The Singapore Court of Appeal Partially Sets Aside Arbitral Awards Made in Excess of Jurisdiction and in Breach of Natural Justice, and Provides: (1) Key Observations on the Consequential Impact on the Tribunal's Costs Orders; and (2) Important Guidance on the Assessment of Costs in Cases Transferred from the General Division of the High Court to the Singapore International Commercial Court

In judgments released in appeals arising from an application to set aside two International Chamber of Commerce ("**ICC**") arbitral awards ("**Setting-Aside Application**"), the Singapore Court of Appeal decided that:

(a) An arbitral tribunal's ruling on the substance of a claim in the face of an unresolved jurisdictional challenge against that claim provided grounds for setting-aside under the International Arbitration Act ("**IAA**") and UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**");

(b) An arbitral tribunal's award on costs, which was premised upon the validity of a prior merits ruling which had been set aside, should consequentially also be set aside; and

(c) The costs guidelines in Appendix G to the Supreme Court Practice Directions ("**Appendix G**") will continue to guide the assessment of pre-transfer costs in cases transferred from the General Division of the High Court ("**General Division**") to the Singapore International Commercial Court ("**SICC**").

The first two holdings were made in *CBX and Anor v CBZ and Ors* [2021] SGCA(I) 3 (the Court of Appeal's judgment concerning the substantive merits of the Setting-Aside Application) ("**Merits Judgment**"), and the third in *CBX and Anor v CBZ and Ors* [2021] SGCA(I) 4 (the Court of Appeal's judgment concerning the SICC's assessment of costs in the Setting-Aside Application) ("**Costs Judgment**").

Our Partners Wendy Lin and Monica WY Chong acted for the successful appellants before the Court of Appeal.

Background to the Appeals

Pursuant to two share purchase agreements executed in 2015 ("**SPAs**"), the appellants ("**Buyers**") agreed to purchase from the respondents ("**Sellers**") shares in a company ("**AAA**") for a consideration of US$700 million. AAA held a controlling stake in another company ("**BBB**"), which indirectly owned and operated various wind farm projects in Thailand.

Under the SPAs, which are governed by Thai law, the US$700 million purchase price was to be paid in tranches: (a) initial instalments totalling US$175 million were payable following closing under the SPAs; whereas (b) payment of the remaining US$525 million ("**Remaining Amounts**") was deferred, contingent upon, and pegged to the future achievement of commercial operational milestones for BBB's wind farm projects. Those milestones were set out in Schedule 5 of the SPAs ("**Schedule 5 Milestones**").

In early 2016, the Sellers commenced two Singapore-seated ICC arbitrations ("**2016 Arbitrations**") alleging various breaches of the SPAs by the Buyers. Chief among the relief sought by the Sellers were: (a) rescission of one of the SPAs; and (b) an order for immediate payment of the full Remaining Amounts even though the Schedule 5 Milestones had not yet been fully achieved ("**Accelerated Payment Claim**").

The 2016 Arbitrations were bifurcated into two Phases. In Phase I, the tribunal ("**2016 Tribunal**") dismissed the Sellers' rescission claim (among other things) and deferred their Accelerated Payment Claim to Phase II. In June 2019, following the hearing in Phase II, the 2016 Tribunal then issued awards ("**Phase II Awards**") dismissing the Sellers' Accelerated Payment Claim, but *additionally*:

(a) ordering the Buyers to make payment of the Remaining Amounts, which it held were "*now due in accordance with Schedule 5*" (in view of the fact that the Schedule 5 Milestones were achieved by the time of the Phase II Awards, albeit only after the Phase II hearing and the parties' filing of post-hearing briefs) ("**Schedule 5 Order**"); and

(b) ordering the Buyers to make payment of interest on the Remaining Amounts, at a 15% per annum rate compounded annually from the date of the Phase II Awards ("**Compound Interest Order**").

