

# Kluwer Arbitration Blog

## Pleading Points in International Arbitration: Substance Over Form?

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In general, arbitration laws do not make express provision for rules of evidence and institutional rules largely leave it to the arbitral tribunal to determine matters of evidence. It might, therefore, be thought uncontroversial to state that strict rules of evidence do not apply in arbitration proceedings.

But while most practitioners would concede that arbitration (specifically, international arbitration) does not import domestic rules of civil procedure, in practice the issue of whether parties should be confined to strict rules of pleadings is often contested. In particular, some parties and practitioners continue to urge arbitral tribunals to disregard aspects of the counterparty's case because of certain formalities about the way in which the relevant allegation was expressed in the opposing party's 'pleadings'.

These attempts to import the 'strict rules of pleadings' into arbitration proceedings raise the question of whether arbitral tribunals must or should apply (or at least be guided by) litigation-like rules of pleadings when determining issues such as whether a particular matter is within the scope of the parties' submissions by reference to a strict linguistic analysis in the way that a court pleading might be.

### The view from the courts

The Courts in major arbitral hubs across Asia-Pacific have adopted a broadly uniform position in approaching this issue. The 'pleading points' considerations are generally addressed by the courts when determining award challenges on grounds such as lack of the tribunal's jurisdiction to decide on the 'non-pleaded' points, or procedural fairness due to the party's inability to argue a disputed issue and adduce evidence to such effect.

The Singaporean courts have a long line of authority supporting the proposition that irrespective of the submissions style (memorial or pleading), there is no distinction in the methodology of assessing 'pleading points'. Recently, in *CFJ and CFK v CFL and CFM [2023] SGHC 1 CTC* the Singapore International Commercial Court observed that in memorial style arbitrations "any reference to 'pleadings' is no more than a convenient analogy, when lawyers from common law traditions are involved". The narrative nature of memorial style submissions triggers the holistic interpretation of the 'pleadings' which, subsequently, makes memorials less susceptible to a strict

linguistic analysis in the way that a court pleading may be where issues in dispute are ‘confined’ by the court pleadings and subjected to the domestic laws’ procedural scrutiny.

This decision confirms the well-established position of Singaporean courts underlined in *BTN v BTP [2021] SGHC 271* (BTN v BTP). In that case, the High Court found that the disputed issue was pleaded “*at the very least by reasonable implication, based on a holistic reading of the pleadings and the framing of the relevant issue by the parties*”.

In Hong Kong, the High Court also has a long-standing position that the strict rules of pleadings applicable in domestic litigation have not been imported into international arbitration. Most recently, in *S Co v B Co [2014] 6 HK 421* at [95], the Court of First Instance of the High Court affirmed this position and aligned itself with Singaporean case law in holding that:

“...strict rules of pleadings and procedures are not insisted upon for arbitration proceedings...Narrow and technical construction of the claims made in the pleadings filed in an arbitration should be discouraged, in order to give effect to the intention of the parties to use arbitration as the more informal manner of dispute resolution, as opposed to litigation in the courts”.

That said, the Court cautioned that a party cannot introduce “*a new difference*”, or a “*new dispute*” which was not within the scope of the original submission to arbitration, and that “*each party should be given the opportunity of responding to points made by the other*”.

Such clarification is in line with the Singaporean position outlined in *CBX and another v CBZ and others [2021] SGCA(I) 3* where the Court noted that “[p]leadings generally serve the valuable function of defining the parameters of the issues which the parties have to address and, in so doing, precluding unexpected surprises which a party does not have a fair opportunity to address”.

In Australia, in *Imperial Leatherware Company Pty Ltd v Macri and Marcellino Pty Ltd (1991) 22 NSWLR 653 at 661*, the Supreme Court of New South Wales expressed the view that arbitrators are not required to follow the pleading practice of the Supreme Court noting that:

“The heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues. Those aims, to a large extent, are made impossible of achievement if the procedures of a Court are mimicked. Nor is there anything in the requirement to provide ‘procedural justice’ which requires adoption of the pleadings and procedures of Courts. What is required is that the parties enjoy the benefits of natural justice consistently with the requirements of arbitrators for dispensing with technicalities, with discovery, and doing away with interrogatories. The proper requirement that each party have full notice of the case to be made by the other and a full opportunity to prepare and to answer that case does not require pre-trial pleading, discovery and other procedures of the Court”.

## The ‘Five Sources’: Where is the limit of the Tribunal’s jurisdiction?

The court judgments outlined above suggest that, although the scope of the tribunal’s jurisdiction is not limited by the pleadings or memorials, a practical view must be taken when assessing the substance of the dispute. This requires, as recently summarised in *CJA v CIZ [2022] SGCA 41*, “regard to the totality of what was presented to the tribunal whether by way of evidence, submissions, pleadings or otherwise and consider[ation of] whether... these points were live”.

