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Newsletter

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What's inside?

Award set aside due to incompatible appointment procedures in multi-contract dispute

KK Cheung

In SYL v GIF [2024] HKCFI 1324, the court considered an application by the Plaintiffs to set aside an interim arbitral award made in an arbitration administered by the HKIAC. The arbitration had been dealt with, at the Defendant's request, as a single arbitration under multiple contracts, pursuant to Article 29 of the HKIAC Rules. Article 29 allows claims arising out of or in connection with more than one contract to be made in a single arbitration, provided that (a) a common question of law or fact arises under each arbitration agreement giving rise to the arbitration; and (b) the rights to relief claimed are in respect of, or arise out of, the same transaction or series of related transactions; and (c) the arbitration agreements under which those claims are made are compatible. Upon interpretating the arbitration agreements in the three contracts in question, the court found that there was a clash in the appointment procedure in two of the contracts on the one hand and one of the contracts on the other hand, since they provided for different appointment procedures. Accordingly, the arbitration agreements which contained differences as to a fundamental aspect of how the arbitration should be conducted, were not "*compatible*" within the meaning of Article 29. As one of the threshold requirements under Article 29 had not been satisfied, the court held that the Defendant was not entitled to commence the arbitration in the present form as a single arbitration under multiple contracts and on that basis, the Interim Award was set aside.

The Arbitration

The subject dispute arose out of three contracts, namely a Loan Agreement and two security deeds (January Deed and July Deed). Each contract contained an arbitration clause referring disputes to arbitration administered by the HKIAC (Arbitration Agreements). Relying on the Arbitration Agreements, the Defendant commenced arbitration proceedings against the Plaintiffs under the auspices of the HKIAC, pursuant to the HKIAC Administered Arbitration Rules 2018 (HKIAC Rules). Under the Notice of Arbitration, the Defendant requested a single arbitration under multiple contracts, pursuant to Article 29 of the HKIAC Rules. The Defendant also indicated that it would nominate its arbitrator (whose nomination was eventually approved). The Plaintiffs objected to having a single arbitration under multiple contracts, but despite their objections, the HKIAC proceeded with the arbitration, leading to the appointment of arbitrators and the interim award being issued.

Plaintiffs' grounds for setting aside award

In gist, the Plaintiffs advanced two grounds of complaint (which were made before the Tribunal): (i) The Arbitration Agreements were incompatible with one another. Hence, the Plaintiffs say that the arbitration should not have been commenced under Article 29 of the HKIAC Rules as a single arbitration under multiple contracts (Compatibility Ground). (ii) The composition of the Tribunal was defective, since it was not done in accordance with the parties' agreement under the three contracts (Agreement Ground).

The 3 Arbitration Agreements

The court considered the wording of the three Arbitration Agreements and found that there was a clash in the appointment procedure in the Loan Agreement and January Deed on the one hand, and the July Deed on the other hand. Under the Loan Agreement and January Deed, the Plaintiffs would have the right to designate an arbitrator. The Other Mortgagors had no say. However, under the July Deed, it was the 1st Plaintiff and Other Mortgagors who would have the right to designate an arbitrator. The 2nd Plaintiff had no say.

Article 29 of the HKIAC Rules

The court said that the question then, was whether this would render the Arbitration Agreements "*incompatible*", such that Article 29 of the HKIAC Rules could not be engaged.

Regarding the meaning of "*compatibility*", Article 29 of the HKIAC Rules provides that: "*Claims arising out of or in connection with more than one contract may be made in a single arbitration, provided that: (a) a common question of law or fact arises under each arbitration agreement giving rise to the arbitration; and (b)the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and (c) the arbitration agreements under which those claims are made are compatible*."

The court said that reading Article 29 as a whole, it is apparent that "c*ompatibility*" is an independent and separate requirement i.e., all three limbs under sub-paragraphs (a), (b) and (c) need to be satisfied before Article 29 is engaged.

Meaning of "*compatibility*"

As regards what is meant by "*compatible*", the court said that essentially, it means an ability to exist or be used together without causing problems. The court referred to "A Guide to the HKIAC Arbitration Rules, 2nd ed, §10.125", where the authors explain the meaning of "*compatibility*" as follows: "*The arbitration agreements need not be identical in order to meet this criterion. They must, however, be substantively compatible. Any differences must be surmountable by the parties, the tribunal, and HKIAC. Consolidation will be ordered when it will make no practical difference if the consolidated case proceeds on the basis of one or the other underlying arbitration agreements. Where, for example, two arbitration clauses provide for different rules, different seats, or a different number of arbitrators, it will be difficult in practice to consolidate the arbitrations without significantly changing those aspects in one of the cases. In these circumstances, HKIAC will typically find the agreements to be incompatible, unless the parties can agree an acceptable compromise*." The authors then set out factors relevant to the determination of compatibility: (a) Any

preconditions to the commencement of arbitration. (b) Any required qualifications of the arbitrators (e.g. that an arbitrator be qualified in a particular law or discipline, or speak a particular language). (c) The procedure for appointing arbitrators. (d) The language of the arbitrations. (e) The governing law of the arbitration agreements. (f) The method for determining the fees and expenses of the tribunal.

The court concluded that since the Loan Agreement and January Deed on the one hand and the July Deed on the other hand provided for different appointment procedures, the Arbitration Agreements were not compatible with each other:

(1) First, it infringed party autonomy to impose on the parties a single arbitration when the underlying Arbitration Agreements adopted different appointment procedures. This offended the cornerstone of modern international arbitration, namely, the primacy of consent as enshrined in s.3(2) of the Arbitration Ordinance. In the present case, the court said: (i) Under the Loan Agreement and January Deed, the Plaintiffs had contracted for the right to designate an arbitrator should any dispute arise between the parties. (ii) Had the Defendant chosen to commence an arbitration under the Loan Agreement and January Deed only, the Plaintiffs could have designated the Plaintiffs' Nominated Arbitrator. (iii) The Plaintiffs' willingness to arbitrate was only premised upon the Plaintiffs having a right to designate an arbitrator of their choice. Without such a right, the Plaintiffs could not be said to have consented to arbitrate.

(2) Second, the court said, it also infringed the parties' contractual rights: (i) The Arbitration Agreements are contracts in their own right. The parties have negotiated for and obtained such rights as they considered would best fit their commercial interests. Having so bargained and agreed, they must be bound by their choices, whether they eventually liked it or not. (ii) The Plaintiffs have bargained for and obtained a right to designate an arbitrator under any intended arbitration arising from the Loan Agreement and January Deed. The Plaintiffs' right is not a right shared with the Other Mortgagors, as would be the case under the July Deed. (iii) As a matter of principle, the right to designate an arbitrator cannot be curtailed by a unilateral decision on the part of a counterparty (such as the Defendant) to commence a single arbitration based on multiple contracts. (iv) The deprivation of the Plaintiffs' contractual right is in and of itself prejudice, which is a serious issue impacting upon the integrity and sanctity of the arbitration.

(3) Third, there are valid concerns over whether the Defendant may gain an unfair advantage in the arbitration by refusing the Plaintiffs a right to designate an arbitrator of the Plaintiffs' choice: (i) In this arbitration, it was not disputed that the Defendant successfully retained the arbitrator of its own choice. (ii) Again, in the counterfactual scenario where separate arbitrations were commenced, the Plaintiffs could have designated the Plaintiffs' Nominated Arbitrator. In such circumstance, the Plaintiffs would have been given the same right, and hence an equal opportunity, to influence the constitution of the Tribunal. (iii) However, when the Defendant chose to commence a multiple contract arbitration, it also deprived the Plaintiffs' right to designate an arbitrator of the Plaintiffs' choice. In this sense, the parties were no longer treated equally. (iv) This gave rise to justifiable concerns over whether this would give the Defendant an unfair advantage. This impeached the integrity of the arbitration.

