Singapore: Tribunal not bound by precise terms of parties' pleadings and submissions

By Nandakumar Ponniya, Richard Allen and Darrell Lee

It is trite that an arbitral tribunal has no jurisdiction to decide any issue that has not been submitted to arbitration, and that the parts of an arbitral award that relate to such issues may be set aside by the court. In *CJA v CIZ* [2022] SGCA 41 ("***CJA v CIZ***"), the Singapore Court of Appeal ("**SGCA**") held that a tribunal that made findings beyond the precise terms of the pleadings and submissions advanced by a party did not exceed its jurisdiction as the findings were premised on the fundamental point raised by the parties. Concomitantly, the making of such findings also did not breach the rules of natural justice as the parties had a reasonable opportunity to address the determinative issue.

Factual Background

By way of a Deed of Novation, the appellant took over a Consultancy Agreement to provide consultancy services to the respondent in relation to mergers and acquisitions of oil and gas fields. The respondent agreed to pay the appellant a Success Fee upon the appellant's presentation of an 'Opportunity' and the respondent's corresponding completion of an acquisition of an interest in an oil field. The appellant and respondent also entered into an Amended Agreement, which terms were in substance the same as those of the Consultancy Agreement. Both the Consultancy Agreement and the Amended Agreement were stated to expire on 31 December 2013.

A dispute arose as to whether the appellant was entitled to a Success Fee in respect of the respondent's acquisition in 2016 of shares in X Co, an operator and owner of oil fields ("**X Opportunity**"). The appellant commenced arbitration against the respondent. In its Statement of Claim, the appellant averred that the Consultancy Agreement had been extended by an oral agreement such that it subsisted at the time of the respondent's acquisition of the shares in X Co. The respondent denied this and averred in its defence that there was no subsisting agreement after 31 December 2013.

The Arbitral Tribunal hearing the matter ("**Tribunal**") awarded the appellant the Success Fee for the X Opportunity. The Tribunal rejected the appellant's assertion of a subsisting agreement after 31 December 2013. Instead, the Tribunal found that the Consultancy Agreement did not require the Opportunity to be completed before the expiration of the Consultancy Agreement and/or Amended Agreement, and that the subject of the X Opportunity (i.e., shares in X Co) was exactly the same as in an earlier transaction that the appellant had worked on.

The respondent applied to the Singapore High Court ("**SGHC**") to set aside the part of the award relating to the Success Fee for the X Opportunity on the grounds that (i) this was beyond the scope of the submission to arbitration and (ii) there had been a breach in the rules of natural justice in connection with the making of the award. The SGHC allowed the respondent's application on the first ground, and the appellant appealed.

Decision of the SGCA

The SGCA allowed the appeal. The SGCA held that the appellant's case in the arbitration was broader than what was found by the SGHC, and included the fundamental point upon which the Tribunal had found for the appellant — namely, that the Success Fee was payable upon completion of the Opportunity even if that took place after the Consultancy Agreement or Amended Agreement had expired ("**Fundamental Point**").

Whether the award involved a 'new difference'

The SGCA reiterated the two-stage inquiry in assessing whether an arbitral award should be set aside for an excess of jurisdiction: (a) first, the court must identify what matters were within the scope of submission to the arbitral tribunal; and (b) second, whether the arbitral award involved such matters, or whether it involved a "*new difference … outside the scope of the submission to arbitration*".

In relation to the first stage, the court must look at matters in the round to determine what issues were live in the arbitration, including the following sources: the parties' pleadings, the list(s) of issues, opening statements, evidence adduced, and closing submissions. The SGCA held that the SGHC erred in holding that a tribunal is not entitled to depart from the pleadings to the extent of making a decision based on a ground that has not been pleaded at all or is not ancillary to the pleadings.

Having gone through the relevant sources, the SGCA found that it was 'apparent' that the Fundamental Point was present in the appellant's submissions and therefore did not amount to a 'new difference'. In this regard, although the Tribunal had gone further than the appellant in construing the effect of an article of the Amended Agreement, this did not involve a 'new difference' but was premised on the Fundamental Point.

Moreover, the respondent had also argued against the Fundamental Point in its closing submissions. Thus, the issue was clearly canvassed before the Tribunal even though the eventual reasoning of the Tribunal was not explicitly in the terms argued by the appellant.

Whether the Tribunal acted in breach of natural justice

The respondent also argued that the appeal should be dismissed on the additional ground that the Tribunal breached the rules of natural justice, i.e., by finding for the appellant based on a case that the appellant did not advance (i.e., the Fundamental Point), and that the Tribunal's findings did not reasonably follow from the disputed issue.

