Published on 12 May 2022

Case Comment

TO PLEAD OR NOT TO PLEAD?

CLX v CLY [2022] SGHC 17

[2022] SAL Prac 11

LEE Hwai Bin[1]
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore), *Roll of Solicitors of England and Wales*;
Partner, WongPartnership LLP.

Justin **LOW**
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Senior Associate, WongPartnership LLP.

I. Introduction

1 In the Shakespearean play *Julius Caesar*, to convince Brutus to join the assassination conspiracy against Julius Caesar, Cassius famously remarked, "[m]en at some time are masters of their fates: the fault, dear Brutus, is not in our stars, but in ourselves". Cassius had intended to convey that a person's destiny is within his or her own control and not necessarily pre-determined by a higher divine power. In *CLX v CLY*,[2] which concerned a setting-aside application of an arbitral award, the court dismissed the plaintiff's ("CLX") allegations of the defendants' ("CLY" and "CLZ") fraudulent conduct and dismissed the application on the principal ground that the fraud allegation was not made out and that these allegations raised were matters which could have been discovered and pleaded in the arbitration.

1 The authors would like to thank Hong Jia Yu, who assisted with the preparation of this article.
2 [2022] SGHC 17.

2 While less dramatic than the Shakespearean play, the court's introduction in its judgment sums up its take on the case, that is, that the onus is on the parties to a dispute to put forward their case fully and exhaustively before the arbitral tribunal so that the dispute submitted to the tribunal for determination and all issues encompassed within it can be conclusively and comprehensively resolved. This is all the more pertinent in the context of arbitration where commercial interests of finality are paramount. A party who fails to do so and seeks to introduce an issue or argument material to the merits of the underlying dispute under the guise of fraud or breaches of natural justice rules or public policy grounds will not find favour with the courts.[3]

II. Background facts

A. The parties' contract

3 The parties had entered into a contract for the design, supply, installation, testing and commission of overhead cranes for a multi-level warehouse and container depot owned by CLY.[4] CLX was a subcontractor who undertook to design, supply, install, test and commission the overhead cranes, while CLZ was the main contractor appointed by CLY and who had entered into the subcontract with CLX. Disputes arose between the parties over the overhead cranes supplied by CLX. On 22 December 2015, CLZ assigned its rights under the subcontract with CLX to CLY.[5]

B. Commencement of arbitration

4 Thereafter, CLY issued a written notice of termination and commenced arbitral proceedings, conducted under the auspices of the Singapore International Arbitration Centre ("SIAC"), against CLX to seek, *inter alia*, a rescission of the parties' contract, a refund of the contract sums paid to CLX, and/or damages for CLX's breach of the contract, on the grounds that the quality of

3 *CLX v CLY* [2022] SGHC 17 at [1].
4 *CLX v CLY* [2022] SGHC 17 at [7].
5 *CLX v CLY* [2022] SGHC 17 at [8].

the overhead cranes supplied by CLX was unsatisfactory and that CLY was thus entitled to reject the cranes.[6]

C. Tribunal's decision

5 The arbitration ran its course with an oral hearing conducted over ten days. The arbitral tribunal, comprising of a sole arbitrator, was tasked to consider 23 issues. The arbitrator rendered an award granting multiple reliefs prayed for by CLY and CLZ, including a refund of the contract sums paid to CLX for the defective overhead cranes, and damages on the various alternative grounds of liability pleaded by CLY.[7] The arbitrator also granted CLY's prayer for an order for removal of the overhead cranes in the award.

6 Following the release of the award, CLX conducted a physical inspection of the overhead cranes at CLY's premises (the "Site Visit"), alleging thereafter that the overhead cranes had been "damaged and/or destroyed, with several key parts missing and/or cannibalised" by CLY.[8]

7 In the wake of the Site Visit, CLX submitted an application under r 33 of the SIAC Rules[9] seeking for the award to be corrected, interpreted and/or for an additional award to be issued. One of the requests, categorised by the arbitrator as "Request 4", concerned CLX's request for access to inspect the overhead cranes to provide a full itemisation of the destroyed and/or missing parts and additional directions in respect of the conduct of proceedings in relation to the further order being sought (*viz*, to hold CLY liable for the depreciation in value of the cranes occasioned by CLY's alleged damages to the overhead cranes while in storage during the arbitration).[10] The arbitrator rejected CLX's request to inspect the cranes (*ie*, Request 4) on the basis that the issue of depreciation had neither been pleaded nor

6 *CLX v CLY* [2022] SGHC 17 at [8]–[9].
7 *CLX v CLY* [2022] SGHC 17 at [12].
8 *CLX v CLY* [2022] SGHC 17 at [13].
9 Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016).
10 *CLX v CLY* [2022] SGHC 17 at [14].

put before him during the arbitration.[11] Apart from an adjustment to the sum finally awarded to CLY to correct a double-counting error in the aftermath of CLX's application under r 33 of the SIAC Rules, the tribunal's award was substantively preserved.[12]

8 CLX's allegations concerning the state of the overhead cranes observed at the Site Visit eventually formed the bedrock of its fraud complaint in the application to set aside the award.[13]