Accordingly, the Arbitration Agreements, which contained differences as to a fundamental aspect of how the arbitration should be conducted, were not "*compatible*" within the meaning of Article 29. As one of the threshold requirements under Article 29 had not been satisfied, the Defendant was not entitled to commence the arbitration in the present form as a single arbitration based on multiple contracts. On this basis, the Interim Award was liable to be set aside.

The court said that following from the above ruling on the Compatibility Ground, the Agreement Ground must also succeed. The composition of the Tribunal was defective. The Defendant should not have commenced a single arbitration on the basis of multiple contracts in the first place. The Tribunal purportedly constituted under Article 29 was therefore not composed in accordance with the parties' agreement.

Comments

In drafting dispute resolution clauses for a transaction consisting of various contracts, it is important to make sure that they are compatible with each other if the parties intended that all disputes arising out of the

transaction under different contracts are to be resolved in the same arbitration. Inconsistency may arise when the draftsman of the contract documents uses templates from different transactions.

AAA & Ors v DDD (see below) is another example of the decision of the arbitral tribunal being successfully challenged in court due to conflicting arbitration clauses in different contracts between the same parties.

Loan agreement arbitration clause did not confer jurisdiction on tribunal to determine dispute regarding related promissory note

KK Cheung

In AAA & Ors v DDD [2024] HKCFI 513 the issue was whether the arbitration clause in a Loan Agreement conferred jurisdiction on the arbitral Tribunal formed under it, to determine related disputes arising out of a Promissory Note, which had its own arbitration agreement. The Tribunal, constituted under the HKIAC 2018 Administered Arbitration Rules, decided that it had jurisdiction to determine the related disputes under the Promissory Note. The Borrower and Guarantors (who were parties to the Loan Agreement and Promissory Note) disagreed and appealed against the Tribunal's decision on jurisdiction. Deacons acted for the Borrower and Guarantors (the Plaintiffs in this action and Respondents in the arbitration) in the appeal. Allowing the appeal, the court set aside the Tribunal's decision on jurisdiction and made a declaration that the Tribunal had no jurisdiction to decide claims for payment under the Promissory Note.

Underlying Documents

DDD (the Lender) made a loan to AAA (the Borrower), which was guaranteed by two Guarantors (BBB and CCC, respectively). All of them were parties to the Loan Agreement, under which the Lender agreed to loan a Principal Amount to the Borrower and defined the "Transaction Documents" as comprising the Loan Agreement, Share Charge Agreements and Promissory Note. The Loan Agreement provided for the Borrower to issue a Promissory Note to the Lender as security for the loan.

The Arbitration

The Borrower failed to repay the Principal Amount and the Lender issued a Notice of Arbitration (NOA) against the Borrower and Guarantors, which defined the "Principal Amount" due as the loan amount provided under the Loan Agreement. The NOA mentioned the Promissory Note, reciting that the Borrower acknowledged receipt of the Principal Amount and issued a Promissory Note and the Promissory Note was exhibited to the NOA. However, the NOA said nothing else on the Promissory Note.

The Respondents complained that the Tribunal lacked jurisdiction over the Lender's claims against the Guarantors based on the Promissory Note, alleging that a dispute over payment under the Promissory Note had yet to crystallise. The Tribunal heard submissions on the Respondents' jurisdictional challenge and decided that it had jurisdiction over the Lender's claims based on the Promissory Note.

The Tribunal considered that the NOA implicitly referred such dispute over payment under the Promissory Note to arbitration pursuant to the dispute resolution clause in the Promissory Note, evident it said from the fact that the NOA had mentioned the Promissory Note and exhibited a copy of the same.

Application to Court to set aside Tribunal's decision on jurisdiction

The court first considered how the Tribunal should have approached the question of its jurisdiction. It identified three broad paradigms in which conflicting dispute resolution clauses can feature:

***Basic Paradigm*:** where there is a single contract, with two or more conflicting dispute resolution clauses.

Intermediate Paradigm: where there are multiple related contracts, but only one of the contracts contains a dispute resolution clause.

Generalised Paradigm: where there are multiple related contracts, with conflicting dispute resolution clauses in two or more (but not necessarily all) of the contracts.

The court said that in the case of a generalised paradigm (which applied in this case), by multiple contracts, it meant agreements that appear to form a package, aimed at achieving some objective and typically executed at about the same time and where the parties to the contract will be the same or nearly the same.

The court said that whether a case involves the basic, intermediate, or generalised paradigm, the authorities are unanimous, that determining the scopes of conflicting dispute resolution clauses is essentially an exercise in objectively construing the clauses to ascertain the parties' likely intentions. Absent contrary indications, one may employ certain common-sense presumptions or assumptions as an aid to construction. But one must be careful not to use the presumptions or assumptions in a manner that runs roughshod over the parties' intentions as manifested in the dispute resolution clauses agreed among them.

Fiona Trust Presumption

The court said that the Fiona Trust Presumption that the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal, only applied to the basic paradigm. It said that the extended Fiona Trust Presumption that a jurisdiction agreement contained in one contract may, on its proper construction, extend to a claim that is made under another contract, applied to the intermediate paradigm, where the parties to the multiple related contracts were the same and the contracts "*have been concluded at the same time as part of a single package or transaction or (if concluded at different times) dealt with the same subject-matter*". In such situation, there would be scope for a common-sense presumption that, absent evidence to the contrary, the parties must have intended for all disputes arising out of their commercial package to be resolved by reference to the dispute resolution clause in the one contract. The court said that the extended *Fiona Trust* principle would not be applicable in the present situation, where there are different dispute resolution clauses in the agreements comprising the package

Centre of Gravity

The Court said that in the case of the generalised paradigm, there can be no initial presumption that the parties intended all their disputes to be resolved in a single forum, even though the contracts here constituted a package, having the objective of providing financing for the Borrower's acquisition of shares, while ensuring security for the Lender. Instead of applying a presumption, the court said, one must construe each contract in the package to map out what disputes must have been intended to be covered by the dispute resolution clause of a given contract. The contractual arrangements here being inter-related, disputes among the parties may, the court said, involve intertwined issues which might reasonably be regarded as falling within the ambit of two or more dispute resolution clauses. If so, in deciding whether a particular forum has jurisdiction to deal with an intertwined issue or dispute between the parties, one must locate the "centre of gravity" of that issue or dispute as best one can, assessing which dispute resolution clause is "closer" to the issue or dispute**.**

Applying the centre of gravity test, the court said that the Tribunal had competence to adjudicate claims (i) by the Lender that the Guarantors are or remain liable under the Loan Agreement and (ii) allegations by the Guarantors that they have been released from their obligations as guarantors. Such questions depend on the proper construction of the Loan Agreement and an examination of the corresponding facts. The court said the questions would be within the "centre of gravity" of the Loan Agreement and close to its dispute resolution clause. In contrast, the question whether the Guarantors are or remained liable to pay under the Promissory Note was distinct. The question fell within the "centre of gravity" of the dispute resolution provision in the Promissory Note and therefore outside the scope of the Tribunal's jurisdiction.

Court's Decision

Accordingly, the court quashed the Tribunal's decision on jurisdiction and made a declaration that the Tribunal had no jurisdiction to decide claims for payment under the Promissory Note.

