Hogan Lovells

Arbitration Highlights in the Year of the Rabbit

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As the world welcomes in the Year of the Rabbit, we look back at seven decisions that made an impact over the past year.

In the decisions, the Hong Kong courts considered the circumstances in which interim relief should be granted, the boundaries of the “one stop shop” adjudication approach in the context of construction cases and the importance of witness evidence when deciding whether an arbitration agreement exists in the first place.

A question of construction

The issue of whether an arbitration clause between the parties exists at all is one that often comes before the courts. With it comes all kinds of questions of interpretation, intention and an analysis of the underlying factual matrix.

Such a case came before Deputy Judge Le Pichon in *Talent Mark Development Ltd v Kwan On-U-Tech Joint Venture* [2022] HKCFI 3277. Kwan On-U-Tech Joint Venture (D1) was the joint venture of U-Tech Engineering Company Limited (D2) and Kwan On Construction Company Ltd (D3), which were all three defendants in the case. The defendants sought a stay of proceedings brought by the plaintiff pending arbitration.

D2 as contractor entered into two written subcontracts with the plaintiff as subcontractor in 2015 and 2016 (the TSW and Slopes subcontracts). These subcontracts contained "Conditions of Sub-Contract" (GCC). The GCC was a template that D2 used in its subcontracts and GCC 19(a) contained an arbitration clause.

In 2016, the Civil Engineering & Development Department (CEDD) invited tenders for the construction of universal access facilities for seven footbridges. D1 subcontracted the work in respect of four of them to the plaintiff.

In August 2016, representatives of D1 and the plaintiff attended a site visit arranged by CEDD during which they entered into an oral subcontract regarding the works. It was subsequently proposed that D1 would enter into a Chinese subcontract with the plaintiff. A draft agreement was forwarded to the plaintiff on 31 March 2017, seven months after work had commenced, but was never signed.

Once the works were completed, disputes arose over the final account and the plaintiff issued proceedings. The defendants belatedly requested a stay to arbitration on the basis that the representatives were said to have agreed during the site visit that Clause 19 of the GCC, the dispute resolution clause, would be incorporated into the subcontract, arguing that this was also demonstrated in the preamble to the draft agreement. The plaintiff contended it was only the payment terms of the GCC that were incorporated, not the dispute resolution provision.

Principles

Deputy Judge Le Pichon reminded the parties that the onus was on the applicant for a stay of proceedings to demonstrate there was a good *prima facie* or plainly arguable case that an arbitration clause or agreement existed. Where the issue gave rise to respectable arguments from both sides, the issue should be resolved in favour of arbitration.

The relevant test was that set out in *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1995] 1 HKLR 300, that "*in construction cases, one has to approach the question of incorporation by reference from the standpoint of the intention of the parties with no preconceived notions.*"

Regard had to be to the purpose of the contractual term and the background that was objectively or reasonably known to the parties at the time of the agreement. "*The overriding objective is to give effect to what a reasonable person would have understood the parties to mean.*"[1]

The defendants' evidence was found wanting. They provided an affirmation as to what took place during the site meeting from a manager who was not present and was not even the direct recipient of what was relayed by their representative at the meeting.

Insofar as the defendants submitted that the dispute resolution provision of the main contract should apply by default, the court said the approach could not be correct as it would disregard the express provision that required an enquiry or assessment as to the existence of any contradiction with the terms of the draft agreement.

The confirmation and agreement in the penultimate paragraph of the draft agreement related only to the "rights" and "obligations" of the parties. The court observed that it would be odd to describe arbitration as an "obligation" or "liability" under the main contract.

In summary, the court did not consider that the defendants had made out an arguable case that an arbitration agreement existed. Their case was "*predicated on evidence that, cumulatively, is far from "cogent and arguable*" but which fell into the "*dubious and fanciful*" category. The court dismissed the defendants' summons for a stay of proceedings and granted an order nisi of costs in favour of the plaintiff.

Key takeaways

Where there is no written contract, being able to demonstrate what the parties intended is crucial. Consider carefully which witnesses can speak to the evidence and do not suggest witnesses that are at best one remove away from what actually happened. This is a pro arbitration decision as arbitration is consensual. Despite the courts' general support of arbitration, the court will not artificially construct an agreement to arbitrate where none in reality exists.

