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Newsletter

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What's inside?

Court dismisses application to set aside HKIAC award

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In Pan Ocean Container Suppliers Co., Ltd v Spinnaker Equipment Services Inc [2024] HKCFI 1753, the court refused the Plaintiff's application to set aside an arbitral award on the basis that it had not been effectively served with the arbitral proceedings and had only learned of the arbitral Award when the Defendant applied to enforce it on the Mainland. The court found that all written communications to the Plaintiff regarding the arbitration, including the Notice of Arbitration and Award had been communicated to the Plaintiff in accordance with Article 3 of the 2018 HKIAC Administered Arbitration Rules (2018 Rules), which Rules applied by virtue of the terms of the Purchase Agreement, which was the subject of the arbitral proceedings. Accordingly, the communications were deemed received by the Plaintiff. That being the case, the further question was whether there was sufficient and credible evidence to rebut the presumption of receipt. On the facts of this case, the Court held that there was not.

Background

The Plaintiff and Defendant had entered into a Purchase Agreement under which the Defendant agreed to purchase cargo containers from the Plaintiff. The Defendant claimed that the Plaintiff failed to deliver a number of containers and commenced arbitral proceedings against the Plaintiff by a Notice of Arbitration (NOA). The Tribunal acceded to the Defendant's request for the proceedings to be conducted in accordance with the Expedited Procedure pursuant to Article 42.1 of the 2018 Rules. The Plaintiff did not participate in the arbitral proceedings, on the alleged basis that it was not made aware of them. The arbitral tribunal was constituted, consisting of a sole arbitrator and an Award made in the Defendant's favour for damages for non-delivery and also liquidated damages.

The Plaintiff's case was that it never received the Award and only found out about it when its Mainland bank informed it that its account was frozen, as a result of the Defendant's application to enforce the Award in the Mainland. The Plaintiff then applied to the Hong Kong Court under s.81 of the Arbitration Ordinance (AO) to set aside the Award on the following grounds under the following Articles of the UNCITRAL Model Law: (1) Article 34(2)(a)(ii): it was not given proper notice of the appointment of the Tribunal or arbitral proceedings or was otherwise unable to present its case (Proper Notice Ground); (2) Article 34(2)(a)(iii): the Award dealt with a dispute not contemplated by or falling within the terms of the submission to arbitration, or contained decisions on matters beyond the scope of the submission to arbitration (Scope of Arbitration Ground); (3) Article 34(2)(a)(iv): the composition of the Tribunal or arbitral procedure was not in accordance with the agreement of the parties (Due Procedure Ground); and (4) Article 34(2)(b)(ii): the Award was in conflict with Hong Kong public policy (Public Policy Ground).

Proper Notice Ground

Article 34(2)(a)(ii) of the Model Law provides that an arbitral award may be set aside if the party making the application furnishes proof that: *"the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case…"* The Plaintiff's Chairman (Ye) was the only deponent for the Plaintiff and it was his evidence that the Plaintiff did not have *actual or proper* notice of the arbitral proceedings. He asserted that (i) service was not in accordance with the 2018 Rules to trigger their deeming effect and (ii) even if the deeming provisions were triggered, the Plaintiff's evidence had the effect of rebutting them. The Plaintiff contended that (a) all physical mail was sent to an "ineffective" address and never reached the Plaintiff's management; (b) the Plaintiff's fax number did not receive any fax from Hong Kong at the material time; (c) all relevant emails had been sent to a low-ranking employee (Qin) who had already resigned and had no authority to accept service of the NOA or any other written communications in the arbitral proceedings on the Plaintiff's behalf and Qin had never brought the arbitral proceedings to the attention of the Plaintiff's management; and (d) as a result, the Plaintiff's management was kept in the dark about the arbitral proceedings and did not receive any relevant documents, including the NOA, the HKIAC's notice that it was minded to appoint a sole arbitrator and the Award.

Were written communications communicated pursuant to the 2018 Rules?

The court referred to section 10 of the AO (which gives effect to Article 3 of the Model Law), which provides that unless otherwise agreed by the parties, any written communication is deemed to have been received, if delivered to the addressee personally or at his place of business, habitual residence or mailing address and, if none of those can be found after making a reasonable inquiry, a written communication is deemed to have been received if sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it and the communication is deemed to have been received on the day it is so delivered.

The Plaintiff accepted that the arbitral proceedings were, pursuant to the Purchase Agreement, governed by the 2018 Rules, Article 3 of which provides that any written communication pursuant to those Rules shall be deemed to be received by a party, arbitrator, emergency arbitrator or HKIAC if: (a) communicated to the address, facsimile number and/or email address communicated by the addressee or its representative in the arbitration; or (b) in the absence of (a), communicated to the address, facsimile number and/or email address specified in any applicable agreement between the parties; or (c) in the absence of (a) and (b), communicated to any address, facsimile number and/or email address which the addressee holds out to the world at the time of such communication; or (d) in the absence of (a), (b) and (c), communicated to any last known address, facsimile number and/or email address of the addressee; or (e) uploaded to any secured online repository that the parties have agreed to use. Article 3.2 provides that if, after reasonable efforts, communication cannot be effected in accordance with Article 3.1, a written communication is deemed to have been received if it is sent to the addressee's last-known address, facsimile number and/or email address by means that provides a record of attempted communication.

Under Article 4.1 of the 2018 Rules, the party initiating arbitration shall communicate the NOA to the HKIAC and other party. The court said that the NOA was a written communication covered by Article 3.1. At the time the NOA was issued, the Plaintiff's contact details were variously stated in a number of different sources

– business card, Purchase Agreement (PA Address), Purchase Orders (PO Address) and business certificate (registered address).

Was there evidence to rebut the presumption of receipt?