Comments

The Fiona Trust Presumption is often quoted as the authority that all disputes arising out of related transactions should be referred to the same arbitration. This judgment helpfully sets out the correct approach in applying the Fiona Trust Presumption.

Soleh Guidelines continue to apply in RHC O.73, r.10A applications

Joseph Chung

Where an arbitral award creditor obtains an order for enforcement of the award in Hong Kong (Enforcement Order) and the award debtor applies to set aside the Enforcement Order, the award creditor may apply under the Rules of High Court (RHC) Order 73, rule 10A for an order that the award debtor provide security for the claim before proceeding with the setting aside application. In the recent judgment in *中國機床銷售與技術服務有限公司 v 國晟機電設備有限公司* [2024] HKCFI 958, the court confirmed that the Soleh Guidelines continue to apply in Hong Kong in such applications under RHC Order 73, rule 10A.

Background

The Plaintiff (P) and Defendant (D) were respectively claimant and respondent in a CIETAC arbitration, in which the arbitral tribunal made a Final Award in P's favour for around RMB232 million plus interest. That sum was the total of service fees prepaid by P to D under Service Agreements between them (Prepaid Sum). The Hong Kong court granted P leave to enforce the Final Award in Hong Kong (Enforcement Order). D applied to set aside the Enforcement Order under s.95 of the Arbitration Ordinance (AO) and P now applied under RHC Order 73, rule 10A for an order that D provide security for the claim (of around RMB233 million (i.e. the Final Award amount and accrued interest) and security for costs (of around HK$1.8 million).

RHC Order 73, rule 10A

RHC Order 73, rule 10A provides that where a debtor has applied to set aside an Enforcement Order, the court may as it thinks fit, either of its own motion or on the creditor's application, impose such terms as to giving security or otherwise as a condition of the further conduct of the application.

The court said that ever since RHC Order 73, rule 10A came into effect, the courts have consistently and uniformly applied the Soleh Guidelines set out in *Soleh Boneh v Government of Uganda* [1993] 2 Lloyd's Rep 208 to an application for security made pursuant to it. However, D's counsel argued that the Guidelines did not apply in this case. Therefore, a preliminary matter to be decided by the court was whether the Guidelines applied.

The Soleh Guidelines

Under the Soleh Guidelines, the court must consider:

(1) The validity of the arbitral award, as perceived on a brief consideration by the court. If the award is manifestly invalid, there should be an adjournment and no order for security. If it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between, there will be various degrees of plausibility in the argument for invalidity and the court must be guided by its preliminary conclusion on the point.

(2) The ease or difficulty of enforcement of the award, and whether it will be rendered more difficult e.g. by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger. If, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.

Active remedy and passive remedy scenarios

D's counsel argued that the Soleh Guidelines only apply in an "active remedy scenario", namely where the award debtor takes the initiative and applies to set aside the award in the supervisory court and s.89(5) of the Arbitration Ordinance (AO) has been triggered. S.89(5) provides that *"If an application for setting aside or suspending a Convention award has been made to a competent authority as mentioned in subsection (2)(f), the court before which enforcement of the award is sought - (a) may, if it thinks fit, adjourn the proceedings for the enforcement of the award; and (b) may, on the application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security."*

D's counsel argued that the Soleh Guidelines do not apply in a "passive remedy" scenario, as here, where the award debtor waits until enforcement is sought and then challenges the award, because as a matter of principle, the common law does not recognize any general right for an application for security for judgment, as opposed to security for costs. In the passive remedy scenario, D's counsel argued, the court should only exercise its discretion to order security where the challenge appears to be flimsy or otherwise lacks substance.

Do the Soleh Guidelines apply in a passive remedy scenario?

The court acknowledged that the present application was concerned with a passive remedy scenario, where no adjournment was sought pending the resolution of an application in the supervisory court. However, the court held that RHC Order 73, rule 10A is drafted broadly to cover *all* arbitrations and that the court would therefore continue to apply the Soleh Guidelines in a passive remedy scenario.

Validity of arbitral award

Here, D sought to set aside the Enforcement Order under s.95 of the AO on the grounds that it would be contrary to public policy for the final award to be enforced, as the arbitral tribunal had retrospectively applied a Mainland Civil Code to contracts predating its effective date (Retrospectivity Ground) and the award was obtained in a manner whereby P's legal representatives were acting in conflict of interest with D (Conflict of Interest Ground).

The court said that it appeared that neither the Retrospectivity Ground nor Conflict of Interest Ground could be characterized as strong. Between the two ends of manifest validity and manifest invalidity, it found that the Final Award was placed decidedly closer to the side of manifest validity, which itself provided a sufficient reason for ordering security.

Ease or difficulty of enforcement

The court said that even if that was not the case, the second factor in the Soleh Guidelines, namely ease or difficulty of enforcement, also provided additional justification for ordering security, as an investigative report commissioned by P identified that D had no known fixed assets in Hong Kong. Although, it could not be disputed that by reason of the Prepaid Sum, D had substantial deposits in its bank accounts in Hong Kong, the court said that D's refusal to provide P with information on what had become of the Prepaid Sum was plainly a basis to infer or show difficulty in enforcement. Further, the court said, the size of the award is a relevant consideration and that where there is a very large award, delay without security is inherently likely to prejudice the award creditor and certainly risks doing so, which is a factor which would incline the court towards providing some security.

Accordingly, the court concluded that enforcement of the award would be rendered more difficult, by movement of assets when, as here, enforcement was delayed.

Security for the claim

The court proceeded on the basis that D, in opting for the passive remedy, was not a factor which should be viewed adversely against it. However, an important factor in the present case was that any security ordered could be met or ought to be met by the Prepaid Sum. D did not make a counterclaim in the arbitral proceedings, and the only basis upon which it could keep the Prepaid Sum was if the Service Agreements were still "alive" (but were found to have been terminated in the Final Award). The present situation was unlike the usual cases, the court said, where a party resisting enforcement is driven to "dip into" its own resources to put up security for an award in damages and there was no suggestion that D's s.95 application would be stifled if it was ordered to pay security for the claim.

The court decided that the appropriate amount of security to be paid by D was RMB150 million. It said that although that was somewhat less than the amount asked for, the court rarely makes an order for full security.

Security for costs

As regards security for costs, liability to provide such was not disputed and only quantum was in issue. On a broad-brush basis, the court decided that HK$900,000 was an appropriate amount.

Court's order

Accordingly, D was ordered, within 14 days, to make payment for security into court (or provide such security in a manner to P's satisfaction of (a) RMB150,000,000, being security for P's claim under the Final Award; and (b) HK$900,000, being security for costs of these proceedings, including the costs of opposing the s.95 application, failing which the s.95 application be dismissed with costs be paid to P on an indemnity basis, and P be entitled to take enforcement proceedings pursuant to the Enforcement Order.

Comments

It takes time for the court to dispose of an application to enforce an arbitral award, if the defendant contests it. As can be seen from this judgment, the leave to enforce the award was granted on 27 July 2023 and the judgment was only handed down on 3 April 2024. Some similar applications may take even longer in our experience. Some defendants, who have no good ground for challenging the award, contest the enforcement application only for the purpose of delaying payment. In such case, an order for security for the claim can be very useful in frustrating the delaying tactics of unscrupulous defendants.