If the parties intend to incorporate the arbitration agreement from a different contract, then they should do so expressly. In the Hong Kong case of *OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd (Yue You 903)* [2020] HKCFI 375, the Court of First Instance also confirmed that express wording must be used in order to incorporate an arbitration clause from a charterparty into a bill of lading. General words of incorporation will not be sufficient. Express reference to an arbitration agreement avoids a detour through the courts and provides certainty.

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1 *Building Authority v Appeal Tribunal (Buildings) (ENM Holdings Limited)* (2018) 21 HKCFAR 194

One stop in the shop?

In separate decisions, the Hong Kong courts considered the "one stop shop" adjudication approach adopted in the leading case *Fiona Trust v Privalov* [2007] Bus LR 1719 and found that whilst it applied in one case (where the parties had intended all disputes to be adjudicated by a single tribunal), it did not apply in the second, where the parties had clearly intended there to be a carve out.

In *G v T* [2022] HKCFI 2214, proceedings were commenced by the plaintiff against two defendants for amounts due under the defendants' guarantees signed on 28 February 2019 and an undertaking signed by them on 19 December 2019. The plaintiff claimed RMB 42.7 million as damages in respect of the defendants' breach of the guarantees and the undertaking.

The guarantees contained a clause specifying arbitration for all disputes caused by or arising under the guarantees. The plaintiff argued it had separate and/or distinct claims against the defendants in the Hong Kong courts based on the undertaking and that the undertaking did not contain any arbitration or jurisdiction clause.

The Honourable Madam Justice Mimmie Chan said it was clear from the Statement of Claim that the cause of action relied upon by the plaintiff under the guarantees fell "*within the ambit and scope of the Arbitration Clause*", further noting that the "*claim for the sums said to be due from the defendants to the plaintiff are pleaded to be due by virtue of the guarantees, and the defendants' dispute of their liability for such sums clearly constitute a dispute caused by or arising under the guarantees* ("*因擔保合同產生的糾紛*")."

It was clear from the Statement of Claim that the claims against the defendants were made in respect of their alleged breach of their obligations under the guarantees.

The court said that on the facts of the case, the *Fiona Trust* presumption in favour of arbitrability and the "one stop" adjudication approach should apply. The plaintiff and the defendants as rational business people were "*more likely to have intended any dispute arising out of the relationship in which they [had] entered to be decided by the same tribunal.*" The undertaking was entered into "*in performance*" of the guarantees "*as part and parcel of the same transaction between the plaintiff and the defendants*", and only involving one additional party which was not being sued in the action.

In conclusion, the court found there was a *prima facie* case that the plaintiff and the defendants were bound by an arbitration agreement. This being the case, it was the plaintiff which had the onus of proving that the arbitration agreement was null and void, inoperative or incapable of being performed. The court found that the plaintiff had not met this bar. The court had no further discretion but to stay the action to arbitration.

In *H v G* [2022] HKCFI 1327 which also came before Mimmie Chan J, by way of contrast, the determination of an arbitral tribunal that it had jurisdiction over a dispute under a waterproofing guarantee entered into by H as the main contractor and by H's subcontractor and supplier, was set aside.

G was a property developer which entered into a building contract with H, a building contractor, whereby H was the main contractor for G's project in Hong Kong. The building contract contained a dispute resolution clause, in which the parties agreed that if any dispute could not be resolved by a specified mechanism, it would be referred to and finally resolved by arbitration under the Domestic Arbitration Rules in accordance with the HKIAC procedures for domestic arbitrations. The obligation was set out in a Deed of Warranty appended to the building contract.

The specification preliminaries which formed part of the building contract expressly provided for H to give a guarantee/warranty in respect of a waterproofing system that was to be installed and that the system would be free from defects for ten years commencing from the date of practical completion.

Fifteen months after the building contract was signed between H and G, H and its subcontractor, SC, jointly executed the warranty, thereby warranting the performance of the waterproofing systems for the project and further warranting that the product would remain free from deficiencies and defects and would remain fit for its intended purpose. The warranty contained a non-exclusive law and jurisdiction clause in favour of the Hong Kong courts.

Disputes arose between the parties and in February 2020, G commenced the arbitration against H claiming there was extensive render cracking across all face elevations of the project structure and extensive debonding of the joint sealant. G claimed in the arbitration that H had negligently failed to install adequate expansion joints and that the joint sealant had been improperly applied to the external render.

