

Insights

HK COURT EXPLAINS PRINCIPLES REGARDING CORRECTION OF ARBITRATION AWARDS

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In *SC v OE1* (HCCT48/2019) [2020] HKCFI 2065 and *OE1 v SC* (HCCT66/2019) [2020] HKCFI 2065 (Date of Decision: 24 August 2020), the Hong Kong Court of First Instance (the “**Court**”) dismissed an application to set aside an arbitration award and allowed an application to enforce the award. In doing so, Hon Mimmie Chan J explained the principles regarding the correction of awards under Article 33 of the Model Law.

Background

OE and SC entered into an OEM Supply Agreement (“**Agreement**”). Disputes arose as to SC’s alleged breach of the Agreement, and OE commenced arbitration in Hong Kong.

A final award on liability (“**Award**”) was made which found that SC breached certain provisions of the Agreement in respect of its filing of patents and utility models on the Mainland. In its “Dispositive Order”, the Tribunal (a) declared that SC was in breach of its obligations under certain provisions of the Agreement, (b) ordered SC to pay the costs of the arbitration, and (c) stated that *“all other claims and reliefs sought by the Parties are rejected”*.

After the Award was issued, OE applied to the Tribunal to correct the Award on the basis of the Tribunal’s failure to address OE’s requests (a) for a perpetual licence under the Agreement, and (b) for injunctions. OE had sought both of these in its claims for relief. OE requested the Tribunal to correct the Award pursuant to Article 33(1) of the Model Law (as adopted in section 69 of the Arbitration Ordinance (Cap 609)), or to make an additional award pursuant to Article 33(3) to correct the Award.

The Tribunal acceded to OE’s application and issued an Addendum to the Award. The Tribunal stated in the Addendum that it was a “mistaken omission” not to have set out the declaration of the licence and not to have included the injunctive relief in the Dispositive Order.

SC applied to the Court to set aside parts of the Addendum, whereas OE applied to enforce the Award as corrected by the Addendum.

This case note will discuss the principles regarding when an arbitration tribunal may correct its award or make an additional award under Article 33 of the Model Law, as explained by the Court.

The correction of errors under Article 33(1)(a)

SC contended that the Tribunal had no power under Article 33(1)(a) of the Model Law to make the purported corrections.

Article 33(1) provides that:

“Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties: (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature” (emphasis added)

As regards the part highlighted in Article 33(1)(a) above, SC contended that the power under Article 33(1)(a) to correct an award is confined to errors which stem from a “mental lapse” or a “slip of the pen”, or are mathematical or typing errors, but do not include errors which stem from “an error of judgment”.

The Court ruled that the Tribunal’s omission to make orders with respect to the grant of the licence and to grant the injunctive relief did not fall within the power under Article 33(1)(a):

(a) The omissions / failures were not errors in computation, which relate to mistakes in calculation only, and

(b) The omissions / failures were not typographical errors.

The Addendum under Article 33(3)

The Court then considered whether the Addendum could be considered to be an additional award, pursuant to Article 33(3) of the Model Law.

Article 33 (3) provides that:

“Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.”
(emphasis added)

SC argued that all issues of OE’s entitlement to relief had been dealt with and determined by the Tribunal in the Dispositive Order, when it declared that “*all other claims and reliefs sought by the Parties are rejected*”.

However, the Court agreed with OE's submissions that in determining whether the Tribunal had "*dealt with*" OE's claims in the Arbitration for the relief relating to the licence and the injunctions, the Award must be read in its context.

After considering the Award, the Court was of the view that (a) an injunction against SC's various breaches under the Agreement should flow from the Tribunal's findings, and (b) the Tribunal must have intended that a royalty free perpetual licence should be granted to OE. As a result, the Court considered that the "rejection" of "*all other claims and reliefs sought by the Parties*" in the Dispositive Order was not the true objective intent of the Award, and that OE's claims for the injunction and the licence had not been "dealt with" by the Tribunal.

In view of the above, the Court decided that the Tribunal was entitled under Article 33(3) to make an additional award.

Major take-away points

First, this case reinforces the narrow scope of the "slip rule" under Article 33(1)(a). A correction of an arbitration award is allowed under this provision only if it is an error in calculation or a typographical type error.

Secondly, this case shows that, in considering Article 33(3), the courts will read an arbitration award in its context before deciding whether the tribunal has "dealt with" a party's claim. The wording "all other claims and reliefs sought are rejected" that commonly is found at the end of an award is not conclusive.

Thirdly, this case again is consistent with the pro-arbitration and pro-enforcement attitude of the Hong Kong courts. As it was stated by the Court in *SC v OE1*, there are good policy reasons for the Court to facilitate the arbitration process, which includes refusing to intervene in an arbitration where the Tribunal has the power to amend an error or to make an additional award under Article 33 of the Model Law.

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