The court found that all written communications were communicated to the Plaintiff in compliance with Article 3 of the 2018 Rules, and as a result, were deemed received by the Plaintiff. That being the case, the court said, the further question was therefore whether there was sufficient and credible evidence to rebut the presumption of receipt. The court said that the arbitrator had been keenly aware of the fact that she needed to take extra care in maintaining the structural integrity of the arbitral proceedings, in light of the complete lack of response on the Plaintiff's part and had only come to her conclusion that due notice of the relevant written communications was given to the Plaintiff, after a careful analysis.

The court found that the Plaintiff had failed to adduce sufficient and credible evidence to rebut the presumption of receipt. It was important to bear in mind, the court said, that the overarching theme in the Plaintiff's evidence was that Ye himself or "the management" did not receive any of the written communications each sent to the Plaintiff via multiple means (courier, fax and email). The court found that on the evidence, the majority of written communications were successfully delivered to the Plaintiff at the PO Address, which was not an ineffective address as contended by the Plaintiff. Even if written communications were on sporadic occasions not delivered at the PO Address, it did not follow, it said, that the PO Address was ineffective, especially when some of those occasions were caused by factors unrelated to the "effectiveness" of the address, for example COVID-19 considerations as identified by the Tribunal. As regards communications by fax, which the Plaintiff asserted was not an agreed mode of communication in the Purchase Agreement, the court said that one was concerned with written communications communicated in the arbitral proceedings, which was plainly governed by the 2018 Rules and not the Purchase Agreement. The fax transmissions sent by the Defendant were accompanied by a confirmation of successful transmission, which were contemporaneous records to which the court attached significant weight. There was no suggestion by the Plaintiff that the contemporaneous fax confirmations were not authentic or unreliable. The burden being on the Plaintiff, the court said, there was no evidence adduced to suggest that any fax transmission by the HKIAC or Tribunal to the Plaintiff was not successful.

As regards email communications, the court found that contemporaneous evidence plainly showed that Qin was the Defendant's main contact within the Plaintiff's organization. He was involved in the negotiation of the Purchase Agreement, and email correspondence was mainly conducted between Qin and the Defendant (without copying Ye). Ye's evidence that Qin was a low-ranking employee, or had resigned or was terminated was not accepted. Further, the court found that it made no commercial sense to suggest that the Plaintiff, being a sizeable organization, would simply neglect or omit to make alternative arrangements to maintain communication flow with outside parties following Qin's departure.

The court found that on the evidence Qin was at least one of the persons designated within the Plaintiff to deal with the arbitral proceedings and the Plaintiff's argument on Qin's authority to receive written communication was misplaced. Qin was not a third party or agent. At the time of the issuance of the NOA, Qin was indisputably an employee of the Plaintiff.

The court concluded that the Proper Notice Ground was entirely opportunistic and had no hesitation in rejecting it. The Plaintiff had failed, it said, to prove that it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case. In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court, it said, is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of "must be serious, even egregious", before the Court would find that there was an error sufficiently serious so as to have undermined due process. Here, the Plaintiff was unable to show that any of the written communications were not communicated successfully by at least one of the means permitted under Article 3.1 of the 2018 Rules. Any sporadic failure in respect of one of the means of communication did not materially affect the structural integrity of the arbitral proceedings and could not be considered serious or egregious.

Public Policy Ground

The court said that "contrary to public policy" has been held by the Court of Final Appeal to mean "*contrary to the fundamental conceptions of morality and justice*" of the forum and that in case authorities the court has explained that if the public policy ground is to be raised, there must be "*a substantial injustice arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant*". The Plaintiff alleged a number of procedural irregularities under this ground.

Failure to notify the HKIAC that the Expedited Procedure was no longer appropriate

The Plaintiff argued that the Defendant, in discharging its duty of good faith, was required to inform the HKIAC when the surrounding circumstances of the arbitral proceedings rendered the Expedited Procedure no longer appropriate. Under Article 42.1(a) of the 2018 Rules, prior to constitution of the arbitral tribunal, a party may apply to the HKIAC for the arbitration to be conducted in accordance with the Expedited Procedure under Article 42.2, where the amount in dispute representing the aggregate of any claim and counterclaim (or any set-off defence or cross-claim) does not exceed the amount set by the HKIAC, as stated on its website on the date the Notice of Arbitration is submitted. Article 42.3 provides that upon a party's request and after consulting with the parties and any confirmed or appointed arbitrators, the HKIAC may, having regard to any new circumstances, decide that the Expedited Procedure shall no longer apply. In its NOA, the Defendant had sought a direction that the arbitration be conducted under the Expedited Procedure on the basis that the amount in dispute was approximately HK$8.3 million, which was accordingly well below the monetary threshold of HK$25 million set by the HKIAC.

The Plaintiff argued that the Defendant should have, on at least two occasions, informed the HKIAC that the Expedited Procedure was no longer appropriate. First, when the Defendant's claim had increased to an amount exceeding the HK$25 million monetary threshold and second, when the Defendant decided to pursue additional claims, meaning that its claims for damages had increased. It was said by the Plaintiff that the increased quantum would have justified the scrutiny of a more robust procedure than that under the Expedited Procedure (e.g. a live hearing and a panel of 3 arbitrators). The court said that as regards the first occasion, the liquidated damages claim would by effluxion of time naturally increase and the increase in quantum did not affect the complexity of the underlying claim. As regards the second occasion, the court said that the Defendant's pursuit of the additional claims was in response to an invitation by the arbitrator to it to set out its final relief in the event she was not minded to grant the declaratory relief sought. The court said that what was in fact suggested by the Plaintiff was that the Defendant was obliged to make a request under Article 42.3 to disapply the Expedited Procedure. However, no authority was cited for the proposition, namely where, as here, the Plaintiff had chosen not to participate in the arbitral proceedings, the Defendant was nevertheless obliged to make a request for a more elaborate procedure which the Plaintiff would unlikely participate in in any event. Further, the court said, even within the "streamlined" Expedited Procedure, the Tribunal was meticulous and careful in the process, even disallowing substantial parts of the Defendants' claim without any input by the Plaintiff. The Plaintiff's submissions failed to acknowledge this crucial aspect and barely asserted the need for closer scrutiny.