Mimmie Chan J found that G and H had clearly intended to carve out disputes under the warranty from the arbitration agreement contained in the main contract. The warranty gave rise to obligations which were distinct from the duties and obligations imposed by the building contract, not least the ten-year duration of the warranty when contrasted with the limited defects liability period under the main contract.

Mimmie Chan J noted that the Fiona Trust "one stop shop" adjudication presumption "*has limited application in a case where the overall contractual arrangements between the parties gave rise to agreements containing different dispute resolution provisions.*"

Key takeaways

The *Fiona Trust* presumption is a rebuttable presumption. It is not an unlimited presumption which applies irrespective of the facts (see Hogan Lovells alerter *Cheque-mate – Hong Kong Court of Appeal refuses stay to arbitration on dishonoured cheque*, discussing *T v W* [2022] HKCA 95.) Everything comes down to what the parties intended.

In *G v T*, the Court took the view that the proper construction of the warranty and the non-exclusive jurisdiction clause taken together, meant that the parties had agreed that any dispute arising out of the relationship between them was to be decided by the same tribunal. In *H v G*, the Court found the intention of the parties was to separate out disputes under the warranty.

An arbitration conspiracy?

The plaintiff in *Excel Jumbo International Ltd v Cybernaut Greentech Investment Holding (HK) Ltd* [2022] HKCFI 3555, alleged that the four intended defendants named in the draft Statement of Claim, had conspired to strip the first defendant (the company) of its assets by fabricating corporate and contractual documentation, with an arbitration featuring in the supposed conspiracy.

The plaintiff sought leave to commence a statutory derivative action in the name of the company against the four intended defendants and an injunction to restrain the first intended defendant from proceeding with the arbitration, a Hong Kong arbitration administered under the CIETAC rules, until the determination of the intended action.

The dispute

Central to the dispute was a potential share subscription by Beijing Cybernaut Green-Tech Investment Management Company Limited (Beijing Cybernaut) in a company then known as L'sea Resources international Holdings Limited (L'sea), which was listed on the Hong Kong Stock Exchange. During the negotiation over the terms, Beijing Cybernaut designated the first intended defendant, Power Investment Holding Limited (PIL) and one of its group members, as the appropriate vehicle to enter into any subscription agreement which might materialise.

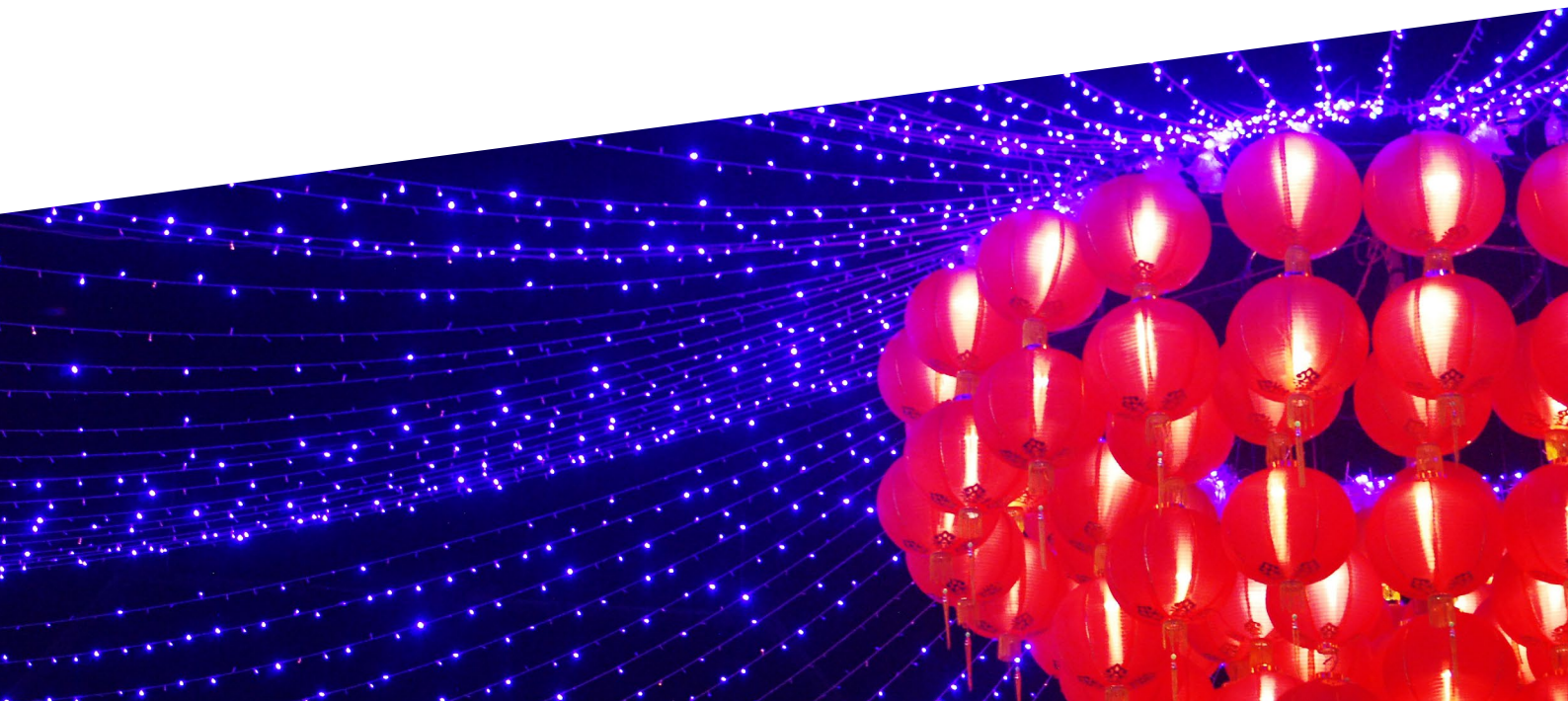
PIL entered into a loan agreement with L'sea as borrower and one of L'sea's substantial shareholders, Mr Xie Haiyu, as guarantor. According to the loan agreement, PIL agreed to lend L'sea HK$176 million, an amount which L'sea needed for the purpose of redeeming outstanding convertible bonds.

