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Newsletter

International Arbitration

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What's inside?

CFA holds that whether parties have complied with a pre-arbitration mechanism in a contract is a matter for the arbitral tribunal and not the court

KK Cheung

In C v D [2023] HKCFA 16, the Court of Final Appeal (CFA) decided that the question of whether parties have complied with a pre-arbitration mechanism in a contract is a question of admissibility, rather than jurisdiction, and therefore is a matter for the arbitral tribunal to decide on and not the court. The CFA also held that there is a presumption, that a challenge based on non-fulfilment of a pre-arbitration condition, is non-jurisdictional. Although the Court said that parties can expressly agree that compliance with such a condition is amenable to review by the court, clear, unequivocal words to that effect would be required because it would be contrary to all normal expectations to find that such was the parties' intention. In the present case, the CFA found that there was nothing in the operative clauses of the parties' contract that suggested an intention to confer jurisdictional status on the pre-arbitration conditions in question.

Background

A contractual dispute arose between the Appellant (A) and Respondent (R). The Contract contained a dispute resolution clause providing for a pre-arbitration mechanism (Clause 14.2), namely that the parties "*shall attempt in good faith promptly to resolve such dispute by negotiation. Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution*." It went on to state that if the dispute could not be resolved within 60 business days from the date of the written request for negotiation, then either party may refer the matter to arbitration at the HKIAC, in accordance with the UNCITRAL Arbitration Rules then in force.

R referred the dispute to arbitration at the HKIAC and A objected on the ground that the pre-arbitration procedures in the Contract had not been complied with. In a partial arbitral award, the tribunal found that those procedures *had* been complied with and held A in breach of the Contract, reserving the question of damages for the next phase.

A applied to the Court of First Instance (CFI) to set aside the tribunal's partial award, contending that the arbitrators were wrong to decide that the pre-arbitration requirements had been complied with. The CFI dismissed the application and its decision was upheld by the Court of Appeal (CA).

In holding that the court lacked power to set aside the tribunal's award in the present case, both the CFI and CA applied the distinction between "jurisdiction" and admissibility", as an aid to construing the Arbitration Ordinance s.81(1), (which incorporates Article 34(2)(a)(iii) of the UNCITRAL Model Law), holding that the objections raised by A related to "admissibility" and not "jurisdiction", since that is an approach widely adopted by academic writers and in the recent case law of courts in other jurisdictions which are, like Hong Kong, leading centres for arbitration.

For further details of the decisions of the CFI and CA, please see our previous article.

Question for determination by the CFA

A was granted leave to appeal to the CFA on the question whether, if an arbitration agreement stipulated a pre-arbitration condition that the parties should first attempt to resolve their dispute by a specified mechanism, an arbitral tribunal's determination on the fulfilment of that condition is subject to recourse to the court, pursuant to Article 34(2)(a)(iii) of the UNCITRAL Model Law.

Article 34(2)(a)(iii) provides that an arbitral award may be set aside by the court only if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. The appeal was therefore concerned with the reviewability of a pre-arbitration condition. Such clauses are commonly found in arbitration agreements, stipulating that conditions such as negotiations, mediation, conciliation or the passage of a stated period of time have to be satisfied before commencing the arbitration. They are sometimes referred to as multi-tiered or cascading dispute resolution clauses.

CFA's decision

The CFA unanimously dismissed the appeal, holding:

- On their true construction, both the dispute as to whether the pre-arbitration condition had been complied with and the main contractual dispute as to whether A was in material default of the Contract were intended to be dealt with exclusively and finally by the tribunal i.e. the disputes came within the parties' contemplation and intended submission to arbitration, so that the AO s.81(1), ML 34(2)(a)(iii) did not provide a basis for judicial intervention to set aside the arbitral award.

- (By majority) The conceptual distinction between a challenge to an arbitral tribunal's "jurisdiction" and a challenge to the "admissibility" of a particular claim, *does* serve as a helpful aid to construction, when deciding whether, in a particular case, judicial intervention in an arbitral process is permissible. The principle is that the court may review a tribunal's ruling on the former, but not on the latter category of challenge.

