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Newsletter

Construction

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What's inside?

When will the Court grant an interim injunction to stay arbitration proceedings?

Justin Yuen

In the recent case of Atkins China Ltd v China State Construction Engineering (Hong Kong) Ltd, HCMP 1193 2020, the Plaintiff sought in its Originating Summons (i) a declaratory judgment that, as a matter of construction, a settlement agreement entered into between the parties had settled all claims and counterclaims arising under a Design Agreement; and (ii) a final injunction restraining the Defendant from taking further steps in the arbitration proceedings commenced in the name of the Defendant by its insurers. The Plaintiff sought an interim injunction to stay the arbitration proceedings, pending resolution of the Originating Summons. Since the summons for an interim injunction was served less than two clear days before the hearing, although the Defendant appeared by counsel, the Court could only treat it as an *ex parte* application on notice.

Background

The Plaintiff and Defendant had signed a Design Agreement whereby the Plaintiff was appointed to design permanent structures of certain sections of the Hong Kong Zhuhai-Macao Bridge, including reclamation works and construction of a seawall (Project). There was an arbitration clause in the Design Agreement requiring the parties to refer disputes arising out of or in connection with the Design Agreement to arbitration.

Pursuant to the Design Agreement, the Plaintiff designed and the Defendant erected various structures. Certain instability incidents occurred at the Project, as a result of which, part of the seawall collapsed. The Plaintiff was owed money in respect of unpaid variation orders.

Negotiations ensued between the parties, culminating in a settlement agreement under which the Defendant agreed to pay the Plaintiff HK$10 million. It was a term of the Settlement Agreement that the Plaintiff and Defendant "*…unanimously and irrevocably agree[d] to the Final Design Agreement Value for the said Design Agreement, this being in full and final settlement of all Variation Works claims, counterclaims, and contra-charges between [the Defendant] and [the Plaintiff] howsoever arising under the Design Agreement*." The Settlement Agreement did not contain an arbitration clause. Upon execution of the Settlement Agreement, the ongoing settlement discussions and negotiations came to an end and the payment was made to the Plaintiff.

Arbitration proceedings commenced

Seven months later, the Defendant, by its insurers, served a Notice of Arbitration on the Plaintiff, claiming that the arbitration arose from a dispute between the Plaintiff and Defendant in relation to the Plaintiff's defective design under the Design Agreement, which had caused the collapse of the seawall. Damages of HK$240,000,000 were claimed.

The Plaintiff sought an interim injunction to restrain the Defendant from proceeding with the arbitration. The Defendant argued that the Plaintiff's application for an injunction should be dismissed because there was no urgency to grant interim injunctive relief. It argued that the arbitration clause in the Design Agreement was binding on the parties and the current dispute fell within its ambit and that the same injunctive relief could be applied for in the arbitration.

Interim injunction to restrain arbitration proceedings

The Court said that it had jurisdiction to grant an injunction to restrain arbitration proceedings upon consideration of the following factors (although the discretion to grant such injunction will be exercised sparingly): (i) the injunction does not cause injustice to the plaintiff in the arbitration; (ii) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process; and (iii) delay in making an application for an injunction may be fatal to the application.

Court's decision

The Court found that the Plaintiff had shown a serious issue to be tried as to whether or not the Settlement Agreement was so broad as to have settled all disputes (including the negligence claim) between the parties so that nothing could be referred to arbitration. It said, upon settlement, the Defendant had no justification for relying on the arbitration clause in the Design Agreement.

The Court said that the Settlement Agreement, which formed a separate and distinct contract to the Design Agreement, should be construed on its own terms. The Settlement Agreement did not contain an arbitration clause and any dispute as to the validity or effect of the Settlement Agreement was not within the jurisdiction of an arbitrator appointed under the Settlement Agreement, but was to be resolved by a court of competent jurisdiction.

The Plaintiff, the Court said, was invoking the Court's jurisdiction to restrain a vexatious and oppressive arbitration and it may be justified in doing so if the Settlement Agreement was found to be valid and covered the subject matter of the arbitration. The Plaintiff should not, it said, be asked to incur endless time and costs in defending an arbitration which should never have been commenced and which is abusive.