Should the subscription materialise, the loan would be treated as part of the share subscription monies payable by PIL to L'sea, but if the subscription failed to materialise, the loan would be repayable by L'sea to PIL with interest. On 17 March 2016, L'sea received the loan from PIL and applied the proceeds to fully redeem the convertible bonds.

On 5 December 2016, L'sea announced that the possible subscription had failed to materialise and so the loan became repayable to PIL with interest. On 29 March 2017, L'sea, Mr Xie, the company and PIL entered into four agreements in respect of the capitalisation and repayment of the loan, including a loan assignment agreement (LAA) between PIL (as the assignor), the company (as the assignee), L'sea (as the debtor) and Mr Xie (as the guarantor). Under the LAA, PIL agreed to assign all its rights and obligations under the loan agreement to the company.

Two versions of the LAA were produced to the court. The plaintiff complained that PIL and its director Mr Yang had conspired with the Cybernaut group and its nominees and directors and/or agents to fabricate the defendants' version (Ds' LAA) as well as a supplemental agreement (Ds' SLAA), and that this fabrication had enabled PIL to commence the arbitration against the company and obtain an arbitral award with the object of stripping the company of its only assets.

The defendants contended that the intended action raised no serious issue to be tried as the plaintiff had failed to put forward any credible evidence to support its allegation of fabrication and also that Ds' LAA had been validly authorised by the company through its sole shareholder at the time, the second defendant's nominee.



The decision

The court was not persuaded that either the evidential point or the sole shareholder point made the intended action unarguable. Where it could be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, the assent was as binding as a resolution in general meeting would be (the *Duomatic* principle). However this also raised question of what members in a general meeting are *entitled* to do.

The court was not satisfied that D2's power necessarily extended to binding the company to an agreement which on the plaintiff's case was part of a conspiracy to cause damage to the company. At the very least, this raised difficult questions of law which Deputy Judge Chang was not in a position to determine summarily.

The court was satisfied that the intended action was seriously arguable and that it was *prima facie* in the interests of the company for the claims to be pursued. The court granted leave to the plaintiff to commence a statutory derivative action in the name of the company against the intended defendants.

The court was also satisfied that the continuation of the arbitration would be vexatious, oppressive and/or unconscionable in the circumstances. The court found there was a seriously arguable case that the continuation of the arbitration furthered a conspiracy to strip the company of its only assets and that there was a real risk that the company would be unable to properly conduct its defence in the arbitration, due to the deadlocked nature of the board.

