

Insights

HONG KONG COURT REFUSES TO UPHOLD AN ARBITRAL AWARD FOR ENFORCEMENT ON GROUNDS OF EXCESS OF AUTHORITY AND DENIAL OF A FAIR HEARING

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SUMMARY

In *X v Y* (HCCT 62/2018) [2020] HKCFI 2782 (Date of Decision: 5 November 2020), the Hong Kong Court of First Instance (the **Court**) set aside an order to enforce an arbitration award on the basis (i) that the tribunal's findings were beyond the scope of the arbitration clause and the parties submission to arbitration, and (ii) that the respondent in the arbitration had not been given a reasonable opportunity to present its case and to meet the case of the claimant in the arbitration.

In her judgment, Mimmie Chan J explained the principles for determining the proper scope of the tribunal's jurisdiction where a dispute involves a series of connected agreements that are subject to different dispute resolution clauses. The court also provided guidance on how arbitrators should proceed if they are impressed by a point that had never been explored or advanced by either side in evidence or submissions.

BACKGROUND

The dispute arose from a series of investment structures that were set up between a Taiwanese life insurance company (the **Claimant**) and a bank (the **Respondent**), including the subscription to a unit trust.

On the investment side, the Claimant had granted a discretionary investment management mandate in favour of the Respondent (the **Mandate**) for the management of various assets held by the Claimant, directly or indirectly through a trustee (the **Trustee**) in the unit trust account maintained with the Singaporean branch of the Respondent (the **Unit Trust Account**). The Mandate was governed by the laws of Taiwan, and the parties agreed to arbitration by the Arbitration Association of the Republic of China.

On what the Court called the credit side of the transaction, the Claimant (acting through the Trustee) pledged its assets in the Unit Trust Account to the Respondent (the **Pledge**) as security for the facilities granted by the Respondent to a subsidiary of the Claimant (the **Subsidiary**). The Pledge was governed by the laws of Singapore and the parties agreed to submit to the non-exclusive jurisdiction of the courts of Singapore, with an option for the Respondent to bring proceedings in the courts of other jurisdictions.

After the Claimant was put into receivership, the receiver terminated the Mandate and demanded the Respondent to return all the monies in the Unit Trust Account. The Respondent retained the portion that was subject to the Pledge, and returned the remainder to the Claimant.

THE ARBITRATION

The Claimant commenced an arbitration pursuant to the arbitration clause in the Mandate for the Respondent's failure to return the money and assets (the **Arbitration**). The Claimant argued that, because the Subsidiary had been set up by two rogue employees for their own benefit, the Pledge was void for the lack of consideration. On the Claimant's alternative case, if the Pledge was valid, the Respondent was liable in tort for assisting, concealing and covering the fact that the two rogue employees violated the Taiwanese regulations which prohibited insurance companies from providing security for the debts of others.

In parallel, the Respondent sought a declaration from the Singaporean courts on the validity and enforceability of the Pledge, and applied for the stay of the Arbitration pending the resolution of the Singaporean litigation. The stay application was unsuccessful.

In the arbitration, the arbitral tribunal made an award in favour of the Claimant (the **Award**). The Tribunal found that the deployment of the Claimant's assets under the Mandate and the Pledge were prohibited under the Taiwan Insurance Act. It was common ground between the Taiwanese law experts that the contravention of the relevant provisions in the Act merely give rise to criminal liability and would not render a transaction invalid, but nonetheless the Tribunal found that the provisions had the effect of invalidating both the Mandate and the Pledge.

The Tribunal deliberately refrained from examining the Pledge's validity from a Singapore law perspective, and held that the Pledge was invalid as a matter of Taiwanese law. Accordingly, the assets transferred by the Claimant to the Respondent remained the Claimant's assets, and the Tribunal ordered the Respondent to return all the assets to the Claimant.

After the Claimant was granted leave by the Court to enforce the Award, the Respondent applied to set aside the enforcement order under section 86 of the Arbitration Ordinance.

The Respondent's challenge to the Award was that the Award dealt with matters beyond the scope of the submission to arbitration, and that the Respondent had been unable to present its case in the Arbitration.