The Plaintiff submitted that the interim injunction was unlikely to cause injustice to the Defendant and would only push back the arbitration for a few months, pending resolution of the Originating Summons. There was no delay on the Plaintiff's part in taking out the summons.

The Court held that there was not such urgency that the Defendant should even be deprived of an inter partes hearing of the summons and to file evidence in opposition beforehand. The only urgency that the Plaintiff had shown was that the Arbitration Notice required the Plaintiff to give a response by 19 August 2020. Little prejudice would be caused to the Plaintiff, the Court said, before the next summons day for an inter partes hearing, that could not be compensated for by costs or money, even if the Plaintiff had to respond to the Arbitration Notice by 19 August 2020.

Accordingly, the Court declined to grant an interim injunction on an ex parte on notice basis

Comments

The arguments raised by the parties are interesting. Although counsel for the Defendant attended the hearing, since less than 2 clear days' notice was given, the hearing was deemed to be ex parte and was adjourned to another date to give the Defendant a full opportunity to file an affirmation in opposition and argue its case properly. Please stay tuned for our update on the decision of the Court at the adjourned hearing.

Court held that pre-bid agreement appointing sub-subcontractor could not be inferred

KK Cheung

In the recent case of Redland Precast Concrete Products (China) Ltd v Permasteelisa Hong Kong Ltd, HCCT 35/2018, the Court had to decide whether a contract existed between the Plaintiff and Defendant whereby the Defendant agreed to appoint the Plaintiff as its subcontractor for works to be carried out on a project. The Plaintiff claimed that it had entered into a pre-bid agreement with the Defendant, that should the Defendant be awarded the subcontract works, the Defendant

would sub-contract the works to the Plaintiff. The Defendant denied that such agreement existed. The Court held that no such agreement could be inferred from the documents relied upon by the Plaintiff as showing such agreement or from the parties' conduct.

Background

The Employer on the project awarded the Main Contract for the project to Hsin Chong Construction Company Limited (HC). On 22 October 2015, the Defendant was appointed as subcontractor for the design, supply, fabrication and installation of the curtain wall, skylight, precast ceramic façade system and LED lighting and associated works (Subcontract Works) and a formal Subcontract was signed between HC and the Defendant on 18 April 2016 (Subcontract).

Plaintiff's Case

The Plaintiff's case was that a sub-subcontract and/or agreement was made between the Plaintiff and Defendant, in respect of the part of the Subcontract Works, identified as the design, supply and delivery of the precast concrete façades (Works), which was to be integrated with the curtain wall forming part of the exterior façade system of the Subcontract Works. The Plaintiff claimed that it had agreed with the Defendant to undertake the Works for HK$79,432,305.

The Plaintiff claimed that it had entered into a pre-bid agreement with the Defendant, that should the Defendant be awarded the Subcontract Works, the Defendant would sub-contract the Works to the Plaintiff. The Plaintiff claimed that the pre-bid agreement was contained in and/or evidenced by: (1) a confidentiality agreement entered into between the Plaintiff and Defendant dated 10 June 2015; (2) the Defendant's emails of 23 and 25 June 2015 (June Emails); (3) a letter dated 25 June 2015 from the Plaintiff (25/6 Letter); and/or (4) a pre-bid agreement which was made between HC and the Defendant dated 31 August 2015 (HC/Defendant Pre-bid Agreement). These documents are referred to below collectively as "4 Documents".

The Plaintiff claimed that the Defendant was in breach of the Sub-subcontract when it terminated or repudiated it (by employing another subcontractor), by its letter to the Plaintiff dated 8 June 2016 and its email of 11 June 2016. The Plaintiff claimed to be entitled to the amount due under the Sub-subcontract, or damages for the Defendant's breach, or alternatively, to a reasonable price on a quantum meruit basis.