The court therefore granted the injunction sought restraining PIL from taking further steps in or proceeding with the arbitration against the company until the determination of the derivative action.

Key takeaways

The threshold for leave to bring a statutory derivative action is comparatively low in Hong Kong, whereas the court's discretion to grant anti-arbitration injunctions is one that is rarely exercised.

The power may be exercised if two conditions are satisfied: (i) the injunction does not cause injustice to the claimant in the arbitration, and (ii) the continuance of the arbitration would be oppressive, vexatious, unconscionable or and abuse of process.

The court's discretion to grant an anti-arbitration injunction should be exercised very sparingly and with due regard to the principles of autonomy, independence and finality as embodied in the Arbitration Ordinance.

Privacy in its place

The Hong Kong court dismissed an application seeking to restrain a party to an arbitration from publishing information relating to arbitrations commenced in relation to an unspecified product. In *A v B* [2022] HKCFI 3620, the Honourable Madam Justice Mimmie Chan considered the nature of the court's duty to grant interim relief and the circumstances in which such relief should be refused.

In August 2022, the plaintiff was granted an *ex parte* injunction according to which the defendant was restrained from disclosing any information related to arbitrations that had commenced in Hong Kong between the parties or of any award ultimately to be rendered in the arbitrations. The terms of the injunction were broad, covering the identity of the parties, factual allegations, quantum claimed and the very existence of the arbitrations and their outcome.

Subsequently, the plaintiff sought an *ex parte* injunction to restrain the defendant from disclosing information relating to the arbitrations and their connection with the product, including the product's "*issuance, promotion or redemption*" and from taking any further steps to issue or promote the product (the restraining order). The court however was not prepared to make such a wide order at the ex parte stage on the basis of delay and the perceived need to hear the defendant's case.

The plaintiff then issued a series of applications, with the court finally directing that the issue should be confined to the preliminary question of why the court should not decline to grant the restraining order sought under section 45(4) of the Ordinance.

Under section 45(2), the court "may" in relation to any arbitral proceedings which have been or are to be commenced outside Hong Kong, grant an interim measure. Section 45(4) states that a court may decline to grant an interim measure on the grounds that (a) the interim measure sought is currently the subject of arbitral proceedings; and (b) the court considers it more appropriate for the interim measure sought to be dealt with by the tribunal. The plaintiff argued that both of these conditions had to be satisfied before the court could decline the grant of the interim measure.

The court concurred with the defendant however that the noting that the powers under the section are discretionary and an interim measure sought by any party may, or may not, be granted by the court. The court had in every case "*to decide whether it is proper, just or convenient for the Court to grant the injunctive relief sought" and "whether the balance of convenience lies in favour of the grant of the injunction*".

Mimmie Chan J said that the terms of the injunction were clear and if the plaintiff contended that the defendant had acted or threatened to act in breach of it, it was open to the plaintiff to take appropriate action against the defendant and others by way of enforcement including the institution of contempt proceedings.

Whether the promotion and issue of the product was a breach of the injunction could all be argued before the court in the Seychelles. It was neither urgent nor necessary for the court "*to explain or clarify on the plaintiff's application the terms of the injunction already made*" before the plaintiff could raise an objection in the Seychelles to the approval of the scheme. The court also noted that the tribunal had been constituted and was now in place. Mimmie Chan J failed to see why the tribunal should not deal with the application.

Applications for interim measures are usually made to the tribunal, unless it has not been constituted, where the parties have the choice to go to an emergency arbitrator or the courts. Several provisions in the Ordinance recognize that the tribunal is often the more appropriate body to deal with applications for interim assistance.

Key takeaways

The court's decision is another reminder of the "pro arbitration" stance of the Hong Kong courts that will intervene only in the rarest of cases where a tribunal is administering an arbitration in accordance with the parties' agreement, and as provided in the Ordinance. The ruling also emphasised the primacy of the arbitral tribunal over the courts – where a tribunal is in place, a dissatisfied party should turn to the tribunal first, rather than the court, for interim measures.

No institution? No problem

The court in *李明實 v ACE Lead Profits Ltd* [2022] HKCFI 3342 was asked to determine whether where the arbitral institution did not actually exist, the arbitration should proceed.

Moving parts..

P2, Dr. Wang and a Mr. Lou founded a successful industrial automation company in 1999. In anticipation of a public listing, a number of overseas companies were incorporated, including P3 and D1, two BVI companies called respectively "Plus View" and "Ace Lead".

