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Case Comment

THE POWER TO CONSIDER REMITTAL AS A NEW POINT IN AN APPEAL: A MATTER OF JURISDICTION OR POWER?

CBS v CBP [2021] SGCA 4

[2021] SAL Prac 16

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I. Summary

1 There are very few instances where the Singapore Court of Appeal has no jurisdiction or power[1] to make an order in the context of civil proceedings.[2] As the apex court in Singapore which exercises both original jurisdiction[3] and appellate jurisdiction, this state of affairs is not unexpected.

2 The Court of Appeal's decision in *CBS v CBP*[4] that it does not have the power to remit an arbitral award back to the tribunal for reconsideration or determination of an issue is therefore an interesting anomaly.

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1 As a creature of statute, the Court of Appeal's jurisdiction and power are derived from statute. The main statute which sets out and regulates the Court of Appeal's jurisdiction and power is the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). The SCJA must be read with other statutes and subsidiary legislation which either expand or circumscribe the Court of Appeal's jurisdiction or power. An example is the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

2 The context of this article is limited to civil proceedings.

3 Original jurisdiction here refers to the few situations where an application can be made directly to the Court of Appeal. The most common application is for leave to appeal to the Court of Appeal: see O 57 r 2A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

4 [2021] SGCA 4.

3 This article seeks to explain why, having regard to the arguments that were made to the Court of Appeal, the decision in *CBS v CBP* should be reconsidered and, with respect, reversed.

II. Background

A. The challenge against the award

4 The key facts can be summarised thus. The plaintiff in the court proceedings was the respondent in the arbitration. The respondent had requested for an oral hearing to lead and cross-examine witnesses. The claimant in the arbitration said there was no need for such a hearing. The tribunal interpreted the relevant arbitral rules as providing tribunals with the power to decide whether to convene an oral hearing to receive witness testimony, which extends to declining to convene an oral hearing against the wishes of one party.

5 After declining to hold an oral hearing to receive witness testimony, the tribunal proceeded to determine the merits of the dispute and found against the plaintiff. The plaintiff then applied to the Singapore High Court to set aside the award on the ground, amongst others, that the tribunal had breached the rules of natural justice in depriving the plaintiff of its right to present its case.

6 The High Court ruled in the plaintiff's favour. On appeal, the Court of Appeal agreed with the High Court's decision. This article focuses not on the merits of the natural justice argument, but on an ancillary point decided by the Court of Appeal.

B. Question on remittal of arbitral award

7 The defendant then invited the Court of Appeal to consider remitting the award back to the arbitrator pursuant to Art 34(4) of the Model Law. This was not a point argued before the High Court.

8 Before sketching the parties' submissions to the Court of Appeal, it is apposite to reproduce Art 34(4) of the Model Law:

> The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

9 The defendant submitted that the Court of Appeal had the power to remit the award because the reference to "court" in Art 34(4) "can refer to both the High Court and the Court of Appeal". Moreover, s 37 of the Supreme Court of Judicature Act[5] ("SCJA") states that the Court of Appeal "shall have all the powers … of the High Court" and may "make any order which ought to have been given or made". [6]

10 The plaintiff, on the other hand, argued that the Court of Appeal did not have the power to remit the award because the "plain text of Art 34(4)" required the party resisting the setting aside to request for remittal while the setting-aside proceedings were still afoot and before they were determined. However, on the facts, no request for remittal was made before the High Court and the setting-aside proceedings had concluded with the High Court's decision to set aside the award.[7]

III. Court of Appeal's decision on remittal of award

11 On the basis of the parties' submissions, the Court of Appeal identified the "key interpretive issue"[8] as whether the "court" referred to in Art 34(4) includes the Court of Appeal. The Court of Appeal provided three arguments in answering the key interpretive question in the negative.

12 *First*, the Court of Appeal held that as the "court" in Art 34(4) is the same court that is referred to in Art 6 of the Model Law, and s 8(1) of the International Arbitration Act[9]

5 Cap 322, 2007 Rev Ed.
6 *CBS v CBP* [2021] SGCA 4 at [96].
7 *CBS v CBP* [2021] SGCA 4 at [98].
8 *CBS v CBP* [2021] SGCA 4 at [102].
9 Cap 143A, 2002 Rev Ed.

("IAA") designates the High Court as the court for the purposes of Art 6, it follows that the High Court is the court referred to in Art 34(4).[10] This shall be referred hereafter as the "Model Law Reason".