Defendant's Case

The Defendant highlighted that the Plaintiff's case was based on an agreement being inferred from the 4 documents and the parties' conduct. It argued that such inference could not be made and that on the facts there was no pre-bid agreement reached and the Plaintiff and Defendant had merely been in preliminary discussions and still at the stage of evaluation as to the suitability of the Plaintiff to be the Defendant's sub-contractor in respect of execution of the Subcontract Works.

Applicable legal principles

The Court referred to the applicable legal principles for deciding whether a contract can be inferred from the parties' conduct, namely that the court will not imply a contract lightly and the conduct relied on must be unequivocally referable to the contract sought to be inferred. If the parties would or might have acted exactly as they did in the absence of a contract that would be fatal to a contract being inferred.

Did the 4 Documents constitute an agreement?

Confidentiality Agreement

The Defendant said that it was its standard practice and standard practice in the construction industry to ask potential sub-contractors to enter into a standard form confidentiality agreement for the purpose of preventing bidders divulging confidential information about the project to third parties during the tender stage. The Court said that the terms of the Confidentiality Agreement were clear. The parties acknowledged in the recital, that they were engaged in discussions and negotiations, whereby they were mutually exploring and evaluating the appropriateness and possibility of the Plaintiff's involvement as the proposed specialist subcontractor of the Defendant in the tender for the Main Contract of the project. They further acknowledged and agreed, that the provision and exchange of information under the agreement would not commit or bind either party to any present or future contractual relationship, and further, that the Defendant had no obligation under the agreement to enter into any contractual arrangement with the Plaintiff - including but not limited to any pre-bid agreement for engaging the Plaintiff as the Defendant's specialist subcontractor.

With these express provisions in mind, and taking into account the fact that the burden was on the Plaintiff to establish the existence of the pre-bid agreement, the Court said that it required very convincing and unequivocal evidence to

accept that, notwithstanding the parties' acknowledgment contained in the Confidentiality Agreement, they had indeed entered into and concluded the pre-bid agreement. The Court will not, it said, imply a contract lightly, in the absence of conduct which is unequivocally referable to the contract sought to be inferred.

June Emails

The Plaintiff relied on emails which it said evidenced the existence of the pre-bid agreement, in particular, an email from the Defendant stating that the Defendant was working on the pre-bid agreement for the Plaintiff to team up with the Defendant and HC and asked for the Plaintiff's best offer based on such pre-bid agreement.

The Court said that the June emails were equivocal, and did not show the conclusion of any agreement between the Plaintiff and Defendant. The Defendant had only said that it was reviewing the pre-bid agreement which it had received from HC and was working on a pre-bid agreement with the Plaintiff. There was no mention of the terms of the proposal for the "teaming up" of the Plaintiff with the Defendant and HC. The email did not express any commitment to the inclusion of the Plaintiff's precast concrete panel works in the Defendant's contractual arrangement with any main contractor, including HC. "Teaming up", the Court said, is itself a general and vague term and does not invariably have the meaning that the Plaintiff contended it had i.e. that should the Defendant be awarded the Subcontract, it shall "sublet the Subcontract work" to the Plaintiff. The Plaintiff, HC and the Defendant may "team up" in different ways, to work on the Project, the Court said.

25/June Letter

The Plaintiff relied on a Letter of Intent which it was asked by the Defendant to issue to it, confirming its willingness to act as the Defendants key domestic supplier for the provision of the precast concrete facade panel fabrication if the contract was awarded to the Defendant. The Plaintiff argued that the Defendant's request for such letter showed that the intention was for the Plaintiff to be the Defendant's subcontractor if HC was awarded the main contract and the Defendant was awarded the subcontract.

The Court said that there was no unequivocal agreement expressed by the Defendant that it would enter into a contract with the Plaintiff if the Defendant was awarded the Subcontract.

The matters relied upon by the Plaintiff as evidence of the pre-bid agreement were consistent, the Court said, with the Defendant considering whether the Plaintiff was a suitable subcontractor to be proposed as a specialist subcontractor, and for inclusion in the tender for the Main Contract and under the Plaintiff's scope of works. The conduct was just as consistent, the Court said, with there being *no* pre-bid agreement between the parties. The 25/6 Letter was not sufficient to tilt the scales in favour of the existence of the pre-bid agreement contended for. It only committed the Plaintiff to act as the key domestic supplier for the provision of the precast concrete panel works. The Defendant's request for the Letter of Intent from the Plaintiff, was not conduct which was unequivocally referable to the existence of the pre-bid agreement.

