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Newsletter

International Arbitration

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What's inside?

Court refuses enforcement of Mainland arbitral award

KK Cheung

*廣東順德展煒商貿有限公司 v Sun Fung Timber Company Limited, HCCT 25/2019,*involved an application to set aside an Enforcement Order, whereby the Applicant had been granted leave to enforce an arbitral award of the Zhanjiang Arbitration Commission. The court granted the application and set aside the Enforcement Order, holding that the Respondent was not a party to the arbitration agreement, had not been given proper notice of the arbitration, had been unable to present its case and that enforcement of the award would be contrary to the public policy of Hong Kong. That decision was upheld on appeal.

As the grounds to set aside as set out in sections 95(2)(b), 95(2)(c) and 95(3) (b) of the Arbitration Ordinance (AO) had been established, it was not necessary for the court to elaborate on the ground that the Enforcement Order should be set aside for material non-disclosure. However, the court made it clear that failure to disclose the sale of the property where arbitration documents had been served and that service was very likely to be disputed, was serious, deliberate, intentional and material and that representations made to the court were misleading.

Background

This was an application to set aside an Enforcement Order granting the Applicant (GD) leave to enforce an arbitral award made by the Zhanjiang Arbitration Commission (Tribunal), for payment by the Respondent (Company) to GD of RMB59 million, with costs (Award). The Award was made in an arbitration commenced by GD against the Company on the basis of the Company's breach of a Contract entered into by the Company for the sale of marble to GD, a Mainland company. The Company was incorporated in Hong Kong. 50% of its shares are held by ST and 50% by a company, NI, of which DL is the majority shareholder and director. ST and DL are the only two directors of the Company. The Company carried on a timber retail business at a Property, at least until August 2017, when the Property was sold.

The Issues

In issue were whether there was a binding Contract under which GD claimed to be entitled to commence the arbitration, whether the Company had proper notice of the arbitration and the Award, and whether enforcement of the Award made

in GD's favour could be refused on the grounds provided for in section 95 of the AO. The gist of NI's complaint was that the Contract, made in the name of the Company and signed by ST, was not authorised, and was therefore invalid, that the Contract was made by ST in collusion with GD in an attempt to strip the Company of its assets by their agreeing on an onerous Contract, admitting to the Company's breach and liability in the arbitration brought by GD on the Contract, agreeing to the Award and enabling GD under the Award to obtain the proceeds of sale of the Property and other assets of the Company via enforcement of the Award.

NI claimed that the Company had not been given proper notice of the commencement of the arbitration, nor of the Award, as all relevant documents relating to the arbitration were served on the Company at the Property, which had been sold in May 2017 to the knowledge of ST. DL and NI as shareholders of the Company only became aware of the Award when GD commenced winding-up proceedings against the Company on the basis of the debt under the Award. NI had obtained leave of the court to intervene in these proceedings to set aside the Award.

Court's decision

The court held that the Contract was entered into by ST (one of the two directors of the Company) without any authority of the Company under Hong Kong law, such that the Company was not a party to the Contract at all. It followed that the Company was never a party to the arbitration agreement contained in the Contract. If PRC law was applicable, the court was also satisfied on the evidence that GD or SW knew or ought to have known that ST lacked authority to act for the Company when he made the Contract.

There could be no dispute, the court said, that an arbitration agreement is separate to and severable from its underlying contract. In this case, however, the underlying agreement for sale and purchase and the arbitration agreement were contained in the same document, i.e. the Contract. Having found and accepted the Company's claim that ST, who purported to sign as agent for the Company, had no authority to conclude any agreement on behalf of the Company with GD, the contract to arbitrate had not been agreed to by the Company, and was likewise impeached.

The court found that there had been no "proper" notice of the arbitration to the Company, when the Property had been sold by ST, and documents served at the registered office address there could not be brought to the proper attention of the Company. Notably, there was no evidence of the service of the notice of arbitration on the Company. The Award itself did not refer to the fact, details or manner of service of the arbitration documents on the Company. It only referred to the Company's address at the Property, the Company being represented by ST in the arbitration hearing, and the Company's consenting to the summary procedure for the arbitration as well as to the claims of breach of contract and payment of damages to GD.

The court noted that what section 95 of the AO specifies as a ground of refusal of enforcement of an arbitral award is that the party was not given "proper notice" of the arbitral proceedings, or was unable to present its case. If ST had no authority to act on behalf of the Company in his conduct of the arbitration, there was no other evidence, nor claim, that DL, NI or anyone else of the Company had been notified of the commencement of the arbitration, or of the claims made by GD in the arbitration, to be given the opportunity to present the Company's case in opposition to the claims made in the arbitration. Whether it had a defence, if the Contract was valid, was of course a separate matter. The court therefore accepted that the Company had not been given proper notice of the arbitration, and was unable to present its case.