ISSUE 1: WHETHER THE TRIBUNAL'S DETERMINATION EXCEEDED THE SCOPE OF THE PARTIES' SUBMISSION TO ARBITRATION

The usual starting point, in general terms, is that parties should be taken to have intended to resolve all of their disputes in front of the same tribunal. This is often referred to as the "Fiona Trust presumption", from the well-known UK decision in *Fiona Trust & Holdings Corp v Privalov* [2007] UKHL 40.

The Court referred to various authorities and concluded that, if parties enter into multiple related commercial agreements and the overall contractual package contains multiple choice of law and jurisdiction clauses which govern different aspects of their relationships, the usual presumed starting point might be rebutted. This, the Court reasoned, is because it is improbable that a jurisdiction clause was intended to capture disputes more naturally seen as arising under a different (related) contract, and sensible or rational business people would not have intended that a dispute, at one and the same time, could fall within the scope of two inconsistent dispute resolution agreements.

As such, the Court accepted the Respondent's submission that the proper test for construing dispute resolution clauses in such circumstances is that the parties should be taken to intend to resolve a dispute or claim under the dispute resolution mechanism set out in the agreement which has the closest connection with the dispute or claim. This, the Court explained, involves considering which contractual dispute resolution provision is at "the centre of gravity" or the "commercial centre" of the particular dispute in question.

The real issue in the Arbitration was whether the Respondent could rely on the Pledge to retain the assets in the Unit Trust Account after the Claimant terminated the Mandate. Therefore, it was the Pledge that had the closest connection to the dispute.

Because the parties had agreed to resolve disputes relating to the Pledge by litigation in Singapore, the Tribunal should have recognised such agreement as the limits to its jurisdiction. If a question of the Pledge (including its validity) arose in the Arbitration, the Tribunal should have referred the question to final determination by the Singaporean courts.

For these reasons, the Court refused to uphold the Award for enforcement on the ground that the Award dealt with matters beyond the scope of the arbitration clause and the parties' submission to arbitration in the Arbitration.

ISSUE 2: WHETHER THE RESPONDENT HAD BEEN UNABLE TO PRESENT ITS CASE IN THE ARBITRATION

In the post-hearing submissions, the Claimant argued for the first time that the Pledge was void from a Taiwanese law perspective. Although the validity of the Pledge was an active issue in the Arbitration, previously both parties had advanced their cases on the basis that the validity of the

Pledge was governed by Singapore law, and that the Taiwan Insurance Act did not have an effect on the Pledge's validity.

The parties had exchanged post-hearing briefs simultaneously and accordingly there had been no opportunity for the Respondent to comment on the Claimant's new argument. Despite this, the Tribunal proceeded and found that the Pledge was void under the Taiwan Insurance Act.

The Court pointed out that, in examining whether a party was given an adequate opportunity to comment on a substantive criticism of its claim or defence, it is important to examine the case about which the party was given prior notice. In particular, a party is only expected to make submissions on the issues as framed in the pleaded case and the evidence, and not beyond.

The Court held that the Tribunal's findings involved a significant departure from the case presented by the parties before the post-hearing submissions were exchanged. Although the Tribunal had invited the parties to comment on the effect of the Taiwanese provisions and the validity of the investment under Taiwanese law in the post-hearing submissions, in the Court's view, this was not sufficient to fulfil the Tribunal's duty to give the Respondent a fair opportunity to be heard. If the Tribunal is impressed by a point that had not been raised by either party, then natural justice requires the Tribunal to put the point to the parties and give the parties an opportunity to deal with it.

Therefore, having found that the Respondent had not been given a reasonable opportunity to present its case and to meet the Claimant's case, and had suffered substantive injustice as a result, the Court set aside the enforcement order.

BCLP PERSPECTIVE

This is a rare case where the Hong Kong courts, acting as the enforcement court rather than supervisory court, refused to uphold an arbitral award for failing to meet the standards of due process under Hong Kong law.

The refusal to enforce comes against the background of Hong Kong's well established reputation as a pro-arbitration and pro-enforcement jurisdiction. However, upon closer examination, it shows that Hong Kong courts – quite rightly - place great emphasis on the integrity of the arbitration proceedings and will protect parties' right to a fair hearing and due process.

This case also highlights that great care should be taken when a point that was not pleaded by either party arises in the course of the hearing or at a late stage of the proceedings. The judgment serves as an important reminder to those involved in the arbitration process (both party representatives and tribunal members) to act fairly and to observe and uphold the principles of natural justice.

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