

# Singapore Court of Appeal Affirms Decision Partially to Set Aside Arbitral Award for Breach of Natural Justice and Excess Jurisdiction

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## *CAJ and another v CAI and another* [2021] SGCA 102

The Singapore Court of Appeal in *CAJ and another v CAI and another* affirmed a decision by its High Court to set aside in part an arbitral award on the grounds that the tribunal acted in excess of its jurisdiction and breached principles of natural justice when it allowed a defence to be introduced for the first time in the closing submissions stage.

### BACKGROUND

The dispute between the parties arose from two contracts regarding the construction of a polycrystalline silicon plant owned by the Respondent, CAI, through a subsidiary. The Appellants, CAJ and CAK, were contractors hired to construct the plant. During construction, issues arose in connection with excessive vibrations in the compressors of the plant, and such issues remained outstanding until the contractual date of mechanical completion. Nevertheless, rectification works were subsequently carried out “*in a piecemeal fashion*” following instructions by CAI’s subsidiary.

Subsequently, CAI instituted Singapore-seated International Chamber of Commerce (“ICC”) arbitration proceedings against CAJ and CAK, claiming liquidated damages from CAJ and CAK on the basis that they had caused a 144-day delay in the completion of the mechanical work of the plant. In turn, CAJ & CAK argued *inter alia* that the mechanical work was completed on time, that any delay was a result of the rectification measures and that CAI had either waived its right to claim liquidated damages or, alternatively, was estopped from making a claim on this basis.

In their closing submissions, CAJ and CAK advanced the argument for the first time that they were contractually entitled to an extension of time, which would reduce the amount of liquidated damages owed to CAI (the “EOT Defence”). CAI objected to the EOT Defence on the basis that raising it at this stage was procedurally unfair as it prevented CAI from addressing the issue during document production, witness evidence

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or cross-examination of witnesses. CAI therefore asked the tribunal to dismiss this new argument.

In its final award, the tribunal found that CAJ and CAK did not achieve the mechanical completion by the stipulated date. The tribunal also rejected the estoppel defence but accepted the EOT Defence on the basis that CAI had been granted the opportunity to respond to the defence in its written closing submissions. As a result, the time for mechanical completion was extended by 25 days, and CAI was only entitled to receive liquidated damages for 74 instead of 99 days.

CAI applied to the Singaporean High Court (the “High Court”) to set aside the final award in part on the following grounds: (i) in allowing the EOT Defence, the tribunal had exceeded its jurisdiction arising out of the parties’ submission to arbitration; and (ii) the final award was in violation of the principles of natural justice.

#### DECISION OF THE HIGH COURT

S Mohan JC at the High Court allowed the set aside application on three grounds, namely that: (i) CAI did not have a fair opportunity to respond to the EOT Defence, as it was a “*completely new defence which was factually and conceptually distinct from the Estoppel Defence*”; (ii) the tribunal had relied substantially on its “*professed experience*” in reaching its decision on the EOT Defence, without explaining how this was relevant to the parties’ positions and (iii) the EOT Defence was beyond the scope of the parties’ submission to arbitration.

The High Court ruled in favour of CAI and ordered the number of days of delay for which liquidated damages were payable to be increased to 99 days.

The decision was appealed to the Singapore Court of Appeal (the “SGCA”).

#### DECISION OF THE SGCA

The SGCA rejected the appeal and confirmed that the number of days for delay for which liquidated damages were payable was 99 days instead of 74 days. It also found that the tribunal exceeded its jurisdiction and breached principles of natural justice when considering the EOT Defence.

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### The Nature of the Appellants' EOT Defence

At the outset, the SGCA noted that the scope for judicial intervention in arbitration proceedings in Singapore is narrow, with approximately only 20% of applications to set aside arbitral awards being accepted in the past 20 years and only in “exceptional” cases.

The SGCA then considered the “*true nature of the EOT Defence*” of CAJ and CAK, finding that based on the text of the contract, the EOT Defence was highly fact-sensitive in nature and would ordinarily involve a significant evidentiary exercise to identify the impugned act, resulting breach and consequent reasonable period of extension. However, despite the EOT Defence “*being dependent on the fulfilment of several conditions, none of them [were] pleaded*” or even addressed across the entire arbitration until CAJ and CAK’s written closing submissions.

