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HONG KONG COURT GRANTS PERMANENT ANTI-SUIT INJUNCTION TO RESTRAIN COURT PROCEEDINGS IN MAINLAND CHINA

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SUMMARY

In Giorgio Armani SpA v Elan Clothes Co Ltd [2019] HKCFI 2983, the Hong Kong Court of First Instance granted a permanent anti-suit injunction against the defendant which had commenced proceedings against the plaintiffs in Shandong, China, in breach of an arbitration clause. In this judgment, Hon Mimmie Chan J reiterates the presumption in favour of one-stop arbitration, and clarifies the principles regarding anti-suit injunctions.

In *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] HKCFI 2983 (Date of Judgement: 10 December 2019), the Hong Kong Court of First Instance (the "**Court**") granted a permanent anti-suit injunction against the defendant which had commenced proceedings against the plaintiffs in Shandong, in breach of an arbitration clause. In this judgment, Hon Mimmie Chan J reiterates the presumption in favour of one-stop arbitration, and clarifies the principles regarding anti-suit injunctions.

Facts

A Master Agreement ("**MA**") was entered into between the 1st plaintiff ("**SPA**") and the defendant ("**Elan**"), under which Elan was appointed as an authorized retailer.

The MA provided for the laws of Hong Kong to be the governing law, and clause 13 of the MA provides as follows:

> *"13.1 Any dispute, controversy or claim deriving from, arising out and/or regarding this Agreement, including any dispute regarding the validity, interpretation, construction, performance, breach and termination thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules …*
>
> *13.2 Nothing in this article 13 shall be construed as preventing any Party from seeking conservator or other interim relief and remedies, in relation to which the arbitration committee is*

not competent pursuant to mandatory provisions of law, in any court of competent jurisdiction."

Disputes arose and SPA commenced arbitration in Hong Kong against Elan ("**Arbitration**"). The arbitral tribunal ("**Tribunal**") was constituted. Elan then commenced legal proceedings against the 2nd to 4th plaintiff ("**Shanghai**", "**HK**" and "**GA**", respectively) in Shandong ("**Shandong Proceedings**").

In response to the Shandong Proceedings, SPA commenced the present proceedings in Hong Kong for an anti-suit injunction against Elan. By its originating summons ("**OS**"), SPA sought a declaration that Elan's conduct of commencing the Shandong Proceedings was a breach of the MA and the arbitration clause; permanent injunctions against Elan to require it to discontinue the Shandong Proceedings, and to restrain Elan from commencing or pursuing any proceedings other than in accordance with the arbitration clause in the MA; and interim injunctions and interim measures pending the final determination of the arbitration.

Elan's defence

Elan made two main lines of defence:

1. HK, Shanghai and GA were not parties to the MA; and
2. The Court should not determine the claims made by the plaintiffs in its OS, as this would preclude and pre-empt the Tribunal's decision on the issue of the joinder of HK, Shanghai and GA to the Arbitration.

Parties to the MA and the scope of the arbitration clause

The MA was expressed to the made "by and between" SPA "together with its branch offices and Affiliates", and Elan. Each of SPA and Elan was referred to in the MA as a "Party", and together as the "Parties".

There was no dispute that HK was wholly owned by SPA, that Shanghai was wholly owned by HK, and that GA controlled and was the Chairman of SPA's board.

The Court had no difficulty in deciding that the wide definition of "Affiliates" in the MA included Shanghai, HK and GA, and therefore the court concluded that they also were parties to the MA.

In arriving at this decision, the Court stressed the importance of commercial considerations in the construction of contracts, including arbitration clauses. The assumption is that as rational businessmen, parties are likely to have intended any dispute arising out of the relationship in which they had entered or purported to enter to be decided by the same tribunal, i.e. one-stop arbitration. An arbitration clause should be construed in accordance with this presumption unless there is clear language that states otherwise.

The Court also stated that even if Shanghai, HK and GA were not parties to the MA, in accordance with the modern trend of presumption in favour of one-stop arbitration, the arbitration clause must extend to Elan's claims made in the Shandong Proceedings, given that those claims relate to the dispute in the Arbitration.

As regards Elan's point that its claim in the Shandong Proceedings were tortious but not contractual in nature, the Court stated that as long as Elan's claims were "derived from, arise out of and/or are regarding the MA", the claims fell within the scope of the arbitration clause.

As such, the Court ruled that Elan breached the arbitration agreement contained in the MA by instituting the Shandong Proceedings.

Should the Court decline to grant an interim measure?

Relying on section 45(4) of the Arbitration Ordinance ("**Ordinance**"), Elan argued that it was more appropriate for the plaintiffs' claims for the declaration and injunctions to be dealt with by the Tribunal, and therefore the Court should not pre-empt the decision of the Tribunal.

Section 45(4) of the Ordinance states:

> *"The Court may decline to grant an interim measure under subsection (2) on the ground 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 arbitral tribunal."*

The Court stated that this section only states that the Court "may" decline to grant such interim measure, if it considers it more appropriate for the interim measure to be dealt with by the Tribunal. However, this section does not prohibit the Court from granting "interim relief". Pursuant to section 45(3) of the Ordinance, the Court stated that it may exercise powers conferred by this section irrespective of whether or not similar powers may be exercised by an arbitral tribunal under section 35 in relation to the same dispute.

Relying on the rationale adopted by the court in *The Angelic Grace* [1995] 1 Lloyd's Rep 87, the Court decided that the injunction should be granted on the simple and clear ground that the defendant had promised not to bring proceedings otherwise than by way of arbitration in Hong Kong, unless good reason can be shown why the Court should not exercise its discretion. The Court stated that it did not see why it would be more appropriate for the Tribunal to deal with the relief sought by the plaintiffs, and that no other good reason has been advanced by Elan as to why the declaration and permanent injunction should not be granted by the Court.

The Court also stated that, if the Tribunal subsequently agreed that Shanghai, HK and GA are parties to MA, there would be no inconsistency between its finding and the finding made by the Court. However, even if the Tribunal does not agree (thereby causing an inconsistency between the

findings of the Court and the Tribunal), the Court still was prepared to grant the permanent injunction and declaration sought by the plaintiffs because it would be "unconscionable" to allow Elan to pursue the Shandong Proceedings. In doing so, the Court accepted that the Shandong Proceedings were oppressive, vexatious, brought for the purpose of frustrating and obstructing the Arbitration and to exert pressure on the plaintiffs.

Major take-away points

This judgment is consistent with the pro-arbitration attitude of the Hong Kong courts.

First, it demonstrates the importance of commerciality and practicality in the courts' interpretation of arbitration clauses, in particular if they are contained in contracts agreed by businessmen. This could be seen from the Court's decision to extend the coverage of the arbitration clause to Elan's claims made in the Shandong Proceedings even if Shanghai, HK and GA were not parties to the MA. Given the strong presumption in favour of arbitration, it is unlikely that a party to an arbitration clause will be able easily to escape arbitration and initiate court proceedings (whether in Hong Kong or in other jurisdictions) relying on technical or linguistic arguments.

Secondly, it demonstrates that the courts will use its wide discretion in granting injunctions to give effect to the parties' arbitration agreement. If litigation proceedings are considered as vexatious attempts to bypass the arbitration agreement, and to subject the other party to duplicative costs and inconvenience in parallel proceedings on the same issues, the courts are likely to grant permanent injunctions to restrain the litigation proceedings.

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