Court refuses to stay enforcement of award pending outcome of 2nd arbitration

Joseph Chung

In CF v SHK [2024] HKCFI 1493, the Hong Kong Court dismissed an application to stay enforcement of a RMB1 billion arbitral award, pending determination of a second arbitration. The court held that to stay enforcement of a judgment originating from an arbitral award, in circumstances when the debtor seeks to rely on the claims made in a second pending arbitration as an equitable set-off, there must be very special circumstances to justify such and that the court should not otherwise prevent a judgment creditor from enjoying the fruits of the judgment.

The dispute

Under a Share Purchase Agreement, (SPA), CF agreed to sell and SHK agreed to purchase, CF's 80% shareholding in CF China. CF, CF China and SHK then entered into a Shareholders Agreement (SHA), under which CF acquired an initial put option (Option), to require SHK to purchase its remaining 20% shares in CF China at an initial put price (IPP). S Listco signed a Guarantee, whereby it guaranteed SHK's obligations in relation to the payment of the IPP. Subsequently, CF exercised the Option, calling for SHK to purchase its 20% shares in CF China at the IPP of RMB 1.2 billion, but SHK failed to make payment by the

deadline. CF and SHK entered into a Settlement Agreement under which SHK agreed to pay CF the IPP by instalments, and specifically covenanted to make such payment "*without any withholding, set-off, counterclaim, retention or deduction*" (Anti-Set-Off Clause). S Listco executed a Guarantee extending the coverage of its obligations under the Guarantee to include SHK's obligations under the Settlement Agreement.

Arbitration proceedings

As a result of SHK's default in paying an instalment due under the Settlement Agreement, CF commenced arbitration proceedings against SHK and S Listco and by an arbitral award, SHK and S Listco were ordered to pay CF RMB 1 billion (Award). CF obtained the court's leave to enforce the Award as a judgment of the court (Enforcement Order).

Application to stay Enforcement Order

SHK and S Listco applied for a stay of execution/enforcement of the Enforcement Order until final determination of separate arbitration proceedings which by then had been commenced by SHK and S Listco in Hong Kong against CF and its parent company (2nd Arbitration). On behalf of SHK and S Listco, it was contended that SHK's claims in the 2nd Arbitration that the SPA had been induced by CF's misrepresentations, constituted an equitable set-off, which could be asserted against CF in respect of the sum said to be due to it under the Award. SHK and S Listco claimed that it would be just for the court to order a stay of execution of the Enforcement Order, pending final resolution of the claims made against CF in the 2nd Arbitration.

The core issue to be determined by the court turned on whether special circumstances existed to justify a stay of the enforcement proceedings and depriving CF of the benefits of the Award and judgment entered in its favour.

Applicable legal principles

The court referred to the legal principles governing the court's exercise of its power and discretion to stay enforcement of a judgment originating from an arbitral award, in circumstances when the debtor seeks to rely on the claims made in a second pending arbitration as an equitable set-off, namely:

- The award creditor should not be deprived of the benefits of the judgment, unless there is abuse or manifest injustice, and there must be "*very special circumstances*" to justify a stay of enforcement.

- In deciding whether special circumstances exist, the nature of the claims, extent of the identity between the claim in the judgment and unresolved cross-claim, strength and size of the cross-claim, likely delay before the cross-claim can be adjudicated, and extent of prejudice that may be suffered by the judgment creditor and judgment debtor respectively, are all matters to be taken into consideration.

- Generally, the starting point is that a judgment creditor is entitled to enforce the judgment he has secured against the judgment debtor. The discretion of the court in granting stay of execution / enforcement should thus only be exercised in exceptional circumstances, where an injustice would otherwise be caused, to prevent abuse, to preserve the dignity of the court or to facilitate the administration of justice. The court should not otherwise prevent a judgment creditor from enjoying the fruits of the judgment.

Existence of Anti-Set-Off Clause

By virtue of the Anti-Set-Off Clause in the Settlement Agreement, SHK had agreed to pay CF the IPP in instalments, and specifically covenanted to make such payment "*without any withholding, set-off, counterclaim, retention or deduction*". The court said that the submissions made on CF's behalf that (i) this clause unequivocally excluded any form of set-off, legal or equitable and nullified any right of set-off; and (ii) the terms of the parties' agreement must be paramount and take precedence over the court's discretion to grant a stay, meaning that cross-claims had been excluded by the parties' express agreement, were convincing and supported by the authorities.

The court said that the Anti-Set-off Clause clearly and plainly, on its face, provided for payment of the IPP without any withholding, set-off, counterclaim, retention or deduction. The expressed intention of the parties was obvious, the court said, and there was no reason why SHK should be permitted to depart from what it had expressly agreed, and it could not be unjust to find that SHK was bound by the Anti-Set-Off Clause. SHK could not be permitted, the court said, to delay enforcement of the Award and judgment until its claims in the 2nd Arbitration had been determined, and for such claims in its favour to be used as a set-off or deduction against the sum found due in the arbitration. This was precisely what the tribunal had found in the Award, after analysing the evidence.

Was the Anti-Set-Off Clause valid?

The court said that it was pertinent to consider the issues put before the tribunal in the arbitration and findings made in the Award. It said it was clear from the Award and framing of agreed list of issues, that the arbitrator did (and had to) deal with SHK and S Listco's defence as to their entitlement to assert a set-off against CF's claim. It said that although the tribunal may not have jurisdiction to deal with or grant any relief to them by virtue of their counterclaim, which were claims made under or relating to the SPA (which the arbitrator found contained a separate arbitration clause, which conflicted with the those in the Settlement Agreement and Guarantee), he did have jurisdiction to decide CF's claims in the arbitration and SHK and S Listco's defence to those claims, as to whether they had any right of set-off at all. Pertinently, the court said, the arbitrator recorded in the Award that the parties had agreed that the tribunal "*can and should decide*" the important issue of set-off.

It was clear, the court said, that the arbitrator did make a final decision, that the Anti-Set-off Clause satisfied the requirement of reasonableness under s.4 of the Misrepresentation Ordinance, and that SHK and S Listco were contractually precluded from raising any defence of set-off in the arbitration and that their defence accordingly failed.

The court made it clear that it was not concerned with the correctness of the arbitrator's findings on facts or on law, and there was indeed no challenge to the arbitrator's Award.

Progress of 2nd Arbitration

The court referred to the fact that the 2nd Arbitration was still at an early stage and that the claims made by SHK in it were not expected to be resolved for at least another two years after the issue of the Award. On CF's case, significant delay would be caused if a stay was granted, and it would be unjust for CF, which had a final and binding judgment for a substantial amount, to have to wait for the resolution of the 2nd Arbitration. The court said that significant delay is recognized in the authorities to be a matter which militates against a stay.

Further, neither SHK nor CF had sought to argue that the merits of their respective claim and defence in the 2nd Arbitration were so strong as to justify or resist a stay of enforcement. At most, the court said, it could only be said that SHK had an arguable claim in the 2nd Arbitration.

Court's ruling

The court concluded that there would be no injustice if a stay was refused and there was no basis for SHK and S Listco to claim that there was any prejudice by reason only of the fact that any award which may be obtained in the 2nd Arbitration had to be enforced against CF outside Hong Kong. SHK had agreed to arbitrate in Hong Kong, well knowing that CF may not have assets here and had no duty to bring assets into Hong Kong.

Having reviewed all the circumstances of this case, the balance of injustice was in favour of refusing a stay of execution of the Enforcement Order, the court said.

Comments

This judgment helpfully sets out the principles governing the grant of a stay of execution of judgment. The court has no difficulty in rejecting an argument that the judgment creditor has no assets in Hong Kong. An

arbitral award is directly enforceable in other jurisdictions pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards which has over 170 member states and in Mainland China pursuant to the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong SAR made between the Hong Kong Government and the Supreme People's Court of PRC.

