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AMENDMENT OF PLEADINGS IN ARBITRATION

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I. Introduction

1 It is trite that pleadings in arbitration proceedings delineate the scope of the issues that the parties have to address, and that the arbitral tribunal has been constituted to decide.[1] Its purpose is to prevent any party to the arbitration from being taken by surprise and seeks to avoid "an arbitration by ambush".[2]

2 While the role and purpose of pleadings are widely known in arbitration, "pleading formalities" are not required by most institutional arbitration rules and as Gary Born puts it, "are seldom rigorously observed in practice".[3] However, parties to an arbitration are encouraged to properly plead their case, and ensure that the appropriate amendments are made to the pleadings to ensure that the relevant issues are within the scope of submission to the tribunal. Such conduct could help obviate potential setting-aside applications on the ground that there was

1 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at [71].
2 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at [71].
3 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 15 at p 2426.

no reasonable opportunity for the opposing party to address the issues that were outside parties' pleadings.

3 It is thus helpful for parties to an arbitration to know the different situations which require them to amend their pleadings, in particular, the specific facts that are required to be pleaded. This article begins by outlining what sources in the arbitration record may be considered in determining whether an issue is properly within the scope of submission to the tribunal, then proceeds to consider the degree of specificity required in a pleading before an issue is considered as having been put before a tribunal. Lastly, this article will examine different cases in a bid to shed light on when a party should seek to amend its pleadings to include certain facts during the arbitration.

II. Relevant sources in determining whether issue is within scope of submission to tribunal

4 Whether pleadings in an arbitration have to be amended depends on whether the issue is within the scope of submission to the tribunal. Crucially, while pleadings are a convenient way to define the jurisdiction of the tribunal,[4] they are not the be all and end all when considering whether an issue is within the scope of submission to the tribunal.

5 Indeed, in order to determine whether an issue is within the scope of submission to the tribunal, the court may have reference to five sources (as may be appropriate to the case):[5] (a) parties' pleadings; (b) any agreed list of issues; (c) opening statements; (d) evidence adduced; and (e) closing submissions. These five sources are not to be considered as discrete or independent sources. Further, it may not be sufficient for the issue to have been raised in only one of the five sources; instead the overriding consideration is to determine whether the issue was properly pleaded before the tribunal.[6]

4 *CDM v CDP* [2021] 2 SLR 235 at [19], *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [33].
5 *CDM v CDP* [2021] 2 SLR 235 at [18].
6 *CAJ v CAI* [2022] 1 SLR 505 at [50]; *BTN v BTP* [2021] SGHC 271 at [74].

6 In considering the five sources, a broad and holistic interpretation of these documents may be adopted so as to avoid an inflexible and rigid analysis of the issues raised in the arbitration. This is such that issues which arise from or are a natural consequence of the pleaded issues are not excluded.[7]

III. Degree of specificity required in a pleading before issue is considered as having been put before tribunal

7 The parties' pleadings should be considered in context and as a whole in order to understand the nub of the claim or defence advanced.[8] At the end of the day, the tribunal's jurisdiction is by no means limited by the parties' pleadings because a practical view has to be taken regarding the substance of the dispute being referred to arbitration.[9]

8 An issue may be considered as having been put before a tribunal in the following circumstances:[10] (a) if it arises from the party's express pleadings; (b) if it is raised by reasonable implication by a party's pleadings; (c) 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 (d) if the links in the chain flow reasonably from the arguments actually advanced by either party or are related to those arguments.

IV. Unpleaded facts: to amend or not to amend?

A. Where pleadings need not be amended

9 Where the legal effect of a new fact is within the scope of the parties' submission to arbitration, pleadings need not be amended. In *PT Prima International Development v Kempinski Hotels SA*[11] ("*Kempinski*"), parties entered into a management contract

7 *CAJ v CAI* [2022] 1 SLR 505 at [44]; *BTN v BTP* [2021] SGHC 271 at [90].
8 *BTN v BTP* [2021] SGHC 271 at [87].
9 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1.
10 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [159]; *BTN v BTP* [2021] SGHC 271 at [89].
11 [2012] 4 SLR 98.

to manage a hotel owned by the defendant in the arbitration proceedings ("Management Contract"). From November 1996 to May 2000, the Indonesian Ministry of Tourism issued decisions ("Three Decisions") which made it illegal for a foreign entity to manage hotels in Indonesia.

10 On 6 February 2002, the defendant issued a notice of termination to the plaintiff on the ground that the plaintiff had failed to perform its obligations. The plaintiff commenced arbitration proceedings on the grounds that the termination was wrongful. However, the defendant raised the defences of illegality and *force majeure* in a bid to escape liability. The arbitrator issued two interim awards which, among others things, decided that the Three Decisions did not prevent performance of the Management Contract but only prescribed the manner of performance, and thus the possibility of damages was still available to the plaintiff if it could establish liability. However, after the second interim award was issued, the defendant discovered that the plaintiff had entered into another management contract with another hotel in Indonesia ("New Management Contract") and this was in breach of the Management Contract. The defendant's solicitors wrote to the arbitrator to seek "clarification" of the second award as to whether the alternative modes of performing the Management Contract were still possible in view of the New Management Contract.