The court said that this complaint did not come close to having the character of precipitating a substantial injustice which was shocking to the court's conscience.

Due Procedure Ground / Scope of Arbitration Ground and related Public Policy Ground

The complaints underpinning these grounds related to the arbitrator's invitation for further submissions from the parties in the event that she was not minded to grant the declaratory relief. This led to the Defendant's pursuit and eventual award of the non-delivery claim in addition to the liquidated damages claim. Again, the court found the challenge to be without merit and in so far as any of the complaints were also pursued under the Public Policy Ground, the Court did not regard any of them as having the effect of amounting to any breach of natural justice or shocking the court's conscience.

Court's Ruling

The court dismissed the Plaintiff's application to set aside the Award and ordered it to pay the Defendant's costs on an indemnity basis.

Comments

In many court applications, the parties are required to file evidence by way of affidavit. One should bear in mind that if the evidence filed by one party is unconvincing, it will be readily rejected by the court. The evidence filed by the Plaintiff in this case is such an example.

On the applicability of the Expedited Procedure, Article 42.3 of the 2018 Rules only empowers the HKIAC to consider disapplying the Expedited Procedure upon the request of any party. Here, the Defendant had not done so and therefore the HKIAC's power to disapply the Expedited Procedure could not be invoked. The only argument is whether the Defendant acted in good faith in failing to do so. It has been held in previous decided cases that parties to arbitration have a duty of good faith or to act bona fide (see KB v S & Others [2015] HKEC 2042). Unfortunately, the judge in this case did not find the Defendant had failed to discharge the duty.

Court refuses confidentiality order preventing public disclosure of information relating to HKIAC arbitration

Joseph Chung

In *Beijing Songxianghu Architectural Decoration Engineering Co., Ltd v Kitty Kam (桂藝芙) also known as Wang Yuzhi (王妤之)* [2024] HKCFI 1657*,* the court refused to grant a confidentiality order preventing public disclosure of information relating to an HKIAC arbitration in parallel court proceedings brought against a party related to the respondent in the arbitration. The court found that section 18(2)(a)(i) of the Arbitration Ordinance (AO) which provides the exception that a party may disclose such information "*to protect or pursue a legal right or interest of the party*" applied and the court was not satisfied that there were cogent reasons in this particular case to justify a departure from open justice.

Background

In this action, the Plaintiff claimed against the Defendant (Kam) to recover HK$253 million for fraud, dishonest assistance and conspiracy to injure by unlawful means. Shortly after the action was commenced, arbitration proceedings were commenced by the Plaintiff against an entity related to Kam. There were many common issues between the arbitration and the action and much overlap between the action and the arbitration.

Sections 16 and 18 of the Arbitration Ordinance

In the court action, there was to be a contested hearing of Kam's summons to strike out the Statement of Claim and discharge of the Mareva Injunction granted against Kam. Kam sought a confidentiality order, that (a) the hearing of his summons be closed to the public; (b) the decision to be given on the summons not be searched, inspected or published without the court's leave; (c) documents in the court file containing information relating to the arbitration be sealed and not available for public inspection, or alternatively (d) such part of the hearing, during which "*information relating to the arbitration*" would be disclosed, be closed to the public, and (e) in the striking-out decision, the parties and a number of persons/entities be anonymized and all references to *"information relating to the arbitration*" be redacted and the parties' comments on the redaction be obtained before the striking-out decision would be released to the public.

Kam argued that confidentiality is protected in the arbitration under sections 16 and 18 of AO. S.16 provides that arbitration proceedings are to be heard otherwise than in open court, although the court may order arbitral proceedings to be in open court on the application of any party or, if in any particular case, the court is satisfied that the proceedings ought to be heard in open court. S.18 provides that, unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to the arbitral

proceedings or arbitral award. Exceptions to this prohibition in s.18, where such publication, disclosure or communication of information is permitted, include, amongst others, where it is (i) to protect or pursue a legal right or interest of the party; or (ii) to enforce or challenge the award in legal proceedings before the court or other judicial authority.

Kam's stance was that confidentiality was undermined by the gap created by the Plaintiff's decision to commence the parallel proceedings against Kam, which effectively left open a loophole that allowed the Plaintiff to breach its confidentiality obligations through the backdoor.

Court's Decision

The court said that the first important thing was to identify with some precision what "*information relating to the arbitration*" means and encompasses. The starting point, the court said, must be that open administration of justice is a fundamental principle of great importance and any departure from this in any given case must be justified by reference to the principles and circumstances of the case in question. A central consideration is whether the due administration of justice requires the principle of open administration of justice to be compromised.

Kam emphasized that she was entitled to arbitral confidentiality as it is protected by s.18 of the AO. However, the court said that s.18(2)(a)(i) provides the exception that a party may disclose such information "*to protect or pursue a legal right or interest of the party*". Similarly, Article 45.3 of the 2018 HKIAC Administered Arbitration Rules (which governed the arbitration) provides that a party is not prevented from disclosure of such information to protect or pursue a legal right or interest of the party.

It was not disputed that the Plaintiff was entitled to bring the action against Kam as of right. The Plaintiff's allegations, evidence and documents it proffered in the action were therefore disclosed to pursue a legal right or interest of the Plaintiff within the meaning of s.18(2)(a)(i) and Article 45.3 of the HKIAC Rules.

