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Newsletter

International Arbitration

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What's inside?

Court refuses to enforce arbitrator's award for emergency relief

Joseph Chung

In the recent case of GD v HY, HCCT 76/2021, the court had to construe the provisions of a loan agreement to determine whether an arbitration agreement in a subsequent document varying the repayment schedule of the loan was valid. The court held that there was no valid arbitration agreement. Therefore the court's previous order allowing the Applicant (GD) to enforce an award of an emergency arbitrator for emergency relief was set aside.

Background

GD (a licensed Hong Kong money lender) had commenced arbitration proceedings in respect of a Loan Agreement between GD as Lender, HY and SD as Borrowers, and two companies (AEHL and HYL) as Covenantors/ Guarantors. The Loan Agreement contained a dispute resolution clause providing for disputes in relation to or arising out of the Loan Agreement to be resolved by litigation in the courts of Hong Kong. A Supplemental Agreement to the Loan Agreement was signed by the same parties, whereby the schedule of instalment payments of the Loan Agreement was revised. The repayment date of the loan under the Loan Agreement was extended 4 times, as evidenced by letters and attaching a repayment schedule and signed by HY and SD.

Subsequently, GD issued a letter to HY and SD (5th Extension Letter), referring to their request for a further extension of the time for repayment of the outstanding loan. The 5th Extension Letter contained, for the first time, an arbitration clause (Arbitration Agreement), stating that "*notwithstanding any provision in the Loan Agreement*", the Borrowers and Covenantors irrevocably agreed that they had liberty to choose to refer any disputes, differences or claims relating to or arising out of the Loan Agreement and the related guarantees to arbitration in Hong Kong. The 5th Extension Letter and the Schedule to it were countersigned by HY, but not by SD, AEHL or HYL.

Application to set aside Enforcement Order

GD commenced arbitration proceedings against HY in Hong Kong (Arbitration). The emergency arbitrator made an Award whereby emergency relief was granted, restraining HY from removing, encumbering, dissipating or otherwise disposing

of his property, until further order or award was made in the Arbitration or upon termination of the Arbitration (Enforcement Order) and to make disclosure of his assets. The court had granted GD leave to enforce the Award.

HY now sought to set aside the Enforcement Order on the basis that there was no valid arbitration agreement between GD and HY, as the 5th Extension Letter was not signed by all parties to the Loan Agreement, and was not a valid variation under the Loan Agreement. In the Award, the arbitrator considered the question of the 5th Extension Letter not having been signed by SD, but considered that it was not relevant to GD's application for the injunction and relief sought. He concluded that he had jurisdiction to grant the Award.

Meaning of "Party" and "Parties"

The court noted that the Loan Agreement was signed by GD, HY, SD, AEHL and HYL. Clause 15 of the Loan Agreement expressly provided that it "*shall not be amended, supplemented or modified except by written instrument signed by the Parties hereto or their respective duly authorised representatives*". Counsel for HY highlighted that the Loan Agreement stated that "*the Lender, the Borrowers and the Covenantors" shall collectively be referred to as "Parties*" and each individual as a "*Party*" and that the term "*Parties*" by definition therefore referred to GD as Lender, HY and SD as Borrowers, and AEHL and HYL as Covenantors. Further, "*Parties*" and "*Party*" were referred to in a number of clauses in the Schedule to the Loan Agreement, and in the dispute resolution clause of the Loan Agreement. Another Clause dealt with communications between the "Parties" and the confidentiality obligations of the "Parties".

The court said that, having considered the terms of the Loan Agreement as a whole, in the context of the nature of the Loan Agreement and obligations of the Borrowers and Covenantors under it, as a matter of construction and objective interpretation, the meaning and effect of clause 15 was that the Loan Agreement could not be amended or supplemented except by written instrument signed by all Parties, named and defined as including not only HY, but also SD, AEHL and HYL.

