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HONG KONG COURT REJECTS APPLICATION TO SET ASIDE ARBITRAL AWARD

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SUMMARY

In the case of X v Jemmy Chien (also known as Chien, Ching Yu or 簡慶裕) HCCT 31/2019 [2020] HKCFI 286, the Hong Kong Court of First Instance rejected the plaintiff's application to set aside an arbitral award. The plaintiff's application was made on the grounds that (a) there was no valid arbitration agreement, and (b) the arbitral award was in conflict with the public policy of Hong Kong.

In the case of *X v Jemmy Chien (also known as Chien, Ching Yu or 簡慶裕)* HCCT 31/2019 [2020] HKCFI 286 (Date of Decision: 4 March 2020), the Hong Kong Court of First Instance (the "**Court**") rejected the plaintiff's application to set aside an arbitral award. The plaintiff's application was made on the grounds that (a) there was no valid arbitration agreement, and (b) the arbitral award was in conflict with the public policy of Hong Kong.

Brief facts

X (the plaintiff in the court case) was the respondent in the arbitration, and Jemmy Chien (the defendant in the court case) was the claimant. The arbitration concerned a dispute arising under an agreement ("**Service Agreement**") made between the parties, whereby the defendant agreed to provide product, marketing and promotion services to the plaintiff, in exchange for a commission.

Under clause 7 of the Service Agreement, the parties agreed to refer all disputes relating to the Service Agreement to arbitration in Hong Kong, according to Hong Kong arbitration rules, if such disputes could not be resolved by negotiation ("**Arbitration Agreement**").

The plaintiff applied to the Court to set aside the arbitral awards, being the awards on merits and on interest and costs.

Existence of an arbitration agreement?

The first issue before the Court was whether the defendant was the true party to the Arbitration Agreement.

The arbitrator found that the defendant indeed was the true party to the Service Agreement and therefore the Arbitration Agreement. In deciding so, he referred to the fact that the Service Agreement clearly named the defendant as "Party B" ("乙方") in the preamble and the signature block. He also referred to the fact that the Service Agreement did not explicitly or impliedly indicate that the defendant was not contracting in his personal capacity or was signing on behalf of someone else.

The plaintiff contended that the defendant was not the true party to the Service Agreement, because the defendant had signed it as an agent for a third party named Chen, the principal and true party to the Service Agreement. The plaintiff argued that the arbitrator should have given proper consideration to the factual matrix, e.g. the defendant did not have any relationship with the plaintiff (or its group) before the Service Agreement was signed, the plaintiff had dealt with Chen all along, and the defendant's lack of involvement in the negotiation and performance of the Service Agreement.

The Court reiterated the principles applicable to an application to set aside an arbitral award by way of challenge to the existence of an arbitration agreement. The Court stated that the standard of review of the tribunal's ruling on jurisdiction is one of "correctness". The Court commented that the scope of the Court's review must be limited to true questions of jurisdiction and the Court must be cautious not to stray into the merits of findings of fact and law made by the tribunal, on issues unrelated to or not necessary for the question of jurisdiction.

In light of these principles, the Court adopted a hands-off approach, deferring to the arbitrator's decision because he was the best person to decide on questions of the parties' intention, on the basis of the testimony from the witnesses he heard, and the documentary evidence which the parties produced in the course of the arbitration. On reading the award on merits, the Court stated that it could not conclude that the arbitrator had made any mistake in finding that there was a valid agreement between the plaintiff and the defendant personally.

Contrary to public policy?

The second issue was whether the enforcement of the Arbitration Agreement and arbitral awards would be contrary to public policy.

The plaintiff's supporting affidavit served with the originating summons ("**OS**") stated that *"if the Arbitration Agreement contained in the Service Agreement is enforceable, the Court would be enforcing a sham agreement whereby the Defendant was never meant to be the true party"*. In rejecting this point, the Court emphasised that the Arbitration Agreement is separate from the underlying Service Agreement. Even if the services in the Service Agreement were (and were intended to be) carried out by Chen, that did not affect the existence, enforceability or validity of the

Arbitration Agreement. It was open to the plaintiff and the defendant to agree separately that any dispute under the Service Agreement was to be arbitrated between the plaintiff and the defendant.

At the hearing, counsel for the plaintiff argued that the Service Agreement was a sham because it was the intention of the parties to hide what was in truth the illegality of Chen contracting with the plaintiff for the performance of the services provided under the Service Agreement, in breach of his fiduciary duties under Taiwanese law to Chen's company (of which Chen was vice-president). The plaintiff's counsel also argued that the Service Agreement should not be given effect if the real object and intention of the parties at the time of the contract necessitated their performing some act which is illegal in a foreign country (Taiwan in this case).

The Court first stated that O. 73 r. 5(4) of the RHC requires the affidavit served with the OS to frame the party's case, and that the facts and grounds relied upon in the application to set aside should be stated in the affidavit precisely and with the necessary particulars. The Court criticised the plaintiff's affidavit for not mentioning about the illegality of the Service Agreement and the fact that the object and intention of the said Service Agreement necessitated the performance of an illegal act in Taiwan. The plaintiff's affidavit only alleged that the Services Agreement was a sham because the Defendant was never meant to be the true party to it.

Further, the Court considered that if the plaintiff's contention was true, the Service Agreement would be a sham and smokescreen to hide the true transactions between the plaintiff and Chen and to divert business away from Chen's company. To accept the plaintiff's application of resisting enforcement of the arbitral award was tantamount to permitting the plaintiff to rely on its own wrongdoing and to avoid payment for the services rendered to it under the Service Agreement. The Court did not see how this was in line with public policy interests.

Major takeaway points

- The bar of setting aside an arbitral award on the basis that there was no arbitration agreement is high. Courts in Hong Kong generally would defer to the arbitrator's decision and would refrain from reviewing the merits or correctness of the arbitrator's findings of credibility and of fact. To challenge an arbitral award on this ground successfully, the court must be persuaded that the arbitrator was "wrong".
- To set aside an arbitral award on the ground of public policy, the supporting affidavit must be fully particularised in a sufficiently detailed manner, according to O. 73 r. 5(4).
- An applicant could not rely on his own wrongdoing to set aside an arbitral award on the ground of public policy.

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MEET THE TEAM

Glenn Haley

Co-Author, Hong Kong SAR

glenn.haley@bclplaw.com
+852 3143 8450

Ian Cheng

Co-Author, Hong Kong SAR

ian.cheng@bclplaw.com
+852 3143 8455