The court said that on the particular facts and evidence in this case, it would indeed be shocking to the conscience of the court to permit GD to enforce the Award which the court had found to be procured by ST in collusion with GD, or SW acting on its behalf. The arbitral process and the Award had been misused by ST with the assistance of GD, and it would be contrary to the public policy of Hong Kong to permit enforcement of such an Award. The court found that the failure to disclose the sale of the Property, and that service of documents at the Property had been and was very likely to be disputed, was serious, deliberate, intentional, and material. The representations made to the court were misleading. There was clearly material non-disclosure, the court said. It followed that the Enforcement Order had to be set aside and there was no basis to re-grant the Enforcement Order.

Appeal

The Applicant applied for leave to appeal the above decision on the grounds that the court had erred in law and/or on the evidence in arriving at its conclusion. The court declined to grant leave to appeal, as it was not satisfied that such appeal had reasonable prospects of success, for the following reasons:

- On the question of the authority of ST, the court rejected the argument that ST had authority as the alleged *de facto* managing director of the Company. The court had found on the evidence that there was no course of dealings between ST and GD/SW in marble, that the Contract was of a totally different nature and scale from previous dealings between the Company and SW/GD in terms of quantity, products and price involved, and further that there was no valid, or clear unequivocal, representation of the authority of ST to bind the Company on the basis of ST's apparent authority.

- The Applicant sought to argue again that the court should not have made findings on the basis of affirmation evidence and that the Applicant did not have the chance to cross-examine the witnesses who made affirmations on the Company's behalf, especially as claims made on the Company's behalf concerned serious allegations of fraud and collusion. The court rejected these arguments, since the Applicant had never applied for a hearing for cross-examination of the relevant deponents and also had only given extremely limited evidence to refute the serious allegations, apart from a bare denial.

- The intended appeal was against findings of fact and the exercise of the court's discretion, the threshold for which was very high. The court was not satisfied that the court's findings could be said to be perverse or irrational, or otherwise without the necessary evidential support, to be plainly wrong. Nor was the court satisfied that the court had failed to consider relevant evidence, or had taken into account irrelevant matters, such that findings were plainly wrong in the exercise of any discretion.

- In the context of an appeal which involves an exercise of a judge's discretion, the Court of Appeal has highlighted the fact that the appellate court adopts a cautious approach in relation to the weight given by the judge to the facts taken into account when exercising its discretion. The fact that an appellate court would have given more weight than the judge to one of the many factors to be taken into account in the exercise of the discretion is not a ground for interfering with the judge's decision.

Comments

Given the "enforcement biased" approach of the Hong Kong court, this is one of few cases where enforcement was refused. The finding of the lower court that GD or SW knew or ought to have known that ST lacked authority to act for the Company when he made the Contract had an important bearing on the outcome of the appeal.

Court upholds arbitration clause in deed of mutual covenant

Carmen Ng

In a recent water leakage case (Silver King China Ltd v Huy Yun Shiu & Ors, DCCJ 3960/2021), the court stayed the proceedings and referred the dispute to arbitration, based on an arbitration clause in a Deed of Mutual Covenant (DMC).

Background

The Plaintiff (P) was the owner of the G/F, 1/F and 2/F of premises (Building). The 1st Defendant (D1) was the owner of the 3/F of the Building, the 2nd Defendant (D2) was the incorporated owners of the Building and the 3rd Defendant (D3) was the management company of the Building.

P commenced proceedings against the Defendants (Ds) for breaching the DMC of the Building, the Building Management Ordinance (BMO), negligence and nuisance.

P sought injunctive relief and damages against D1 (who P alleged had caused the water leakage problem). As against D2 and D3, P sought a declaration that they were in breach of the DMC for failing to take any action against D1.

Arbitration clause in DMC

The DMC contained an arbitration clause (Clause 16) providing that all disputes between the parties to the DMC shall be referred to arbitration. Ds therefore argued that the action should be stayed and P's claim referred to arbitration. P, on the other hand, argued that given the nature of P's claims (i.e. including nuisance, negligence and breach of the DMC and BMO) and the relief sought (i.e. including injunctive relief and damages), the court was the proper forum.

Ds' position

Ds' position was that the disputes between P and Ds *prima facie* fell within the ambit of Clause 16 of the DMC and therefore, in accordance with s.20 of the Arbitration Ordinance, Cap 609 (AO) the court *must* (i.e. it was mandatory) stay the proceedings and refer the matter to arbitration.

