# When should an impugned award be remitted to the original tribunal, and when should it be set aside? Vietnam Oil v Power Machines

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1. It is rare indeed for a challenge to an award to succeed. Accordingly, the courts do not often get a chance to consider the appropriate remedy in such a case, in particular whether the award should be remitted to the tribunal or set aside. The Singapore Court of Appeal has given a comprehensive guide on this issue when allowing the appeal in the recent decision of Vietnam Oil v Power Machines [2025] SGCA 50.

## Background

2. The present case arises out of a project to construct a thermal power plant in Vietnam (the "Project") between Vietnam Oil and Gas Group ("PVN"), the owner of the Project, and Power Machines ("PM") that served as the contractor for the Project.

3. The Project was governed by an EPC Contract between the parties and was subject to Vietnamese law. There were 2 clauses which provided for the parties' rights to terminate the EPC Contract:

   (a) Clause 16.2(b) permitted PM to terminate the EPC Contract if payments due were not received when due.

   (b) Clause 19.6 permitted any party to the EPC Contract to terminate the contract if works were prevented by reason of *force majeure.*

4. The Project commenced on 30 January 2015. On 26 January 2018, PM was placed on the OFAC sanction list ("US Sanctions") and all US persons were prohibited from engaging in transactions involving PM. Consequently, many of PM's sub-contractors suspended the performance of their obligations under their subcontracts with PM.

5. Parties were not able to resolve the impasse caused by the US Sanctions and on 28 January 2019, PM issued a notice of termination of the EPC Contract on the ground that the US Sanctions constituted a *force majeure* event (the "First Notice"). The First Notice provided that the EPC Contract would terminate on 18 February 2019.

6. On 8 February 2019, PM issued a second notice of termination on the ground that various payments were outstanding (the "Second Notice"). In the Second Notice, PM stated that the EPC Contract would terminate on 22 February 2019.

## The arbitration

7. The parties referred their dispute to arbitration in Singapore under the SIAC Rules. PM's case was that it had validly exercised its right of termination of the EPC Contract on two grounds:

   (a) PM's primary case was that the EPC Contract was validly terminated on 18 February 2019 by reason of *force majeure* via the First Notice.

   (b) Alternatively, the EPC Contract was deemed to have been terminated on 22 February 2019 by reason of PVN's non-payment via the Second Notice.

8. In response, PVN contended that the issuance of the First Notice amounted to a wrongful termination of the EPC Contract because the US Sanctions did not amount to a *force majeure* event. The Second Notice was not a valid termination notice since PM had, by its First Notice, previously and wrongfully repudiated the EPC Contract and abandoned the works.

9. On 30 November 2023, the arbitral tribunal ("Tribunal") issued the Final Award. It found that:

(a) The US Sanctions did not constitute a *force majeure* event under the EPC Contract and PM's purported termination of the EPC Contract by way of the First Notice was without basis.

(b) However, the effective date of termination was held to be the date on which the relevant notice period expired and not the date of the notice of termination itself. Therefore, on the date that the Second Notice was issued (8 February 2019), the EPC Contract was still in place as this was before the date of termination stipulated in the First Notice (18 February 2019), and that this Second Notice, for non-payment was valid.

10. The Tribunal was of the opinion that by issuing a Second Notice prior to the First Notice taking effect, PM must be taken to have intended the Second Notice to replace or, at the very least, supplement the First Notice. The Tribunal went on to hold that PM had validly terminated the EPC Contract on 22 February 2019 by way of the Second Notice, and awarded damages accordingly.

11. The Tribunal acknowledged that the Vietnamese law experts from both parties did not specifically deal with the scenario found by the Tribunal, i.e. an unlawful First Notice and a lawful Second Notice. It is also to be noted that the finding was contrary to PM's pleaded case, that when it issued the Second Notice it did not intended to withdraw the First Notice.

## The decision below

12. PVN applied to the General Division of the Singapore High Court to set aside the decision. The Judge held that there were grounds for setting aside the Final Award in that the Tribunal had acted in in breach of natural justice: see *Vietnam Oil and Gas Group v Joint Stock Company (Power Machines – ZTL, LMZ, Electrosila Energomachexport) and another matter* [2024] SGHC 244 ("GD").

13. In the Judge's view, the Tribunal's reasoning that PM must have intended for the Second Notice to have replaced or supplemented the First Notice had no nexus to the parties' cases. Neither party had advanced this contention as part of its case.

14. However, instead of setting aside the Final Award, the Judge remitted to the Tribunal the question of whether the Second Notice overrode, superseded, replaced or supplemented the First Notice such that it terminated the EPC Contract, and, in the event it was not effective, what consequential changes need to be made to the Final Award.

15. The parties have filed cross-appeals against the Judge's decision. PM appealed against the Judge's finding that there were grounds for setting aside the Final Award and PVN appealed against the Judge's decision to order remission instead of setting aside the award.

## The Appeal

16. The Court of Appeal upheld the decision of the court below that the Tribunal's reasoning and conclusion did not bear a reasonable nexus to parties' arguments, and that there had been a breach of the fair hearing rule. It then considered whether remission should have been ordered.