The court said that the meaning of "Parties" and "Party", as defined and contended by HY, was consistent with the presumed intention of the parties as to the meaning to be placed to and purposes of Clauses 13 and 15. Clause 13 dealt with communications between the Parties collectively, i.e. communications amongst the Lender, Borrowers and Covenantors, and information and material supplied to or received by any of them from the other Party, and referred to the release of any of the Parties from the Loan Agreement. Likewise, notice to be served under the Loan Agreement was required to be served and signed by the individual Party giving the notice, i.e. by any of the Parties to the Loan Agreement as may be individually serving the notice.

By referring in the dispute resolution clause to the submission of the "Parties" to the jurisdiction of the Hong Kong courts, the court said that the Lender, Borrowers and Covenanters expressed their collective agreement on jurisdiction. By using "Parties" in the collective sense, Clause 15 required any amendment and modification of the Loan Agreement to be in writing signed by the Lender, Borrowers, and Covenantors collectively, in order to be valid and binding on them.

It had to be borne in mind, the court said, that in this case, the Loan Agreement contained a dispute resolution clause, whereby the Parties, including GD and HY, submitted to the non-exclusive jurisdiction of the Hong Kong courts. The Arbitration Agreement relied upon by GD was thus a variation of the dispute resolution provision of the Loan Agreement, agreed between GD and HY. GD and HY were bound by Clause 15 of the Loan Agreement, such that if they wished to vary the dispute resolution mechanism, such variation had to be by written instrument signed by the "Parties" to the Loan Agreement, defined to mean GD as Lender, HY and SD as Borrowers, and AEHL and HYL as Covenantors. As the 5th Extension Letter was only signed by GD and HY, it was not a valid variation of the dispute resolution provision of the Loan Agreement, and hence, there was no valid Arbitration Agreement.

The Arbitration Agreement itself referred to the Covenantors as well as the Borrowers, and their agreement to submit their disputes to arbitration. The 5th Extension Letter also provided for the confirmation by AEHL and HYL, to be signed by them, by way of their acknowledgment and agreement to the amendments to the Loan Agreement and the provision for arbitration. The court said that this supported the construction that the parties had intended the 5th Extension Letter to be signed by *all* the defined Parties.

As a commercial agreement, the construction of "Parties" as contended by HY made commercial sense, the Court said. The named Parties had rights amongst themselves, and would wish and expect any variation of the terms of the Loan Agreement to be disclosed to and agreed by each of them, and for all disputes amongst themselves to be resolved together, in one forum.

Court's decision

The court therefore set aside Enforcement Order, as there was no valid arbitration agreement between GD and HY.

Comments

This case illustrates the complications which may arise out of multi-party agreements, although GD might have thought that the change from court litigation to arbitration did not concern other parties to the Loan Agreement. In particular, if the dispute between GD and HY touched-upon the Covenantors, the assumption would be that all parties would like to have all disputes resolved in a single forum. Further, when HY signed the 5th Extension Letter, it is not clear whether it intended that the variations in it were to be immediately binding or subject to the signature of the Covenantors.

An arbitral tribunal's decision on compliance with pre-arbitration procedures and conditions is not reviewable by the court

KK Cheung

In the recent case of *T v B,* HCCT13/2021*,* the court confirmed that an arbitral tribunal's decision as to compliance or non-compliance with pre-arbitration procedures or conditions is a question of admissibility rather than jurisdiction and is therefore not reviewable by the court.

The Contract

The Defendant (D), the Main Contractor for reclamation works, engaged the Plaintiff (P) as Sub-contractor. P claimed that D breached the Sub-Contract, leading to P's acceptance of repudiation to bring the Sub-Contract to an end. P claimed substantial damages. The Sub-Contract contained an arbitration agreement (Clause 31) providing that Sub-Contract Disputes shall be referred to arbitration and that a Sub-Contract Dispute would be deemed to arise when either party served on the other a Notice of Dispute, but that such Notice of Dispute shall only be raised after the completion certificate was issued under the Main Contract.

The Arbitration

P referred the dispute to arbitration, but D objected on the basis that it was premature because the completion certificate had not been issued. The arbitrator, by way of Interim Award (Award), ruled that he did not have jurisdiction, on the basis that on the proper construction of Clause 31, the purported commencement of arbitration was premature. P applied to set aside the Award under s.81 of the Arbitration Ordinance (AO).