In 2006, HollySys Automation Technologies Limited (HollySys) was incorporated in the BVI and was listed on the Nasdaq Stock Exchange in 2008. As founder members, Ace Lead and Plus View were allotted shares in HollySys. As a reward to employees, Dr. Wang and Mr. Lou set up a trust to distribute the HollySys shares, tasking Mr. Shao (D2) with setting it up and managing it.

The scheme was implemented in two stages between 2009 and 2017 with numerous declarations of trust (DoTs) executed over the course of the two stages. Clause 8.5 of the DoTs provided that "本合約以香港法例為准據法，信託人與受託人之間信託關係的任何爭議在調解無效時，均有權提交香港仲裁委員會裁決", with the agreed working translation being "*The governing law of this contract is Hong Kong law, and either party shall have the rights to, when mediation is ineffective, refer any disputes arising from the trust relationship between the settlor and the trustee to the Hong Kong arbitration committee for adjudication.*" The defendants claimed this was an arbitration agreement.

Dr. Wang had been Ace Lead's sole director and shareholder but transferred his one share in Ace Lead (the entire issued share capital at the time, the Ace Lead Share) to Mr. Shao, on 12 August 2016. Mr. Shao who had been Chief Executive Officer of HollySys since 2013, then became Chairman, before being removed from these positions in July 2020. However, he held onto the Ace Lead Share.

The plaintiffs, who included as P1, employees suing on their own behalf and on behalf of employees who had taken part in the trust scheme, sought a declaration that the HollySys shares held by Ace Lead were held on trust for the HollySys employees under the trust scheme (the Trust Shares Claim); that Mr. Shao held the Ace Lead Share on trust for Dr. Wang (the Ace Lead Claim) and that Mr. Shao should give an account of shares and proceeds of an earlier liquidation of Plus View shares, which they claimed he held in breach of trust (the Plus View Claim).

The defendants sought an order that the action be stayed on the basis that the claim was within the ambit of an arbitration agreement said to be incorporated in the trust document in Clause 8.5 of the trust document.

Relevant provision

The relevant section of the Arbitration Ordinance was section 20(1), bringing into effect Article 8 of the UNCITRAL Model Law. Article 8 provides that:

> *"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."*

In considering whether a stay should be granted, the Honourable Justice Keith Yeung said the court determines four questions: (i) is there an arbitration agreement between the parties?; (ii) is the arbitration agreement capable of being performed?; (iii) is there in reality a dispute or difference between the parties?; (iv) is the dispute or difference between the parties within the ambit of the arbitration agreement?.

The onus is on the applicant for stay to demonstrate that there is a *prima facie* case that the parties were bound by an arbitration clause, and unless the point is clear, the court should not attempt to resolve the matter and the matter should be stayed to arbitration, as it is for the tribunal to decide first on its jurisdiction.

The court found that when an employee joined the scheme by submitting a declaration of trust, they became bound by the terms of the declaration of trust, including importantly the arbitration agreement.

The next question before the court, was whether the arbitration agreement was capable of being performed. The court rejected the suggestion that the parties were entitled to submit the dispute to arbitration only when mediation had been ineffective. Applying *C v D* [2021] HKCFI 1474, it was for the tribunal to decide on admissibility and such decision was not for review by the court (see Hogan Lovells alerter, *The final frontier – Hong Kong Court of Final Appeal grants leave to appeal in arbitration escalation clauses dispute*).

A potentially more problematic issue was the fact that the parties' chosen arbitral institution, 香港仲裁委員會, or the "Hong Kong arbitration committee", does not exist. There was clear Hong Kong authority that, "*where the parties have clearly expressed an intention to arbitrate, the agreement is not nullified even if they chose the rules of a non-existent organisation.*"[2]

Here, in the view of the court, the intention to arbitrate had been clearly expressed in the clause. It was not nullified by the non-existence of the institution. The court found the arbitration agreement was clearly capable of being performed.

The court found however that the defendants had failed to show that the dispute between the parties as it related to the Trust Shares Claim fell within the ambit of the Arbitration Agreement. The court also went onto to reject the defendants' application for a stay of the Ace Lead Claim and the Plus View Claim on the grounds of *forum non conveniens*.