13 *Second*, the Court of Appeal explained that the conclusion from the Model Law Reason is consistent with the purpose of the remittal device. In essence, remittal was meant to be a "useful device for curing procedural defects *without having to set aside the award*" [emphasis added].[11] Hence, remittal is "an alternative remedy which may be used to mitigate the draconian consequences associated with the setting aside of an award altogether".[12] This shall be referred to hereafter as the "Purpose Reason".

14 *Third*, the above conclusions are also consistent with the fact that the Court of Appeal's role is "limited to reviewing the High Court's decision on the issue [*ie*, whether the award may be remitted], assuming an application had been made below". The Court of Appeal said it had "no (original) jurisdiction to deal with an *ab initio* application to remit".[13] The Court of Appeal observed that s 37 of the SCJA would be engaged, and the Court of Appeal had the power to order a remittal, had the issue been raised before the High Court at first instance. Short of that, the Court of Appeal "has no jurisdiction to deal with an *ab initio* application to remit".[14] This shall be referred to hereafter as the "Role of the Court of Appeal Reason".

IV. Discussion

A. Model Law Reason

15 The Model Law Reason justifies closer scrutiny.

10 *CBS v CBP* [2021] SGCA 4 at [103].
11 *CBS v CBP* [2021] SGCA 4 at [104].
12 *CBS v CBP* [2021] SGCA 4 at [104].
13 *CBS v CBP* [2021] SGCA 4 at [105].
14 *CBS v CBP* [2021] SGCA 4 at [108].

16 As alluded to above, the Court of Appeal linked the reference to "court" in Art 34(4) of the Model to the definition of "court" in Art 6 read with s 8(1) of the IAA. The linkage, however, raises questions and invites further consideration.

17 It is true that under s 8(1) of the IAA the High Court is the designated court for the purposes of Art 6. It is also correct that Art 6 states that the functions to be performed in various articles of the Model Law "shall be performed by" the court designated by the relevant jurisdiction – in this case, the High Court, pursuant to s 8(1) of the IAA.

18 The problem with the reliance on Art 6 is this: Art 34(4) is *not* one of the articles expressly referred to in Art 6.[15]

19 Indeed, where the reference to an authority or court in an article of the Model Law is intended to be a reference to the authority or court specified in Art 6 of the Model Law, the former article will expressly say so. For instance, Art 34(2) states:

> An arbitral award may be set aside by the *court specified in Article 6* only if … [emphasis added].

20 Compare the above with Art 34(4) which simply reads, "*[t]he court*, when asked to set aside an award …" [emphasis added]. The contrast is stark and also clear. If it is assumed that the difference in wording is deliberate (which is a fair assumption, especially given that the Model Law went through extensive deliberations and stages of comments), and a reference to Art 34(2) in Art 6 was intended to be limited to just Art 34(2) and no other provision, however related, then it must follow that the "court" in Art 34(4) is *not* limited to the "court" in Art 6. Indeed, if the "court" in Art 34(4) were meant to be limited to the same court in Art 6, then Art 34(4) would be one of the articles referred to in Art 6, and the wording of Art 34(4) should refer back to Art 6. That is not the case, and the court has good reason to be slow to come to that conclusion.

15 Art 6 refers to Arts 11(3), 11(4), 13(3), 14, 16(3) and 34(2).

21 Applying the Court of Appeal's reasoning from Art 6 therefore actually takes the court away from, rather than to, the interpretation that "court" in Art 34(4) refers to the designated court under s 8(1) of the IAA.

22 There is another reason why the interpretation of "court" in Art 34(2) or Art 34(4) and its relationship to Art 6 should not be over-analysed, even if the proper relationship between the articles should be understood. If Art 34(2) were to be construed strictly, because of the reference in Art 34(2) to the "court" in Art 6, it would follow that the *only* court that can set aside awards in Singapore is the High Court. This means that if the High Court refused to set aside, on appeal, the Court of Appeal may not set aside the award. This is of course a startling proposition and almost certainly wrong.

23 Therefore, Art 6 should be approached not as a provision that governs the jurisdiction of appellate courts (such as the Court of Appeal) over first instance courts (such as the High Court). Rather, Art 6 is a provision that identifies and gives certainty to the judicial body which is empowered to deal with the matters referred to in Art 6. So, in the case of setting aside, it is the High Court of Singapore which is the judicial body that decides, at first instance. Art 6 has no other implication beyond that, especially on the Court of Appeal's jurisdiction. Certainly, it should not be read as restricting or circumscribing the jurisdiction of the Court of Appeal.