The court held that the arbitrator's decision was one of admissibility rather than jurisdiction and was therefore not reviewable by the court. It said that a typical jurisdictional challenge concerns the existence, scope and validity of an arbitration agreement. The answer to such a challenge is a binary one; the tribunal either has jurisdiction or has no jurisdiction. The lack of jurisdiction is permanent, and parties cannot cure the defects by entering into an arbitration clause *ex post facto* or to rewrite the clause to bring the dispute within its ambit.

In comparison, the court said, an allegation that the commencement of arbitration is premature does not entail a permanent bar to arbitration. The bar is a temporary one. The bar could be removed once the parties have complied with the contractually agreed pre-arbitration requirements. An attempt to enforce pre-arbitration procedures is a positive affirmation of the existence of a valid arbitration agreement, instead of the denial of the agreement. This, the court said, puts a prematurity objection at the opposite side of a conventional jurisdictional challenge.

D relied heavily on the judgment in *C v D* [2021] HKCFI 1474 in which G Lam J (as G Lam JA then was) carefully surveyed the judicial approach towards non-compliance with pre-arbitration procedural requirements in the UK, Singapore and US, as well as in academic writings from leading scholars in the area. In *C v D*, the arbitration agreement provided that parties should refer a dispute to the CEOs of both companies for resolution first, before going to arbitration. The court held in that case that compliance with procedural pre-arbitration requirements is a question that should be left to be decided by the arbitral tribunal, since it is a question that goes to the admissibility of the claim, rather than the arbitral tribunal's jurisdiction. In other words, the court has no power under section 81 of the AO to re-assess the arbitral tribunal's decision on this matter and to set aside the award. The court clarified that in approaching applications to set aside arbitral awards, the court must confine itself to true questions of jurisdiction.

The court in the present case, said that drawing together strands from G Lam J's thorough survey, it can be seen that:

- S.81 of the AO, incorporating Article 34 of the Model Law, sets out exhaustively the bases on which the court may set aside an award;
- it is settled that, if the question raised is a true question of jurisdiction properly falling within Article 34, the court may review the arbitral decision on the standard of "correctness" and decide the question *de novo*. But the court must confine itself to true questions of jurisdiction;
- a jurisdictional challenge targets the power of the tribunal to hear a claim, whilst an admissibility challenge asks the appropriateness for the claim to be heard by the tribunal, despite its having power to do so;
- one way of posing the question is to ask whether the objecting party is taking aim at the tribunal or at the claim;
- a jurisdictional challenge asks whether there is a contractual duty to refer the claim to arbitration at all. The objection is that there is no valid consent to submit a particular claim to arbitration;
- the objection for an admissibility challenge is not that there is no contractual duty to arbitrate at all, but that it should not be heard by the tribunal, or at least not yet;
- a challenge concerning timing to institute arbitration e.g. whether it is too early or too late, is properly a question of admissibility. So are other pre-arbitration conditions such as issuance of notices in advance;
- jurisdiction, and so susceptibility to challenge, is commonly defined to refer to the power of the tribunal to hear a case, whereas admissibility refers to whether it is appropriate for the tribunal to hear it;
- the fact that a condition is regarded as going to admissibility rather than jurisdiction does not mean it is unimportant. It means that the arbitral tribunal has jurisdiction and may deal with the question as it sees fit;
- questions of admissibility are to be determined by the tribunal. The tribunal's decision on admissibility, unlike a decision on jurisdiction, is final and not subject to review by courts.

C v D was recently referred to by Mimmie Chan J in *Kinli Civil Engineering Limited v Geotech Engineering Limited* [2021] HKCFI 2503, where she endorsed the view that non-compliance with pre-arbitration procedures or conditions goes to admissibility of the claim and a tribunal's decision in this regard is not reviewable by the court. The court in the present case, agreed with this.

The court added that the parties are not of course prevented from agreeing that pre-arbitral procedural requirements should go to the tribunal's jurisdiction, but such an agreement in an arbitration clause would require clear and unequivocal language.

The court said that if the court is the master of its own procedural rules, so should the arbitral tribunal be. It is logically sound that a tribunal's decision on parties' compliance or non-compliance with pre-arbitration procedures or conditions should be final and non-reviewable by the court.