Kam prayed in aid the English Court of Appeal decision in *CDE v NOP* [2021] EWCA Civ 1908, where in a similar case to the present one, the Defendants were accused of fraud and those same allegations were the subject of an arbitration against companies said to be connected with the defendant. The arbitrators produced an award finding the claimant's allegations well-founded and the claimants asserted that the award was binding on the defendants, as they were privy to it, and sought to make the award public and admit it as evidence in the action. The question of whether the award was binding (privity application) was to be determined in a coming hearing at which the claimant would apply for summary judgment. The broad issue argued in that appeal concerned the extent to which proceedings in that action, particularly the privity application, which involved reference to the contents of the award should be heard in public. The Court of Appeal in CDE held that the judge in the court below had been right to hold a case management conference in private and also upheld the judge's order, effectively making no decision whether the privity application should be heard in public and placing the burden on the claimant to seek a determination from the judge hearing the privity application to decide whether the hearing should be held in public or private. However, the Court of Appeal made it clear that the starting point is that the hearing of the privity application should be in public and any derogation from that position needed to be justified.

The court in the present case referred to the Court of Appeal's comments in *CDE* that it was necessary to make clear that the considerations leading to the conclusion that it was necessary to have the case management conference heard in private did not have the same force if applied in the context of a hearing where the merits of the dispute would be considered and decided. The court said that this was pertinent in the present case, as Kam's striking out application could potentially affect the Plaintiff's substantive right. Further, the Court of Appeal in *CDE* had mentioned twice that should the hearing of the privity application be decided under procedural rules to be heard in public, there would be no breach of confidentiality as such disclosure was in order to protect or pursue a legal right of the claimant. The court said that with *CDE* so properly understood, it did not assist Kam. Rather, the judgment in that case reinforced that disclosure to protect or pursue a legal right of the party, as provided by s.18(2)(a)(i) of the AO, does not amount to a breach of the arbitral confidentiality.

The court said that arbitral confidentiality being so excepted by s.18(2)(a)(i) of the AO, it fell on Kam to satisfy the court that there were otherwise cogent reasons in this particular case (save arbitral confidentiality) to

justify a departure from open justice, or that due administration of justice required the principle of open administration of justice to be compromised. Other than arbitral confidentiality, Kam did not put forward any such other reasons or justification. Therefore, Kam's application was refused.

Comments

It is not uncommon for parties to be engaged in litigation and at the same time in arbitration concerning related disputes. This judgment clarifies when the exception to the duty of confidentiality under s.18(2)(a)(i) of the AO applies.

Court grants interim measures in aid of arbitration despite dual application before arbitral tribunal

Justin Yuen

In Company A & Anor v Company C [2024] HKCFI 3505, the court granted the Plaintiffs' application for interim measures (Injunctions) against the Defendant under s.45 of the Arbitration Ordinance, Cap 609 (AO), in aid of arbitration proceedings ongoing between the Plaintiff and Defendant outside Hong Kong. The court rejected the Defendant's argument that the Tribunal had already granted the interim measures in the arbitration. It also rejected the argument that the court should decline to grant the interim measures on the ground that the interim measures were currently the subject of arbitral proceedings and it was more appropriate for them to be dealt with by the arbitral tribunal (Tribunal), by virtue of s.45(4) of the AO. The court emphasized that the object and aim of the AO is for the court to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense and that s.45 AO expressly states that the court's power to order interim measures is for the purposes of facilitating the process of the arbitral tribunal. Here, the court found that there had been procrastination and obstruction by the Defendant to execute an escrow agreement as directed by the Tribunal in the application before it for Injunctions and that it was appropriate, just and convenient for the court to grant the Injunctions in order to preserve the status quo, pending the Tribunal's further and final orders and award in the arbitration.

Background

The Plaintiffs, as Claimants in an arbitration, claimed damages for breach of a settlement agreement of around US$55 million against the Defendant (Company C) and its wholly owned subsidiary, SZ. Whilst the arbitration was still ongoing, SZ issued an announcement of its intention to dispose of its 51% equity interest in the Defendant, including the transfer or disposal of the Defendant's existing business operations and assets to SZ and companies connected to SZ. The Plaintiffs believed that the Defendant intended to fraudulently divest its assets to render itself judgment proof, thereby rendering any arbitral award to the Plaintiffs nugatory.

Emergency relief application to the Tribunal

The Plaintiffs therefore applied to the Tribunal for emergency relief to prevent the alleged fraudulent transfer **(**Emergency Relief Application). The application sought orders (i) restraining the Defendant from completing the transfer of assets from the Defendant to SZ and (ii) for the Defendant to deposit security of US$55.5 million (Escrow Relief) in an escrow account.

The Tribunal directed the parties to file submissions in support of and opposition to the Emergency Relief Application, but did not order any interim-interim stop-gap measure. However, the Tribunal agreed that the Plaintiffs could seek emergency interim relief from the Hong Kong Courts to stop the transfer, whilst the Tribunal considered the matter further. Accordingly, on 24 May 2024, the Plaintiffs obtained an *ex parte* Injunction on an interim basis, until the *inter-partes* hearing on 31 May 2024.

Originating Summons proceedings in Hong Kong

On 27 May 2024, the Plaintiffs issued an Originating Summons (OS), seeking Injunctions in terms mirroring the relief sought under the Emergency Relief Application, pending the final arbitral award or until interim measures were granted by the Tribunal. On 31 May 2024, the Defendant offered undertakings not to (i) transfer any of its assets to SZ or any associated entity; and (ii) not to remove from Hong Kong any of its assets up to the value of US$55.5 million **(**Undertakings**)**, pending the Tribunal's grant or refusal of the Emergency Relief Application in the arbitration.

Ongoing disagreements before the Tribunal

Whilst the above interim orders were granted by the Hong Kong Court, things were progressing in tandem before the Tribunal. The Defendant proffered 3 guarantees from the transferees of the Defendant's assets, who claimed that they would protect the Plaintiffs' interests **(**Guarantees**)**. However, the Tribunal found this to be insufficient protection, and as early as 28 May 2024, the Tribunal had indicated that it was prepared to grant a preliminary injunction in the Plaintiffs' favour. The Tribunal invited the Plaintiffs to submit a draft order, and the Defendant to submit objections. Thereafter, the main area of disagreement between the parties related to the terms of the Escrow Relief to be granted by the Tribunal, which had not been resolved by the time of the hearing of the OS before the Hong Kong Court in October 2024.