24 This interpretive approach to Art 6 is buttressed by other provisions in the Model Law which expressly circumscribe matters which may not be appealed against. Those provisions can and should be properly regarded as limiting the appellate court's jurisdiction. A clear example is Art 16(3) of the Model Law which states that any decision by the first instance court in an application concerning a tribunal's ruling on jurisdiction as a preliminary question is "subject to no appeal".

25 That Art 16(3) curtails the Court of Appeal's civil appellate jurisdiction is explicitly recognised in s 10(1) of the IAA. That provision states that s 10 is to apply "notwithstanding

Article 16(3) of the Model Law" and, specifically in relation to an application concerning a tribunal's ruling on jurisdiction as a preliminary question, an appeal may be brought against the High Court's decision with leave of the appellate court.[16] The existence of provisions such as Art 16(3) is further evidence that where the drafters of the Model Law intended to limit appellate jurisdiction, they did so expressly; by extension, the drafters did not envisage Art 6 as a jurisdiction-limiting provision.

B. The Purpose Reason

26 The Purpose Reason places a premium on the effect of remittal on the determination of the setting-aside proceedings. The core logic can be summarised thus. Because remittal is a device that is to be deployed *before* a setting-aside decision is made, it follows that the issue must be raised *before* the setting-aside decision is made.

27 The Purpose Reason is sound and supported by the express language of Art 34(4). Under Art 34(4), the remittal remedy is engaged when:

(a) the court is being asked to set aside an award, *ie*, where there is a pending application before the court;

(b) where remittal has been "requested by a party"; and

(c) where remittal is "appropriate".

28 The fact that the remittal remedy is contemplated as an alternative to setting aside, as the Court of Appeal rightly pointed out, is underscored by the power given to the court under Art 34(4) to "suspend the setting aside proceedings for a period of time … in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as

16 With the recent changes to the High Court, the appellate court now refers to the Appellate Division of the High Court: see s 10(11) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) read with s 29C of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

in the arbitral tribunal's opinion will eliminate the grounds for setting aside".

29 The Court of Appeal's explication of the Purpose Reason is therefore sound and unimpeachable.

30 The Purpose Reason, however, is not *on its own* a ground for determining, one way or the other, whether the Court of Appeal is empowered to remit the award to the tribunal in circumstances where the remittal has not been sought before the High Court. Put another way, the Purpose Reason is not any less efficacious if the Court of Appeal has the power to remit notwithstanding that the issue is raised only for the first time on appeal.

31 This is because the very same conditions for engaging the remittal remedy, as set out in para 27 above, also apply to a hearing in the Court of Appeal. There is no question that in an appeal, the setting-aside proceedings remain afoot; it is artificial and meaningless to say that setting-aside proceedings have concluded or are no longer extant after the High Court has rendered a decision. Indeed, the Court of Appeal did not (expressly, at least) endorse this argument which was made by the plaintiff in the appeal.

32 Hence, the Purpose Reason does not, of itself, lend support to the conclusion that the Court of Appeal is not empowered to remit the award to the tribunal in circumstances where remittal has not been sought before the High Court. If anything, because the conditions for engaging the remittal remedy can be satisfied in an appeal before the Court of Appeal, the Purpose Reason actually supports the opposite conclusion.

C. Role of the Court of Appeal Reason

33 This last reason is perhaps the Court of Appeal's strongest justification for its conclusion. The essence of this reason is that the Court of Appeal's appellate jurisdiction is over issues raised before the High Court. Any issue not raised before the High Court is therefore not within the Court of Appeal's jurisdiction to decide.

34 Now, it is necessary to distinguish between jurisdiction and power. They are conflated often. Most times, the conflation is inconsequential. In the present case, it is.

35 The *locus classicus* on the distinction between jurisdiction and power is the Court of Appeal's decision in *Re Nalpon Zero Geraldo Mario*[17] ("*Nalpon Zero*"). In that case, the Court of Appeal clarified that "jurisdiction" refers to the court's "authority, however derived, to hear and determine a dispute that is brought before it".[18] The Court of Appeal went on to point out that the Court of Appeal's jurisdiction is based in statute. In other words, the Court of Appeal has the authority to hear and determine a dispute if – and only if – the Court of Appeal has been granted such authority by a statute.