P's Position

P argued that (i) D3 was not a party to the arbitration agreement in Clause 16; (ii) the nature of the claim against D2 and D3 did not fall within the ambit of Clause 16; (iii) Clause 16 was incapable of being performed; (iv) the mandatory stay provision in s.20 of the AO would deny the public's right to information regarding the safety and management of the Building, and was therefore inoperative.

Was Clause 16 of the DMC *prima facie* an arbitration agreement between P and Ds?

As noted by the court, Ds only had to show a *prima facie* and not a conclusive case that the parties were bound by the arbitration agreement.

There was no dispute that Clause 16 was an arbitration agreement between P on the one hand and D1 and D2 on the other hand. The court held that it was plainly arguable that Clause 16 could also be regarded as an arbitration agreement governing the dispute between P and D3 because it was P's pleaded case (such plea undisputed by D2 and D3) that D3 was the property management company of the Building acting in the course of its business as an agent of D2.

As pointed out by the court, s.18 (2) (c) of the BMO provides that incorporated owners have the power to retain a manager or other professional trade or business to carry out any duties or powers of the corporation under the BMO or the DMC. Further, the court said that since D3 was the agent retained by D2 to carry out D2's duties under the DMC, while there was a dispute between a co-owner and D3 as to whether D3 had failed to discharge such duties, it would certainly be arguable that (i) bearing in mind that D3 was D2's agent, the dispute between the co-owner and D3 would also be a dispute between that co-owner and D2. The dispute between the co-owner and D3 would in substance be the same as the dispute between that co-owner and D2; (ii) there was no reason why the dispute between the co-owner and D2 would be resolved by arbitration in accordance with Clause 16, but the same subject matter between the co-owner and D3 would be resolved through litigation in the court.

The court said that what was important was that in its own pleading, P was saying that D3 was bound by the DMC, and that being the case, D3 would also be bound by Clause 16 of the DMC and would be entitled to take the benefit of that clause. P must be bound by its own pleaded case.

It was therefore plainly arguable, the court said, that Clause 16 of the DMC could be regarded as an arbitration clause governing the dispute between P and D3.

Did the matters in dispute fall within the ambit of Clause 16?

The court went on to consider whether the matters in dispute between P and Ds fell within the ambit of Clause 16 and it concluded that they did. Accordingly, unless P could show that Clause 16 was null and void, inoperative or incapable of being performed, it was mandatory for the court to stay the proceedings in favour of arbitration.

Was Clause 16 incapable of being performed?

P argued that Clause 16 was incapable of being performed because its mechanism for the appointment of arbitrators was incapable of being performed in a multiple party dispute. Clause 16 provided that disputes were to be referred to "*a single arbitrator in case the parties agree upon one, otherwise to two arbitrators, one to be appointed by each party*…" The court disagreed with P. It said that in the event of the parties failing to appoint a single arbitrator, the parties could try to agree that they would appoint a single arbitrator selected by a neutral and reputable organisation such as the HKIAC and if the parties were acting reasonably, there should be no difficulty in pursuing that option. Alternatively, the parties could have a discussion to try to agree on an appointment procedure to cater for their current situation. The court said that in the event of the parties failing to agree on an appointment procedure, the mechanism laid down in sections 13 and 24 of the AO would apply and the HKIAC could take the necessary measure to secure the appointment of arbitrator(s).

Would the mandatory stay provision in s.20 of the AO deny the public's right to information regarding the safety and management of the Building?

P argued that s.20 of the AO was inoperative in this case because the principle of open justice and the public's right to seek and receive information would be infringed if the dispute was referred to arbitration. The court held that P's argument had no valid legal basis upon which the court could refuse to enforce the mandatory stay provisions prescribed in s.20(1) of the AO. It said that each and every co-owner of the Building had acquired an interest in the Building subject to and with the benefit of the provisions in the DMC, including Clause 16. This was an informed choice made by each co-owner at the time of acquisition of his unit in the Building.

Court's decision

The court concluded that P had failed to show that Clause 16 of the DMC was null and void or incapable of being performed and it therefore stayed the proceedings and referred the matters in dispute to arbitration.

Comments

This case demonstrates the importance of commencing legal proceedings in the appropriate forum. The Hong Kong Court adopts an "arbitration biased" approach. As can be seen from the judgment, indemnity costs in the total sum of HK$280,000 were awarded against P. Whilst the amount of P's claim is not mentioned in the judgment, disputes of this nature in the District Court may not be substantial. It also took 7 months for P to have the case decided by the Court. In this case, the judge handed down his decision right after the hearing. For many other cases, it is not uncommon for the judge to reserve judgment which may result in further delay to the resolution of the disputes between the parties.