In November 2019, the Buyers filed the Setting-Aside Application in the General Division to set aside the Schedule 5 and Compound Interest Orders on the following grounds:

(a) **Schedule 5 Order**: Since the only relief the Sellers sought *vis-à-vis* the Remaining Amounts was for the *accelerated* payment of the Remaining Amounts (*c.f.*, *deferred* payment under Schedule 5), the Schedule 5 Order granted relief ("**Schedule 5 Relief**") which the Sellers never in fact pursued, and which the Buyers thus never had a chance to defend. The Schedule 5 Order should in the circumstances be set aside as being a decision (i) made in excess of the 2016 Tribunal's jurisdiction (Article 34(2)(a)(iii) of the Model Law) and/or (ii) in breach of the Buyers' right to be heard (Article 34(2)(*a*)(ii) of the Model Law and/or Section 24(b) of the IAA); and

(b) **Compound Interest Order**: While the Sellers did (in Phase I of the 2016 Arbitrations) initially seek compound interest on all sums due to them, by Phase II, parties were agreed that the compounding of interest was unlawful and unenforceable under Thai law ("**Agreed Point**"). In Phase II, the Sellers therefore informed the 2016 Tribunal that they were only seeking *simple* interest. The Compound Interest Order (which was made in deviation from the Agreed Point) should in the circumstances be set aside as (among other things) it (i) went beyond the scope of the parties' submission to arbitration (Article 34(2)(a)(iii) of the Model Law), and (ii) was in breach of the Buyers' right to be heard (Article 34(2)(*a*)(ii) of the Model Law and/or Section 24(b) IAA).

Following the filing of the first round of affidavits in the Setting-Aside Application, the case was transferred from the General Division to the SICC, and was heard before an International Judge ("**Judge**") in June 2020.

In July 2020, the Judge issued judgment rejecting all of the Buyers' arguments and upholding the Phase II Awards (*CBX and another v CBZ and others* [2020] 5 SLR 184). In a further judgment issued in October 2020 (*CBX and another v CBZ and others* [2021] 3 SLR 10), the Judge awarded the Sellers the full amount they sought as their costs of the Setting-Aside Application (S$150,000 all-in plus post-judgment interest). In doing so, the Judge rejected the Buyers' submission that Appendix G and Order 59 of the Rules of Court ("**ROC**") remained relevant to the assessment of costs both *pre* and *post*-transfer of the case to the SICC, and instead assessed costs of the entire Setting-Aside Application on the basis of Order 110 Rule 46 of the ROC.

The Buyers appealed against both the Judge's July 2020 dismissal of the Setting-Aside Application ("**CA 136**") and the Judge's October 2020 costs decision ("**CA 197**"), and succeeded in both appeals.

The Court of Appeal's Merits Judgment in CA 136

The Court of Appeal agreed with all of the Buyers' key arguments in CA 136, and set aside both the Schedule 5 and Compound Interest Orders.

Setting-aside of the Schedule 5 Order

In setting aside the Schedule 5 Order on both jurisdictional and natural justice grounds, the Court of Appeal held that:

(a) The 2016 Tribunal and the Judge concluded *wrongly* that the 2016 Tribunal had jurisdiction to grant the Schedule 5 Relief irrespective of acceleration. They did so by relying on the terms of the Sellers' Phase II Reply, which included for the first time a "*very subsidiary claim*" for the Buyers to provide a guarantee or undertaking to ensure timely compliance with Schedule 5 as and when the Schedule 5 Milestones are met. That conclusion (based on the Sellers' Phase II Reply) was unjustified as:

- Following the filing of the Sellers' Phase II Reply, the Buyers took issue with any attempt to introduce new claims in respect of the Remaining Amounts not based on acceleration, and continued to repeat those clear objections at all material times: at the Phase II hearing, in their post-hearing briefs, and in subsequent communications to the 2016 Tribunal. The Buyers also made clear their understanding that any such new claim was no longer being pursued by the time of the post-hearing briefs.

- The fact that the issue of the Sellers' entitlement to the Remaining Amounts other than by way of acceleration was the subject of a separate ICC arbitration commenced by the Buyers in September 2018 ("**2018 Arbitration**") was also clearly made known to the 2016 Tribunal, who never proceeded to identify or rule on what this meant for its own jurisdiction or its exercise (in fact, in the Phase II Awards, the 2016 Tribunal's expressed intention was to leave to the 2018 Tribunal matters that were raised before the latter).

