first, whether and how far a party may, on a remission, go outside the scope of the order for remission, and second, whether and how far the SICC was correct in its analysis that the appellant was seeking, but should not be permitted, to do this: at [1].

First Appeal

In the First Appeal, the Court of Appeal was confronted with the critical issue of whether the Principal Debt and any interest on it were matters within the scope of the arbitration.

Interestingly, the starting point in this case was that there was no pleading in the arbitration addressing the position regarding the Principal Debt. Nonetheless, the absence of any pleaded counterclaim or set-off in CKG's Statement of Defence and Counterclaim was not fatal. CKG had raised the Principal Debt issue as a defence to CKH's claim for failure of log supply obligations, and also "*sought a set off against any damages awarded in substitution of log supply to [CKH]*": at [18] and [27].

The Court, taking into account the five sources, held that on an objective analysis of the parties' position and course of events, the natural expectation on both sides must have been that CKG's claim to the outstanding Principal Debt should be accounted for as an item to be set off against CKH's claims. Put another way, if the tribunal had adjudicated on the Principal Debt, CKH would not have been able to set aside the award on the ground that the tribunal had strayed outside the scope of the matters submitted to it for determination: at [26].

In light of cases that have repeatedly affirmed the relevance of the five sources in determining the scope of submission to arbitration, it is apt to highlight the Court of Appeal's observations that "*[t]he pleadings are the first place in which to look for the issues submitted to arbitral decision. But matters can arise which are or become within the scope of the issues submitted for arbitral decision, even though they are not pleaded.*": at [16].

Two comments can be made on this.

The first relates to the elusive definition of pleadings. Nowhere in the Model Law can one find the word "pleading", let alone its definition. While it appears twice in the International Arbitration Act, that section 2A of the International Arbitration Act draws a distinction between "pleading", "statement of case", and "any other document in circumstances in which the assertion calls for a reply", sheds no light on the definition of "pleading" or its ambit. This problem features also in the Singapore International Arbitration Centre Rules (which applied in the present case) and other common arbitration rules such as the UNCITRAL Arbitration Rules and the London Court of International Arbitration Rules.

The same issue arises in case law. In the seminal case of *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98, neither the High Court nor Court of Appeal discussed the meaning of "pleadings" in the context of international commercial arbitration. In that case, the court held that "*any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded*". The Court of Appeal

reasoned that "*[g]iven the extensive correspondence, written submissions and expert opinion*", it was unnecessary for the parties to specifically plead facts of an ancillary nature. Such reasoning suggests a narrow interpretation of the definition of "pleadings", but the court did not offer express guidance on the scope of the term. Had a wider interpretation been taken, the Court of Appeal could possibly have found that those "*ancillary*" facts were pleaded.

Notwithstanding the present five-sources framework, it would still be beneficial for the courts to offer guidance on the scope of "pleadings" since that remains "*the first place in which to look for the issues submitted to arbitral decision*": *CKH v CKG* [2022] SGCA(I) 4 at [16]. Issues raised in a parties' pleadings may therefore be less likely contested as falling outside the tribunal's jurisdiction, as compared to issues raised in the any of the other four recognised sources, ie. the agreed list of issues, opening statements, evidence adduced, and closing submissions.

Second, the Court of Appeal's decision in the First Appeal is an implicit refutation of Professor Gary Born's critique that the Singapore courts have been "*unduly formalistic*" in their reliance on pleadings to answer "*the question whether a particular issue or argument was submitted to the tribunal*".[1)] Although the Principal Debt issue was not expressly pleaded, that did not bar a finding that the issue was nonetheless submitted to arbitration. As the Court of Appeal held, "*[w]hether a matter falls or has become within the scope of the agreed reference depends ultimately 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*": at [16].

The approach taken in *CKH* comports with the "*pragmatic*" inquiry suggested by Born, which asks whether the parties and tribunal had a reasonable opportunity to consider and submit evidence and arguments on a particular issue. The parties in the present case did, as the court in *CKH* rightly held.

Second Appeal

For completeness, two comments should also be made in relation to the Second Appeal, which was dismissed by the Court of Appeal in 12 paragraphs as being "*without merit*": at [12].

The first pertains to the scope of remission. After the matter was remitted to the tribunal, CKH raised several points that CKG contended fell outside the scope of remission. The tribunal thus ordered that dispute to be referred to the High Court judge, who then confirmed that the tribunal's role was strictly limited to the terms of the remission order. On the facts, the points raised by CKH fell outside that scope: at [5] to [12].

The second and perhaps more interesting point is that only the High Court has the power to remit an arbitral award back to the tribunal. This proposition, which was stated by the Court of Appeal in *CBS v CBP* [2021] 1 SLR 966 at [103], was strictly speaking *obiter*. In that case, the issue did not arise because the Court of Appeal was not being "*asked to set aside an award*" within the meaning of Article 34(4) of the Model Law. The award had already been set aside by the High Court, and the Court of Appeal was being asked to reverse it. Where the issue may arise is in the following hypothetical scenario. Suppose the High Court has chosen to not set aside an award. The Court of Appeal – when asked to do so – would not have the option of ordering remission as an alternative to a setting aside because the apex court has no power to do so. This is also supported by section

8(1) of the IAA, which confirms that the court under Article 34(2) of the Model Law is the High Court.

References

?1 Gary Born, *International Commercial Arbitration* (3rd Ed, Kluwer Law International, 2021) at 3581.

This entry was posted on Monday, November 7th, 2022 at 8:19 am and is filed under Jurisdiction, Pleadings, Remission, Set aside an arbitral award, Singapore
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