

Defective Solar Panels: Singapore High Court Provides Guidance on How Unpleaded Claims and Abandoned Claims May Affect Pleadings

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Introduction

In *DGE v DGF* [2024] SGHC 107, the claimant DGE advanced eight grounds for setting aside an arbitral award in the defendant DGF's favour, that the photovoltaic modules (solar panels) supplied by DGE were inherently defective. The High Court ("**Court**") dismissed each of these grounds in declining to set aside the award.

This article deals with interesting questions that the Court considered – (i) whether the tribunal's raising of an unpleaded issue on the first day of the hearing made it a live issue, and (ii) whether a party's change in its legal position underlying an abandoned claim was a matter requiring pleading or amendments to pleadings.

The defendant was successfully represented by Partner [Lai Yew Fei](#), Partner [Tao Tao](#), and Associate Brendan Tan Zi Jian of Rajah & Tann Singapore.

Factual Background

Claim

DGF ("**F**") procures building materials, including photovoltaic ("**PV**") modules, and builds residential houses in various cities. DGE ("**E**") is a company whose business includes manufacturing materials used in the PV industry.

The parties entered into two agreements for F's purchase of PV modules ("**2012 Contract**", "**2013 Contract**"). The 2013 Contract appended a document titled "Limited Warranty for PV Modules" ("**Limited Warranty**").

In 2013, E delivered the PV modules purchased under the contracts to F, and these were installed on the rooftops of various residential houses. 365,000 of these were modules with AAA backsheets ("**AAA Modules**"). In 2017, F discovered that the backsheets had developed cracks.

Arbitration

In 2018, F commenced two arbitrations against E, which were subsequently consolidated, for the supply of PV modules with defective backsheets. The arbitration was bifurcated into a liability phase and a remedies phase. In the liability phase, the three-member tribunal found in F's favour that the 365,000 PV modules supplied by E were inherently defective ("**Award**"). The remedies to be awarded were to be determined in the final award.

High Court's Decision

Before the Court, E advanced eight grounds for setting aside the Award, relying on Articles 34(2)(a)(i), (ii), (iii), (iv) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("**Model Law**"), and section 24(b) of the International Arbitration Act 1994 ("**IAA**"). The Court dealt with and dismissed each of these grounds in declining to set aside the Award.

Breach of natural justice (fair hearing rule)

For context, F had originally argued that the Limited Warranty applied between E and F, and one of its claims against E was for breaches of various clauses of the same ("**Limited Warranty Claim**"). E had also argued that the Limited Warranty applied between E and F, and that there were certain clauses therein which excluded some of F's other claims against it ("**Limited Warranty Defence**"). This included F's claim of a breach of Article 35 of the United Nations Convention on Contracts for the International Sale of Goods, 1489 UNTS 3 to deliver PV modules of quality conforming with the contracts including fitness for purpose ("**CISG Claim**").

At the start of the hearing, the tribunal raised the unpleaded issue of whether the Limited Warranty was: (i) a third-party warranty that was to be invoked by the end-user of the PV modules; or (ii) applicable between the parties (E and F) ("**Third-Party Warranty Issue**"). The tribunal eventually found *inter alia* that the Limited Warranty was a Third-Party Warranty that could not be relied upon as between the parties.

This finding did not have an impact on F's Limited Warranty Claim against E, as F had by the end of the evidentiary hearing abandoned its Limited Warranty Claim and adopted the view that the Limited Warranty was a Third-Party Warranty. However, this finding meant that E could no longer rely on the Limited Warranty Defence to exclude F's CISG Claim against it. As such, given the tribunal's finding that the AAA backsheets were inherently defective, the tribunal also found that F succeeded in its CISG Claim against E.

Before the Court, E relied on *inter alia* Article 34(2)(a)(ii) of the Model Law and section 24(b) of the IAA to assert that, in breach of the fair hearing rule of natural justice, it had had no reasonable opportunity to present its case on the Third-Party Warranty Issue. The Court found that (i) E had had a reasonable opportunity to present its case on the issue at various junctures after the tribunal first raised this (and the Court detailed these various opportunities); (ii) there was no breach of the fair hearing rule; and (iii) E had failed to establish any prejudice.

Specifically, the Court disagreed with E's submission that its opportunity to present its case was hampered because F failed to amend its pleadings to plead its revised position, that the Limited Warranty was a Third-Party Warranty. The Court found that there is a qualitative difference between a party advancing a new claim versus a party abandoning a

claim and its underlying premises. F had only withdrawn its Limited Warranty Claim and concomitant underlying legal position (i.e. the latter). This left E as the only party advancing a positive case on the Third-Party Warranty Issue by way of its Limited Warranty Defence. F had been content to rest on responsive legal arguments and was thus not required to plead or amend its pleadings on the same. If E wished to argue that the Limited Warranty applied as between parties for the purpose of the Limited Warranty Defence, then it was for E (not F), to request amendment of its pleadings.

Scope of submission to arbitration

The Court disagreed with E's arguments under Article 34(2)(a)(iii) of the Model Law that the Third-Party Warranty Issue fell outside the scope of submission to arbitration.

The Court found that while matters that fell within scope are identified with reference to: (i) pleadings; (ii) the agreed list of issues; (iii) opening statements; (iv) evidence adduced; and (v) closing submissions, a balanced approach is required towards assessing what falls within scope. Matters can come within scope even though they are unpleaded. Such scope may also widen to include a point which was raised, and which parties had an adequate opportunity to address.

In this case, the Court found that the Third-Party Warranty Issue fell within the scope of submission to arbitration, as:

1. it arose from or was connected to the pleaded disputes;
2. it was raised at the start of the evidentiary hearing and the parties were directed to address it;
3. it was a live issue in the arbitration; and
4. the parties had a reasonable opportunity to address it and availed themselves of the opportunity.

Breach of agreed arbitral procedure

The Court disagreed with E's arguments under Article 34(2)(a)(iv) of the Model Law that the agreed arbitral procedure was not adhered to.

The Court found that the agreed procedure did not automatically mandate that new matters raised at the hearing may be raised only upon attendant amendment in pleadings. Instead, this was to be left to the tribunal to determine, including whether directions for amendments of pleadings were required, and whether to grant permission to advance the new matter without any application being made (in exceptional circumstances).

In this case, the Court found that there was no breach of the agreed procedure; the tribunal's direction for parties to address the Third-Party Warranty Issue constituted leave in exceptional circumstances for parties to advance new arguments on the issue without making an application to do so, and the tribunal had permitted parties to address this issue without requiring them to amend their pleadings. Even if there had been any breach of agreed procedure by F not pleading its position on the issue, it would not reasonably have made a difference to the tribunal's decision. F did not rely on any evidence to advance its position on this issue, and its pleadings (even if amended) would have only contained the legal arguments already included in its various briefs. If E had wished to adduce evidence on the issue, it did not have to wait for F to amend its pleadings.

Concluding Remarks

Clients and their legal advisors are encouraged to read this decision carefully in order to pre-emptively formulate their responses for situations where: (i) a tribunal raises an unpleaded issue of its own accord; and/or (ii) another party abandons its claim and underlying premises with resulting implications for the client's own pleadings, the evidence-taking process, and other documents (e.g. the list of issues, as well as various submissions and briefs).

For further queries, please feel free to contact our team below.

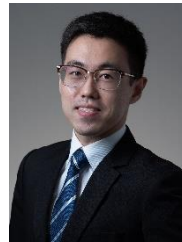
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