(b) There was thus clearly **an unresolved jurisdictional issue** as to whether the Sellers should be permitted to advance any claim to the Remaining Amounts other than by way of acceleration, which jurisdictional issue was never clearly ruled upon by the 2016 Tribunal. On this, the Court of Appeal observed that:

- The Terms of Reference in the 2016 Arbitrations (which recorded the Sellers' claims) stated that the 2016 Tribunal had "*not deemed it appropriate at this stage to establish a list of issues to be decided*" and that "*the issues to be determined will be those contained in the Parties' pleadings, including forthcoming submissions, and such other issues as may arise during the course of the arbitration, subject to Article 23(4) of the ICC Rules*".

- The provision in the Terms of Reference forgoing any list of issues must however be read in context, in particular, Article 23(4) of the relevant ICC Rules ("…*no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorised 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*"), which clearly contemplated the tribunal's express consideration and determination of the issue of whether new claims should be permitted.

- The Court of Appeal in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 did not (by its comments at [47]) give unrestrained licence for the introduction of new claims; those comments addressed the introduction of new and unpleaded facts or changes of an *ancillary* nature in that case (in contrast to the present case which involved the introduction of new claims or causes of action, and which would have required clear indication and admission by the tribunal).

(c) **The 2016 Tribunal did not make any ruling admitting a claim for Schedule 5 Relief, and so had no jurisdiction to rule on them in the Phase II Awards**. That taking of jurisdiction in the Phase II Awards without any prior discussion or ruling furthermore meant that **neither party had any opportunity to address the 2016 Tribunal on the relevant issues**, and in turn, allowed the Sellers, in the 2108 Arbitration, to submit that the Phase II Awards (specifically, the Schedule 5 Order) gave rise to a *res judicata* binding on the 2018 Tribunal on the issue of the Sellers' entitlement to the Remaining Amounts other than by way of acceleration, thereby **prejudicing the Buyers**. The Schedule 5 Order was therefore set aside pursuant to Article 34(2)(a)(iii) of the Model Law and Section 24(b) of the IAA.

Setting-aside of the Compound Interest Order

Consequential to the setting-aside of the Schedule 5 Order, the Compound Interest Order (which was premised upon the Schedule 5 Relief) was also set aside. Notwithstanding that, the Court of Appeal observed (in *obiter dicta*) that it would in any case have independently set aside the Compound Interest Order as:

(a) It went beyond the scope of parties' submission to arbitration within the meaning of Article 34(2)(a)(iii) of the Model Law, in that it went outside the scope of what both parties had agreed the 2016 Tribunal could (under the relevant governing law, which was Thai law), or should, afford by way of relief; and

(b) It involved a breach of natural justice within Section 24(b) of the IAA by the making of orders contrary to the parties' agreed position without first giving the parties warning and an opportunity to make further submissions.

Setting-aside of the 2016 Tribunal's Costs Award

Consequential to the above, the Court of Appeal also set aside the 2016 Tribunal's Costs Award which had ordered the Buyers to pay 66% of the Sellers' costs in Phase I and Phase II of the 2016 Arbitrations. In doing so, the Court of Appeal rejected the Sellers' argument that the Court could not interfere with the Costs Award (notwithstanding the setting-aside of the Schedule 5 and the Compound Interest Orders) as none of the IAA or Model Law setting-aside grounds applied to the Costs Award. The Court of Appeal held that:

(a) In cases where a *whole* award is set aside for having been made in excess of jurisdiction or in breach of natural justice, the costs award (which will normally have depended on the substantive award now set aside) will consequentially also be set aside.

(b) The present case differs from those situations as it concerns only the *partial* setting-aside of the Phase II Awards. Nevertheless, the 2016 Tribunal's conclusions regarding the substantive aspects of the Phase II Awards now set aside were clearly significant matters in its mind when it made the Costs Award.

