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THE EVOLUTION OF THE SINGAPORE COURTS' ANALYSIS OF WHETHER AN ISSUE IS "ALIVE" IN CHALLENGES TO ARBITRAL AWARDS

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In the recent decision of *PhoenixFin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 ("*Convexity*"), the Singapore Court of Appeal upheld the challenge to an arbitral award. In *Convexity*, the tribunal had invited parties to submit on a new issue, extended timelines for further evidence and submissions and made a number of entreaties to the applicant's witnesses to attend a resumed evidentiary hearing – which the applicant's witnesses refused.

So what went wrong?

This article traces the evolution of the Singapore courts' analysis of whether an issue is "live" and what is expected of tribunals seeking to insert new issues or consider new arguments. It tracks some of the key developments in the past 15 years and culminates in *Convexity* – one of three decisions in the last year which, the authors submit, sets out the analytical framework and lens which are likely to be adopted by the Singapore courts in future challenge applications.

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I. Introduction

1 The Singapore courts are no stranger to applications to set aside international arbitral awards made in Singapore. The *corpus* of local jurisprudence dealing with such applications grows every year – at last count, since 1995 the High Court and Court of Appeal have issued more than 200 judgments dealing with applications to set aside awards.

2 A common complaint ventilated by dissatisfied parties is that the arbitral tribunal had based its decision on an issue, fact or legal submission that was not placed before it. This would *prima facie* allow parties to challenge an award on the grounds that: (a) natural justice had been breached;[1] (b) the decision was outside the scope of submission to arbitration;[2] and/or (c) that the arbitral procedure was not conducted in accordance with parties' agreement.[3]

3 In the recent decision of *Phoenixfin Pte Ltd v Convexity Ltd*[4] ("*Convexity*"), the Court of Appeal was faced with such a challenge. The authors opine that *Convexity* is a culmination of an incremental evolution of the courts' approach to whether an issue is "live" and sets out more clearly for the first time what is expected of tribunals and parties who seek to insert a new issue. The authors examine this evolution below, before summarising the courts' current approach to determining whether an issue is live and some important takeaways.

II. Whether an issue is live seems to be limited to a review of the arbitral award

4 The authors begin with the Court of Appeal case of *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*[5] ("*PT Asuransi*").

1 International Arbitration Act 1994 (2020 Rev Ed) s 24(*b*).
2 UNCITRAL Model Law on International Commercial Arbitration (1985) Art 34(2)(a)(iii).
3 UNCITRAL Model Law on International Commercial Arbitration (1985) Art 34(2)(a)(iv).
4 [2022] 2 SLR 23.
5 [2007] 1 SLR(R) 597.

5 In *PT Asuransi*, the Court of Appeal was asked to set aside the second of two awards made between the parties. It had to determine if certain findings made by the second award "contradicted" the first award. The examination therefore turned on the precise issues submitted in the first arbitration and whether certain findings and rulings had been made in the first award. The Court of Appeal simply examined the first award to ascertain the issues submitted in the first arbitration.[6]

6 Based on *PT Asuransi*, the reference point in determining whether an issue was within the scope of submission seems to be the arbitral award.

III. Shift towards a review of the arbitration pleadings and proceedings

7 The approach was clarified shortly after in the seminal Court of Appeal decision of *Soh Beng Tee v Fairmount Development Pte Ltd*[7] ("*Fairmount*").

8 *Fairmount* concerned a construction arbitration between an employer and a contractor. It was contended that the arbitrator's finding that time had been set at large due to various acts of prevention of the employer (the "Disputed Issue"), such that the employer's termination was unlawful – it constituted (a) a breach of natural justice and (b) was a matter outside the scope of submission to arbitration.

9 The High Court found that the Disputed Issue was not a "live" issue.[8] On appeal, the Court of Appeal analysed whether the Disputed Issue was alive by examining whether (a) the pleadings touched on the Disputed Issue and (b) if it was alive or properly inserted during the arbitration hearing.