Defendant's opposition to the OS

The Defendant opposed the continuation or grant of the Injunctions sought under the OS on the basis that (i) the Tribunal had already disposed of and granted the interim measures sought by the Plaintiffs in the arbitration, such that the relief now sought in the OS (pending the order of the Tribunal) was unnecessary. The Defendant also contended that the court should not exercise its power under s.45 of the AO, and should decline to grant the relief by virtue of s.45(4), as the interim measures were currently the subject of the arbitration before the Tribunal; and (ii) it was neither appropriate for the matter to be dealt with by the court, nor just or convenient for the court to grant the relief sought by the Plaintiff.

Section 45(7) of the Arbitration Ordinance

The court pointed out that s.45(7) of the AO sets out the reminder that in exercising the power under subsection (2) to grant an interim measure in relation to arbitral proceedings outside Hong Kong, the court must have regard to the fact that the power is ancillary to the arbitral proceedings outside Hong Kong and for the purposes of facilitating the process of a court or arbitral tribunal outside Hong Kong that has primary jurisdiction over the arbitral proceedings. The court said that the court should therefore pay heed to s.45 in this case, since the Plaintiffs' application for interim measures, in the form of the Injunctions and for the Escrow Relief, had already been made to and heard by the Tribunal. The court should consider whether it was "more appropriate" (under s.45(4)(b) of the AO) for the Tribunal to deal with the Plaintiffs' present application for the Injunctions to be granted or continued by the court, pending the issue of the award in the arbitration.

Court's jurisdiction to grant interim measures

The court referred to the principles that the court's jurisdiction to grant interim measures should be exercised "sparingly", and only where there are special reasons to utilize the power, with emphasis on the court's policy of minimal curial intervention in arbitrations, and the need to recognize the autonomy of the arbitral process. However, the court said that it is precisely because the power of the Hong Kong court to grant interim measures is for the purposes of facilitating the process of the arbitral tribunal outside Hong Kong (as stated in s.45(7)(b) of the AO) that the orders sought by the Plaintiffs in the OS should be granted in this case, in order to support the Tribunal and to facilitate the orders the Tribunal had so far made in the arbitration.

The Tribunal's Procedural Orders

The court said that the progress of the Emergency Relief Application before the Tribunal could best be described as procrastination, and frustration. It was pertinent to note, the court said, that on 14 June 2024,

the Tribunal had issued a Procedural Order No 32 (PO 32), whereby it found that it had jurisdiction to issue relief to prevent the disposal, transfer, movement or dissipation of the Defendant's assets, in order to preserve the Tribunal's ability to render meaningful relief in the arbitration and the parties had been directed to *agree* upon the terms and language of an escrow account arrangement or, alternatively, a bank guarantee arrangement, to address the Plaintiffs' concerns about the Defendant's transfer and intended transfer of assets and the Plaintiffs' ability to collect on any net award and to submit a report to the Tribunal by 19 June 2024, including the text of a jointly agreed escrow account agreement or bank guarantee document.

Following PO 32, the Tribunal made a number of further procedural Orders regarding the escrow account arrangement, but after a lapse of around 5 months and at least until the hearing of the OS in Hong Kong on 22 October 2024, the escrow agreement had still not been signed as the parties had not been able to agree on the terms and contents. The court said it was clear from the Tribunal's Procedural Orders since PO 32, that the execution of an escrow agreement had all along been envisaged and directed by the Tribunal and the escrow agreement was to contain the terms directed by it and set out in PO 35. It said that despite the Defendant's claims in September 2024, that its Undertakings had already been discharged upon the Tribunal's grant of interim measures, it was clear from the contents of the Procedural Orders since PO 32 (in June 2024) that the Tribunal had still to rule on the Plaintiffs' application for the interim relief sought, and that the escrow agreement which the Tribunal had intended the parties to sign had yet to be finalized for the Tribunal's acceptance. These interim measures as sought by the Plaintiffs could not therefore be said to have been finalized already, when the order for the measures had (even on the day of the hearing before the Court) yet to be approved, and made by the Tribunal.

The court said that the Tribunal had made the position clear in PO 37, when it stated that the Defendant's Undertakings had *not* been discharged. The Undertakings were expressed to be valid "*until the granting of interim measures in the Plaintiffs' favour by the Tribunal as sought*", or alternatively, 7 days after the application for interim measures was refused by the Tribunal. Even if the Defendant was right, that the Tribunal had already granted the interim measures, by ordering the Defendant's payment of its cash and non-cash assets into an escrow account, coupled with an order for the execution of an escrow agreement (on terms to be agreed or finalized), it was clear beyond peradventure that the Tribunal's directions for the parties to negotiate and finalize an escrow agreement had fallen on deaf ears, and had not been complied with by the Defendant despite the lapse of over 4 months from June 2024 when PO 32 was issued.

Injunctions granted by the court

The court held that such delay and non-compliance on the Defendant's part should not in any event be condoned by any court, when the object and aim of the AO is for the court to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense (under s.3 (1) of the AO), and when s.45 expressly states that the court's power to order interim measures is for the purposes of facilitating the process of the arbitral tribunal. In light of the procrastination and obstruction by the Defendant to the execution of the escrow agreement as directed by the Tribunal, it was appropriate, just and convenient, the court said, for it to grant the Injunctions sought by the Plaintiffs, in order to preserve the status quo pending the Tribunal's further and final orders and award in the arbitration. Further, to the extent that any order for interim relief had *already* been made by the Tribunal by its procedural orders, it was appropriate and just for the court to grant leave to enforce those orders under s.61 of the AO, as an order or direction of the court.