11 On 20 May 2008, the arbitrator issued the third interim award which held that the methods of performance that remained open after the Three Decisions were no longer possible and hence there was only a possibility of damages for the period between the date of the termination of the Management Contract and the date of the New Management Contract. Subsequently, the arbitrator also issued a fourth interim award stating that any award of damages would be against the public policy of Indonesia and would be unenforceable. The plaintiff sought to set aside the third and fourth interim awards. One ground relied upon by the plaintiff was that the third and fourth interim awards dealt with the New Management Contract that had not been formally pleaded.

12 While the New Management Contract was not formally pleaded, the Court of Appeal in *Kempinski* held that the "crucial point" was whether the legal effect of the New Management Contract was within the scope of the parties' submission to arbitration.[12] In holding that it was within the scope of parties' submission to arbitration, the Court of Appeal held that the underlying basis of the third interim award was that of *force majeure* and since the pleaded issues submitted for arbitration included the plaintiff's claim for damages from 6 February 2002 onwards for the remainder of the term of the Management Contract, the issue of what the legal effect the New Management Contract had on the continuing viability of the claims was within the scope of the parties' submission to arbitration.[13] The Court of Appeal further reasoned that:[14]

> 47 … 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 …

13 It is noted that while the New Management Contract was not formally pleaded, parties did exchange "extensive" correspondence regarding the New Management Contract and parties tendered written submissions and expert opinions on the legal effect of the New Management Contract.[15] These facts formed part of the court's consideration that the plaintiff had "ample notice" of the defendant's case on this point and there was no prejudice caused to the plaintiff.[16] Consequently, the Court of Appeal did not set aside the third and fourth interim awards.

12 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [42].
13 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [46]–[47].
14 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [47].
15 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [50]–[51].
16 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [51].

14 A new fact that arose after submission to arbitration need not be pleaded if it is clear from parties' pleadings and actions that the parties expressly submitted the issue to the arbitration. In *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC*[17] ("*Bloomberry Resorts*"), the respondents filed their notice of arbitration on 12 September 2013 which did not raise any issue regarding the appellants' interference of shares since no such interference had occurred yet. Subsequently, in January 2014, the respondents sought to sell shares but the appellants objected to it and took out regional court proceedings to obtain an injunction ("Interference with Shares"). When the tribunal issued its award, it determined that the appellants wrongfully interfered with the respondents' attempts to sell the shares. The appellants were ordered, among other things, to pay the respondents moneys in exchange for the shares. The appellants sought to set aside the award on various grounds, including that the award dealt with the issue of the Interference with Shares which was beyond the scope of parties' submission to arbitration.

15 The Court of Appeal refused to set aside the award, and held that the issue of the Interference with Shares was within the scope of parties' submission to arbitration after analysing parties' pleadings and actions after January 2014. In doing so, the court made several "pertinent"[18] observations. First, the entire issue of the Interference with Shares arose before the tribunal was constituted and was dealt with by the tribunal in an interim order in December 2014.[19] Second, the appellants' counsel in the arbitration took the position that the issue of the Interference with Shares had been "framed for this arbitration".[20] Third, in a letter dated 22 January 2015, the respondents stated clearly that they were seeking damages relating to the Interference with Shares[21] and the appellants "never voiced any objection" to the

17 [2021] 2 SLR 1279.
18 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at [84].
19 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at [84].
20 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at [84].
21 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at [87].

respondents' understanding that their statement of claim could and would include a claim for damages in respect of the same.[22] Fourth, in the respondents' subsequent pleadings, they explicitly sought damages arising from the appellants' Interference with Shares.[23]

16 It is clear from *Bloomberry Resorts* that when assessing whether an issue is within the scope of parties' submission to arbitration, the court may consider: (a) when the issue arose; (b) *both* parties' conduct in the arbitration which includes positions that *both* parties took during the arbitration hearings and in correspondence; and (c) parties' subsequent pleadings. Any objections to the scope of parties' submissions to arbitration should be raised there and then, or as early as possible in order to ensure that a party's rights are not waived due to inaction or silence.

B. Where pleadings need to be amended

17 While the aforementioned cases might indicate significant latitude in considering what issues have been put before the tribunal, there is not an unrestrained licence to introduce new claims. Crucially, only a 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 need not be pleaded, as it is already part of that dispute.[24]

18 Accordingly, in most instances where a new issue is raised (even if by the tribunal's own motion), the relevant party should for the sake of good order amend the relevant pleading, and consequential orders for amendment of affected pleadings and calling of evidence should be made to ensure fairness to the party affected by the new issue.[25]

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22 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at [90].
23 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at [89].
24 *CAJ v CAI* [2022] 1 SLR 505 at [51(c)].
25 *CAJ v CAI* [2022] 1 SLR 505 at [51(c)].