6 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [5] and [40].
7 [2007] 3 SLR(R) 86.
8 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [25]–[27].

10 The Court of Appeal first examined the pleadings and found that while the Disputed Issue was not explicitly pleaded, there was constant reference to the Disputed Issue in the statement of claim (albeit in different contexts) which the defendant responded to in its defence.[9] The court then found that counsel had raised the Disputed Issue as an argument and had made some tangential reference to it in submissions. The arbitrator had then invited submissions (although not specifically just on the Disputed Issue) to respond during the course of the hearing and the parties had done so.[10] The Disputed Issue was thus alive during the arbitration.

11 As an alternative, the Court of Appeal found that the factual basis of the arbitrator's ruling on the Disputed Issue was actually in play throughout the arbitration proceedings[11] – albeit in the context of a specific extension of time claim rather than setting time at large. This permitted the arbitrator to make the legal finding that because of the acts of prevention, time was set at large.

12 *Fairmount* crystallised the following guiding principles:

(a) the supervising court first examines the pleadings to determine if an issue is live at the start of the arbitration;

(b) it then determines if the issue became or remained live during the arbitration; and

(c) an arbitrator could extract an alternate position or legal conclusion even if the precise issue or argument was not live so long as the factual basis and building blocks of the decision were "in the arena" and within the contemplation of the parties.

13 *Fairmount* thus seems to advocate a more substantive approach than in *PT Asuransi*. Instead of simply relying on the tribunal's record of events in its award, the supervising court

9 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [34].
10 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [40].
11 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [67].

would examine the arbitration proceedings and documents before determining if an issue was a live issue in the arbitration.

IV. A return to *PT Asuransi*

14 In 2010, the High Court in *Sui Southern Gas v Habibullah Coastal Power Co*[12] ("*Sui Southern*") was invited to determine whether an issue was within the scope of submission to arbitration.

15 The High Court in *Sui Southern* returned to the *PT Asuransi* approach of simply referring to the issues as set out in the award to determine if the disputed issue in that case (the definition of "pipeline system" in a contract between the parties and whether or not one party was required to upgrade its pipeline system) had been placed before the tribunal.[13]

16 It does not appear that the *Fairmount* approach was considered in *Sui Southern*. However, to be fair, it appears from the judgment that an analysis of the award was enough to warrant the conclusion that the disputed issue was clearly within the scope of submission to the tribunal and this sufficiently determined the case.

V. *PT Prima International Development v Kempinski Hotels SA*

17 About five years after *Fairmount*, the Court of Appeal heard and determined *PT Prima International Development v Kempinski Hotels SA*[14] ("*PT Prima*") which adopted the *Fairmount* approach of examining the pleadings and additionally seemed to introduce more flexibility into the determination of whether an issue was alive in the arbitration.

18 The issue in *PT Prima* was whether the hotel owner, PT Prima, wrongfully terminated an operator contract and accordingly whether the operator, Kempinski, was entitled to specific performance. As a defence, PT Prima raised the fact that

12 [2010] 3 SLR 1.
13 *Sui Southern Gas v Habibullah Coastal Power Co* [2010] 3 SLR 1 at [11] and [35].
14 [2012] 4 SLR 98.

Kempinski had secretly entered into a contract to manage another hotel (the "New Management Contract") which was a breach of the exclusivity clause of the contract between the parties.[15] It was not a new claim, but it was not disputed that it was unpleaded.

19 At first instance, the High Court set aside three awards on the basis that the New Management Contract was not properly pleaded. It appears from the decision that the High Court was focused on the pleadings in the arbitration.[16]

20 The Court of Appeal allowed the appeal. It recognised that the New Management Contract was not specifically pleaded but held that it had been referred to the arbitration as it was ancillary to the pleaded issues and both parties were fully aware of it.[17] The court then focused its analysis on whether parties had been given the opportunity to address the new fact. It found that the tribunal had informed parties to address it on the legal effect of this New Management Contract and parties filed rounds of written submissions and expert opinions on the same. In this way, while the New Management Contract was not initially a live issue, it was ancillary to the pleaded issues, parties were aware of it and later it was expressly inserted as an issue in the arbitration by the tribunal.