III. Issues at setting-aside application commenced by CLX

9 CLX sought to set aside the award on grounds, *inter alia*, that the award was induced or affected by fraud and that there was a breach of natural justice in the making of the award.[14]

IV. The High Court's holding and analysis

A. CLX's setting-aside application dismissed

10 The court dismissed CLX's application on the basis that:

(a) CLX had failed to discharge its legal burden of proving that CLY had acted fraudulently in the course of the arbitration;[15]

(b) CLX was not denied of the opportunity to be fairly heard by the arbitrator;[16] and

(c) there was no basis for the tribunal's award to be set aside on grounds of it being contrary to public policy.[17]

11 *CLX v CLY* [2022] SGHC 17 at [19].
12 *CLX v CLY* [2022] SGHC 17 at [24].
13 *CLX v CLY* [2022] SGHC 17 at [13].
14 *CLX v CLY* [2022] SGHC 17 at [6].
15 *CLX v CLY* [2022] SGHC 17 at [70] to [71].
16 *CLX v CLY* [2022] SGHC 17 at [117].
17 *CLX v CLY* [2022] SGHC 17 at [122].

B. The High Court affirms the law concerning fraud

11 In dismissing CLX's application, the court affirmed the law concerning fraud as elucidated in *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC*[18] ("*Bloomberry*"). The court summarised the key principles elucidated in *Bloomberry* as follows (the "*Bloomberry* Principles"):[19]

> (a) Perjury and the deliberate suppression or withholding of documents in an arbitration can in a proper case amount to obtaining an award by fraud.
>
> (b) Where the fraud alleged is perjury, the applicant must prove that:
>
> > (i) false evidence is given which is intended to cause any person in that proceeding to form an erroneous opinion that touches any point material to the result of such proceeding;
> >
> > (ii) the new evidence demonstrating fraud could not have been discovered or produced, despite reasonable diligence, during the arbitration proceedings; and
> >
> > (iii) the newly discovered evidence must be decisive in that it would have prompted the arbitrator to have ruled in favour of the applicant instead of the other party.
>
> (c) Where the fraud alleged is concealment or non-disclosure of material information or documents, the applicant must prove that:
>
> > (i) there is deliberate (as opposed to innocent or negligent) concealment aimed at deceiving the arbitral tribunal or the other party/parties to the arbitration;
> >
> > (ii) there is a causative link between the deliberate concealment and the decision in favour of the concealing party (*ie*, the concealment must have substantially impacted the making of the award). The document(s) (or information) concealed must be so material that earlier discovery would have prompted the arbitrator to rule in favour of the applicant; and
> >
> > (iii) there must not have been a good reason for the non-disclosure.

18 [2021] 3 SLR 725.
19 *CLX v CLY* [2022] SGHC 17 at [59].

(d) Where new evidence is being introduced to demonstrate fraud, the applicant would have to demonstrate why it was not available or could not have been obtained with reasonable diligence at the time of the arbitration.

(e) The three common core elements to such procedural fraud (*ie*, perjury and concealment of documents/information) include: (a) dishonesty or bad faith; (b) the materiality of the new evidence to the decision of the tribunal; and (c) the non-availability of the evidence during the earlier proceeding. Further, while proving fraud, dishonest or unconscionable conduct is essential, it is not sufficient.

12 In addition to affirming that the law, the court provided its analysis on the facts and evidence relied on by CLX for invoking fraud as a ground for setting aside a final arbitral award.

C. The court's analysis

(1) Legal burden on the alleging party to be discharged with strong and cogent evidence

13 In the context of an arbitration, the *Bloomberry* Principles dictate that the plaintiff must first prove that the defendant had acted dishonestly to conceal or give false evidence to the tribunal in an attempt to induce a favourable award (see the *Bloomberry* principles (b)(i) and (c)(i) respectively). In the present case, CLX alleged that CLY had falsely represented to the arbitrator that the overhead cranes had merely been "dismantled" for storage, and that CLY had dishonestly concealed from the arbitrator the fact that the overhead cranes had been dismembered, destroyed, and/or cannibalised by CLY for the latter's own use, which fact was only discovered by CLX during its Site Visit.[20] To support its allegations, CLX argued that the arbitrator had not been aware of any damage or destruction to the overhead cranes, or of any cannibalised or missing parts when the arbitrator rendered the award.[21] CLX also relied on photographs it took during the Site

20 *CLX v CLY* [2022] SGHC 17 at [60].
21 *CLX v CLY* [2022] SGHC 17 at [66] and [70].