The court accepted the Plaintiffs submission that an order from the court to enforce POs 36 and 41 was not sufficient to afford adequate protection for the Plaintiffs in view of the Defendant's obstructive and un-cooperative attitude towards compliance with those orders of the Tribunal and agreed that to best facilitate the Tribunal, to preserve the status quo pending the Tribunal's final orders on the Plaintiffs' applications before the Tribunal, and pending the issue of the final award, orders should be made along the lines of the relief sought in the OS.

Comments

This case illustrates how the court should exercise its power to grant interim measures under s.45 of the AO and its interaction with the process of the arbitration, bearing in mind the court's policy of minimal curial intervention in arbitrations. The main consideration is whether the granting of the interim measures by the

court will facilitate the process of the arbitral tribunal which is consistent with the pro-arbitration approach adopted by the Hong Kong courts.

Court of Appeal to consider an arbitrator's duty of disclosure

Stanley Lo

We previously reported on the Decision in TGL v SDC [2024] HKCFI 1796, in which the court dismissed the Respondents' application to set aside an Enforcement Order, whereby the Applicant had been granted leave by the Hong Kong 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 court has now granted the Respondents leave to appeal the Decision (see TGL v SDC [2024] HKCFI 2393). The court noted that the Decision is a final one and it was not persuaded that the Respondents had an arguable case with reasonable prospects of success that the Decision exceeded the generous ambit within which reasonable disagreement is possible, and was plainly wrong. However, it still granted leave to appeal because the parties had not advanced focused arguments at the hearing on the duties of an arbitrator to make disclosure throughout the course of an arbitration, which duty exists by virtue of s.25(1) of the Arbitration Ordinance (AO), the extent of such duties with regard to matters which came to the arbitrator's knowledge or which he ought reasonably to have known, and whether the matters required to be disclosed should be wider in scope than what would justify recusal of an arbitrator. The court said that breach of such duties may be relevant to the question of whether enforcement of the arbitral award should be refused, as being contrary to public policy, and this question was one of general principle and of importance, such that a decision of the Court of Appeal would advantageous to the arbitration community.

The Decision

To recap, the Respondents had applied to set aside the Enforcement Order on the grounds that given the relationship between the arbitrator and companies associated with the Applicant, there was apparent bias on the arbitrator'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 therefore in accordance with the parties' arbitration agreement, and/or the law of the Mainland and/or it 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 AO.

In the Decision, the court had found that the Hong Kong court of enforcement should give due regard and weight to the decision of the Shenzhen Court, as the supervisory court of the arbitration, that there was no breach of PRC law and no breach of the SCIA Rules governing the arbitration regarding 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 a reasonable doubt as to the arbitrator's fairness and impartiality. The ground under s.95(2)(e) of the AO was accordingly not established.

The court also found that in the circumstances of the case, there was no cogent and rational link between any association which the arbitrator may have had with the Applicant, and the capacity of such association to influence the arbitrator's decision in the arbitration, to give any impression of possible bias on the arbitrator's part. As such, it would not be contrary to the public policy of Hong Kong to enforce the Award.

Grounds for seeking leave to appeal the Decision

The Respondents sought leave to appeal the Decision, arguing that the court had erred in accepting at face value, or placing too much weight on, the arbitrator's own representation or evidence as to the relevant facts, of the Impugned Relationship between the Applicant and the companies with which the arbitrator/his firm had dealings, and of the arbitrator's professed knowledge or lack of knowledge of those facts and relationship. They also argued that the court had failed to consider relevant matters which would have shown

inconsistencies in the arbitrator's disclosure, and would have caused an objective fair-minded and informed observer to conclude that the arbitrator had not been truthful, and that there was a real risk of bias on his part.

Court's decision on leave application

The court held that the Decision was a final one, and under s.84(3) of the AO (which applies to a Mainland award by virtue of s.92(1)(b) of the AO), the leave of the court is required for any appeal from a decision of the court to grant or refuse leave to enforce an award. A decision to grant or refuse leave to enforce an arbitral award is an exercise of the discretion of the court, and the applicant for leave to appeal has to show that he has an arguable case with reasonable chances of success that the relevant decision exceeds the generous ambit within which reasonable disagreement is possible, and is in fact plainly wrong, and not merely that the appellate court would prefer a solution which the judge had not chosen. A reasonable prospect of success means an appeal with prospects that are more than "fanciful" but which do not need to be shown to be "probable". It is insufficient to show that the appeal was "merely arguable" and "not fanciful" for the court to be satisfied that the applicant had a reasonable prospect of success.

The court found that there was no evidence adduced at the hearing which could contradict the arbitrator's claims, that he had no knowledge of the dealings relating to the Impugned Relationship of which the Respondents complained. Having considered all the facts and circumstances and the entire history of the dealings between the arbitrator and the group of companies of which the Applicant formed part, the court was not satisfied that there was a sufficiently cogent and rational link between any association which the arbitrator may have had with the Applicant, and the capacity of such association to influence the decision of the arbitrator, to give any impression of a real risk of bias on the part of the arbitrator. Hence, the court was not persuaded that the Respondents had an arguable case with reasonable prospects of success that the Decision exceeded the generous ambit within which reasonable disagreement is possible, and was plainly wrong.

However, the parties had not advanced focused arguments at the hearing on the duties of an arbitrator to make disclosure throughout the course of an arbitration, the extent of such duties with regard to matters which came to the knowledge of the arbitrator or which he ought reasonably to have known, and whether the matters required to be disclosed should be wider in scope than what would justify recusal of an arbitrator. Breach of such duties may be relevant to the question of whether enforcement of the Award should be refused as being contrary to public policy. This question, the court said, is one of general principle and is of importance, such that a decision of the Court of Appeal would serve as an advantage to the arbitration community. For that reason, the court granted leave to appeal.