Court refuses enforcement of Mainland awards in Hong Kong

Justin Yuen

In A v R1 [2024] HKCFI 1511, the court set aside the Enforcement Order, whereby the Applicant (A) had been granted leave to enforce two Mainland arbitral awards in Hong Kong, under section 95 of the Arbitration Ordinance (AO). Under s.95, the court may refuse to enforce Mainland awards on specified grounds. During the arbitration, A had obtained, on an *ex parte* basis, an Approval from the tribunal to extend the time limit to render the 1st Award and had reached an agreement with the Shenzhen Court of International Arbitration (SCIA), which was administering the arbitration, to pay the arbitration fee by instalments. The court held that these failings were sufficiently serious to affect the structural integrity of the arbitration proceedings.

Background

The Arbitration

A commenced arbitration proceedings against the Respondents in relation to a share transfer agreement in October 2019 (1st Arbitration). The hearing before the tribunal took place in January 2012, but the 1st Award was not issued until January 2019. The tribunal found in A's favour and the Respondents were held liable to pay A RMB11.7 million together with interest (up to the date of the Notice of Arbitration) and costs, totaling RMB74.6 million. A subsequently obtained a further award (2nd Award) in a 2nd Arbitration for additional interest on the sum outstanding under the 1st Award and costs.

Enforcement of arbitral awards

After the Awards were issued, no attempt was made to set them aside in the Mainland. A's enforcement actions against the Respondents in the Mainland were unsuccessful, as they had no assets in the Mainland and the Mainland enforcement proceedings were concluded in in June 2023.

An obtained leave from the Hong Kong court to enforce the arbitral awards against the Respondents in Hong Kong.

R2's application to set aside Enforcement Order

R2 applied to the court under section 95 of the Arbitration Ordinance (Cap 609) to set aside the Enforcement Order on the following grounds:

(i) **Defective Procedure Ground:** (a) inordinate delay of 7 years in rendering the 1st Award; and (b) continuation of the 1st Arbitration, notwithstanding A's failure to pay (in full) the arbitration fees;

(ii) **Due Process Ground:** throughout the 1st Arbitration, in breach of the rules of natural justice, the Respondents were kept in the dark in relation to the Approval (which extended the time limit to render the 1st Award) and the Deferral Agreement (whereby A reached an agreement with SCIA to pay the arbitration fee in two instalments). R2 was therefore unable to address the Tribunal as to: (a) its position on the undue delay in rendering the 1st Award and (b) why the 1st Arbitration should have

been terminated upon A's payment default of the arbitration fees. R2's position was that the Approval, obtained on an *ex parte* basis, granted undue leniency and leeway in A's favour.

(iii) **Public Policy Ground:** there is a public policy against enforcement of the 1st Award, which was improperly rendered and inordinately delayed.

Underpinning the above grounds were the following undisputed matters:

- The 1st Arbitration was governed by the 2011 SCIA Rules which provide that the tribunal is required to deliver its award within 5 months of the tribunal being constituted. Here, the 1st Award was issued over 7 years after the tribunal was constituted.

- In the 1st Award, the tribunal's explanation for the timing of the award was stated to be that the case could not be concluded in time and that with the tribunal's approval, the time limit had been extended to 18 January 2019 (Approval);

- Under Article 15 of the SCIA Rules, applications to commence arbitration proceedings are treated as having been withdrawn where an applicant fails to settle payment of the required fees within the time limit prescribed in the Notice of Acceptance issued by SCIA;

- R2 was never involved in or consulted on the Approval.

- SCIA's Notice of Acceptance of the 1st Arbitration issued on 19 October 2011 expressly stated that the arbitration fees (RMB615,359) had to be paid in full by 24 October 2011, failing which the 1st Arbitration would be treated as withdrawn. A's case was that it had reached an agreement with SCIA to pay the arbitration fees in 2 instalments (Deferral Agreement)**.**

Section 95 of the Arbitration Ordinance

Section 95 of the Arbitration Ordinance sets out the grounds upon which the court may refuse to enforce a Mainland arbitral award.

The court said that in section 95 applications, the court is concerned with the structural integrity of the arbitration proceedings and the conduct complained of "*must be serious, even egregious*", before the court will find that there was an error sufficiently serious so as to have undermined due process. Even if sufficient grounds are made out to refuse enforcement of an award, the court has a residual discretion and may nevertheless enforce the award, despite the proven existence of a valid ground.

The court said that here, the key issue was whether the Approval, which was interwoven with the Deferral Agreement, had affected the structural integrity of the 1st Arbitration.

Had the structural integrity of the arbitral proceedings been affected?

The court concluded that there was a clear breach of the parties' agreed procedure in how the Approval was obtained and granted. There is nothing in the 2011 SCIA Rules, the court said, which permits the *ex parte* process adopted by both the tribunal and SCIA in processing the Approval, and as a result, R2 was deprived of the opportunity to present its case on the issues, in particular when it was plain that R2 had presentable arguments to make.

The court found that, on the evidence, the 7-year extension was granted only because of A's financial condition and it seemed self-evident that respectable counter arguments were available to R2, including accrual of a limitation defence. The court found those failings sufficiently serious to affect the structural integrity of the arbitral process and to have undermined due process. Further, there was no issue of waiver or breach of good faith on R2's part.

As regards public policy, the court said that the opportunity for a party to present his case and a determination by an impartial and independent tribunal which is not influenced, or seen to be influenced, by private communications, are basic to the notions of justice and morality in Hong Kong. The court

commented that it may be said that, in the arbitral context, a more informal procedure may be adopted for procedural matters, but such informality should not be extended to permit dealing with the matter on an *ex parte* basis.

The court held that enforcement of the 1st Award in Hong Kong would violate the basic notions of justice in our forum. Accordingly, the Enforcement Order was set aside and enforcement of the 1st and 2nd Awards refused.

Comments

It is a cardinal principle in arbitration that communications with the arbitration body and arbitral tribunal must be copied to the other party to the arbitration at the same time, no matter whether it is expressly required by the arbitration rules or not. The failure of the party to comply with such requirement was fatal to the enforcement of the arbitral award in this case, as it involved an agreement with the tribunal/SCIA not to strictly enforce the arbitration rules.

No extension of time to set aside order for enforcement of Mainland award

Justin Yuen

In KZ v KY [2024] HKCFI 1880, the Hong Kong Court refused the Respondent's application for an extension of time to set aside the Enforcement Order, whereby the Applicant had been granted leave to enforce a Mainland arbitral award in Hong Kong. There had been substantial delay in making the application (44 months) and the Court found no justification for the delay and no merit in the intended application to set aside the Enforcement Order.

The dispute and arbitration award

The Applicant brought arbitration proceedings in the Mainland against his brother, the Respondent, claiming he had entrusted the Respondent to hold shares in a family company (F International) on his behalf, and that in breach of the Share Entrustment Agreement, had failed to transfer the shares back to him. The Xiamen Arbitration Commission made an Award in the Applicant's favour, entitling him to terminate the Share Entrustment Agreement and to have the shares transferred from the Respondent's name into his.

The Respondent applied to the Xiamen Intermediate People's Court to set aside the Award, on the ground that it contained matters beyond the scope of the arbitration agreement contained in the Share Entrustment Agreement, and that the arbitration was conducted contrary to the agreed procedure or procedure prescribed by law. That application was dismissed by the Xiamen Court on 23 August 2019.