Visit and photographs adduced by CLY of the overhead crane parts prior to dismantling to show significant damage to the same.[22]

14 The court held that CLX's comparison of the photographs was insufficient to stand as strong and cogent evidence to make out a convincing case that CLY had acted dishonestly to induce the award in CLY's favour;[23] in other words, CLX could neither prove that CLY had deliberately concealed material information from the arbitrator, nor that CLY had given false evidence to mislead the arbitrator.[24] The court rationalised that: (a) it was close to impossible for the court to adjudge with any degree of confidence that CLY had deliberately damaged, destroyed, or cannibalised the overhead cranes (as opposed to other plausible explanations for any damage such as negligence and/or caused inadvertently in the course of relocation) simply by a comparison of the photographs;[25] and (b) CLY did not seek to assert that there was no damage to the overhead cranes at all and had in fact been consistently putting forth evidence regarding the condition of the overhead crane parts.[26] Failing to meet the threshold, the court will not assist or infer a finding of fraud.[27]

(2) Applicant must prove that discovery of evidence was not possible despite exercise of reasonable diligence

15 The court considered the fact that CLX could have obtained the necessary evidence as to the state of the overhead cranes if it had exercised reasonable diligence during the course of the arbitration.[28]

16 In the course of the arbitration, CLX could have invoked a request for disclosure or to inspect the cranes under the SIAC Rules to safeguard its legal position or advance a position, even if in the alternative; CLX did not do so.[29] The court found

22 *CLX v CLY* [2022] SGHC 17 at [74].
23 *CLX v CLY* [2022] SGHC 17 at [62].
24 *CLX v CLY* [2022] SGHC 17 at [71]–[72].
25 *CLX v CLY* [2022] SGHC 17 at [74]–[76].
26 *CLX v CLY* [2022] SGHC 17 at [74] and [80].
27 *CLX v CLY* [2022] SGHC 17 at [77].
28 *CLX v CLY* [2022] SGHC 17 at [98].
29 *CLX v CLY* [2022] SGHC 17 at [97].

that CLX's failure to seek information and evidence regarding the condition of the overhead cranes, either during or after the dismantling process and during the course of the arbitration, in the face of a claim for rescission and CLY's pleaded claims or reliefs, was inexplicable.[30] In addition, the court found that CLX's failure to inquire or investigate amounted to a failure to act with reasonable diligence.[31]

17 The court also noted that it may "in a proper case, dismiss an objection … on the basis that a party had plainly made a decision not to raise it before the tribunal when it ought to have done so".[32]

18 Of interest is the court's consideration of the position in Singapore on the requirement for reasonable diligence to be exercised. The court affirmed the position taken in Bloomberry and declined to adopt the English position (*ie*, that there is no requirement to show that the fraud could not be uncovered with reasonable diligence in the earlier proceedings).[33]

(3) No breach of natural justice if new evidence constituting alleged fraud could have been obtained earlier

19 On reliance on the factual matrix for making out the fraud, CLX also applied to set aside the award on the grounds that it was precluded from putting forward a different case.[34] CLX had framed this ground as a breach of natural justice.

20 The principles for establishing a breach of natural justice or the fair hearing rule are well established.[35] In the present case, it is noteworthy that CLX accepted that there was no act or

30 *CLX v CLY* [2022] SGHC 17 at [99] to [100].
31 *CLX v CLY* [2022] SGHC 17 at [101].
32 *CLX v CLY* [2022] SGHC 17 at [111].
33 *Takhar v Gracefield Developments Ltd* [2020] AC 450 at [46] and [54].
34 *CLX v CLY and CLZ* [2022] SGHC 17 at [115] and [116].
35 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 and *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695, see also *CLX v CLY* [2022] SGHC 17 at [113] and [114].

omission on the part of the arbitrator that had resulted in any breach of natural justice.[36]

21 In finding that there was no breach, the court considered that it was CLX's duty to seek and adduce evidence regarding the condition of the overhead cranes and to take all the relevant points in its pleadings and submissions, however slight. When it failed to do so, it cannot be permitted to characterise its dissatisfaction with the outcome of the arbitration proceedings as a failure of natural justice.[37]

V. Key takeaways

22 The importance of the pleadings stage within an arbitration cannot be understated and is aptly described as "pivotal to the entire arbitral proceedings" by the learned authors of *Arbitration in Singapore – A Practical Guide*.[38]

23 The court's analysis above demonstrates that parties to a dispute have to ensure that their pleaded position is sufficiently robust and that claims, defences and/or positions are well thought through. It was clear from *CLX v CLY* that parties to a dispute have to comprehensively and fully consider and strategise claims, defences and/or positions in the forum of dispute. This necessitates having to exercise due diligence, pleading alternatives (no matter how slight) and considering the case to meet, or simply invoking avenues available to them (in this instance, the SIAC Rules) to discover evidence which may affect the parties' positions. Turning a blind eye or ignorance will find no favour with an arbitrator or a court, when faced with a setting-aside application.

24 For the sake of progeny, however, this unfortunate outcome does not have to be the case; CLX was the master of its fate, who could have, but failed to, put pen to paper and

36 *CLX v CLY* [2022] SGHC 17 at [115].
37 *CLX v CLY* [2022] SGHC 17 at [118].
38 Sundaresh Menon CJ *et al*, *Arbitration in Singapore – A Practical Guide* (Sweet and Maxwell Asia, 2nd Ed, 2018) at para 11.022.

consider its full legal position in the arbitral proceedings. It cannot therefore seek the court's assistance when dissatisfied with the outcome.