HC/Defendant Pre-bid Agreement

The Court said that this Agreement added nothing to the evidence. It was by itself simply an agreement made between the Defendant and HC, on its own terms and conditions, and made no provision for any commitment by the Defendant or the Plaintiff to enter into a sub-subcontract. Even in the absence of a pre-bid agreement between the Plaintiff and Defendant, the Court said, the Defendant would just as likely have entered into the HC/Defendant Pre-bid Agreement.

Court's Decision

The Court concluded that there was no pre-bid agreement made between the Plaintiff and Defendant, contained in and/or evidenced by the 4 Documents.

Post-tender period and work done

The Plaintiff relied on the fact that, after the award of the Main Contract to HC and Subcontract to the Defendant, the Plaintiff had prepared and submitted mockup samples, produced manufacturing quality plans, prepared and submitted information, plans and drawings and attended meetings and workshops from December 2015 to June 2016, all of which the Plaintiff claimed was work performed within the scope of the Sub-subcontract. The issue was whether such conduct was consistent only with there being a Sub-subcontract.

The Court did not accept that the parties' conduct after the award of the Main Contract to HC in September 2015 and award of the Subcontract to the Defendant in October 2015, was unequivocally referable to the existence of a pre-bid agreement or a binding Sub-subcontract between the Plaintiff and Defendant. The Court said that the submission of the Plaintiff's 4th quotation on 8 January 2016 (Quotation 4), the meetings held between the Plaintiff and Defendant and

Plaintiff's submission of technical details and samples, were equally consistent with the Tender Analysis being conducted by the Defendant on the Plaintiff's capabilities and suitability as a possible subcontractor for the Works.

The Confidentiality Agreement, the Court said, clearly set out the parties' acknowledgment and agreement that they were not bound to any present or future contractual relationship save for carrying out and continuing with the negotiations on the involvement of the Plaintiff as a proposed specialist subcontractor in the tender for the Main Contract. The Court found that the parties' negotiations on the terms of the Plaintiff's involvement and appointment as the Sub-subcontractor, and the work carried out by the Plaintiff after the award of the Subcontract to the Defendant, were not unequivocally referable to the fact that a binding Sub-subcontract had been concluded. Such work was, on the balance of probabilities, part of the continuing process of due diligence and Tender Analysis conducted by the Defendant, as to the appropriateness of appointing the Plaintiff as its subcontractor.

The Court therefore concluded that there was no pre-bid agreement and no Sub-subcontract made between the parties such as would entitle the Plaintiff to any payment.

Quantum meruit claim

Having found that there was no contract between the parties, it followed that there was no breach or wrongful termination of contract, as alleged. The Plaintiff claimed as an alternative, payment of a reasonable price for the works carried out on a quantum meruit basis.

The Court had found that the work carried out by the Plaintiff was not work done for the Project but rather for the purpose of the Tender Analysis and due diligence carried out by the Defendant, and for its objective of obtaining and securing the Sub-subcontract from the Defendant. The work carried out by the Plaintiff was not requested by the Defendant in contemplation of the Sub-subcontract being executed, nor in anticipation of the execution of the Sub-subcontract, the Court said.

There was no express reservation of the parties' negotiations being "subject to contract" in this case, but the terms of the Confidentiality Agreement made it clear that the parties were not committed to any present or future contractual relationship, and that there was no obligation on the Defendant's part to enter into any agreement with the Plaintiff. The work was performed by the Plaintiff in 2016 after it had been invited to submit its quotation to assist in the Defendant's evaluation of its bid. By then, the Defendant had also unequivocally stated its position in a letter of 6 January 2016, that there was no pre-bid agreement, nor any binding commitment to the Plaintiff. The Defendant had also stated in the letter that there was a tender analysis being undertaken, in which the Plaintiff's knowledge of the project would be taken into account. Even in the Plaintiff's own letter of 26 February 2016, the Plaintiff had shown that it was acutely aware of the fact that there was no Sub-subcontract awarded to it, when it stated that it would only update the MQP once the Defendant awarded the contract to it. It could hardly be said that both parties confidently expected at the time that a formal contract was bound to eventuate.