21 Accordingly, the Court of Appeal held that Kempinski was not deprived of an opportunity to address this issue of law and also that the matter was not beyond the scope of submission to arbitration.[18]

22 The authors submit that *PT Prima* thus expanded the *Fairmount* approach. It recognised that an issue could be inserted into the arbitration so long as parties had an opportunity to address the new issue. It further appeared that *PT Prima* seemed to carve

15 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [43].
16 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [54]–[63].
17 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [47].
18 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [5] and [51].

out an exception that an unpleaded issue would be considered within the scope of submission, as long as it was "ancillary to the dispute submitted and … is known to all the parties".[19] This is actually an expansion from *Fairmount* and provided, for the first time, guidance on when and how tribunals could insert issues and the further directions that they should give in order to afford all parties an opportunity to be heard – in *PT Prima* this took the form of further submissions and expert evidence.

VI. Introduction of five reference points

23 In 2021, a trio of separate applications which sought to set aside awards was heard by the Court of Appeal in Singapore. These decisions further expanded the scope of review for a court in determining if an issue is a "live" issue and also set out a more detailed analysis of what is expected of a tribunal which seeks to insert a new issue into the proceedings.

24 The first decision is *CDM v CDP*[20] ("*CDM*"). In *CDM*, the central issue in the arbitration was whether the respondent CDP was entitled to payment of the fourth instalment under a shipbuilding contract (the "Fourth Instalment"), which turned on whether the appellant CDM had approved the launch of the vessel on either 20 January 2015 or 3 May 2015 (the "Second Launch Issue"). The tribunal found in favour of CDP and held that CDM was liable for the Fourth Instalment based on the Second Launch Issue.

25 CDM applied to set aside the award on the basis that the Second Launch Issue had not been submitted to arbitration and the applicant had been deprived of an opportunity to be heard.

26 CDM's application was dismissed by the High Court and the Court of Appeal. The Court of Appeal for the first time expressly identified five factors that had to be considered in determining whether a matter was within the scope of parties'

19 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [47].
20 [2021] 2 SLR 235.

submission to arbitration – the parties' pleadings, agreed list of issues, opening statements, evidence adduced and closing submissions at the arbitration.[21]

27 The Court of Appeal found that although the notice of arbitration and the statement of claim did not make any reference to the Second Launch being a basis for due payment of the Fourth Instalment, the Second Launch was expressly addressed in the applicant's statement of defence and counterclaim, subsequent pleadings, the agreed list of issues, parties' opening statements, the evidence in the arbitration and parties' closing submissions.[22]

28 In this way, the issue of the Second Launch was "live" in the arbitration although it had not been introduced into the arbitration initially. It was raised and addressed midway through the pleadings, had been a basis on which parties had engaged in the arbitration and had formed the basis of parties' submissions – albeit as the respondent's alternate basis for a claim to the Fourth Instalment.

29 The authors opine that the five factors set out in *CDM* provide greater clarity in the analysis of whether an issue is "live".

VII. A re-affirmation of the role of pleadings

30 In *CAJ v CAI*[23] ("*CAJ*"), the appellant had raised for the first time in its written closing submissions in the arbitration a contractual defence claiming an extension of time (the "EOT Defence") so as to reduce the amount of liquidated damages payable. It was not disputed that the EOT Defence was not pleaded. The tribunal allowed the EOT Defence and reduced the liquidated damages payable.