The court's finding that the characterisation of the question of compliance or non-compliance with pre-arbitration procedures is an admissibility issue – not a true jurisdictional challenge – meant that the decision in the Award was one on admissibility and not subject to review.

Comment

This decision basically follows the analysis of the differences between admissibility and jurisdictional challenge in C v D and the conclusion of Coleman J is unsurprising. It also confirms the comment in our article on *C v D*, that failure to comply with the pre-arbitration procedure is outside the scope of section 34, leaving the losing party with no avenue for reviewing the tribunal's decision in that respect.

Outcome Related Fee Structures by lawyers in arbitration

KK Cheung and Genevieve Lam

On 15 December 2021, the Outcome Related Fee Structures for Arbitration Sub-committee of the Law Reform Commission published a report recommending the lifting of the prohibition on the use of outcome related fee structures (ORFS) by lawyers in arbitration taking place in or outside Hong Kong. For details of different types of ORFS, please see the article in our February 2021 newsletter.

Highlights of the Commission's recommendations

The Commission recommends:-

- Success fee premium and legal expense insurance premium shall not in principle be borne by the unsuccessful party, save in exceptional circumstances;
- There should be a cap on the success fee - capped at 100% of benchmark costs (i.e. fees that lawyers would charge their clients without ORFS agreement);
- "Damages-Based Agreement" payment as agreed between the lawyers and their clients should be capped at 50% of the financial benefit obtained by the clients;
- The subsidiary legislation should specify, on a non-exhaustive basis, that a lawyer/client is entitled to terminate a ORFS agreement prior to the conclusion of the arbitration;
- Amendments be made to (1) the Arbitration Ordinance (Cap 609), (2) the Legal Practitioners Ordinance (Cap 159), (3) the Hong Kong Solicitors' Guide to Professional Conduct, and (4) the Hong Kong Bar Association's Code of Conduct in clear and simple terms;
- Lawyers and legal practices should be permitted to charge separately for work done in relation to separate but related aspects of the arbitration, such as counterclaims, enforcement actions and appeals.
- Various safeguards should be included in the subsidiary legislation such as:-
  - the ORFS must be in writing and signed by the client;
  - the lawyer should inform client that they have the right to obtain independent legal advice;
  - the ORFS should be subject to a minimum 7-day cooling-off period; and
  - the exclusion of personal injury claims from ORFS for arbitration.

Comments

All major arbitral seats permit some form of OFRS nowadays. The law reform relating to ORFS for arbitration should therefore attract more contracting parties to choose Hong Kong as the seat of arbitration and maintain Hong Kong's competitiveness as a leading arbitration centre.

Court of Appeal confirms arbitration clause did not apply to bill of exchange dispute

Justin Yuen

In a previous article we reported on the Court of First Instance (CFI) decision in *T v W,* HCA 366/2020, in which the court held that the action brought on a dishonoured cheque should not be stayed to arbitration, even though there was an arbitration clause in the underlying loan agreement under which the cheque had been provided for repayment of the loan. The Court of Appeal (*T v W,* CACV 20/2021) recently upheld that decision.

Background

To briefly recap, the Plaintiff and Defendant entered into a Loan Agreement under which the Plaintiff loaned the Defendant HK$5 million. The Loan Agreement referred to the Plaintiff's cheque drawn for the loan and to the Defendant's cheque drawn for repayment. The Loan Agreement provided that any dispute should be arbitrated in Hong Kong. The Defendant's cheque was dishonoured and the Plaintiff issued a writ claiming the sum due under the cheque. The Defendant, relying on the arbitration clause contained in the Loan Agreement, applied under s.20 (1) of the Arbitration Ordinance to stay the proceedings to arbitration.

CFI Decision

The court noted that the cheque was a separate contract from the Loan Agreement and that bills of exchange were generally regarded as the equivalent of cash. The court was not satisfied that the arbitration clause in the Loan Agreement could be construed to extend to claims made under the dishonoured cheque. The court therefore dismissed the Defendant's application to stay the proceedings to arbitration, holding that the Plaintiff's claim was on the cheque and the cause of action on the cheque was separate to the cause of action on the underlying Loan Agreement.