36 An important observation might be noted at this juncture. The jurisdiction is tied to the authority to hear a "dispute" in contradistinction to an issue, unless expressly stated otherwise by statute. This is made clear by, for instance, s 53(2) of the SCJA which provides that the Court of Appeal's exercise of civil jurisdiction consists of, among other things, "any appeal against any decision made by the General Division in any civil cause or matter in the exercise of its original or appellate civil jurisdiction", "any appeal from the Appellate Division", and "any appeal or other process that any written law provides is to lie …". Nowhere in s 53 of the SCJA is the Court of Appeal's jurisdiction over an appeal limited in content. It is not, because the jurisdiction is over the appeal, not the contents of the appeal.

37 Pertinently, there is nothing by way of legislation which restricts or circumscribes the Court of Appeal's appellate jurisdiction over arguments or reliefs that were not made at first instance. If there was such legislation, the plaintiff would no doubt have brought that to the Court of Appeal's attention and the Court of Appeal would have referenced the relevant statutory provision limiting its jurisdiction. Because the Court of Appeal's

17 [2013] 3 SLR 258.
18 *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [13].

jurisdiction is a consequence of legislative power, that would have been the end of the matter.

38 That is not to say that the Court of Appeal is obliged to entertain any and all arguments made in an appeal that is properly brought, *ie*, an appeal that meets all of the criteria for an appeal. There are restrictions. For example, O 57 r 9A(4) of the Rules of Court provides:

> If a party is —
>
> > (*a*) abandoning any point taken in the Court below; or
> >
> > (*b*) intends to apply in the course of the hearing for leave to ***introduce a new point not taken in the Court below***,
>
> *this should be stated clearly in the Case …*
>
> [emphasis added in bold and italics]

39 Order 57 r 9A(5) provides:

> A respondent who, not having appealed from the decision of the Court below, ***desires to contend on the appeal*** that the decision of that Court should be varied in the event of an appeal being allowed in whole or in part, or that the decision of that Court *should be affirmed on grounds other than those relied upon by that Court,* ***must*** *state so in his Case, specifying the grounds of that contention*.
>
> [emphasis added in bold and italics]

40 Order 57 rr 9A(4) and 9A(5) both contemplate that a new point, *ie*, a point not raised in the court below, may be made in the Court of Appeal. As a corollary, O 57 rr 9A(4) and 9A(5) also contemplate that the Court of Appeal has the *power* to refuse to hear new points *if* those new points are raised without compliance with the requirements in O 57 r 9A(4) or O 57 r 9A(5). This is an issue of the exercise of power, not jurisdiction. As the Court of Appeal explained in *Nalpon Zero* (by reference to an earlier decision):[19]

> The powers of a court constitute its capacity to give effect to its determination by *making or granting the orders or reliefs* sought by the successful party to the dispute. … [emphasis added]

19 *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [31].

41 Order 57 rr 9A(4) and 9A(5) are thus consistent with the proposition that the Court of Appeal has *jurisdiction* to hear and determine new points, whether of law or fact. Put another way, if the Court of Appeal has no jurisdiction to hear and determine new points not raised in the court below, as a hard legal rule, then O 57 rr 9A(4) and 9A(5) are otiose. It would be a pointless exercise for the parties to give notice or make an application when their new points would simply not be entertained for want of jurisdiction. The existence of numerous cases dealing with arguments raised for the first time in the Court of Appeal[20] suggests that conclusion is likely incorrect.

42 From the judgment, the Court of Appeal appears not to have been directed to O 57 r 9A(4) or O 57 r 9A(5). If that is right, there is a good chance that the Court of Appeal might have been persuaded to arrive at a different conclusion had full arguments on O 57 rr 9A(4) and 9A(5) been made.

43 In summary, it is respectfully suggested that it is more accurate to say that the Court of Appeal has full jurisdiction to remit an award to the tribunal even where a request was not made before the High Court, but the Court of Appeal has the power not to consider the issue, either because the preconditions under the Rules of Court for raising remittal as a new point have not been complied with or, as explained below, the defendant in the proceedings has been taken to have waived or accepted the position that remittal is not an "appropriate" relief (see para 27 above) on the facts by not seeking that relief before the High Court.