- When considering an objection relating to a pre-arbitration condition, it is necessary first to construe the arbitration agreement. It is open to the parties expressly to agree that compliance with such a condition is amenable to review by the court. However, the court will require unequivocally clear language to arrive at that conclusion because it would be contrary to all normal expectations to find that such was the parties' intention. They have opted to submit their disputes to an arbitral tribunal rather than a court for resolution and it would be surprising to discover that they intended to have a court involved and to undergo two rounds of decision-making to determine whether a pre-arbitration condition had been met.

- A presumption that pre-arbitration conditions should be regarded as non-jurisdictional is consistent with the consensual basis of the tribunal's jurisdiction: in the absence of unequivocal language to the contrary, an objection to how the tribunal has resolved an issue concerning a pre-arbitration condition does not challenge the tribunal's authority to arbitrate conferred by the parties' consent.

- In the present case, there was nothing in the operative clauses of the parties' contract that suggested an intention to confer jurisdictional status on the pre-arbitration conditions in question. On the contrary, those clauses lent themselves to a construction that the relevant conditions are merely procedural and intended to be exclusively decided by the tribunal.

Comment

In this judgment, the Court of Final Appeal also clarified that if the challenge is against the admissibility of a claim before the arbitral tribunal, it is not reviewable by the court pursuant to article 16 of the Model Law, given effect by section 34 of the Arbitration Ordinance. Before applying to the court for review of the tribunal's decision, an applicant must be very

clear that the nature of its application is one concerning jurisdiction e.g. whether the arbitration agreement exists or is valid or whether the claim is within the scope of the submission to arbitration.

SCCA revises its Arbitration Rules

Joseph Chung

The Saudi Center for Commercial Arbitration has recently revised its SCCA Arbitration Rules, which apply to all arbitrations filed on or after 1 May 2023. The aim of the revised Rules is to enhance efficiency, reduce costs and optimize the arbitration process. The SCCA say that the new Rules are in conformity with the latest international standards in the arbitration industry and take into account best practices followed by other eminent arbitral institutions. The following are some of the more notable revisions:

- **Introduction of the SCCA Court**, which is independent of the SCCA and empowered to make key administrative decisions in SCCA administered arbitrations, such as appointing and removing arbitrators, reviewing of awards, fixing fees and determination of jurisdiction objections. The Court consists of 15 arbitration experts from 12 different countries, including international arbitrators, academics, former leaders of arbitral institutions, retired appeal court judges and high profile practitioners.

- **Expansion of the arbitral tribunal's discretionary powers to**: (i) determine the most effective format for hearings e.g. in person or remote; (ii) refuse a party's request to change or add a representative, if it considers such refusal necessary to safeguard the composition of the arbitral tribunal or finality of the award; (iii) encourage parties to mediate (where appropriate); (iv) limit the length or content of, or dispense with, written submissions, limit oral or written witness testimony and limit any requests for document production.

- **Promotion of the use of technology in the filing and managing of cases**: (i) Any written notification, communication, proposal, request, answer, pleading, or submission may be made by email or other electronic means. (ii) The arbitral tribunal may conduct hearings remotely by video conferencing or other appropriate means of communication, or in a hybrid format. (iii) Unless the parties otherwise agree, administrative conferences (which may be conducted by the SCCA Court before the arbitral tribunal is constituted, to facilitate party agreement on matters such as arbitrator selection) are to be held remotely by video conferencing, telephone or other appropriate means of remote communication. (iv) Arbitral awards may be signed electronically. (v) The Online Dispute Resolution Procedure Rules will automatically apply to small claims not exceeding a certain threshold amount.

- **Cybersecurity and data protection**: Parties, arbitrators, and the SCCA must adopt information security measures that are reasonable in the circumstances of the case, taking into account (i) the risk profile of the arbitration; (ii) the existing information security practices, infrastructure, and capabilities of the parties, arbitrators, and SCCA; (iii) the burden, costs, and relative resources of the parties, arbitrators, and SCCA; (iv) the proportionality, relative to the size, value, and risk profile of the dispute; and (v) the efficiency of the arbitration.

- **Coordination or consolidation of proceedings**: After consulting with the parties, the arbitral tribunal **may coordinate the proceedings in two or more arbitrations** by aligning specific procedural aspects of the arbitrations, issuing a single award in relation to all arbitrations, or suspending any of the arbitrations until after determination in another. The SCCA Court can also, in certain circumstances, **consolidate** two or more arbitrations.