19 *CAJ v CAI*[26] concerned an arbitration which was commenced where the claimant sought liquidated damages from the respondents alleging that the respondents had caused a 144-day delay in the mechanical completion of a plant. The respondents' defence was first that the plant was completed on time, and second that any delay was a result of the claimant's instructions such that the claimant waived its right to claim liquidated damages.

20 It was common ground between the parties that the respondents had not raised any assertion that they were contractually entitled to an extension of time so as to reduce the amount of liquidated damages payable ("EOT Defence"), and this defence remained unpleaded when the arbitration was declared closed.[27] The EOT Defence was raised for the first time in the respondents' written closing submissions in the arbitration.[28] The claimant objected to the respondents' raising of the EOT Defence in its written closing submissions.[29]

21 In spite of the foregoing, the tribunal found that it was entitled to consider the substance of the EOT Defence as the claimant was given the opportunity to make submissions in response to the respondents' arguments in its written closing submissions. Eventually, the tribunal held the respondents were entitled to an extension of a period of 25 days, correspondingly reducing the liquidated damages the claimant was entitled to.

22 The claimant then applied to the Singapore courts to partially set aside the award.

23 The Court of Appeal began its analysis by considering the true nature of the issue in contention: the EOT Defence. It found that the EOT Defence, as a creature of a contractual provision, was fact-sensitive, and was not merely an issue which arose naturally from the arbitration.[30] Hence, the EOT Defence had to

26 [2022] 1 SLR 505.
27 *CAJ v CAI* [2022] 1 SLR 505 at [8] and [41].
28 *CAJ v CAI* [2022] 1 SLR 505 at [8].
29 *CAJ v CAI* [2022] 1 SLR 505 at [9].
30 *CAJ v CAI* [2022] 1 SLR 505 at [29]–[31].

be pleaded. In this regard it is important to note that the Court of Appeal did emphasise the distinction between a fact-sensitive issue such as the EOT Defence and a legal or technical defence which can be determined without reference to evidence.[31] This indicates that should the true nature of the issue be legal or technical, determinable without reference to evidence, the Court of Appeal may have reached a different conclusion.

24 As the respondents conceded that the EOT Defence had not been raised in any of the other four sources (as it was only raised in the closing submissions), there was simply no room to argue that the defence was somehow nonetheless within the scope of the arbitration.[32] No matter the broad interpretation of the arbitration record, the court could not construe the record to include a specific and fact-sensitive contractual defence which did not arise from and was not a natural consequence of the existing pleaded defences.[33]

25 Accordingly, the Court of Appeal held that the EOT Defence would only fall within the scope of the parties' submission upon the introduction of the EOT Defence by way of an amendment to the pleadings (if so permitted by the tribunal).[34] The Court of Appeal further went on to find that *even if* there was an invitation by the tribunal to submit on an unpleaded defence (which the Court of Appeal affirmed did not occur in this case), such an invitation must involve an application to amend the defence so as to plead the EOT Defence (with the corresponding consequential orders if such an application is allowed).[35] Short of the tribunal granting leave to amend the defence, any invitation by the tribunal to the parties to submit on an unpleaded point would equally be a breach of natural justice.

26 In view of the Court of Appeal's finding that the tribunal had decided on an unpleaded point, the affected portion of the award was set aside.

31 *CAJ v CAI* [2022] 1 SLR 505 at [60].
32 *CAJ v CAI* [2022] 1 SLR 505 at [43].
33 *CAJ v CAI* [2022] 1 SLR 505 at [44].
34 *CAJ v CAI* [2022] 1 SLR 505 at [52].
35 *CAJ v CAI* [2022] 1 SLR 505 at [60].

V. Conclusion

27 Having in mind the five sources that the court would look at in determining the scope of submission to the tribunal, it will be helpful for parties to revisit the issues they want submitted to the tribunal at each stage of the proceedings and ensure that said issues are represented within these "five sources".

28 Specifically, with regard to the pleading of facts, parties should be aware of the live issues at hand, and any additional facts that might surface during the course of the arbitration proceedings. Where the legal effect of these new facts is within the scope of parties' submission to arbitration or where it is clear from parties' pleadings and actions that these issues have been submitted to arbitration, parties need not amend their pleadings. However, where the new fact is not ancillary to the dispute submitted to arbitration, pleadings should be amended appropriately.

29 When in doubt, it may be better to err on the side of caution and to amend one's pleadings formally. In fact, institutional rules do clearly provide for parties to amend their pleadings and the court in *CAJ v CAI* has comprehensively elaborated on the consequential orders that should follow after a party makes an amendment to its pleadings.[36]

36 *CAJ v CAI* [2022] 1 SLR 505 at [40].