Hong Kong and Mainland court proceedings

Following the Award, various proceedings were commenced in Hong Kong by both parties and there were proceedings in the Mainland, including an action by the Respondent against the Applicant and his other siblings, in which the Respondent claimed that the shares in F International were assets forming part of the estate of their parents and that he had a one-sixth share in the estate (Mainland Succession Action). The Respondent's claims in the Mainland Succession Action were dismissed by the Mainland Fujian Court on 24 November 2023 and judgment was pending on the appeal.

Enforcement Order

The Applicant had obtained leave from the Hong Kong court in September 2019 to enforce the arbitral Award as a judgment of the Hong Kong court (Enforcement Order). The Enforcement Order stated that the Respondent could apply to set it aside within 14 days after it had been served on him. It was served on the

Respondent on 20 March 2020, but it was only on 11 December 2023 that he applied for an extension of time to set it aside.

Extension of time application

In dealing with the Respondent's application for an extension of time to set aside the Enforcement Order, the court said it had to look at all relevant matters and consider the overall justice of the case, the relevant factors including (but not restricted to) the length of delay, whether the party who had permitted the time limit to expire was acting reasonably in the circumstances, whether the other side had contributed to the delay, and would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time, and the strength of the application.

The Respondent's application was 44 months out of time, which the court regarded as significant delay, bearing in mind the yardstick of 14 days provided in the Enforcement Order. The Respondent's explanation for the delay was that the Enforcement Order was made ex parte, without notice to him and without his knowledge, and that it was only in mid-March 2023 that he learned of the Enforcement Order and separate Order granted by the court on 12 July 2021 authorizing the Applicant's solicitors to execute the instrument of transfer and board resolution approving the transfer of shares. The court found the Respondent's excuse disingenuous and that given the history of the proceedings and various steps taken by him in 2023, it was unbelievable that he was not aware of the effect of the Award by virtue of the Enforcement Order made in September 2019. His failure to apply to set aside the Enforcement Order earlier must have been a conscious and deliberate choice, the court said. Instead of taking any action in relation to the Enforcement Order, he had chosen to start other proceedings in Hong Kong in relation to his alleged interests in the shares in family companies and a Succession Action on the Mainland, and to focus on those and there was no good reason for the significant delay in the application to set aside the Enforcement Order. Nor had the Applicant in any way contributed to the Respondent's delay in making the application.

Merits of the intended application to set aside - Was the dispute arbitrable?

The essential thrust of the Respondent's case was that the dispute over the Applicant's alleged interests in the shares of F International was in fact a succession dispute and as such, under PRC Succession Law, the matter would be handled in accordance with legal succession and the subject matter of the dispute between the Applicant and Respondent in relation to the F International shareholding was not therefore arbitrable.

The court held that firstly, the mere fact that the disputes as to the shareholding in the family companies should be considered and dealt with under PRC Succession Law did not mean it must only be dealt with by the Mainland Court, and could not be arbitrated and decided by the tribunal in accordance with the Succession Law. Secondly, the Mainland Court had already decided this issue against the Respondent in the Mainland Succession Action. Thirdly, the non-arbitrability of the dispute had not been raised in either the arbitration, or before the Mainland Court in the Mainland Succession Action.

The court said that as the underlying Share Entrustment Agreement and arbitration which was held in the Mainland were governed by PRC law, the court would give due regard and weight to the Xiamen Court's findings and dismissal of the application to set aside the Award on the grounds of procedure and alleged failure to comply with PRC law, and to the Fujian Court's judgment for the dismissal of the Mainland Succession Action. It said, the Mainland Courts' decisions were evidence of the applicable Mainland law, and whether there was breach of such law. According to the Xiamen Court, there was no breach of the law on the procedure and scope of the submission to arbitration. According to the Fujian Court, the shares in F International did not constitute assets of the estate of the mother or father.

The court did not find the Respondent's argument as to the subject matter of the dispute being non-arbitrable persuasive at all. It said that there was nothing in the Fujian Court's judgment which held or could be inferred to mean that the dispute as to the shareholding in F International was not arbitrable. Nor was any such contention made by the Respondent to the Mainland Courts.

Further, the court pointed out that the Respondent did not claim in the arbitration that the subject matter of the dispute between the Applicant and himself, as to the interests in and ownership of the shares in F

International, was not arbitrable. Nor did the Respondent claim, in his application to the Xiamen Court to set aside the Award, that the dispute was not arbitrable under PRC Succession Law.

The court said that the Respondent should be treated as having waived, or to be estopped from objecting to the arbitrability of the dispute and to the jurisdiction of the tribunal. It had been open to him to make such challenge or objection but he had failed to do so, either to the tribunal or to the supervisory court. He had thereby deprived the tribunal of the opportunity to consider the question of its jurisdiction and of the arbitrability of the dispute. This was a matter, the court said, which would justify the court of enforcement enforcing the award.

This court concluded that there was little if any merit in the Respondent's claim that the dispute was not arbitrable under Mainland law. The court found that the Award determined the rights and obligations of the Applicant and Respondent as parties to the Share Entrustment Agreement, and was binding on them as to the ownership of the shares in F International. The Award did not, the court said, lack utility to render the subject matter of the dispute non-arbitrable.

Having given consideration to the substantial delay, lack of justification for the delay, lack of merits of the intended application to set aside the Enforcement Order, and the prejudice to the Applicant who had obtained a final and binding Award and been deprived of the fruits of the Award, the court refused to extend the time for the Respondent to set aside the Enforcement Order.

Comments

It should be noted that the court may not grant any extension of time for setting aside an arbitral award lightly, unlike that for interlocutory matters e.g. filing pleadings. In this case, the delay in making the application was extraordinarily long. Coupled with the lack of merits on the setting aside application, it is unsurprising that no extension of time was granted to the losing party.

This case also illustrates that mandatory injunctions granted by the arbitral tribunal compelling the losing party to do certain acts (transfer of shares in the present case) is enforceable in Hong Kong, which may be even more effective than enforcement in the Mainland, although it is not clear from the judgment why the transfer had not been completed a few years after the granting of the injunction.

Court finds no apparent bias on arbitrator's part

Stanley Lo

In *TGL v SDC* [2024] HKCFI 1796, the court dismissed the Respondents' application to set aside an Enforcement Order, whereby the Applicant had been granted leave by the Court to enforce an arbitral Award made by the Shenzhen Court of International Arbitration (SCIA) against them. The court rejected the Respondents' contentions that by virtue of the arbitrator's relationship with the Applicant, there was apparent bias on the arbitrator's part.

The arbitral Tribunal

The arbitral Tribunal had been formed when the Applicant appointed one Mr Chen (a partner of a Mainland law firm, CA) as its arbitrator and the Respondents appointed another arbitrator, who both then appointed a presiding arbitrator. The Tribunal issued an award in the Applicant's favour and the Applicant obtained an order to enforce the Award in Hong Kong (Enforcement Order).

Grounds for setting aside Enforcement Order

The Respondents applied to set aside the Enforcement Order on the grounds that given the relationship between Mr Chen and companies associated with the Applicant (CN Zhongyuan, TFE, CN Nuclear and CN Investment), there was apparent bias on Chen's part, in that he failed to disclose that relationship and the

possibility of the existence of a conflict of interest on his part. The Respondents argued that this gave rise to justifiable and reasonable doubts in the mind of an objective observer as to the arbitrator's independence or impartiality and that the composition of the tribunal was not in accordance with the parties' arbitration agreement, and/or the law of the Mainland and/or would be contrary to the public policy of Hong Kong to enforce the Award, as being in breach of the basic principles of natural justice, such that the Enforcement Order should be set aside and enforcement refused under sections 95(2)(e) and 95(3)(b) of the Arbitration Ordinance (AO).