- **Applicable law**: The arbitral tribunal can now apply the rules of law designated by the parties, failing which it shall apply the law which it determines to be appropriate. The "without prejudice to Sharia rules" provision has been removed.

- **Multi-contract disputes**: Claims arising out of or in connection with more than one contract or arbitration agreement may in certain circumstances be made in a single Request for Arbitration.

- **Objections to tribunal's jurisdiction**: A party must object to the arbitral tribunal's jurisdiction or to the admissibility or arbitrability of a claim no later than at the time of the transmission of the Answer to the Request for Arbitration or the answer to any other claims, although the arbitral tribunal may extend this time limit at its discretion.

- **Emergency Arbitrators**: The SCCA Court must appoint a single Emergency Arbitrator within one business day of the application for such and the Emergency Arbitrator must issue the interim award/order no later than 15 days from the date on which the file was transmitted to him/her.

- **Early disposition of Claims or Defences**: A party can request the arbitral tribunal to dispose of issues of jurisdiction, admissibility or legal merit raised in a claim or defence. Such application must be made within 30 days from the filing of the claim or defence in question.

- **Addition of two additional grounds for challenging an arbitrator**: (i) failure to perform; and (ii) manifest lack of qualifications agreed by the parties.

- Unless the parties agree otherwise, the arbitral tribunal must issue its **final award no later than 75 days from** the close of proceedings.

- **Greater emphasis on transparency**: Each party must promptly disclose to the SCCA, all other parties and the arbitrators the identity of any non-party who has an economic interest in the arbitration's outcome, including any **third-party funder**.

- **Publication of awards**: The SCCA can publish any award, order, decision, or other ruling (anonymized and/or redacted where necessary), unless a party objects before the arbitration concludes.

The new Rules represent another important step forward for the SCCA to achieve its stated aim of being the preferred ADR choice in the region by 2030. In February of this year, the SCCA opened its office in the Dubai International Financial Center (DIFC) offering ADR services in the UAE and around the region.

Court confirms high threshold for setting aside arbitral award

Justin Yuen

In AI & ORS v LG II & ANOR [2023] HKCFI 1183, the Plaintiffs had brought arbitration proceedings in respect of a dispute arising from sale and purchase Agreements for units in trade finance funds. The arbitral tribunal found that the Agreements were not void or unenforceable by reason of illegality or common mistake, as alleged by the Plaintiffs and that there was no basis for rescission of the Agreements. The court dismissed the Plaintiffs' application to set aside the award on the grounds that the tribunal had failed to provide reasons for its decision and to address certain issues and had wrongly applied the law.

Background

The parties had entered into Agreements for the sale and purchase of units in trade finance funds. Disputes arose and the Plaintiffs commenced arbitration proceedings in Hong Kong against the Defendants, seeking declarations (that the Agreements were void or rescinded for illegality or common mistake or discharged and rescinded from frustration of purpose of the Agreements) and damages. The Plaintiffs' fundamental complaint in the arbitration was that the Agreements were part of an unlawful scheme.

Application to set aside arbitral award

The arbitral tribunal found that the Agreements were not void or unenforceable by reason of illegality or common mistake and that there was no basis for rescission of the Agreements.

The Plaintiffs applied to set aside the arbitral award on the basis that the tribunal had provided no or inadequate reasoning for its findings, had failed to deal with certain issues and had made errors of law.

An arbitral tribunal's failure to deal with issues

The court said that as for a claim that a tribunal had failed to deal with an issue, as the basis for contending that the arbitral procedure contravened the principles of natural justice and basic standards of fairness, and/or that it would be contrary to public policy to uphold such an award, the relevant legal principles and approach of the courts are as follows:

(i) The court must to be satisfied that an "issue" which has been put to the tribunal was not dealt with expressly, or in composition with other issues, and that such failure has caused substantial injustice.

(ii) It should be reasonably apparent to a reasonable party in the shoes of the applicant for setting aside that all issues, the determination of which are crucial to the tribunal's decisions, are dealt with.

(iii) The tribunal does not have to set out each step by which it reaches its conclusion, and a failure to deal with an argument or submission is not equivalent to a failure to deal with an issue.

(iv) The fact that the tribunal has not given adequate reasons for its award, or sufficiently clarified that an issue fell away because of the findings which had been made, is not tantamount to the arbitrator having failed to deal with an issue.