In reaching its decision, the CFI followed *CA Pacific Forex Ltd v Lei Kuan leong* [1999] 1 HKLRD 462, where the Court of Appeal held that "*there must be a plain manifestation in the arbitration clause that it is to apply to bills of exchange if the presumption against taking bills of exchange to arbitration is to be rebutted*." It rejected the Defendant's submission that the court should depart from *CA Pacific* and adopt the "one-stop shop dispute resolution presumption" advocated in *Fiona Trust & Holding Corporation & others v Privalov & others* [2007] UKHL 40 and *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd* [2018] 2 Lloyds Rep 152.

The arguments on appeal

Defendant's case

The Defendant's primary position was that *CA Pacific* is plainly wrong because the case of *Nova (Jersey) Knit Ltd v Kammgarn Spnnerei GmbH* [1977] 1 WLR 713, on which the Court of Appeal's reasoning was based, was a decision on German law, not English law. Further, it argued that *CA Pacific* has been overtaken by the subsequent decision in *Fiona Trust* with which it is inconsistent. In *Fiona Trust* the court held that where businessmen have entered into an agreement with an arbitration clause, construction of the arbitration clause should start from the assumption that the parties as rational businessmen are likely to have intended that any dispute arising from their relationship is to be decided by the same tribunal and that the arbitration clause should be construed in accordance with that presumption, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

Alternatively, the Defendant submitted that *CA Pacific* is plainly wrong to the extent that it directs consideration to the language of the arbitration clause alone, to the exclusion of the other circumstances of the case. The Defendant invited the court to depart from *CA Pacific* to the extent of holding that the presumption against taking bills of exchange into arbitration can be rebutted, not only by manifestation of the intention to arbitrate, but also by reference to the circumstances of the case. Thus construed, the Defendant argued, the arbitration clause in this case applied to the claim on the cheque.

The Defendant also challenged the CFI's obiter conclusion that even if one was to start with a presumption of a one-stop dispute resolution, the parties' intention here was that a claim on the cheque was not covered by the arbitration clause. The Defendant submitted that the factors in favour of up-holding the one-stop dispute resolution presumption are stronger than those against it, and that if there is any uncertainty, the matter should be referred to arbitration.

The Defendant invited the Court of Appeal to depart from *CA Pacific* and to adopt the position in *Uttam*, where the English High Court applied the Fiona Trust presumption that rational businessmen will not contemplate fragmentation as regards dispute resolution and decided (obiter) that an arbitrator had jurisdiction to deal with a claim on bills of exchange on the basis that the underlying contract of sale contained an arbitration clause which provided that all disputes arising out of or in connection with the contracts were to be referred to arbitration. In doing so, the court distinguished *Nova (Jersey) Knit* as a case concerned with German law and declined to follow *CA Pacific* and *Rals* (for the decision in *Rals*, please see below).

Plaintiff's case

The Plaintiff argued that the presumption against taking bills of exchange into arbitration, as articulated in *CA Pacific,* is still good law and applicable in this case and that the Defendant had not raised any dispute under the Loan Agreement and that there was nothing to be referred to arbitration under the arbitration clause.

Was CA Pacific plainly wrong?

Under the doctrine of precedent, the Court of Appeal was bound by *CA Pacific,* unless satisfied that it is plainly wrong. The Court of Appeal held that the Defendant had failed to demonstrate that *CA Pacific* is plainly wrong. Further, it was not satisfied that *Fiona Trust* represented a development of law that has so undermined the foundations of *CA Pacific* that it could regard itself as being at liberty to depart from it.

In relation to *Nova (Jersey) Knit*, the Court of Appeal said that whilst true that the construction of the arbitration clause there was undertaken applying German law, the bills of exchange were governed by English law, and the court specifically considered the position under English law. More importantly, none of this was lost upon the Court of Appeal in *CA Pacific*, who nevertheless decided, as a matter of Hong Kong law, that the approach was the same.