Court held that domestic arbitration may apply by implication

Joseph Chung

In the recent case of Employer v Consultant HCCT 39/2021, a construction dispute, the Employer sought consolidation of the arbitration between the Employer and Consultant (1st arbitration) with two other arbitrations that had already been consolidated by consent (namely an arbitration between the Employer and Contractors (2nd arbitration) and an arbitration between the Contractors and Subcontractor (3rd Arbitration). The application for consolidation was made under s.2 of Schedule 2 of the Arbitration Ordinance (Cap 609) (Ordinance). The main issue to be determined was whether s.2 of Schedule 2 applied to the relevant Agreement between the Employer and Consultant. The court held that it did, meaning that the court had the power to order the consolidation sought.

The parties

The Plaintiff was the Employer, the 1st Defendant was the Consultant, the 2nd-5th Defendants were the Contractors and the 6th Defendant was the Subcontractor on a project for construction of a bridge.

The dispute

After the bridge was substantially completed, defects were discovered. An external pre-stressing tendon of the Bridge was found to have ruptured (T3 Tendon). Emergency replacement and disruptions followed. Further investigations revealed widespread voids, corrosion and defects in other tendons of the bridge, as a result of which extensive protective, preservative and remedial works had to be carried out, including the replacement of over 70 tendons.

The arbitrations

The disputes concerning the defects were submitted to arbitration pursuant to the arbitration clauses contained respectively in the Agreement between the Employer and Consultant, the Contract between the Employer and Contractors, and Subcontract between the Contractors and Subcontractor. A sole arbitrator was appointed in the three arbitrations. The arbitration between the Employer and Contractors under the Contract (2nd Arbitration) was by consent consolidated with the arbitration between the Contractors and Subcontractor (3rd Arbitration) (the Consolidated Arbitration).

Employer's application for consolidation

The Employer sought consolidation of the arbitration between the Employer and Consultant under the Agreement (1st Arbitration) with the Consolidated Arbitration, under s.2 (1) of Schedule 2 of the Ordinance, on the ground that there were common questions of law and fact in the arbitrations, that the rights to relief claimed were in respect of or arose out of the same transaction or series of transactions, and that it was desirable to make an order for consolidation. The Contractors and Subcontractor agreed to the consolidation, but the Consultant did not.

The issue in dispute was whether s.2 (1) of Schedule 2 of the Ordinance applied to the Agreement because, if it did not, then there was no basis for the application to consolidate.

Schedule 2 of the Arbitration Ordinance (Cap 609)

As the court explained, the Ordinance, which came into effect in 2011, introduced a unitary regime for arbitration agreements and arbitrations in Hong Kong, and removed the distinction between domestic and international arbitration agreements made in the previous Arbitration Ordinance, Cap 341. However, parties were given the option under the Ordinance to opt into provisions governing domestic arbitrations under Cap 341. These opt in provisions are contained in Schedule 2 of the Ordinance and include a provision for consolidation of arbitrations.

Schedule 2 automatically applies in cases provided for in s.100 of the Ordinance. S.100 provides that "*All the provisions in Schedule 2 apply, subject to section 102, to- (a) an arbitration agreement entered into before the commencement of this Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or (b) an arbitration agreement entered into at any time within a period of 6 years after the commencement of this Ordinance which provides that arbitration under the agreement is a domestic arbitration*."

The purpose of s.100 was to address concerns raised by the construction industry, that the term "domestic arbitration" was a common feature of standard forms of construction contracts used in Hong Kong, and that such users may continue to employ the term "domestic arbitration" in contracts before and for some time after commencement of the Ordinance. Accordingly, a six-year transitional period was provided for in s.100, to allow time to the construction industry to make the necessary preparations for the unified arbitration regime. After the transitional period, parties who wished to utilise the domestic arbitration regime were required to expressly opt in pursuant to s.99 of the Ordinance, and to adopt Schedule 2 in whole or in part.

The arbitration clause in the Agreement between Employer and Consultant

The key issue to be determined was whether the arbitration clause (Clause 44) in the Agreement (made in 2002) provided that the 1st Arbitration under the Agreement was a domestic arbitration.

Clause 44 provided for arbitration of any dispute or difference of any kind arising between the Employer and Consultant in connection with or arising out of the Agreement, to be in accordance with the Arbitration Ordinance or any statutory modification thereof for the time being in force, and stated that the HKIAC Domestic Arbitration Rules shall apply to any arbitration instituted in accordance with the clause, unless the parties agreed to the contrary.

The parties agreed that (i) the 1st Arbitration and Consolidated Arbitration were now governed by the Ordinance; (ii) s.2 of Schedule 2 applied to the Consolidated Arbitration; and (iii) at the time when the Agreement was made in 2002, the applicable arbitration rules referred to in Clause 44 were the 1993 HKIAC Domestic Arbitration Rules (1993 Rules).