(c) As a matter of first principles, **where a later order is ancillary to and depends upon the validity and premises of a prior order, the later order should not survive the setting-aside of the former**; "*[t]he fruit falls with the tree*". Any other conclusion would have the potential for extraordinary anomalies and serious injustice, which would serve neither the cause of, nor the sensitive supportive role which the courts have towards, arbitration.

Key takeaways from the Merits Judgment

(a) In light of this decision, parties seeking to introduce new claims should, where this is challenged, obtain a clear ruling on the issue from the tribunal, or risk having their awards subsequently set aside (or not enforced).

(b) After setting aside the 2016 Tribunal's Costs Award, the Court of Appeal noted that there was no provision in the IAA or Model Law vesting the Singapore Courts with the power to remit the issue of costs to the 2016 Tribunal for reconsideration (unlike the position in England, and *c.f.* the power under Section 10(7) IAA in the context of jurisdictional appeals). In the Court of Appeal's view, it would be "*a matter of regret*" if "*it were not possible in one way or another to find a means, where appropriate, for a party to seek and for some tribunal (or even court) to make a valid costs order, where appropriate according to the circumstances*". The Court of Appeal noted that this may be an area that would benefit from law reform (see [85] of the Merits Judgment), but meanwhile observed (without deciding) that there may be "*scope for argument*" as to whether an arbitral tribunal in cases such as the present is really *functus officio* in relation to the issue of costs.

The Court of Appeal's Costs Decision in CA 197

It followed from the Buyers' success in CA 136 that their appeal in CA 197 also succeeded (with the consequential setting-aside of the Judge's October 2020 costs judgment). Nonetheless, as CA 197 was mounted on the premise that the Judge erred in principle in his assessment of costs, the Court of Appeal found it appropriate to address the substance of CA 197.

Key points of principles arising from the Costs Decision:

(a) There are two types of cases that are heard and determined in the SICC: (i) those emanating from a fresh filing in the SICC Registry and are, from their inception, governed by Order 110 of the ROC and thus subject, always and only, to the costs regime established by Order 110 Rule 46 of the ROC; and (ii) those filed initially in the High Court (General Division) Registry and subsequently transferred to the SICC.

(b) In the latter context, **Appendix G will continue to be the guide and "starting point" for the assessment of pre-transfer costs in the absence of any order made by the Registrar handling the transfer to the SICC that Appendix G is entirely disapplied or of consent from both the parties to such disapplication**. The policy reasons behind the adoption of Appendix G for cases filed in the General Division do not cease to apply to steps taken there simply because it is later considered appropriate to transfer the case to the SICC. The party who wants Appendix G to be departed from bears the burden of justifying such departure.

(c) **Whether Appendix G plays a role in the assessment of post-transfer costs (which, on the face of it, will be assessed under Order 110 Rule 46) will depend on the circumstances of each case**.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

Wendy LIN
Partner – Commercial & Corporate Disputes
d: +65 6416 8181
e: wendy.lin@wongpartnership.com
Click here to view Wendy's CV.

Monica CHONG Wan Yee
Partner – Commercial & Corporate Disputes
d: +65 6517 3748
e: monicawy.chong@wongpartnership.com
Click here to view Monica's CV.

Connect with WongPartnership.

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-
WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-
WongPartnership LLP
Shanghai Representative Office
Unit 1015 Link Square 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

MYANMAR

-
WongPartnership Myanmar Ltd.
Junction City Tower, #09-03
Bogyoke Aung San Road
Pabedan Township, Yangon
Myanmar
t +95 1 925 3737
f +95 1 925 3742

INDONESIA

-
Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

wongpartnership.com

MALAYSIA

-
Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

MIDDLE EAST

-
Al Aidarous Advocates and Legal Consultants
Abdullah Al Mulla Building, Mezzanine Suite 02
39 Hameem Street (side street of Al Murroor Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com

-
Al Aidarous Advocates and Legal Consultants
Zalfa Building, Suite 101 - 102
Sh. Rashid Road
Garhoud
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

-
ZGLaw
27/F 88 Corporate Center
141 Sedeño Street, Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w zglaw.com/~zglaw