As regards *Fiona Trust*, the Court of Appeal noted that the *Fiona Trust* approach to construction has been applied in many first instance decisions in Hong Kong, but that it is not a case concerned with bills of exchange, to which a competing principle is also applicable. A bill of exchange, the Court of Appeal said, is a separate and distinct contract from the underlying transaction and is treated as the equivalent of cash, and moreover, is so regarded generally. Further, an unliquidated cross-claim under the underlying agreement is no defence to an action on the bill. Whilst it may be said that rational businessmen are likely to intend to have a single forum for the resolution of any dispute arising out of the transaction they have entered into, it may also be said – and has been said in *CA Pacific* – that rational businessmen will not readily forgo their rights on a dishonoured cheque, which include the right to sue in court for judgment.

The Court of Appeal said that it is notable that *CA Pacific* has been applied in Singapore, a jurisdiction that has adopted both the UNCITRAL Model Law and the *Fiona Trust* approach of presuming that all disputes between parties fall within the scope of the arbitration clause unless shown otherwise (*Rals International Pte Ltd v Cassa di Risparmio di Parma e*

Piacenza SpA). In *Rals*, the court concluded that a negotiable instrument such as a promissory note, is not governed by an arbitration agreement in the underlying contract, unless the agreement has been expressly incorporated in the instrument.

Whether CA Pacific confines attention to the arbitration clause

As regards the Defendant's submission that the sentence in *CA Pacific* that "*there must be a plain manifestation in the arbitration clause that it is to apply to bills of exchange if the presumption against taking bills of exchange into arbitration is to be rebutted*", is too restrictive in excluding examination of other circumstances of the case beyond the language of the arbitration clause, the Court of Appeal disagreed. It said *CA Pacific* does not have this effect at all and whether or not an action on a bill falls within the scope of an arbitration clause in the underlying written agreement is a question of construction. The clause has to be construed in the context of the agreement as a whole against the factual matrix, which includes all relevant circumstances. In the ultimate analysis, the object of the exercise is to find the intention of the parties from their written agreement properly construed.

Construction of the agreement

The Defendant did not dispute that, applying the *CA Pacific* approach, there was no basis to construe the arbitration clause in the Loan Agreement as covering an action on the cheque alone. It was unnecessary, the court said, to deal with the question of the scope and extent of the arbitration clause under the *Fiona Trust* approach, which did not arise.

Joseph Chung admitted to Panel of Arbitrators (Overseas) of Shanghai Arbitration Commission

Joseph Chung, Partner of our Construction & Arbitration Practice Group G (C&APG), has been admitted to the Panel of Arbitrators (Overseas) of the Shanghai Arbitration Commission (SHAC) with effect from 1 January 2022.

The SHAC Panel of Arbitrators (Overseas) comprises international arbitrators from various jurisdictions who have demonstrated extensive experience and strong expertise in arbitrating international and cross-border disputes. In the renewal period of 2021, the SHAC received over 3,000 applications worldwide and following multiple rounds of reviews and evaluations conducted by SHAC's Advisory Council of Arbitrator Selection, 386 arbitrators from over 110 jurisdictions, including Joseph, were chosen and adopted as Panel of Arbitrators at the Second Plenary Session of the Seventh Governing Body of the SHAC.

SHAC was established under the Arbitration Law of the People's Republic of China in 1995. It has over 500 arbitrators, including senior lawyers, senior engineers, and experienced persons in arbitration, trial, economic management, WTO affairs and other legal professions.

In addition to SHAC, our C&APG partners **K.K. Cheung and Joseph Chung** are also on the list / panels of arbitrators of various other arbitration commissions in the region including:

- The Hong Kong International Arbitration Centre
- China International Economic and Trade Arbitration Commission
- The Shenzhen Court of International Arbitration
- Qingdao Arbitration Commission
- Asian International Arbitration Centre in Malaysia
- The Arbitration Centre Across the Straits

Leo Wong promoted to Senior Associate

We are pleased to announce the promotion of Leo Wong to the positon of Senior Associate. Leo specialises in litigation, arbitration and alternative dispute resolution with a particular focus on construction. Leo has extensive experience in dealing with different issues in private and public construction projects, advising the government, developers and contractors on a wide variety of contentious and non-contentious matters.

Want to know more?

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