(v) If the tribunal has dealt with the issue in any way, it does not matter whether it has dealt with it well, badly or indifferently.

(vi) A tribunal is not required to deal with each issue *seriatim*: it can sometimes deal with a number of issues in a composite disposal of them.

(vii) A tribunal does not fail to deal with an issue if it does not answer every question that qualifies as an issue. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute, it will have dealt with all the issues.

(viii) There is a distinction between "issues" and "arguments" advanced or "points" made by the parties. The tribunal does not have to deal with every argument which the parties have canvassed under each essential issue. So long as a decision on one argument suffices to resolve an essential issue, the tribunal does not have to consider all of the arguments canvassed under that issue.

(ix) Parties' submissions do not dictate how the tribunal is to structure the disposal of the dispute referred to it, although awards often respond to the parties' submissions and should not be interpreted in a vacuum.

The court said that in considering whether a tribunal has dealt with an issue, the approach is to read the award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it. The court also referred to the policy of minimal curial intervention and that the court's approach should be to read the award generously, so as to remedy only meaningful and readily apparent breaches of the rules of natural justice which can cause actual prejudice.

The court concluded that consideration of the parties' submissions and a review of the arbitral award, showed that the tribunal had not failed to deal with the issues in question. This was clearly a case, the court said, of the tribunal having considered the issues in question and the Plaintiffs' submissions and arguments, but rejecting them as not having been established on the evidence.

An arbitral tribunal's failure to give reasons

The court referred to the high threshold that an applicant has to meet, when challenging an award on the basis that the tribunal had failed to give reasons for its decisions and findings. It said that as long as the reasoning of the tribunal is expressed in an award to enable the parties to the award to understand how and why a conclusion is reached on a particular issue as argued, the reasons for the award do not have to be elaborate. There is no need to give reasons to deal with each and every argument presented. It is sufficient if the award explains the basis on which a material finding was made.

In this case, the court held that the tribunal's reasons for its findings were, on a reading of the award by a reasonable party in the shoes of the Plaintiffs and Defendants, clear and discernible from the award.

Errors of law by an arbitral tribunal

The court pointed out that errors of law made by an arbitral tribunal are not an excuse for setting aside an arbitral award, as the court does not sit on appeal from the tribunal's decisions.

This judgment once again reinforces the Hong Kong courts' pro-arbitration approach. The judgment usefully summarises the relevant legal principles for applications to set aside an arbitral award and the high threshold that the applicant has to meet to be successful in such application.

Court refuses to set aside enforcement order on basis of fully virtual arbitration

Stanley Lo

In Sky Power Construction Engineering Ltd v Iraero Airlines JSC, [2023] HKCFI 1558, the court refused to set aside an enforcement order on the basis that the arbitration was held on a fully virtual basis.

The Applicant had been granted leave to enforce (as a judgment of the court) an arbitral award made in an arbitration seated in London and conducted under the London Court of International Arbitration (LCIA) Rules (Enforcement Order). The Respondent applied out of time (8 days late) to set aside the Enforcement Order on the ground that the procedure stipulated in the arbitrator's Procedural Order was altered by the tribunal on the Applicant's initiative, despite the Respondent's objections, and instead of the parties all convening at *one* location in Moscow, the hearing of the arbitration took place on a "fully virtual basis", with the parties, counsel and tribunal engaging in the hearing from their respective locations, the Respondent, its witnesses and representatives attending in Moscow, the arbitrator sitting in London, and the Applicant's witnesses and legal representatives attending in Irkutsk.

In deciding whether to grant the Respondent an extension of time to apply to set aside the Enforcement Order, the court considered the merits of the setting aside application and concluded that such application had no merit because:

- There was clearly no basis for the Respondent to claim that the tribunal did not have power, in the absence of the Respondent's agreement, to direct a virtual hearing.
- The tribunal is given wide discretion and powers under the Arbitration Act 1996 and LCIA Rules in relation to the conduct of the arbitration, and there is nothing which constrains the tribunal when the parties cannot agree on the procedure. Otherwise, an arbitration will be unnecessarily delayed and hampered whenever the parties cannot agree, when the whole purpose and objective of arbitration is for the tribunal to resolve disputes between parties.
- Nor was there any basis to claim that in reaching her decision on the form of the hearing, the arbitrator had failed to act fairly and impartially**.** If there was any inconvenience as a result of the virtual hearing being conducted in the way it was, such inconvenience was suffered by both parties, and each party was subjected to the same risks and difficulties.
- Remote hearings were commonplace in court proceedings as well as arbitrations even before the pandemic and are more so after it.
- Whether it is appropriate in any particular case to permit factual witnesses to give evidence at the hearing remotely, whether the effectiveness of cross-examination can be or was undermined, whether appropriate measures are required or were put in place to ensure the security of the process, are all matters for the consideration and final decision of the tribunal.
- The arbitrator in this case had duly considered the difficulties and delay caused by the global pandemic, the need for a speedy resolution of the arbitration without further postponements in the face of the changing situation and the evolving health regulations and travel restrictions, when she decided on the timing and format of the hearing.
- As reflected in the arbitral award, the arbitrator was obviously satisfied with the manner in which the virtual hearing was conducted, and the parties were not seen to have voiced any concern in the course of the remote hearing.
- In any event, the arbitrator made the final award on the basis of the contractual and contemporaneous documents, construction of the documents, and legal issues raised.
- On the materials available, there was no real injustice or prejudice to the Respondent, in the sense that the outcome of the arbitration could have been different, if the hearing had not been conducted on a fully virtual basis.

Accordingly, the court concluded that there was no permissible ground to set aside the Enforcement Order and refuse recognition of the Award. Whilst the merits of challenging an award made in similar circumstances will be fact specific, this case provides a useful indication of the Court's attitude towards challenges relating to virtual hearings.

Court of Appeal finds dispute resolution procedure in contract too unclear and uncertain to be enforceable

KK Cheung

Children's Ark Partnerships Ltd v (1) Kajima Construction Europe (UK) Ltd & (2) Kajima Europe Ltd [2022] EWHC 1595(TCC), concerned the enforceability and effect of a contractual dispute resolution procedure (DRP) and what the court should do in circumstances where one party has not activated that procedure and has commenced court proceedings instead. The 1st and 2nd Defendants (Kajima) had applied to strike out or set aside proceedings on the grounds of failure to comply with the DRP, said by Kajima to be a condition precedent to the commencement of proceedings. England's Technology and Construction Court (TCC) dismissed the application. Although it found that, properly interpreted, the DRP was a condition precedent to the commencement of court proceedings, it found it to be unenforceable, because it was not sufficiently clear and certain. The Court of Appeal ([2023] EWCA Civ 292) has dismissed Kajima's appeal against the TCC decision.

Background

For the background to this case and TCC decision, please refer to our previous article.

Court of Appeal Decision

Was the DRP enforceable?

The Court of Appeal referred to the general principles applicable to determining whether a DRP is enforceable, namely:

- Wherever possible, the court should endeavour to uphold the agreement reached by the parties and if the agreement is susceptible of an interpretation which will make it enforceable and effective, the court will prefer that interpretation to any interpretation which will result in it being void.

- However, in cases where there is a dispute about the enforceability of an alternative or bespoke dispute resolution provision, which is being relied on to defeat or delay court proceedings, the court will not shy away from concluding that such provision may not be enforceable.

- Clear words are needed to oust the court's jurisdiction, even if only on a temporary basis.

The Court of Appeal agreed with the TCC that the DRP was not sufficiently clear and certain and was therefore unenforceable, for the following reasons:

- The DRP provided that disputes were initially to be referred to a Liaison Committee for resolution and that any decision of the Committee was final and binding, unless the parties otherwise agreed. However, Kajima had no representative on the Committee and was not entitled to attend its meetings, make submissions or see its documents. Accordingly, the Committee was, for the purposes of the construction contract, a fundamentally flawed body, which could neither resolve a dispute involving Kajima "amicably", nor fairly provide a decision binding on Kajima in any event. That suggested an unenforceable process.

- There was no contractual commitment to engage in any particular procedure either covering the referral, or the process to be followed once the dispute had been referred.

- When there is a contractual DRP, one party cannot commence court proceedings until the process has been concluded. Here, it was unclear when the DRP could be said to have come to an end and it was not clear when the condition precedent might be satisfied and when court proceedings could therefore be commenced.

