

# Dispute Resolution Hotline

October 13, 2022

## CAN A PARTY GO OUTSIDE THE SCOPE OF THE ORDER OF REMISSION OF THE AWARD? SINGAPORE COURT OF APPEAL ANSWERS

- Parties can only agitate issues within the scope of the order of remission.
- Jurisprudence in Singapore allows remission of awards to the tribunal where the tribunal has failed to consider an issue; while Indian courts may not permit the same.
- In India, awards can be remitted where there is no reasoning to base a finding, or there is a gap in reasoning in the award.

In **CKH v CKG**,<sup>1</sup> the Singapore Court of Appeal held that a party cannot re-agitate issues that were beyond the scope of the order of remission of the award. When the award is remitted by the courts to the arbitral tribunal to decide issues that were pleaded during the arbitral proceedings but were not decided upon in the award, the tribunal cannot stray from the specific issues that were remitted.

### FACTUAL BACKGROUND

CKH (“**Seller**”) entered into an agreement to sell its interests in certain timber concessions in Indonesia to CKG (“**Buyer**”) in exchange for USD 8 million and a three-year supply of round logs for use in the Seller’s plywood factory. The multiple agreements concluded to that effect prescribed that any dispute arising out of the same shall be seated in Singapore and shall be governed by the SIAC Rules.

Certain disputes arose in relation to failure to supply logs by the Buyer to the Seller and the matter was referred to arbitration. The arbitral tribunal awarded the Seller damages, following which the award was challenged before the Singapore High Court.<sup>2</sup> The Singapore High Court upheld the award except for one variation i.e. that the award failed to take into account the existence and quantum of a debt (“**Principal Debt**”) and interest of 2% compounded monthly owing to the Seller in relation to freight and taxes for logs supplied. Thereafter, the Singapore High Court suspended the set-aside proceedings and remitted the award to the tribunal to decide the issue of the Principal Debt by drawing up specific terms of reference under Article 34(4) of the UNCITRAL Model Law. Article 34(4) of the Model Law empowers the court to suspend set-aside proceedings “to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such action as in the arbitration tribunal’s opinion will eliminate the grounds of setting aside.”

The judgment of the Singapore High Court was challenged before the Singapore Court of Appeal, which was subsequently dismissed.<sup>3</sup>

Upon remission, the Seller made certain submissions before the tribunal that, according to the Buyer, fell outside the terms of reference and the order of remission. The tribunal referred this matter to the Singapore High Court, which held that the parties were permitted to only deliberate upon issues strictly within the scope of the order of remission. The Seller appealed the said decision before the Singapore Court of Appeal.

### JUDGMENT OF THE SINGAPORE COURT OF APPEAL

The Singapore Court of Appeal held that while the power to suspend set-aside proceedings and remit the matter to the tribunal under Article 34(4) of the Model Law is a relatively broad power, the scope of such remission is necessarily defined by the terms of the order ordering remission. The tribunal becomes *functus officio* after the issuance of the original award; and is revived only to the extent of the power conferred by the order of remission. The Singapore Court of Appeal relied on well-established precedent<sup>4</sup> to reiterate that the tribunal’s jurisdiction is only revived within the limited extent of the order of remission.

The Singapore Court of Appeal proceeded to state that since the Seller sought to challenge the accuracy of the order of remission of the Singapore High Court, this would inevitably involve the Seller rehashing submissions that delve into the merits of the case which would go beyond the scope of the order of remission.

The Singapore Court of Appeal considered the Seller’s submissions and stated that all of them fell outside the scope of the order of remission:

**First**, the Seller submitted that an award was made in a parallel arbitration before the Indonesian National Board of Arbitration (“**BANI award**”) in favour of a third company which was an affiliate of the Buyer. This affiliate could, according to the Seller, be equated with the Buyer. The Seller submitted that the BANI award considered the same

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Principal Debt as that under the present arbitration. Hence, it operates as some form of supervening *res judicata*. The Singapore Court of Appeal held that the Singapore High Court had already dismissed this argument in the set-aside proceedings. Further, this was a submission clearly out of the scope of the remission order.

**Second**, the Seller sought to challenge the quantum of the Principal Debt by requiring proof of what sums were owing by way of the Principal Debt. The Singapore Court of Appeal held that the Seller is seeking to reopen the findings of the Award. Further, the challenge to the quantum of debt could not be disguised as a challenge to the existence of the Principal Debt.

**Third**, the Seller submitted that it is entitled to challenge the running of interest at 2% monthly compounded on the Principal Debt until the present date. The Singapore Court of Appeal rejected this contention stating that it falls outside the scope of the order of remission.

Based on the aforementioned findings, the Singapore Court of Appeal dismissed the appeal.

## ANALYSIS AND INDIAN APPROACH

During the set-aside proceedings, the Singapore High Court suspended the proceedings and remitted the award to the Tribunal to allow it to *“decide the one issue which it ought to have, but failed to, decide.”* Hence, awards can be remitted to the tribunal when the tribunal has failed to consider an issue or a finding.

This approach may contrast with that of India. Though Section 34(4) of the Indian Arbitration & Conciliation Act, 1996 (**“Arbitration Act”**) is derived from Article 34(4) of the Model Law and is largely similar in language, the Supreme Court of India, in *I-Pay Clearing Services Pvt. Ltd. v ICICI Bank Ltd.*<sup>5</sup> has laid down certain principles that courts must follow while considering an application to remit an award under Section 34(4) of the Arbitration Act which are distinct to the approach followed in Singapore. The Supreme Court held that an award can only be remitted to the arbitral tribunal where there is a need to record reasons on a finding already given or to fill gaps in the reasoning in the award.<sup>6</sup> Section 34(4) of the Arbitration Act is not available to review findings, which are not based on evidence, or where there are no findings on contentious issues. Therefore, where an issue has not been considered at all in the award, the court will be compelled to set aside the award in its entirety instead of remitting it to the tribunal. The Delhi High Court followed suit in *Delhi Metro Rail Corporation Ltd. vs. J. Kumar Crtg JV*.<sup>7</sup>

— Ansh Desai & Ashish Kabra

You can direct your queries or comments to the authors

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<sup>1</sup> [2022] SGCA(I) 6

<sup>2</sup> CKG v CKH, [2021] SGHC(I) 5

<sup>3</sup> CKH v CKG and another matter, [2022] SGCA(I) 4

<sup>4</sup> Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86; L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd [2014] 1 SLR 1221; AKN and another v ALC and others [2016] 1 SLR 966.

<sup>5</sup> (2022) 3 SCC 121

<sup>6</sup> The Supreme Court has stated on many occasions that Section 34(4) of the Arbitration Act operates to cure a defect where there is a gap in reasoning or there are no reasons attributed to a finding [See *Dyna Technologies (P) Ltd. v Crompton Greaves Ltd., (2019) 20 SCC 1; SomDatt Builders Ltd. v State of Kerala, (2009) 10 SCC 1*]. However, in *I-Pay Clearing Services* it was categorically stated for the first time that the award can only be remitted when there are no reasons recorded, and not where there is a lack of finding or failure to consider contentious issues.

<sup>7</sup> O.M.P. (COMM) Nos. 603/2020 & 39/2020

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