The court noted that whereas s.100 (and the wholesale application of the Schedule) refers to the requirement of an arbitration agreement which "has provided" or "provides" that the arbitration under the agreement is a domestic arbitration, s.99 employs the words "provide expressly", and s.100 is silent as to whether the provision has to be "express". S.99 of the Ordinance states: "*An arbitration agreement may provide expressly that any or all of the provisions (of the Schedule) are to apply…*"

The Consultant's position was that s.100 should not be interpreted to include "implication", as that went against the natural and ordinary meaning of the words in the section and the legislative intent behind s.100. The court disagreed. It said that by omitting use of the word "expressly", s.100 did not exclude an implied provision in the arbitration agreement, and the effect of such implied provision.

The court said that if the legislative intent was to permit the construction industry to retain the use and any benefit of the domestic arbitration regime, when they had agreed to use a common standard form of contract which refers to "domestic arbitrations", with the intention to follow and adopt the domestic arbitration regime that brings about, then it was not against such legislative intent to construe s.100 to extend and apply to an agreement which makes implied provision for domestic arbitrations.

Accordingly, the court concluded that the "provision" in s.100 may be one implied into an agreement.

Did domestic arbitration apply expressly or by implication to the Agreement between Employer and Consultant?

The next issue for determination was whether Clause 44 provided for arbitration to be a domestic arbitration, expressly, or by implication. The court said it was clear that Clause 44 did not *expressly* provide for domestic arbitration.

The court accepted the Employer's submissions that when one considered the Agreement at the time when it was made in 2002, there could be no dispute that Clause 44 was intended to be a domestic arbitration agreement under Cap 341

in force at the time. The adoption of the 1993 Rules reflected that intention – albeit the 1993 Rules themselves did not provide expressly for such.

The court said that at the time when the Agreement was made (which was the relevant time for objectively construing the parties' intention as reflected in the Agreement), s.100 of the Ordinance was *not* in existence. At that point in time, when both parties to the Agreement were Hong Kong parties, their arbitration agreement was domestic by operation of the law, without the need for them to make any specification or provision for their agreement and arbitration to be domestic. It went without saying, in those circumstances and in the context of the Agreement, the court said, that their agreement provided for domestic arbitration, and there was no specification otherwise. Once made, the Agreement and Clause 44 became binding on the parties from 2002, and would not change in its substance, nature and meaning by the subsequent commencement of the Ordinance in 2011.

What s.100 requires, the court said, is that there must be an established intention of the parties in the arbitration agreement that they intended to have a domestic arbitration, which had been demonstrated in this case. By referring to and incorporating the 1993 Rules in their arbitration agreement under Clause 44, the agreement between the Employer and Consultant had by implication provided for domestic arbitration. This was not a case of the Employer merely relying on the arbitration agreement being domestic by operation of the law at the time of the Agreement, under Cap 341, to claim that the parties had "provided" for a domestic arbitration.

Order for consolidation

Having held that s.2 of Schedule 2 applied to the Agreement and 1st Arbitration, the Court had power to order the consolidation sought. The court found that there were clearly common questions of law and fact in the 1st Arbitration and Consolidated Arbitration. The rights to relief claimed undoubtedly arose out of the same transaction or series of transactions in the project, concerned the construction of the bridge, and whether the Consultant, Contractors and/or the Subcontractor should be liable in contract or in negligence for the defects discovered. There would be substantial savings in time and costs, the court said, if all relevant parties were included in the consolidated arbitrations, so that discovery and evidence could be exchanged for all parties, witnesses could be called at the same hearing, and the risks of inconsistent findings could be avoided.

The court noted that the entire dispute was complex, multilayered but intertwined, and it was necessary for the arbitrator to be able to manage the claims and the dispute under one ceiling or reference, in a consolidated arbitration. If there should indeed be parts of the case that, in the Consultant's opinion, did not concern its liability, no doubt it would be open to the Consultant to inform the arbitrator of its stance, and the hearing could be managed for parts of the evidence to be taken without the attendance of the Consultant and its advisers, if the Consultant preferred this, in the interests of saving time and costs.

Accordingly, the court made an order for consolidation of the 1st Arbitration and the already Consolidated Arbitration.

Comments

In this case, reference was made to the decision in A & ors v D [2017] 1 HKLRD 779 whereby the same judge as in this case held that an arbitration agreement could not by implication provide for domestic arbitration simply because the parties were Hong Kong residents and have a local place of business. A v D seems to be readily distinguishable from this case because unlike A v D, in this case, the arbitration clause in the Agreement specifically referred to and incorporated the 1993 Rules. This appeared to be a highly relevant factor that the Court took into account in this case to determine whether the arbitration clause in the Agreement provided for a domestic arbitration.