It was argued that Chen's failure to make reasonable inquiries and act impartially and independently was in breach of the SCIA Rules governing the arbitration and in breach of his duties of disclosure under Article 12(1) of the Model Law which applies by virtue of s.25(1) of the AO, and in breach of his duty to act independently, fairly and impartially under s.46 of the AO. The Respondents also relied on common law principles to argue that there was apparent bias on Chen's part, in that an objective fair-minded and informed observer with knowledge of the relevant facts would conclude in this case that there was a real possibility that the tribunal in the arbitration was biased, and that enforcement of the Award should be refused on public policy grounds.

Shenzhen Court's refusal to set aside the Award

After the Award was handed down, the 1st Respondent had applied to the Shenzhen Intermediate People's Court to set it aside, on the same grounds now relied upon, namely that Chen had acted in breach of the relevant rules and regulations governing the arbitration, and that the constitution of the tribunal and procedure in it was against the agreed procedure prescribed by law. It was claimed that under Article 34 of the Mainland Arbitration Law, an arbitrator should recuse himself if he had an interest in the case, or had another relationship with the parties which may affect the fairness of the arbitration. Further, under Article 27 of the SCIA Arbitration Rules, an arbitrator should be independent from the parties and should treat the parties fairly.

Upon inquiry by the Shenzhen Court, Chen issued a Response claiming that prior to accepting the appointment, he had conducted a conflicts search, and had confirmed there was no conflict of interest in his acting. He claimed that he had no relationship with the relevant companies or Applicant to create any conflict. The SCIA also issued a Reply to the Shenzhen Court confirming that it had made inquiries with Chen, who had confirmed his independence and impartiality. The SCIA stated that the matters relied upon by the 1st Respondent, which were claimed to have affected Chen's independence and impartiality, had taken place before the arbitration, and there were avenues for the 1st Respondent to have ascertained these matters before the first hearing. The SCIA pointed out that throughout the entire arbitration, the 1st Respondent had failed to take any action to seek Chen's recusal, and should be treated as having waived its rights.

In SCIA's opinion, the fact that Chen's present or former firm had provided legal advice to the relevant companies did not give rise to reasonable suspicion as to Chen's independence or impartiality and did not constitute reasons for recusal under the Arbitration Law and nor did the SCIA Rules require the arbitrator to make disclosure or to recuse himself.

On the basis of Chen's Response and Reply from SCIA, the Shenzhen Court ruled that an arbitrator's duty of disclosure or to recuse himself was confined to cases in which a relationship of conflict exists between the arbitrator and the case itself, or the parties to the arbitration, or the agents/representatives of the parties, or by virtue of other matters which may affect a fair decision. It considered that the companies stated to have business dealings with Chen were *not* parties to the arbitration, but were independent legal entities, with businesses which were unrelated to the dispute in the arbitration. According to the Shenzhen Court, there was no evidence of any relationship of interest between Chen and the companies which might affect the impartiality of Chen's judgment, nor create reasonable doubt as to his independence and fairness, so as to require disclosure under the SCIA Rules. The Shenzhen Court also referred to the fact that the 1st Respondent had failed to make any application in the course of the arbitration and before the final hearing, to seek Chen's recusal, and should be treated as having concurred in Chen's acting as arbitrator. The 1st Respondent's application to set aside the Award was accordingly dismissed by the Shenzhen Court.

Hong Kong Court's Decision

The court dismissed the Respondents' application to set aside the Enforcement Order holding:

- As the underlying contract and arbitration, which was held on the Mainland, were governed by PRC law, the court would give due regard and weight to the Shenzhen Court's findings and dismissal of the application to set aside the Award on the grounds of procedure, constitution of the tribunal, and alleged failure to comply with PRC law. The Shenzhen Court's decision was evidence of the applicable Mainland law, and whether there was a breach of such law and of the SCIA Rules. According to the Shenzhen Court, there was no such breach concerning the arbitrator's duty of disclosure, and no actual or apparent bias on his part in that there were no circumstances which may give rise to reasonable doubt as to Chen's fairness and impartiality.

- However, since the Respondents relied on the Award having been made against principles of natural justice, and claimed that enforcement of the Award would be contrary to the public policy of Hong Kong, the court still had to consider common law principles governing bias, and decide whether there were circumstances, indicating to an objective observer in Hong Kong, that there was a real possibility that the tribunal was biased, and that it would be shocking to the conscience of the Hong Kong Court to enforce the Award in such circumstances.

- Under Article 12 of the Model Law, which has effect by virtue of s.25(1) of the AO, an arbitrator approached in connection with his possible appointment as arbitrator "*shall*" disclose any circumstances likely to give rise to justifiable doubts as to impartiality or independence, and from the time of his appointment and throughout the entire proceedings, the arbitrator shall without delay disclose any such circumstances to the parties. S.46 of the AO requires the tribunal to be independent, and to act fairly and impartially as between the parties. A challenge to an arbitrator's independence and impartiality, as called for by s. 46, may be made on the ground of apparent bias, on the basis that the essential rule of natural justice has been breached.

- The right to a fair hearing by an impartial tribunal is fundamental. The impartiality of arbitrators is central to the entire arbitral process, and actual or apparent bias an arbitrator's part is a sufficient ground for setting a determination aside. The test for determining apparent bias on the part of judges applies to arbitrators. This is the "reasonable apprehension of bias" test, of whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a "real possibility" that the tribunal was biased. The threshold for establishing apparent bias is "only a real possibility of unconscious bias". The test is not whether a particular litigant thinks or feels that the judge has been or may have been biased. What matters is the viewpoint of the hypothetical objective fair-minded and informed observer.

- The test applied by the courts is that of the reasonable third person. The court is required to look at the matter through the eyes of that reasonable man, to ascertain the relevant circumstances from the available evidence as would have been considered by the reasonable man, and consider what that properly informed, independent and objective observer would have concluded, as to whether there was a real possibility of bias. The key question was what the objective observer, and not what Chen himself, considered as to the possibility or otherwise of bias, and Chen's own statement of any impact on his mind was not relevant to the issue which the objective observer must decide. The objective observer must be treated as fully informed of the facts and circumstances constituting the association alleged and relied upon in the complaint.

- In this case, the facts which the independent third-party observer was taken to have known were: In April 2019, the Applicant commenced arbitration against the Respondents. Chen was a partner of CA, from September 2019 and formerly a partner of GL from December 2017 to September 2019. In September 2020, the arbitral tribunal was empaneled with 3 arbitrators, and Chen appointed as arbitrator on the Applicant's nomination. Three years prior to Chen's appointment as arbitrator, he had given a lecture or legal training to CN Zhongyuan, a subsidiary of CN Engineering which is an associated company of CN Nuclear, the 30.11% shareholder of the Applicant's parent company. Some four or five years prior to constitution of the arbitral tribunal, CA had acted for TFE, a sister company of the Applicant, in Mainland proceedings. At some unknown time prior to the arbitration, GL, had acted for TFH, the parent company of the Applicant in Mainland litigation. In May 2022, in the course of the

arbitration, a partner of CA had tendered for a project of CN Nuclear /CN Investment. The arbitral Award was issued on 23 May 2022 in the Applicant's favour and one day after, it was announced that CA was recommended as service provider for the project of CN Nuclear/CN Investment, and on 31 May 2022, the contract was announced to be awarded to CA.