Significantly, the payment condition for work carried out by the Plaintiff which had been included in the draft letter of intent was deleted by the Plaintiff on 12 April 2016. The Defendant cannot be taken to have understood that any services carried out by the Plaintiff would have to be remunerated in any way. In the circumstances, the Court found that that there was no implied agreement that the work carried out by the Plaintiff should be paid on a quantum meruit or any other basis.

Estoppel

The Plaintiff also claimed that the Defendant was estopped from denying that there was a Sub-subcontract between them because by requiring the Plaintiff to perform and carry out the Works, the Defendant had made a clear and unequivocal promise or representation to the Plaintiff, that the Sub-subcontract existed, or that the Works were performed by the Plaintiff as subcontractor, and alternatively, that the parties had acted upon a common assumption of the existence of the Sub- subcontract. However, the Court held that the essential element of a clear and unequivocal representation, for the doctrine of estoppel by representation to operate, did not exist.

Comments

In construction projects (even for larger projects), it is not uncommon for a contractor to start working even before the formal contract is signed. If the employer changes its mind later, a dispute is bound to arise about liability for payment for the work done by the contractor.

This judgment highlights the difficulties of recovering payment from the other party when no formal contract has been signed. The conventional thinking is that the contractor in such situation should at least be entitled to recover its cost and expense incurred for the preparatory work on a quantum meruit basis. Usually, the preparatory work is done at the request of the other party on the understanding that it will be reimbursed if no contract is entered into between the parties.

Here, the Court found that such understanding did not exist due to the nature of the work done and deletion of the payment condition in the draft letter of intent.

When can an arbitration award be corrected?

Joseph Chung

In SC v OE1 & Anor, HCCT 48/2019 and OE1 & Anor v SC, HCCT 66/2019, the Court had to consider whether the arbitral Tribunal could make corrections to an arbitration award under Article 33(1)(a) of the Model Law (adopted in section 69 of the Arbitration Ordinance, Cap 609) because the award had failed to address two types of relief which had been claimed. The Court held that the corrections could not be made under Article 33(1)(a) because that was reserved for correcting clerical errors such as mathematical and typographical errors. However, the Court held that the corrections could be made by the Tribunal making an additional award under Article 33(3) of the Model Law.

Background

SC and OE had entered into an Agreement containing an arbitration clause which provided for their disputes to be settled by arbitration in Hong Kong at the HKIAC in accordance with the UNCITRAL Arbitration Rules. Disputes arose as to SC's alleged breach of the Agreement and OE commenced arbitration proceedings in Hong Kong. The arbitral Tribunal issued a final award on liability (Award), by which it made findings on SC's breaches of several sections of the Agreement. In its "Dispositive Order", the Tribunal declared that SC was in breach of its obligations under those sections of the Agreement and also ordered it to pay the costs of the arbitration, and that "*all other claims and reliefs sought by the Parties are rejected*".

OE applied to the Tribunal to correct the Award on the basis that it failed to address OE's requests for a perpetual licence under the Agreement and for injunctions, pursuant to their claims for relief. OE requested the Tribunal to correct the Award under Article 33(1)(a) of the Model Law, or to make an additional award under Article 33(3).

The Tribunal acceded to OE's application and issued an Addendum to the Award. The Tribunal explained that it had already made its findings and conclusions of SC's breaches of the Agreement, and should have repeated a summary of its findings by providing a declaration in the Dispositive Order. The Tribunal clarified in the Addendum, that it was "a mistaken omission" for the Tribunal not to have set out the declaration in relation to the licence and not to have included the injunctive relief in the Dispositive Order.

Did the Tribunal have power under Article 33(1)(a) to make the corrections?