Comments

A decision of the Court of Appeal about the extent of an arbitrator's duties to make disclosure of his/her relationship with the parties will be useful to arbitrators. The arbitration community of Hong Kong is small. It is not uncommon for the arbitrator to have prior relationships with the parties and their legal advisors. If the IBA Guidelines on Conflicts of Interest in International Arbitration is strictly followed, disclosure of relationships has to be made by the arbitrator in many situations. Generally, an arbitrator will err on the side of caution in making disclosure once the matter requiring disclosure has come to his/her knowledge, so that any objection from the parties can be dealt with as soon as possible.

No time extension to enforce CIETAC arbitral award due to delay

KK Cheung

In *宁波梅山保税港区和光泰润二号股权投资中心 v 北京微影时代科技有限公司 & ORS* [2024] HKCFI 2723, the court dismissed the 1st Respondent's application for an extension of time to set aside an Enforcement Order in respect of a Mainland CIETAC arbitral award because the application had been made 1 year and 2

days out of time. The court said that, on any view, a delay of over a year was significant and it did not accept the 1st Respondent's reasons for the delay, namely that it had been labouring under the mistaken advice of its Mainland lawyers that by taking out Mainland setting aside proceedings (which it did), enforcement of the Enforcement Order would be stayed and also due to the COVID pandemic its management had been homebound. The court made it clear that any challenge to an award should be made promptly, so that it can be disposed of quickly and in accordance with the aims of the Rules of High Court (RHC) Order 73, rules 5 and 10 (which set out the time limits for applications under the Arbitration Ordinance) to achieve early resolution of the status of the award.

Background

There had been four Respondents in the Mainland CIETAC arbitration - the 1st Respondent in these High Court proceedings was the 4th Respondent in the arbitration and the Applicant was the Applicant in the arbitration.

An arbitral Award was made in the Applicant's favour on 19 May 2022 providing that the Respondents jointly bear the responsibility for the equity purchase in question and pay the Applicant RMB 200 million for the repurchase plus interest. On 29 July 2022, the Hong Kong court granted the Applicant leave to enforce the Award in Hong Kong (Enforcement Order). The 1st Respondent did not make the present application for an extension of time to set aside the Enforcement Order until 30 October 2023.

Application to set aside Enforcement Order - Grounds

The grounds of the 1st Respondent's application were as follows.

Material Non-Disclosure (MND) Ground: The Enforcement Order was obtained by the Applicant on an *ex parte* basis and the Applicant had failed to make full and frank disclosure to the court that (a) the Respondent had commenced an application with the Mainland Supervisory Court to set aside the Award and (b) Conditions Precedent to the 1st Respondent's share redemption obligation under the Award were not satisfied

Not Yet Binding Ground: The Award was not yet binding as the Condition Precedent in relation to the 1st Respondent's share redemption obligation under the Shareholders' Agreement between the parties had not been fulfilled and enforcement should therefore be refused under s.95(2)(f)(i) of the Arbitration Ordinance, Cap 609 (AO).

Illegality Ground: The Award, which required the 1st Respondent to specifically perform the share repurchase/ redemption obligation under the Shareholders' Agreement, was unenforceable because the performance was contrary to public policy, illegal and gave rise to a matter which was not capable of settlement by arbitration. In particular, performance was contrary to Mainland and Hong Kong Laws, including the Companies Ordinance, Cap 622 and enforcement should be refused under s.95(3)(a)-(b) of the AO.

The Applicant opposed the 1st Respondent's application on the basis that there had been inordinate and unexplained delay in making it.

Delay

Under the terms of the Enforcement Order, leave was granted to the Applicant to serve it on the 1st Respondent out of jurisdiction at its Beijing address and the Respondent could apply to set it aside within 14 days after service of the Order on it. The Enforcement Order was served on the 1st Respondent on 14 October 2022 via the Mainland Judiciary and the 14 days therefore expired on 28 October 2022.

The court referred to the fact that once an award is made, the parties are entitled to expect it to be final, and binding, and if any permissible recourse is to be made to the court, it should be made promptly, so that any challenge to the award can be clarified and disposed of quickly, and parties know without unnecessary delay where they stand in relation to the award, and its recognition and enforcement; the aim of RHC O.73 rr.5 and 10 (which set out the time limits for applications under the Arbitration Ordinance) being to achieve early resolution of the status of the award.

The court said that the 1st Respondent's delay of 1 year and 2 days in making its application was, on any view, significant. The reasons for delay advanced by the 1st Respondent, were that it had been labouring under the mistaken advice of its Mainland lawyers that by taking out Mainland setting aside proceedings (which it did), enforcement of the Enforcement Order would be stayed. It also suggested that the COVID pandemic had had an adverse effect, because the 1st Respondent's management had been homebound.

The court did not accept the 1st Respondent's reasons for the delay. A letter dated 28 October 2022 from the 1st Respondent's Hong Kong solicitors stated that the 1st Respondent had taken time to review the Enforcement Order and sought Hong Kong legal advice and indicated that the 1st Respondent intended to apply to set aside the Enforcement Order. The court said that this letter demonstrated that the 1st Respondent was able to instruct solicitors and obtain Hong Kong legal advice not later than 14 days after receiving the Enforcement Order and unless there was a proper explanation for the delay in making the set aside application, the inescapable inference was that the 1st Respondent had made a deliberate choice not to pursue such application until 30 October 2023. Possibly, the court said, the 1st Respondent was hoping that the set aside application it made in the Mainland and its resistance to the Mainland enforcement actions taken by the Applicant might prevail.

The court noted that the 1st Respondent had made two applications to the Mainland Supervisory Court to set aside the Award. The 1st Application was dismissed on 29 September 2022, before the Enforcement Order was served on the 1st Respondent. The second one was not made until 22 November 2022 (and was dismissed on 9 February 2023). Hence, there was no Mainland set aside application on foot which could have, according to the alleged erroneous advice, acted as a stay when the Enforcement Order was served on the 1st Respondent on 14 October 2022. The court found considerable force in the Applicant's submission that the alleged erroneous advice was an attempt to mislead the court. Therefore, apart from the inordinate delay, the 1st Respondent had tried to mislead the court on the reasons for delay. Such reprehensible behaviour, the court said, would justify a rejection of the 1st Respondent's application as it would be wrong for the court to countenance such behaviour. Therefore, for the reason of delay alone, the court decided that the application must be dismissed.