- The authorities on the test of the hypothetical objective observer have highlighted the fact that although such a person is not a lawyer, he is neither wholly uninstructed about the law in general or the issue to be decided. He is informed, reasonable and fair-minded, and would ordinarily be taken to have sought to be informed on the most basic considerations relevant to arriving at a conclusion. His conclusion would be founded on a fair understanding of all relevant circumstances and he would not reach a hasty conclusion, is neither complacent, nor unduly sensitive or suspicious. With these attributes, would the objective, reasonable and fair-minded observer conclude that there was a real possibility that Chen was biased, and would not act impartially and fairly as arbitrator of the dispute between the Applicant and Respondents? The court was not satisfied that he would be.

- There must be "a cogent and rational link between the association and its capacity to influence the decision to be made", before it can be concluded that by virtue of the association alleged, the adjudicator might not bring an impartial and unprejudiced mind to the resolution of the dispute. The key question is not just the existence of the association in question, but whether the nature and extent of it resulted in a reasonable bystander concluding from it that the adjudicator might be influenced by it, to be biased, or prejudiced, or partial. Where the association in question is "trivial, remote or indirect", the court might conclude that the association is not a disqualifying one.

- CN Zhongyuan could only be described as an indirectly associated company of the Applicant's Parent. The lecture or legal training by Chen had taken place three years prior to the Applicant's nomination of Chen as arbitrator. Chen was a partner only after CA had acted for TFE in proceedings and Chen could not have derived any financial interest, or benefit from CA's involvement in the proceedings. The tender submitted to CN Nuclear/CN Investment, was made by another partner of CA, allegedly without knowledge or involvement of Chen. The invitation for the tender was apparently announced after Chen's appointment in the arbitration, and would not have been known to Chen even if he had conducted a conflict of interest search prior to accepting nomination as arbitrator.

- Chen's past involvement or dealings with the relevant companies were not sufficiently close or frequent to cause the objective and fair-minded observer to think that Chen had a close and serious relationship with them in the wider sense, which relationship might be reasonably perceived to have a capacity to influence how Chen might approach the resolution of the dispute to be decided by him in the arbitration. When the court considers the perspective of the objective, reasonable and fair-minded observer, some reasonable leeway should be given to cater for the realities of the practical and commercial world, as the reasonable observer would accept that it would be unreasonable and unreal to expect the observance of the best and highest standards of practices, over and above what can be described to be reasonable.

- Even if a conflict search had been done by Chen before his appointment as arbitrator, it is probable and reasonable that the search would not disclose Chen's or CA's involvement in any work for TFE, or CN Zhongyuan, which were more remotely associated with the Applicant. Although Chen himself should know that he had given a lecture or legal training to CN Zhongyuan in 2016, this could hardly be said to be a matter which would lead a reasonable, objective and fair-minded observer to conclude that by virtue of such involvement three years before the arbitration, there was a likelihood or any real possibility that Chen would be biased, or that it was a matter which would give rise to justifiable doubts as to Chen's impartiality or independence.

- Whilst the appearance and perception of impartiality are important, the courts do not take a hypothetical or unrealistic view of associations objected to and relied upon by a party when a claim of either disqualification or apparent bias is made. It is always a question of degree whether the nature and extent of the association is such as to give rise to reasonable doubt and suspicion as to the impartiality of the tribunal. Even if an association can be established, there must be reasonable and rational basis

for the conclusion that the association is capable to influence the impartial mind of the decision maker, such that the objective and informed observer can conclude that there is a real risk of bias.

Court's conclusion

The court concluded that in all the circumstances of this case, the objective and informed observer would not be so unduly suspicious as to conclude that because of Chen's history of dealings with the Applicant's loosely associated companies, he was in a position to be influenced to act partially in favor of the Applicant and would not be so unduly suspicious as to consider that Chen actually had knowledge of his partners' tender to CN Nuclearl/CN Investment after his appointment as arbitrator, and that he had deliberately abstained from disclosing this matter to the tribunal and the Respondents. If Chen had no knowledge of the tender and any association with TFH, he was not in breach of his duty to make disclosure. Accordingly, there was no cogent and rational link between any association which Chen may have had with the Applicant, and the capacity of such association to influence Chen's decision in the arbitration, to give any impression of possible bias on Chen's part.

Having rejected the ground of apparent bias or lack of impartiality, the court held that there was no other reason to refuse enforcement of the Award on the ground that it was contrary to the fundamental conceptions of morality and justice to enforce the Award, or that it was so shocking to the court's conscience as to render enforcement repugnant.

Comments

The judge in this judgment followed the objective test for determining whether there were justifiable doubts as to the arbitrator's impartiality or independence set out in the often cited case of *Jung Science Information Technology Co. Ltd. V ZTE Corporation* [2008] 4 HKLRD 776 (Deacons represented *Jung Science*).

It was also held in *Jung Science* that there is a distinction between circumstances which give rise to a duty to disqualify and those which give rise to a duty to disclose. A failure to disclose, of itself, can be one of the circumstances which together with others may give rise to a reasonable apprehension of bias as a party or the public may well be left with the impression that there was intentional concealment or non-disclosure. However, in this case, the judge found that the duty of Chen to disclose did not arise for reasons explained above.

Joseph Chung, Justin Yuen, and Stanley Lo admitted to Asian-African Legal Consultative Organization (AALCO) Hong Kong Regional Arbitration Centre Panel of Arbitrators

Our International Arbitration Partners, **Joseph Chung** and **Justin Yuen**, and Consultant, **Stanley Lo,** have been admitted to the Asian-African Legal Consultative Organization (AALCO) Hong Kong Regional Arbitration Centre Panel of Arbitrators. The AALCO is an inter-governmental organization founded in 1956, currently with 48 member states, comprised of major states in Asia and Africa. Of the nearly 200 countries in the world, and close to 700 cities in China, the AALCO has selected the Hong Kong Special Administrative Region within the Greater Bay Area as the location for its latest regional arbitration centre. This strategic placement positions the centre as an important gateway for the Belt and Road Initiative.

With the recent establishment of the AALCO Hong Kong Regional Arbitration Centre, AALCO now has a total of six international regional arbitration centres under its purview. AALCO is committed to welcoming and serving the needs of parties involved in disputes, with a particular focus on utilizing and promoting the use of legal technology to help resolve such matters at the Hong Kong centre. This includes offering a state-of-the-art Online Dispute Resolution platform. The other five AALCO regional arbitration centres are located in Cairo (Egypt), Kuala Lumpur (Malaysia), Lagos (Nigeria), Tehran (Iran), and Nairobi (Kenya). Each of these centres has been established through international law, and the respective host governments have recognized their

independent status, similar to that of an international organization, granting them the necessary privileges and immunities.

AALCO's expansion of its regional arbitration network underscores its dedication to providing accessible and cutting-edge dispute resolution services across the Asian-African region and beyond.

The inclusion of Joseph Chung, Justin Yuen and Stanley Lo onto the AALCO Panel of Arbitrators is a recognition of their standing in International Arbitration.

Want to know more?

KK Cheung
k.k.cheung@deacons.com
+852 2825 9427

Joseph Chung
joseph.chung@deacons.com
+852 2825 9647

Richard Hudson
richard.hudson@deacons.com
+852 2825 9680

Peter So
peter.so@deacons.com
+852 2825 9247

Carmen Ng
carmen.ng@deacons.com
+852 2825 9502

Justin Yuen
justin.yuen@deacons.com
+852 2825 9734

Stanley Lo
stanley.lo@deacons.com
+852 2826 5395