- The authorities talk about the need for a binding contractual process to contain a definable minimum duty of participation, but it was impossible to look at the DRP and see what, if any, minimum participation was required of either party, and Kajima did not even have the right to attend the Liaison Committee to make representations, so how could it participate?

Appropriate remedy – stay or strike out?

The court also considered what the appropriate remedy is where a party ignores a contractual dispute resolution procedure and commences court proceedings instead – should the court proceedings be struck out or stayed? Kajima

had argued that a strike out was appropriate or else it would be deprived of a limitation defence if the action was stayed. The Court of Appeal acknowledged that deprivation of a limitation defence is an important element of the balancing exercise, but said that it cannot alone be decisive.

The Court of Appeal said that although a stay of proceedings is not the "default remedy" in the sense of it being automatic or inevitable relief which the court will grant to a party when the other party ignores a contractual dispute resolution procedure, it is the usual remedy, although the right remedy, it said, will always turn on the facts of the case.

In the present case, the Court of Appeal held that had the DRP been found enforceable, a stay of proceedings would have been the appropriate remedy, rather than a striking out of the proceedings.

Comment

In this case, the requirement in the contract that on one hand, the Liaison Committee had to resolve the parties' dispute amicably without the participation of one party and on the other hand, that its decision shall be final and binding on the parties, was fatal to the enforceability of the DRP. In some standard forms of contracts, the decision of the architect/main contractor is final and binding and has to be sought before the main contractor/sub-contractor (as the case may be) can proceed to the next tier of dispute resolution procedure. Such provision is likely to be enforceable, since it does not require the architect/main contractor to resolve the dispute amicably.

When will the court grant an anti-arbitration injunction?

Joseph Chung

In 廈門新景地集團有限公司 formerly known as 廈門市鑫新景地房地產有限公司 v. Eton Properties Ltd and Another, [2023] HKCFI 1327, the Hong Kong court granted the Plaintiff an anti-arbitration injunction (but in more limited terms than that applied for) to prevent the Defendants from making certain claims in a new arbitration commenced against the Plaintiff in Mainland China, which claims, the court said, had already been determined by the Hong Kong court in proceedings to enforce previous arbitral awards.

The parties had entered into an Agreement to develop land, which was governed by Mainland China law and subject to CIETAC arbitration in Beijng. Disputes arose in relation to the Agreement and in 2006, a Mainland arbitral tribunal made the 1st Award in the Plaintiff's favour that the Defendants continue to perform the Agreement. The following year (2007), the Plaintiff obtained an order from the Hong Kong Court to enter statutory judgment in terms of the 1st Award.

In 2008, the Plaintiff commenced a common law action in Hong Kong (HCCL 13) to enforce the 1st Award. It sought damages for the Defendants' breach of implied promise to perform the 1st Award. This action was appealed up to the Court of Final Appeal, which granted the Plaintiff's claim and ordered the matter to be returned to the Court of First Instance for a trial on quantum. As a result, the statutory judgment, giving effect to the 1st Award stating that the Defendants continue to perform the Agreement, was set aside.

In 2009, the Defendants sought a ruling from the Mainland tribunal that the Agreement could not be performed. The tribunal rejected this application and made a 2nd Award providing that the 1st Award was final and there was nothing further to be determined by the tribunal.

In 2022, the Defendants commenced a new arbitration against the Plaintiff in the Mainland, as a result of Article 580 of the PRC Civil Code coming into effect in 2021, which allows any party to an agreement, regardless of whether it is the party in breach or the innocent party, to terminate the agreement in certain specified circumstances. The Defendants argued that under Article 580, the Agreement was terminated.

Subsequently, the Plaintiff applied in the present action for an anti-arbitration injunction, to restrain the Defendants from taking any steps to pursue the new arbitration and to compel them to discontinue it.

The judgment usefully sets out the legal principles applicable to the grant of an anti-arbitration injunction, as follows:

- The court has the jurisdiction and power under section 21L of the High Court Ordinance to grant either an anti-suit injunction or an anti-arbitration injunction, where it appears to the court to be just or convenient to do so.

- Whilst the jurisdiction to grant an anti-arbitration injunction exists, the court's power to grant such must be exercised not only with great caution and in circumstances which can be shown to be wholly exceptional, but also with due and proper regard to the objectives and principles of the autonomy, independence and finality of arbitration as enshrined in the Arbitration Ordinance (Ordinance).