Key takeaways

A party seeking a stay to arbitration has to demonstrate cogently that the parties had intended to settle their disputes by arbitration and that the subject matter of the dispute falls within the ambit of the arbitration agreement. The fact that they may have incorrectly identified their chosen arbitral institution is of no consequence – it is the agreement to arbitrate that matters.

Drafting your arbitration agreement broadly to cover any types of disputes or claims arising out of or relating to this contract also helps. We recommend parties at the outset should adopt the institution's model arbitration agreement, and then tailor that to their specific contract.

2 Mimmie Chan J in *Chimbusco International Petroleum (Singapore) PTE Ltd v Fully Best Trading Ltd* [2016] 1 HKLRD 582

No time like the present

The question of whether the parties had agreed to arbitrate also came before the District Court in *Tip Chi Wan v Merry Court (IO)* [2022] HKDC 1264. The case considered the interaction of a non-exclusive jurisdiction clause and a supposed arbitration clause, the wording of which suggested that parties may have only considered arbitration as an option.

The defendant incorporated owners of a residential estate, entered into an agreement with TP, a building contractor, for waterproofing works. The plaintiffs commenced proceedings against the defendant, and the defendant issued a demand letter to TP.

TP denied liability and said that any disputes arising should be resolved pursuant to clause 11.4 of their agreement. This provided that if the parties failed to resolve any dispute by negotiations or mediation, the parties *may* refer the dispute to arbitration. The defendants issued a third party notice against TP and TP filed an acknowledgement of service saying that it intended to contest the defendant's claim.

On 25 April 2022, the court gave directions for the further conduct of the proceedings. Pursuant to the directions, the time given to TP to file a defence was on or before 23 May 2022. No defence was filed by TP and instead, on 27 May 2022, TP took out a summons for an order that all further proceedings in respect of the defendant's claim against it be stayed and referred to arbitration pursuant to section 20(1) of the Arbitration Ordinance.

The defendant opposed the stay application contending that the application was made out of time. It argued that section 20(1) was subject to O.12 r.8(1) or (2) of the Rules of the District Court which states that a defendant wishing to dispute the jurisdiction of the court should apply for an order staying the proceedings within the time limited for service of a defence.

The defendant also pointed to O.12 r.8(7) which states that – except where a defendant makes an application under O.12 r.8(1) or (2) – the acknowledgment of service should be taken as a submission by the defendant to the submission of the court. In other words, if a defendant fails to make an application for stay within the time limited for service of a defence, the acknowledgment of service should be treated as a submission by the defendant to the jurisdiction of the court.

Judge MK Liu disagreed, taking the view that section 20(1) of the Arbitration Ordinance had given effect to Article 8 of the Model Law and that the meaning of the Article was clear and unambiguous.

"Provided that the conditions in art.8(1) are satisfied, the court does not have any discretion but *shall* refer the parties to arbitration. The conditions specified in art.8(1) are (a) '*if a party so requests not later than when submitting his first statement on the substance of the dispute*', and (b) there is no finding that '*[the arbitration agreement] is null and void, inoperative or incapable of being performed*'. The legislature has not said that art.8(1) of the Model Law is subject to O.12 r.8."

As for whether the parties were bound by the arbitration agreement, the defendant argued that Clause 11.4 only provided in permissive, not mandatory terms for arbitration as an option. The clause did not exclude the parties' right to litigate before the Hong Kong courts.

TP on the other hand argued that the parties were mandated to resolve any dispute by arbitration and that even if the clause were permissive, arbitration had become mandatory when TP insisted in correspondence that the dispute be resolved by arbitration. The non-exclusive jurisdiction clause in favour of the Hong Kong courts contained within a separate Clause 16.2 did not amount to a sufficiently clear and unequivocal indication by the parties of an intention to waive the arbitration clause.

The court said it was not necessary for it to decide whether Clause 11.4 was an arbitration agreement. All the court needed to decide was whether TP had demonstrated a *prima facie case* that the clause was such an agreement.

In the eyes of the court, TP had "*clearly overcome this hurdle*". The court allowed the stay application and ordered that all further proceedings in respect of the defendant's claim against TP be stayed and referred to arbitration. The court also ordered indemnity costs against the defendant to be paid to TP forthwith.

Key takeaways

Parties should use language mandating arbitration in their arbitration agreements – "shall" be referred to arbitration, to avoid unnecessary argument. Parties should also take care in taking steps in court proceedings which could be viewed as a waiver of the arbitration agreement.

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