Singaporean courts have developed a structured approach to assessing whether an issue is within the scope of the pleadings. When determining whether an issue is ‘live’ and within the scope of parties’ submissions, there are ‘five sources’ commonly considered by Singaporean courts as outlined in *CDM v CDP [2021] SGCA 45*: (i) the parties’ pleadings; (ii) any agreed list of issues; (iii) opening statements; (iv) evidence adduced; and (v) closing submissions.

A disputed issue may be considered as having been put before a tribunal in one of the following circumstances: if it arises from the party’s express pleadings; if it is raised by reasonable implication by a party’s pleadings; if it does not feature in a party’s pleadings but is in some other way brought to the opposing party’s actual notice; or if the links in the chain flow reasonably from the arguments actually advanced by either party or are related to those arguments (*JVL Agro Industries Ltd v Agritrade International Pte Ltd [2016] SGHC 126 [159]*; *BTN v BTP [2021] SGHC 271 [89]*). These circumstances, as noted by the court in *BTN v BTP*, can be used when determining the degree of specificity required in a pleading before an issue is considered as having been put before a tribunal.

Each of the ‘five sources’ are not featured in every arbitration and the list is instructive but not exclusive. Rather, as noted in *CAJ v CAI [2021] SGCA 102* at [44], the broad approach is aimed “to avoid an inflexible and rigid analysis of the issues raised in the arbitration, so that issues which arise from or are natural consequences of the pleaded issues are not excluded”.

In arbitrations administered under the [ICC Arbitration Rules](#) (ICC Rules) this issue generally centres on the Terms of Reference, which are required to be agreed at the outset of the proceedings and are intended to cover the scope of the disputed issues. Article 23(4) of the ICC Rules provides that parties shall not make any claims which go beyond the Terms of Reference without first obtaining the tribunal’s authorisation. When considering any applications in this respect, the tribunal shall weigh in “the nature of such new claims, the stage of the arbitration and other relevant circumstances” and, in practice, “[a]n arbitral tribunal will usually ask itself to what extent the supposed new claim departs substantially from what was envisaged in the Terms of Reference” (Jason Fry, Simon Greenberg, Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (2012) 258 [3-900]).

### **Determining whether to amend the pleadings**

Singaporean courts note that where new, previously not pleaded facts or legislative changes that are ‘ancillary’ in nature and known to all parties arise after submission to arbitration, there is no need to amend the pleadings. In *PT Prima International Development v Kempinski Hotels SA and other appeals [2012] SGCA 35*, the Singaporean Court of Appeal stated that:

“In our view, 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. It may be raised in the arbitration”.

That said, in *CBX and another v CBZ and others [2021] SGCA(I) 3* the Court cautioned that “[a]ny new claim or cause of action ... must require ... clear identification and admission by the arbitration tribunal, even if that were only to occur by conduct rather than express words or a pleading amendment”. And in *Bloomberry Resorts and Hotels Inc v Global Gaming Phillipines LLC [2021] SGCA 94*, the court expressed the view that “flexibility cannot be allowed to devolve into a free-for-all”.

### **Finding the right balance**

The term ‘Pleadings’ was imported into the international arbitration context by common law practitioners as a useful ‘analogy’ for their professional convenience. However, in international arbitration, this term was never intended to encapsulate the meaning it has in domestic commercial litigation.

While it is unlikely that the ‘pleadings’ terminology will be abandoned by practitioners, it is clear that technical ‘pleading points’ in international arbitration are less rigid (if applicable at all) than in domestic litigation. As underlined by the Singaporean decisions above, the better view seems to be that the scope of issues to be determined by a tribunal is to be found by considering the substance of the dispute and the live issues, which may be guided by reference to a number of sources.

Ultimately, the approach to the interpretation of ‘technical’ pleading points in arbitration may vary depending on the position adopted by each arbitrator and each arbitral tribunal. This may in turn be influenced by the legal background of the relevant arbitrators given that the ‘strict rules of pleadings’ are creatures of common law litigation, and a foreign concept in the civil law legal system.

As one leading commentator puts it, in international arbitrations, while influenced by their legal training, arbitral tribunals will “usually seek to arrive at procedural decisions that are “international,” rather than replicating parochial procedural rules in local courts” (Gary B. Born, *International Arbitration: Cases and Materials* (Wolters Kluwer Law & Business, 2nd edition, 2014) 821). This is another reminder that diversity of the selected arbitral tribunal is a relevant factor in ensuring that the ‘internationally-neutral’ balance nurtured by international arbitration is sustained and ultimately serves the parties in the way they envisaged when they selected arbitration as their preferred dispute resolution mechanism.

It may be time to settle the debate and conclude that, other than as a term used for convenience interchangeably with ‘submissions’ or ‘memorials’, in international arbitration ‘pleadings’ does not have the same reach or significance as it does in domestic litigation proceedings.


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