- Two conditions must be satisfied before the power to grant an anti-arbitration injunction may be exercised, namely: (i) the injunction does not cause injustice to the claimant in the arbitration, and (ii) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

- Where it is clear that the dispute in question is within the terms of a valid arbitration agreement, then the courts should not interfere. In view of the extensive Hong Kong authorities on the approach and policy of the courts here towards upholding arbitration agreements and the finality of arbitral awards, this principle cannot be disputed.

- There is a need for caution in granting anti-arbitration injunctions in relation to arbitrations outside the jurisdiction, because such matters are generally best left to the relevant supervisory courts, being the courts of the country of the seat of the arbitration.

- In many of the cases concerning whether an anti-arbitration injunction should be granted, there is an issue as to whether there is any or any valid arbitration agreement. It is generally appropriate for that issue to be left in the first instance to be determined by the arbitral tribunal.

- The objectives of autonomy as set out in section 3 of the Ordinance, and the policy of minimal curial intervention in arbitration, as repeatedly emphasized by the courts, ***must*** be borne in mind when an application for anti-arbitration injunction is considered.

- The fact that there may be a significant degree of duplication and overlap between concurrent court proceedings and the arbitration is not sufficient to warrant the deprivation of the claimant's right to arbitrate issues which are the subject of the arbitration agreement. The prospect of concurrent court proceedings and arbitration relating to the same subject matter do not make the arbitration vexatious, unconscionable or an abuse of process to justify the court taking the disputed issues out of the hands of the arbitrator.

Court Decision

The court referred to the obviously competing interests in play in this case. What was unusual, was that the 1st Award was for continued performance of the Agreement held to be in place, what the Hong Kong Court was enforcing was a judgment entered on the breach of the promise to honour the 1st Award and what the Defendants sought to do in the new arbitration was to ask for discharge of the Agreement under a new PRC law.

The court said that the judgment in HCCL 13 for compensation in respect of breach of the promise was separate and independent of the Agreement and the rights and duties of the Plaintiff and Defendants respectively flowed from the 1st Award. There had been no judgment or award of compensation for breach of the Agreement. Whether or not the rights and obligations of the parties under the Agreement could be said under PRC law to have continued to subsist after any judgment or award had been entered, were for determination under PRC law and the tribunal and supervisory court on the Mainland were the better forum for argument on those questions. If the Defendants' contractual rights had continued to subsist under the Agreement, it could not be said that they were vexatious or abusive in submitting those rights to the tribunal in the new arbitration for determination.

On balance, the court said it could not conclude that it would be just to grant the injunction in the wide terms sought by the Plaintiff, and the parties should be left to argue before the tribunal whether the Defendants were entitled under the new PRC law to seek termination of the Agreement. Whether their rights under the new PRC law were affected by the findings made by the tribunal in the 1st and 2nd Awards or by the findings of the Hong Kong courts as to the alleged impossibility of either the performance of the Agreement or attainment of the purpose of the Agreement, would have to be argued before and decided by the tribunal.

However, the court concluded that it would be right and just to grant an injunction to restrain the Defendants from continuing the new arbitration on the basis of or for pursuing any claim or assertion that the Plaintiff's action for damages as claimed in HCCL 13 was in substance a claim for damages for the Defendants' breach of the Agreement and/or was in breach of the Agreement, or that it should be determined by or under PRC law on the question of assessment of the Plaintiff's loss for breach of the promise. The Plaintiff had clearly shown that these issues were not covered and not within the scope of the arbitration clause of the Agreement, the Defendants' rights under that clause had not been infringed, and any arbitration of such claims and assertions was vexatious, oppressive and an abuse of process, because it sought to attack the judgments of the Hong Kong courts and undermine the enforcement of the 1st Award in Hong Kong.

This is the latest judgment in the long and ongoing dispute between 廈門新景地集團有限公司 and Eton Properties Ltd. This case represents one of the rare occasions of the Court granting an anti-arbitration injunction although on narrow terms focusing on whether specific claims of the Plaintiff were within the scope of the arbitration clause and whether such claims had already been determined by the Hong Kong court in proceedings to enforce previous arbitral awards. This case once again demonstrates the Hong Kong's Courts' pro-arbitration approach and its reluctance to interfere with the jurisdiction of the arbitral tribunal.

Want to know more?

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