Unlike litigation, the court has no power to consolidate different arbitrations in multi-party disputes, unless Schedule 2 of the Arbitration Ordinance is applicable, even though it may save costs and avoid inconsistent decisions on similar issues. S.100 of the Ordinance is only applicable where an arbitration agreement was entered into before 1 June 2011 or within a period of 6 years from 1 June 2011 which provided that arbitration under the agreement is a domestic arbitration. As time goes by, s.100 will fall into disuse.

Many arbitration rules, for example, the 2018 HKIAC Administered Arbitration Rules, now provide for the power of the HKIAC to order consolidation of arbitrations. However, it still has to satisfy one of the following requirements:-

(a) the parties agree to consolidate; or
(b) all of the claims in the arbitrations are made under the same arbitration agreement; or
(c) the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions and the arbitration agreements are compatible.

It should be noted that many Hong Kong standard forms of building contract, including those used in the private and public sectors, adopt the HKIAC Domestic Arbitration Rules, which ironically do not provide for consolidation of arbitrations.

Arbitral award set aside for going beyond the scope of pleadings

Justin Yuen

In Arjowiggins HKK2 Ltd v X Co, HCCT 77/2020, the court set aside an arbitral award, as it found that the order made in the award, for delivery up of documents, went beyond the parties' pleadings. The court refused to grant leave to appeal this decision. The court made it clear, that bearing in mind the requirement that there should be due process and fairness to both parties in arbitrations, it is not fair when a party is ambushed as a result of the tribunal allowing a party to advance new legal consequences not identified in the pleadings.

Arbitration Proceedings

The dispute between the parties related to their Joint Venture Company (JV) on the Mainland-its operation and ultimate dissolution. X Co brought arbitration proceedings against HKK2 in Hong Kong (2018 Arbitration). In its Statement of Claim, X Co claimed that upon dissolution of the JV, as the former Chinese partner of the JV, it was entitled to take exclusive possession of account books and documents of the JV (JV Documents), as it was required to do so under PRC law, and keep them in its safe custody. X Co further claimed that its entitlement to exclusive possession of the JV Documents was a form of property right, entitling it to sue HKK2 for delivery up of the JV Documents. X Co's pleaded case was that HKK2 had possession, custody or control of the JV Documents, but had deliberately withheld the same from X Co. By way of relief, X Co claimed an order for the immediate return and delivery up to it of the JV Documents.

In its Defence, HKK2 denied that X Co had any property right in, or right to, possession or recovery of the JV Documents against HKK. It referred to the fact that the JV was in the process of liquidation and that a Liquidation Committee (LC) had been formed. HKK claimed that the JV still existed as a legal entity and continued to exist and the JV remained the owner of the JV Documents until completion of the liquidation. The LC was the proper organ to have possession of the JV Documents, HKK2 said, unless and until a liquidation committee was appointed by the court. Just before the hearing of the 2018 Arbitration, the court appointed the Compulsory Liquidation Group (CLG) for the compulsory liquidation of the JV.

The Partial Final Award

The Tribunal found that it was the JV which retained the proprietary right to the JV Documents and X Co did not have any right to call for delivery of the JV Documents itself. According to HKK2, that should have been the end of the matter and the Tribunal should have simply dismissed X Co's claims with costs to HKK2 as the successful party. Instead, the Tribunal pointed out in its Partial Final Award that as it had found that the JV Documents were in the possession, custody or control of HKK2, and that as a party to the JV, HKK2 had a duty to ensure that the terms of the JV in relation to the liquidation were complied with, and that it must cooperate with X Co to facilitate the liquidation, the Tribunal considered that there was scope to invite submissions from the parties, as to what, if any, orders the Tribunal should make in relation to the disposal of the JV Documents.

The Award

In its Final Award, the Tribunal pointed out that the question of whether HKK2 had possession, custody or control of the JV Documents had been the core of the 2018 Arbitration and was not a new question. The "new question" of what orders were appropriate as a result of the findings made as to HKK2 being in possession, custody or power of the JV Documents, and the JV Documents being necessary to the liquidation process, was a question of PRC law. The Tribunal concluded that the question of the remedies which were available to X Co concerned a matter as to the rights and obligations of the parties under the JV, and was within the Tribunal's jurisdiction. The Tribunal considered that even if a remedy is not asked for by a party, it is its duty to act in accordance with the remit given to it by the parties' arbitration agreement, and having given equal treatment to the parties by giving the them the opportunity to make further submissions on the appropriate orders to be made, the Tribunal was satisfied that X Co was entitled to the remedy of procuring delivery up of the JV Documents to CLG, which it ordered.