31 The respondent then applied to the High Court to set aside part of the tribunal's award on the ground that the tribunal had

21 *CDM v CDP* [2021] 2 SLR 235 at [18].
22 *CDM v CDP* [2021] 2 SLR 235 at [46].
23 [2022] 1 SLR 505.

exceeded the scope of submission to arbitration and/or breached natural justice by allowing the EOT Defence. The High Court allowed the setting-aside application.

32 The Court of Appeal dismissed the appeal. In reviewing the five factors set out in *CDM*, it found that the EOT Defence was not "live" during the arbitration and was only inserted in the closing submissions in the arbitration. Importantly, the court rejected the appellant's arguments that a broad reading of the pleadings, list of issues and terms of reference could encapsulate the EOT Defence.[24] As the EOT Defence was specific and fact-sensitive, it needed to be pleaded.[25] As the appellant had not done so and had only raised it for the first time in its written closing submissions, the respondent simply had no prior notice that it had to deal with the EOT Defence.[26]

33 The Court of Appeal rejected the appellant's arguments that the respondent could and should have taken certain courses of action to rectify the prejudice caused – perhaps by seeking permission for further submissions and evidence on a point. For the first time, the Court of Appeal made clear that the burden lay squarely on the party seeking to rely on any new point to address the pleading failure so that it could be properly advanced in the arbitration.[27]

34 Additionally, the Court of Appeal, in highlighting that the EOT Defence was fact-sensitive, seemingly alluded to a distinction between fact-sensitive and pure legal issues and their treatment by tribunals in any remedial efforts to insert such issues or arguments into arbitral proceedings. This distinction was expressly addressed in the subsequent decision of *Convexity*.

24 *CAJ v CAI* [2022] 1 SLR 505 at [44].
25 *CAJ v CAI* [2022] 1 SLR 505 at [31] and [44].
26 *CAJ v CAI* [2022] 1 SLR 505 at [52].
27 *CAJ v CAI* [2022] 1 SLR 505 at [61].

VIII. *PhoenixFin Pte Ltd v Convexity Ltd*

35 In *Convexity*, the Court of Appeal upheld the decision of the High Court to set aside portions of an SIAC award made in favour of the appellant Phoenixfin Pte Ltd ("PPL"), *albeit* on expanded grounds. The Court of Appeal found that although the tribunal had made efforts to allow the respondent Convexity Ltd ("CL") a chance to adduce and test evidence and make submissions on whether the term CL relied on to claim a contractual "Make-Whole Amount" from PPL was an unenforceable penalty clause (the "Penalty Issue"), the tribunal had misconducted the arbitration. At first blush, the efforts to (a) invite submissions, (b) invite further evidence and (c) offer to have the evidence tested in hearing would appear to have ameliorated any prejudice. The refusal of CL to take up the tribunal's offer could have amounted to a waiver of its rights to challenge the award.

36 In the arbitration, CL claimed a contractual "Make-Whole Amount" from PPL under a contract for IT security services. The tribunal found that the term CL relied on was a penalty and dismissed the claim.

37 The Penalty Issue was not initially pleaded by PPL. Shortly before the evidentiary hearing and after all the witness and factual evidence had been filed, PPL sought to amend its defence and counterclaim to plead the Penalty Issue as a defence by way of an application (the "Amendment Application"). CL objected to the application on, *inter alia*, the ground that the Penalty Issue would require evidence on factual issues which were not currently before the tribunal.

38 The tribunal disallowed the Amendment Application (the "Amendment Decision") on the third day of the evidentiary hearing. The evidentiary hearing thereafter concluded. During the oral reply submissions hearing, it became clear that the tribunal considered that the Penalty Issue was part of the proceedings, over objections from CL.

39 The tribunal thereafter made various directions giving an opportunity to CL to file further submissions, further evidence, for

its witnesses to attend a further hearing and be cross-examined by the tribunal and PPL's counsel (collectively, the "Tribunal's Remedial Attempts").