D. Whether a new argument on remittal should be considered if raised for the first time in the Court of Appeal

44 If it is accepted, then, that the Court of Appeal has jurisdiction and power to consider a new argument to remit the

20 See, for example, *Ng Bok Eng Holdings Pte Ltd v Wong Ser Wan* [2005] 4 SLR(R) 561 at [35]; *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 at [14]–[16]; and *Chua Chian Ya v Music & Movements (S) Pte Ltd* [2010] 1 SLR 607 at [16].

award to the tribunal, the only remaining question is what test should govern whether the Court of Appeal should allow the argument to be made.

45 In many ways, guidance is readily available from the jurisprudence relating to O 57 rr 9A(4) and 9A(5) and, following the same logic, the jurisprudence relating to amendments to pleadings made in an appeal. Generally speaking, the Court of Appeal will allow a party to canvass a new point (whether it is an argument or a pleading) if: (a) the point has not been abandoned or conceded in the lower court; and (b) there is no irremediable prejudice to the other party.

(1) If the new point had been abandoned or conceded previously

46 This is a self-evident principle. In accordance with the principle of finality of justice, a party should not be allowed to prevaricate or revert to a contradictory position upon receipt of an unfavourable result. *Chow Khai Hong v Tham Sek Khow*[21] exemplifies this principle.

47 The appellant in that case tried to argue, in the Court of Appeal, that the High Court's finding in relation to pre-trial loss of earnings was erroneous, because the High Court had awarded tips of $100 per month when it was established by the evidence that the value of tips was $160 per month. The Court of Appeal rejected this argument, saying that this point was not "really open to the appellant" because the appellant did not challenge the valuation of the tips in the High Court and did not raise this in argument before the High Court.[22]

48 In the context of setting-aside proceedings, should there be unequivocal evidence that the defendant was wholly against remittal at the High Court level, if the High Court then decides to set aside the award, the defendant ought not to be permitted to turn around and argue for remittal in the Court of Appeal.

21 [1991] 2 SLR(R) 670.
22 *Chow Khai Hong v Tham Sek Khow* [1991] 2 SLR(R) 670 at [7].

(2) If allowing the new point to be made causes irremediable prejudice to the other party

49 This principle is trite and self-explanatory.[23] Its application is most clear-cut in a case where a new point or pleading is sought to be introduced on appeal after a trial, but evidence of this new point was not led and received at trial because the point had not been raised there. In these cases, the law has consistently held that the point may not be argued on appeal where further evidence or findings would have been made had the new point been raised below but these evidence or findings by the court below are now not available to the Court of Appeal because the new point had not been raised.[24]

50 In the context of setting-aside proceedings, this might take the form of evidence relating to the conduct of the arbitrator, the actions or omissions of the parties in reliance on the arbitrator's conduct, the possibility of a fair re-hearing, and the practical consequences of setting aside to each of the parties, all of which could conceivably have a bearing on the Court of Appeal's determination on the appropriateness of remitting the award in lieu of setting aside.

51 Although it does not appear to have been framed as such in its decision, the Court of Appeal might have trained its mind to these very factors as it was determining whether it should entertain the defendant's new request to remit the award to the tribunal. Quite possibly, the Court of Appeal was satisfied on the facts and evidence placed before it that there was insufficient evidence before the Court of Appeal to enable the court to make a considered decision on the appropriateness of remittal. If that was so, the Court of Appeal's decision not to entertain the remittal argument on appeal is uncontroversial and fully in line with the case law concerning new points raised on appeal.

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23 See *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724 at [34]–[35], albeit the specific mechanics of the test are more elaborate. There are a number of factors that are relevant: see *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [55].

24 *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [36].

V. Conclusion

52 As with any appeal, the Court of Appeal's decision is ultimately a reflection of its decision on the merits of the arguments raised by the parties before it. In this particular case, the judgment does not refer to arguments which arguably are relevant and might have had a material bearing on the Court of Appeal's analysis of the issue.

53 Nevertheless, the Court of Appeal's decision not to entertain the defendant's argument on remittal raised for the first time in the Court of Appeal is understandable and consistent with the Court of Appeal's long-standing practice. However, it is hoped that the Court of Appeal would consider revisiting its reasoning in this decision and, in particular, whether this decision could be rationalised using the doctrines of abandonment or irremediable prejudice instead of absence of jurisdiction.