According to the SGCA, the relevant question was how a tribunal ought to treat an unpleaded defence under the ICC Rules. The SGCA found, based on the text and commentary to the ICC Rules, that while the EOT Defence did not constitute a “*new claim*” beyond the Terms of Reference of the arbitration, the fact sensitive nature of the EOT Defence meant that the tribunal should have invited submissions from the parties about whether “*an amendment to the pleadings to include the EOT Defence should be allowed*”.

In this context, the SGCA proceeded to analyse whether the final award was capable of being set aside as a result of the tribunal exercising excess jurisdiction as well as due to breaches of natural justice.

### The Tribunal Exercised Excess Jurisdiction When Considering the EOT Defence

Emphasising that the EOT Defence was “*only raised for the first time*” in CAJ and CAK’s written closing submissions, the SGCA noted that this prevented any argument that the EOT Defence was within the scope of the arbitration and made a number of observations, including that: (i) even the broadest construction of the pleadings, the Lists of Issues and Terms of Reference would not allow the conclusion that the tribunal could adjudicate on a “*specific and fact-sensitive contractual defence which had not been expressly raised*”; and (ii) CAJ and CAK’s argument that the EOT Defence fell within the submission to arbitration simply because it was relevant to CAI’s claim for liquidated damages was flawed. Defences would not generally be encompassed within the arbitration unless specifically pleaded or acknowledged within the Terms of Reference. The tribunal’s decision on the EOT Defence was therefore in excess of its jurisdiction, because that Defence was not encompassed within the arbitration.

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**The Respondent Suffered from a Breach of Natural Justice**

The SGCA agreed with the findings of the High Court that CAI suffered from a breach of natural justice on the basis that raising the EOT Defence at the closing submissions stage meant that CAI did not have the opportunity to lead further evidence, test CAJ and CAK's evidence on this issue and make submissions which could have reasonably impacted to the tribunal's decision. Moreover, the SGCA found that the tribunal did not actually rely on any evidence while granting the extension of time to CAJ and CAK but rather relied on its "experience" in coming to this decision, which the SGCA found was immaterial in deciding the outcome of this case.

On this basis, the SGCA concluded that CAI suffered a breach of its natural justice rights.

**The Appropriate Remedy**

The SGCA found that it was not appropriate in this case to remit the final award back to the tribunal on the basis that: (i) CAJ and CAK failed to persuade the SGCA that the EOT Defence was within the jurisdiction of the tribunal; and (ii) the only way to adjudicate the EOT Defence was by amendment to the pleadings, and allowing this to happen at such a late stage would be manifestly unfair to CAI.

Accordingly, the SGCA ruled that a consequential order setting out the days of delay in the final award as 99 days instead of 74 days was not only within the power of the High Court but also the appropriate ruling in this instance.

**COMMENT**

In this judgment, the SGCA has acknowledged the high bar faced by any party that wishes to challenge an arbitral award for an alleged failure to comply with the principles of natural justice and/or excess of jurisdiction by a tribunal. However, where a tribunal has ruled on the basis of new arguments introduced at a late stage of the proceedings, that can provide grounds to set aside an award, particularly if it deprives the counterparty of the opportunity to test or adduce relevant evidence or to make submissions. In this case, the effect of the set-aside was limited to the EOT Defence, with the other parts of the final award remaining intact.

The judgment also provides an important reminder of the need to ensure that all issues and arguments are considered at an early stage in the dispute and appropriately set out in pleadings and/or other procedural documents so as to minimise the risk of challenge to the award.

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Should you have any questions relating to this bulletin, please do not hesitate to contact any of the authors listed below or your usual Debevoise contact.

**LONDON**



Tony Dymond  
tdymond@debevoise.com



Robert Hoose  
rhouse@debevoise.com



Amina Afifi  
aafifi@debevoise.com



Sophia Burton  
sburton@debevoise.com



Laith Najjar  
lnajjar@debevoise.com



Raeesa Rawal  
rrawal@debevoise.com