The SGCA found that the respondent's argument was unsustainable. The SGCA observed that a tribunal is entitled to arrive at conclusions that are

different from the views adopted by parties, as long as the conclusions are based on evidence before the tribunal and the tribunal consults parties where the conclusions involve a 'dramatic departure' from what has been presented to it. Put differently, a tribunal is entitled to derive an alternative case from the parties' submissions as the basis for its award. Further, a tribunal is not limited to adopting a 'middle path' between the parties' positions — the focus was on whether the parties had been given a reasonable opportunity to address the determinative issue.

In the present case, the Tribunal specifically asked parties to consider the situation where an Opportunity was presented but the transaction was (through no fault of either party) only completed after the expiry of the Amended Agreement, and both parties had made their respective submissions in closing submissions.

Moreover, the SGCA noted that in a situation involving questions of fact, pleadings would assume greater significance in determining whether natural justice rules were breached. Conversely, the present situation involved a legal issue of contractual interpretation, and the SGCA was satisfied that the parties submitted on this and that the respondent had sufficient opportunity to canvass evidence on the contextual dimension and commercial purpose of the Amended Agreement. It was accordingly clear that the determinative issue was canvassed before the Tribunal, and it did not matter that the reasoning eventually adopted by the Tribunal had not been pleaded by the appellant in those precise terms.

Finally, the SGCA found that the chain of reasoning adopted by the Tribunal bore sufficient nexus to the parties' cases, in that it appears to have (a) arisen by reasonable implication on the parties' pleadings, or (b) at the very least been brought to the respondent's notice.

Conclusion

The SGCA's decision in *CJA v CIZ* is a welcome addition to the jurisprudence regarding curial intervention in international arbitration awards. It acknowledges two important realities in the practice of international arbitration and provides guidelines for their reconciliation with the cornerstones of party autonomy and procedural fairness:

1. First, a party's case can evolve over the course of the proceedings. Pleadings are the start, and not the end, of a party's case, and further issues could have been submitted to arbitration in the course of the proceedings. In determining the scope of the submission to arbitration, the court must therefore have regard to the totality of what was placed before the tribunal and cannot just fixate on pleadings.
2. Second, both parties' positions could be 'wrong' (in the tribunal's view). In that situation, the tribunal is not compelled to rubber stamp either position or to attempt to pave an artificial 'middle path' between the two positions. The tribunal is entitled to arrive at conclusions that are different from (or go further than) the views adopted by parties, provided that these conclusions are based on evidence and that the tribunal affords parties a reasonable opportunity to address the determinative issue. Doing so would not involve a 'new difference' insofar as the finding is premised on the fundamental point raised by parties' submissions.

Due to their hitherto broad ambit, challenges on the basis of excess of jurisdiction and breach of natural justice have been by far the most common ground of attempting to set aside Singapore-seated arbitral awards. It is hoped that this decision will help to weed out frivolous challenges where the matters sought to be impugned have in fact been put into issue by the parties and fully ventilated before the tribunal, leaving behind cases where there are real grievances as to the tribunal's conduct. This, in turn, will increase certainty and finality in Singapore-seated arbitral awards.

Key takeaways

- The court must look at matters in the round to determine what issues were live in the arbitration, including the following sources: the parties' pleadings, the list(s) of issues, opening statements, evidence adduced, and closing submissions.
- A tribunal is entitled to make findings that go further than the parties' arguments, provided that such findings are premised on the fundamental points raised by parties. Such findings would not amount to exceeding jurisdiction.

About the authors

Nandakumar Ponniya | Principal

Nandakumar Ponniya is a Principal in the Dispute Resolution Practice Group Baker & McKenzie in Singapore. Nandakumar is seasoned in international arbitration with a focus on building, infrastructure and construction law. He regularly advises on infrastructure projects such as rail systems, oil and gas facilities, and utilities plants, as well as commercial and residential developments across the Asia Pacific region.

Richard Allen | Local Principal

Richard Allen is a Local Principal in the Singapore office of Baker McKenzie and a member of the Firm's Global Dispute Resolution Practice Group. His practice covers a broad spectrum of contentious and non-contentious work, including commercial and competition litigation, international arbitration, public law and regulatory advice. He is a member of the Law Society of England & Wales, the LCIA Young International Arbitration Group, the Royal Institute of International Affairs (Chatham House), the International Law Association, the American Society of International Law and the International Legal Network of Avocats Sans Frontières.

Darrell Lee | Associate

Darrell Lee is an associate in the Dispute Resolution Practice Group in Baker & McKenzie's Singapore office. Darrell's practice focuses on commercial litigation and international arbitration.