## Remission

17. The Court of Appeal pointed out that in deciding the appropriate remedy, the court's fundamental concern is in preserving the integrity of the arbitral process, and not the correctness of the tribunal's reasoning or result. Therefore, as a starting point, remission of an award may be appropriate when the identified defect is capable of being cured. The Court of Appeal identified the following circumstances/ factors as relevant in determining whether remission should be ordered.

18. Decisions in excess of jurisdiction. Certain defects are, by their nature, incapable of being remedied. For example, it would be inappropriate to remit an award where the tribunal has made a decision in excess of jurisdiction on an unpleaded defence. In other cases, the Court of Appeal identified 5 factors as follows.

19. Breach of natural justice/ prejudgement/apparent bias. Where the question of remission arises in the context of remedying a breach of natural justice, the obvious concern is whether the remittal to the very same tribunal would aggravate rather than address the complaint. Hence, the first question to be answered is whether a fair-minded observer could reasonably apprehend that the tribunal may not be able to afford the parties a fair process in its consideration on the remitted issues. This would be so if the tribunal had conducted the matter in such a manner that it would be invidious and embarrassing for it to try to free itself of all previous ideas and to redetermine the same issues.

20. The real focus is on confidence in a fair *process*, rather than confidence in a fair *conclusion*. Thus, where the defect in question would cause a fair-minded observer to reasonably apprehend that the

tribunal may be unable to afford the parties a fair *process* in its determination on the remitted issues, remission will usually be inappropriate.

21. Whether a fair-minded observer would continue to have confidence in the tribunal is a question that depends on the individual facts and circumstances of each case. The concern will be over the tribunal's ability to afford parties a fair and balanced consideration on a remitted issue where a tribunal had already come to a decision on that issue in breach of the fair hearing rule. This is because the party at the receiving end of the breach may justifiably be concerned about questions of prejudgment amounting to apparent bias.

22. Allegations of prejudgment amounting to apparent bias are made against decision-makers whose conduct of the decision- making process gives rise to a reasonable suspicion or apprehension that he or she may have prejudged the dispute at hand. The test to be satisfied is whether a fair-minded and informed observer would, having considered all the facts and circumstances of the case, reasonably suspect or apprehend that the decision maker had reached a final and conclusive decision, or might be predisposed to a given view, before being made aware of all relevant evidence and arguments that the parties wish to present.

23. The court needs to assess the possibility of anchoring and confirmation biases on the part of the Tribunal, i.e. the subconscious tendency to rely too heavily on conclusions and information it had received earlier, at the expense of new information and a fresh analysis, and the difficulty of persuading a decision-maker to change its mind from an initial view it had come to.

24. Where a tribunal had previously decided a point in breach of the fair hearing rule, a fair-minded observer might similarly be concerned about the prospect of the tribunal being improperly influenced by the anchoring and confirmation biases when asked to reconsider the very same point. Concerns of prejudgment may be especially pronounced where a critical point is decided in breach of the fair hearing rule in circumstances involving a denial of the fair opportunity to present one's case or the adoption of a chain of reasoning that is not connected to what the parties have advanced.

25. Centrality of the impugned issue. The centrality of the impugned point must be assessed in the context of the entire award. The court should consider whether the issue in question can fairly be described as affecting a substantial part of the award, or even as being pivotal to the case as a whole. This exercise ought not to be viewed in purely numerical terms. Whether the breach turns on a single issue or concerns an aggregation of several smaller issues cannot be determinative. The single dispositive issue may be crucial to the outcome of the entire case while the many small issues may involve relatively small valuation disputes.

26. The need to amend pleadings. Remission is generally meant to give the tribunal the opportunity to deal with points already before it, meaning that the point would typically have been pleaded or would arise from existing pleadings. Remission would be inappropriate if it would necessitate an amendment of a party's pleadings, in circumstances that would be manifestly unfair to the other party.

27. Time and costs savings. Considerations of time and cost savings may be peripheral in instances where the defect in the arbitral process is so severe and material that a fair-minded observer would no longer have confidence in the Tribunal's ability to come to a fair and balanced conclusion on the remitted matters.

## The Decision

28. Applying the principles above the Court of Appeal found as follows:

    (a) The Tribunal's breach of the fair hearing rule was serious in nature. It bore no relation to the arguments of parties and was contrary to the factual position taken by the beneficiary of the breach, PM.

    (b) It was a pivotal decision that potentially went to the heart of the dispute on liability. But for that decision, PM could have been found liable for wrongful termination, and this in turn would have affected the findings on the amount owed by PVN to PM.

    (c) The Tribunal had come to its decision despite knowing that neither party's expert evidence had addressed the issue. This gives rise to concerns of prejudgement. Given the significance and materiality of the breach by the Tribunal, remission was not an appropriate remedy.

    (d) If an order of remission was made, it would be necessary for PM to change its case as pleaded as it could no longer be able to maintain that the Second Notice was not intended to withdraw the First Notice.

29. Accordingly, the Court of Appeal upheld the decision of the court below that the relevant parts of the Final Award should be set aside, and allowed the appeal against the order of remission, setting it aside.

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