HKK2's application to set aside the Award

HKK2's position was that there was never a pleaded case, nor any dispute submitted to the Tribunal in the 2018 Arbitration, that HKK2 was in breach of an obligation to assist in the liquidation of the JV, or that the JV Documents should be delivered to CLG, or any party other than X Co. Despite the fact that CLG was appointed just before the commencement of the hearing of the 2018 Arbitration, X Co did not take any steps to amend its pleadings or its claim for delivery up of the JV Documents to it.

Court's Decision

The Court set aside the Award, holding that the order made by the Tribunal for HKK2's delivery of the JV Documents to CLG was outside the scope of the parties' submission to the 2018 Arbitration and must be set aside, for the following reasons:

- Any claim of delivery of the JV Documents to CLG was inconsistent with X Co's own pleaded case, that it was the party entitled to the exclusive possession of the JV Documents and the party to which HKK2 should be ordered to deliver them up to, notwithstanding and irrespective of the liquidation.

- It is trite, that the pleadings and not evidence, dictate the proper course of the proceedings and ambit of the orders to be made.

- The fact that an issue or a matter (in this case the parties' contractual obligations and rights to a proper liquidation of the JV) may be within the wide scope of the arbitration agreement does not necessarily mean that the issue or matter is within the scope of the actual reference of the particular dispute to the tribunal in the particular arbitration.

- The Tribunal did not accept that it was precluded from awarding a proper remedy to a party, even though such remedy was not asked for. It considered that so long as there was equal treatment of the parties, and that each party was afforded a reasonable opportunity to present its case on the new remedy sought by X Co, it was entitled and had jurisdiction, indeed a duty, to resolve the dispute between the parties, and to award a proper remedy to X Co. However, the question of whether each of the parties was given a fair and reasonable opportunity to present its case is separate to the question of whether the tribunal has jurisdiction, by consensus of the parties, to act and to decide on the dispute referred to it under the arbitration agreement contained in the JV.

- It is not fair when a party in an arbitration is ambushed as a result of the tribunal permitting the other party to advance new legal consequences not identified in the pleadings served for the arbitration. Parties to an arbitration should know in advance, before the hearing of the arbitration, and in as full an extent as possible, the pertinent claims and remedies sought by the other side, to enable them to consider all possible defences, and to decide on the full extent of the evidence to be adduced, rather than to have new issues raised with witnesses only when they are called.

- The real question was whether, despite the inadequacies of the pleadings and in view of the evidence served before commencement of the hearing of the 2018 Arbitration, HKK2 had been surprised by the claim that the JV Documents should be ordered to be delivered to CLG, pursuant to its duty to properly complete the liquidation of the JV.

- The order for delivery of the JV Documents to CLG could not have been reasonably anticipated from the state of the pleadings and evidence served before commencement of the 2018 Arbitration and was outside the scope of the submission by HKK2 to the arbitration. A party cannot in its pleading simply recite all the rights and duties contained in an agreement, and pick and choose, or ask the tribunal to pick and choose, at the end of the hearing, which rights to enforce and to issue an award on that basis.

X Co's application for leave to appeal

X Co sought leave to appeal the court's decision above (Decision) on the grounds that the court had erred in holding that the issue of the parties' reference and submission to arbitration should be based on the pleadings, and had erroneously held as a result, that the Tribunal had no right to raise new issues to ensure a proper remedy was granted to the parties. X Co argued that the court applied an overly stringent approach to the rules of pleadings in the context of arbitration and that the court should have exercised its residual discretion not to set aside the Award.

The court declined to grant X Co leave to appeal, holding that:

- The Decision on the Award being outside the scope of the submission to arbitration, was *not* made on the basis only of the pleadings in the arbitration, and the construction of the pleadings. A review of the court's decision made it clear that the court had taken into consideration the pleadings served in the arbitration, the evidence submitted, and the arguments and submissions made by the parties on the basis of the pleadings and evidence, before concluding, after careful consideration of the same, that HKK2 had been surprised by the Tribunal's decision to invite further submissions and that the order finally made by the Tribunal was outside the scope of the parties' submission to the 2018 Arbitration.

- The court below had considered the pleadings, the HKIAC Rules, the role of pleadings and procedures used in arbitral proceedings, but had concluded that the key question was whether there was surprise, and whether it was fair for HKK2 to be confronted, after the conclusion of the hearing of evidence, with the questions raised by the Tribunal. The court had given full consideration to the evidence, including expert evidence, in deciding whether there was indeed any surprise to HKK2, and whether it could be said that it had the fair opportunity to deal with the so-called unpleaded issues.