Although the delay was sufficient reason to dismiss the 1st Respondent's application, the court went on to consider the merits of the three grounds for setting aside the Enforcement Order, should it be wrong on the delay issue, and to see if they could justify the application.

Material Non-Disclosure (MND) Ground

It was the 1st Respondent's case that by the time the application for the Enforcement Order was heard on 29 July 2022, it had taken out the 1st Application with the Mainland supervisory court to set aside the Award and the Applicant had failed to disclose this to the Hong Kong Court when it made its *ex parte* application for leave to enforce the Award in Hong Kong. However, the court found that the 1st Application had in fact been made *after* the Enforcement Order was granted and so this was not in truth a matter of MND, but rather whether the Applicant should have gone back to court to inform it of the change of circumstances. Although the court acknowledged that there was a duty on the Applicant to inform the court of a change in circumstances, since the 1st Application had been dismissed before the Enforcement Order was served on the 1st Respondent, there was no real suggestion that the 1st Respondent had been prejudiced by the Applicant's failure to inform the court. Indeed, by the time the Enforcement Order was served on the 1st Respondent, there was no setting aside application on foot and the court had no reason to believe that the failure on the Applicant's part was anything other than inadvertence and there was insufficient reason, it said, to discharge the Enforcement Order.

Not yet binding ground

The grounds for refusing enforcement of a Mainland award are exhaustively listed under s.95 of the AO and the fact that an award has yet become binding on the parties is one such ground. The court said that an award is binding if it is not open to appeal on the merits and in the present case, there was no viable suggestion that the Award was open to appeal on the merits and so this was the end of the matter for this ground. In truth, the court said, the 1st Respondent's case about the difficulty or impossibility of carrying out a reduction of capital so as to allow the repurchase of the Applicant's shares was an argument of impossibility

of performance and not whether the Award was binding and such argument was not relevant to the enforcement of the Award.

Secondly, in September 2023, the 1st Respondent had brought another arbitral proceeding before CIETAC seeking confirmation that if it needed to perform the repurchase obligation under the Shareholders' Agreement, it should treat the completion of capital reduction in accordance with the law as a precondition for performance. In July 2024, the tribunal issued an award rejecting all of the 1st Respondent's claims. It was fair to say, the court said, that the 1st Respondent had taken out multiple proceedings in the Mainland to set aside the Award and to resist enforcement of the same, none of which were successful, whereas the Applicant had been successful in various enforcement proceedings against the 1st Respondent in the Mainland. Therefore, this ground was also rejected.

Illegality / public policy ground

The court did not accept that performance of the 1st Respondent's obligations under the Award was against Mainland law, especially in light of the fact that the Award had been upheld by the Mainland Court, the Mainland Court had granted enforcement relief in the Applicant's favour and the 1st Respondent had failed in its arbitration. Further, it is trite, the court said, that where public policy is relied upon as a ground to resist enforcement of an award, it is the domestic public policy of the court of enforcement (in this case, Hong Kong) which is relevant. As regards, the 1st Respondent's contention that performance was contrary to the Hong Kong Companies Ordinance, the court said that the Companies Ordinance had no application to the 1st Respondent, since it is a Mainland company. This ground was also therefore rejected.

Comments

Although the 1st Respondent had raised various arguments in support of its application for an extension of time for setting aside the award, given the facts as disclosed in the judgment, it is unsurprising that the Court had no difficulty in dismissing the application.

New SIAC Arbitration Rules

Joseph Chung

The Singapore International Arbitration Centre (SIAC) has announced the release of the 7th edition of its SIAC Rules (SIAC Rules 2025), which came into effect on 1 January 2025. As noted on the SIAC website, some of the key features of the SIAC Rules 2025 include:

- Introduction of new procedures, including the Streamlined Procedure, Preliminary Determination and Coordinated Proceedings.
- Expansion of cases eligible for the Expedited Procedure.
- Enhancements to the Emergency Arbitrator procedure, including the possibility of protective preliminary order applications.
- Updated appointment provisions and codification of the power of tribunals to appoint tribunal secretaries in SIAC arbitrations.
- Incorporation of SIAC Gateway, SIAC's online case management system.
- Specific provisions encouraging parties to consider mediation.
- Mechanisms to enhance and promote the overall integrity and efficiency of arbitration proceedings.

A summary of the key features of the SIAC Rules 2025, can be found on the SIAC's website:
https://siac.org.sg/wp-content/uploads/2024/06/Highlights-of-the-SIAC-Rules-2025.pdf

Gillian Lam joins Deacons as Partner

We are pleased to announce the further expansion of our team, with the joining of Gillian Lam as a Partner.

Gillian, a Solicitor Advocate, handles both commercial litigation and international arbitration. She has dealt with a wide range of disputes and compliance issues and her experience includes general commercial/ corporate disputes, shareholders' disputes, trust/ private wealth disputes, cyber fraud recovery, commercial fraud and bribery investigations, employment disputes and investigations, and product liability. Gillian has assisted numerous clients in complex cyber fraud and asset tracing cases. She has also managed a number of multi-million-dollar private wealth/ trust disputes, as well as defamation cases. She is a Fellow of the Chartered Institute of Arbitrators and has handled international arbitrations under the HKIAC, ICC and ICDR Rules. She has also managed a number of multi-million-dollar private wealth/ trust disputes as well as defamation cases (including one that went to the Court of Final Appeal of Hong Kong).

On the compliance side, Gillian has advised on and conducted investigations involving employment, bribery and compliance issues for multi-national companies, as well as product recalls for well-known brands. Gillian has worked on substantial matters with cross-border elements across multiple jurisdictions and has acted for multi-national corporations, listed companies, major financial institutions and high net worth individuals.

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