40 CL objected to the inclusion of the Penalty Issue and did not make its witnesses available at the further hearing.

41 On appeal, the Court of Appeal examined the entire record of the proceedings, including the parties' submissions, the transcripts of the hearings and the tribunal's own rulings. It found that the Penalty Issue was outside the scope of the arbitration proceedings, *ie*, not a live issue throughout the arbitration – it was not pleaded, no evidence was led on it and the Amendment Application to introduce it just before the evidentiary hearing was dismissed. Thereafter, the Court of Appeal turned to examine if the tribunal had properly introduced the Penalty Issue and if any procedural missteps of the tribunal were remedied by the Tribunal's Remedial Attempts.[28]

42 To the best of the authors' knowledge, this is the first time the Court of Appeal has been given a chance to comment on the sufficiency and adequacy of such extensive efforts by a tribunal to give a party a chance to address an issue which was introduced at a late stage.

43 Relying on reasoning drawn from the cases cited above, the Court of Appeal found the Penalty Issue was not a live issue and was not properly inserted at the late stage into the arbitration. The key reasons were as follows:

> (a) Following the approach in *CDM*,[29] a review of the five reference sources showed that the Penalty Issue was not pleaded and did not appear in the list of issues. While CL had touched on the Penalty Issue in its opening statement, this was because at the time of the opening statement, the Amendment Application had not

28 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [65].

29 While the court did not expressly cite *CDM v CDP* [2021] 2 SLR 235 ("*CDM*"), the authors submit that this can be gleaned from the reasoning of the Court of Appeal. Judith Prakash JCA, who delivered the decision in *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23, was also part of the coram in *CDM*.

been decided. While the Penalty Issue was mentioned in CL's closing submissions, CL addressed it to submit that the Penalty Issue had not been pleaded and should be disregarded.

(b) The burden of proof lies on a party asserting that a clause is a penalty to prove that the clause is a penalty. As PPL relied on it as a defence, the burden lay on PPL to introduce the Penalty Issue into the arbitration and make it a live issue – by properly pleading it and adducing factual evidence in support. As PPL failed to do either, and the Tribunal's Remedial Attempts did not address this, the Penalty Issue was not properly introduced.

(c) Because the Penalty Issue was an issue of mixed fact and law, it could not simply be dealt with by CL in submissions. CL was entitled to have it fleshed out in pleadings, to go through document request and to question the opposing party's evidence in support.[30] The Court of Appeal concluded that on the facts of *Convexity*, the Penalty Issue was outside the scope of submission to arbitration.[31] The Court of Appeal also found that a corollary of PPL's failure to put forth its evidential case on the Penalty Issue was that CL was not given the chance to address PPL's case on the Penalty Issue. This was a breach of natural justice[32] and a breach of the agreed procedure.

44 The Court of Appeal also dismissed the appellant's arguments that CL should have done more, sought further directions or accepted and abided by the Tribunal's Remedial Attempts to ensure that the proceedings were conducted properly. As the Penalty Issue was not live, CL was entitled throughout the proceedings to not deal with it and not adduce evidence on the same. Even when the tribunal sought to introduce the Penalty Issue, the court accepted that CL "was entitled to stand its ground and not call its witnesses to adduce evidence on the Penalty

30 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [52].
31 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [71].
32 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [68].

Issue",[33] and "there was no need for [CL] to respond" to the Penalty Issue.[34] Although not clearly expressed in the judgment, the Court of Appeal seems to be endorsing the proposition that an objecting party could properly refuse to respond to the directions of a tribunal to introduce a new unpleaded issue if the issue is a factual one (or one of mixed fact and law) and the objecting party did not bear the burden of proof to lead such evidence.