OE applied to enforce the arbitration award, as corrected by the Addendum, while SC applied to set aside parts of the Addendum, arguing that the Tribunal did not have power under Article 33(1)(a) of the Model Law to make the corrections to the Award.

Article 33(1)(a) provides that "*Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties: (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature*".

The Court held that the Tribunal did not have power under Article 33(1)(a) to correct the Award because:

- Article 33(1)(a) is confined to "errors in computation", "clerical or typographical errors" or "any errors of similar nature". There is no general power to correct errors, and the only errors which can be amended must "stem from a mental lapse or a slip of the pen, not from an error of judgment".

- The errors affected by Article 33(1)(a) are "mainly flagrant mathematical errors or typing errors, which would otherwise complicate the execution of the award".

- The Tribunal's omission to declare the grant of the licence and its failure to grant the injunctive relief sought by OE were clearly not errors in computation, which related to mistakes in calculation only. Nor were they typographical errors.

- The correction of a "clerical mistake" is "something almost mechanical", like the slip of the pen, or an accident affecting the expression of the person's thought.

- Inadvertently including something, and inadvertently omitting anything intended to be included, could simply mean that something had gone wrong in the thought process, or there was an inadvertent or accidental slip, but it was not a "clerical" error.

The Court said there are strong policy reasons against alterations of an award after it has been made. The arbitral process is intended to be a speedy and final resolution of the parties' disputes, without the costs and delays of litigation. Awards should be final and free from continuing dispute about their correctness, completeness or meaning. Circumstances in which corrections or interpretations can be made should be narrowly circumscribed.

Could the Tribunal make the corrections under Article 33(3)?

The Court held that under Article 33(3) of the Model Law, parties were entitled to request, and the Tribunal had power to make, an additional award as to claims presented in the arbitral proceedings but omitted from the Award. OE's claims for the licence and injunctions were included in their Notice of Arbitration, Statement of Case and submissions presented in the arbitration, and SC had been given notice of them. These claims for relief, the Court said, were clearly issues which had been presented to the Tribunal in the arbitration and were included in the list of issues for determination by the Tribunal and SC had been given a full opportunity to address the Tribunal on OE's entitlement to the relief claimed.

SC argued that the issues of OE's entitlement to relief had all been dealt with, and determined by the Tribunal in the Dispositive Order, when it rejected all claims and relief sought by the parties, apart from the declaration made in the Award and award of costs. The Court said that in determining whether the Tribunal had "dealt with" OE's claims in the arbitration for the relief relating to the licence and injunctions, the Award must be read in its context.

Reading the Award in its proper context, the Court said, the objective intent of the Award was not the dismissal or rejection of OE's claims for the licence and injunctions as relief - these claims of OE had not been dealt with by the Tribunal. The Tribunal was accordingly entitled under Article 33(3) to make an additional award in order to deal with such claims. The Court said that how the Tribunal dealt with the claims, whether its manner of disposal (as set out in the Addendum) was right or wrong in law or on the facts, and whether the claims had been properly analysed and reasoned, were not open to review by the Court. Considered as a whole, the corrections and additional orders made by the Tribunal did not create any inconsistencies in the Award, and this was not a case of the arbitrators having second thoughts, or evaluating the evidence differently. The Court therefore concluded that the Tribunal had the power to make the corrections and the additional award

As for policy reasons that arbitral awards should be final and not revisited, there are equally good policy reasons, the Court said, for the Court to facilitate the arbitration process. The Court's powers under the Arbitration Ordinance are to be exercised to support and assist the Tribunal and to further the parties' choice of arbitration, so long as there is due process.

Accordingly, SC's setting aside application was dismissed and OE's enforcement application allowed.

This case highlights the limited circumstances in which an arbitral award can be corrected under Article 33(1)(a) of the Model Law and the circumstances in which a Tribunal may make an additional award under Article 33(3), where there are omissions in the original award. It also once against emphasises the Court's "hands off" approach, one of the objectives of the Arbitration Ordinance being to limit the rights of parties to an arbitration agreement to resort to the courts.

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