- It was in light of the court's review of the pleadings and evidence adduced in the 2018 Arbitration that it reached a decision on what the parties' consensus and agreement had been as to the dispute which was submitted to the Tribunal for determination in the 2018 Arbitration. The Decision was not therefore based on any erroneous application of the law as to the interpretation of what constitutes decisions outside the scope of the parties' submission to arbitration, or on any disregard of the relevant arbitral rules.

Comments

Rules of pleadings in arbitration are said to be more flexible than in court litigation. Whilst that is true to a certain extent, this judgment is a good reminder that the test is whether the other party is taken by surprise and thereby deprived of the fair opportunity to deal with unpleaded issues.

Revamped ICSID Rules for arbitration and conciliation of investment disputes

Joseph Chung

The International Centre for Settlement of Investment Disputes (ICSID), a World Bank Group organisation, was established under the ICSID Convention, for the purpose of providing facilities for arbitration and conciliation of investment disputes between Contracting States and nationals of other Contracting States. Contracting States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.

ICSID recently announced that the ICSID rules for arbitration and conciliation of investment disputes have been updated, with the aim of modernizing, simplifying and streamlining them, while leveraging on information technology to reduce the environmental footprint of ICSID proceedings. The 2022 ICSID Regulations and Rules will come into effect on 1 July 2022. These changes will bring ICSID proceedings more in line with modern arbitration procedures and to address the frequent criticisms of ICSID proceedings not being sufficiently transparent.

Some of the most notable changes include:

- **Publication of awards and decisions**: The revised ICSID arbitration rules will further enhance public access to ICSID awards and decisions. The ICSID Convention requires party consent to publish awards and decisions. Under the revised rules, parties are deemed to have consented to an award/decision being published, unless they object within 60 days after such award/decision has been issued. Where there is an objection to publication of an entire award/decision, the ICSID Secretariat can publish excerpts of those parts of the award/decision not objected to.

- **Electronic filing**: All documents and submissions are to be filed electronically.

- **Remote hearings**: the new rules allow for the first session to be held by video conferencing. Similarly, hearings can be held via videoconferencing. ICSID can also accommodate hybrid hearings.

- **Mandatory time frames**:

- The new rules provide for time frames for tribunals to issue orders and awards. 60 days after last submission if the Tribunal decides that all claims are manifestly without legal merit. 180 days after last submission if the Tribunal declines jurisdiction in a bifurcated proceeding addressing jurisdiction. 240 days after last submission in all other cases.

- **Bifurcation of proceedings**: The new rules provide for bifurcation. The relevant factors for the Tribunal to consider when deciding whether to order bifurcation are similar to those for directing a preliminary determination in arbitrations.

- **Expedited arbitration proceedings**: The new rules provide an option for the parties to consent to expedited arbitrations, involving reduced time frames, for example for appointing arbitrators and for the various steps in the proceedings and putting a limit on the length of written submissions. The expedited procedure may seem to be appropriate for claims of low value.

- **Disclosure of third-party funding**: The new rules require parties to disclose third party funding, including the name and address of the funder.

- **Security for costs**: There are new provisions, allowing a tribunal to order any party making a claim or counterclaim to provide security for costs. In determining whether to order security for costs, the Tribunal will consider all relevant circumstances including the existence of third-party funding.

- **Broader access to ICSID**: Jurisdictional requirements under ICSID's Additional Facility have been modified, providing States and investors access to Additional Facility arbitration and conciliation where one or both disputing parties is not an ICSID Contracting State. Regional Economic Integration Organizations—such as the European Union and ASEAN—may also be a party to proceedings under the amended Additional Facility Rules.

- **Mediation and fact finding**: New rules expressly permit ICSID to administer alternative dispute resolution mechanisms, such as mediation and fact-finding. Both may be used as stand-alone procedures or in combination with arbitration proceedings.

Over the coming months, ICSID will publish guidance notes to assist users in applying the updated rules.

Stanley Lo admitted to the Joint Panel of Arbitrators of The Hong Kong Institute of Architects and The Hong Kong Institute of Surveyors

Stanley Lo, Consultant of our Construction practice group, has been admitted to the Joint Panel of Arbitrators of The Hong Kong Institute of Architects and The Hong Kong Institute of Surveyors for a period of three years.

The HKIA/HKIS Joint Panel of Arbitrators comprises 40 highly knowledgeable members who are experienced in various areas of arbitration as arbitrators, counsel, expert witnesses or instructing solicitors.

HKIA was formed in 1956 and has more than 4,700 members; HKIS was established in 1984 and has more than 7,400 members. Both HKIA and HKIS are unique professional bodies representing their respective professions in Hong Kong and are incorporated by ordinance.

Joseph Chung and Leo Wong recently had an article published in LexisNexis

A closer look at the AALCO Hong Kong Regional Arbitration Centre

Want to know more?

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