IX. Important takeaways on whether an issue is live and how to deal with newly introduced issues

A. Role of pleadings in arbitration

45 The decisions above signify that pleading material factual matters is of paramount importance in arbitration. While there may be no formalistic pleadings rules in arbitration, pleadings are key to the supervising court's determination of whether an issue is within the scope of arbitration and if the opposing party has notice and therefore a reasonable opportunity to address it. Even if an issue is inserted, if it is an issue of mixed fact and law, a supervising court may take the view that pleadings should be amended in order to give parties the full benefit of the arbitral process – particulars, documentary production, a chance to cross-examine witnesses *etc*. A failure to do so may not just be a breach of natural justice but may – as was found in *Convexity* – be a breach of the agreed procedure.

B. Remedial actions

46 The Court of Appeal has made a clear distinction between legal issues and ones which are of mixed fact and law. For the former, any late introduction of such an issue may be remedied by inviting further legal submissions on the same. For the latter, material facts may be required to be pleaded and particularised, disclosure may need to be given, documents sought and expert evidence adduced and tested.

33 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [68].
34 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [67].

47 Thus in a situation like *Convexity* where there was a late introduction of an issue of mixed fact and law, a simple attempt by the tribunal to remedy the belated introduction by inviting "further submissions" and "evidence" on the same at the end of the arbitration proceedings may be insufficient. The default expectation appears to be a reopening of the pleadings stage of the arbitration unless parties agree otherwise.

48 The responsibility may also lie on the party seeking to enforce the arbitral award to advise and guide the tribunal as to the particular steps that should be taken to ensure the unpleaded issue is fully ventilated in the arbitration. A failure to do so could result in the arbitral award being set aside for breach of natural justice.

C. Burden of proof and concept of waiver

49 The Court of Appeal's observations on burden of proof in *Convexity* cannot be understated. In past cases, it could have been argued that a party which failed to avail itself of an opportunity to address the tribunal on a point would have waived its rights such that it would not be able to complain at the challenge stage. *Convexity* suggests an important exception to this – that in considering whether there was a waiver, one must also appreciate who bore the burden of proof. If it is not the complainant which bears the burden, it may be justified in refusing to avail itself of the opportunities to lead further evidence because the other party simply has not discharged the burden of proof. In that situation, it is important for an aggrieved party to stick to its position and be careful not to waive any breaches. The Court of Appeal's holding in *Convexity* that CL's acts were reasonable and could not be faulted appears to have been guided by the observation that it was PPL that bore the burden of proof.[35]

35 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [55]–[63].

D. Suggested framework of analysis

50 From the cases cited above, the authors suggest the following approach to determining if an issue is alive during the arbitral proceedings or if it was properly inserted in the context of setting-aside proceedings:

(a) Consider the five factors identified in *CDM* to determine if an issue is "live" and to what extent.

(b) Consider whether parties had an opportunity to properly deal with the issue in the proceedings. This will entail an appreciation of when the issue was first raised and if it is a legal issue or one of mixed fact and law.

(c) If the issue is one of mixed fact and law and was raised fairly late in the arbitration proceeding, parties may be expected to amend the pleadings, expand disclosure and have the tribunal take fresh oral evidence to ensure all parties have an opportunity to address the issue.

(d) A party that does not avail itself of the opportunity to present new evidence and submissions on a newly inserted issue may not have waived any procedural improprieties. This may require an examination of who bears the burden of proof. A dissenting party which does not bear the burden of proof may be entitled to refuse because complying with the tribunal's directions may actually be waiving any procedural impropriety on the basis that such directions are the agreed procedure moving forward.

X. Conclusion

51 Historically, challenges to arbitration awards criticising a tribunal's ruling on a non-live issue have typically complained that a tribunal had made a finding based on points or submissions not raised in the arbitration. Modern tribunals no doubt circumvent this criticism by inviting parties to address it on new points which may be raised. The focus in modern cases centres on whether a non-live issue was properly inserted into the arbitration. The guidance of the Singapore courts in the last

few years as to when it is, when it is not and what is expected of tribunals to ensure a reasonable opportunity to be heard is afforded to all parties will no doubt be scrutinised by arbitration practitioners henceforth.