

Insights

## **RISKS OF HAVING AN OVERLY HELPFUL TRIBUNAL - ARBITRAL AWARD SET ASIDE BY A HONG KONG COURT FOR CONTAINING DECISIONS ON MATTERS BEYOND THE SCOPE OF THE SUBMISSION TO THE ARBITRATION**

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### **SUMMARY**

In *Arjowiggins HKK2 Ltd v X Co* [2022] HKCFI 128, after dismissing the claims and declining to grant the pleaded remedy, the tribunal invited submissions from the parties on an alternative remedy and ultimately granted relief that was not asked for in the pleadings.

The respondent in the arbitration applied to set aside the award under Article 34(2)(a)(iii) of the UNCITRAL Model Law as incorporated by section 81(1) of the Arbitration Ordinance. In a judgment dated 12 January 2022, the Hong Kong Court of First Instance set aside the award on the ground that the award contained decisions on matters beyond the scope of the parties' submission to arbitration.

### **THE CLAIMS IN THE ARBITRATION**

This case arose out of a shareholder dispute relating to a Sino-foreign equity joint venture company incorporated in the PRC (JV Company).

After the relationship between the shareholders turned sour, a series of legal proceedings was commenced. Relevantly, voluntary liquidation proceedings were commenced in 2014, followed by the arbitration with which the present judgment is concerned (Arbitration) in 2018, and by the compulsory liquidation proceedings in October 2019, two months before the hearing of the Arbitration.

In the Arbitration, the Chinese JV partner (Claimant) sought an order that the foreign JV partner (Respondent) should deliver up the JV Company's accounting books and documents (Documents) to the Claimant.

In brief, the Claimant's case was that, under the joint venture contract (JV Contract) and as a matter of PRC law, the Claimant was entitled to take exclusive possession of the Documents upon dissolution of the JV Company, and such an entitlement was a form of proprietary right. Because the Respondent rather than the JV Company had possession, custody or control over the Documents, the Claimant sought an order for the return and examination of the Documents.

## THE AWARD

While the tribunal found that the Documents indeed were in the Respondent's possession, custody and control, the tribunal held that the Claimant had no right to own or possess the Documents because (a) the JV Company had not been dissolved and therefore the JV Company had retained the proprietary right to the Documents, (b) PRC laws merely imposed a duty on the Claimant to retain the Documents upon the JV Company's dissolution, and did not confer a proprietary right upon the Claimant over the Documents, and (c) the parties' obligations under the JV Contract to cooperate in the liquidation of the JV Company and to abide by PRC laws in respect of their responsibilities to the JV Company did not give the Claimant the right to call for the delivery of the Documents to itself.

## THE PROBLEMATIC ORDER

However, the tribunal did not stop after dealing with the claim for "delivery up". To the contrary, after concluding that the parties have a right to a proper liquidation, the tribunal invited submissions as to the disposal of the Documents.

The Claimant then sought an order for the delivery of the Documents to the Compulsory Liquidation Group appointed by the relevant PRC court in the compulsory liquidation proceedings (New Delivery Order).

In response, the Respondent submitted that the tribunal had no jurisdiction to make the New Delivery Order. First, the Claimant had never amended its pleadings to seek such a relief after the Compulsory Liquidation Group was appointed. Second, such a relief was inconsistent with the Claimant's own pleaded case that the Claimant itself had the proprietary right to the Documents. Third, the Claimant had not pleaded that the Respondent was in breach of the contractual terms relating to liquidation, and the proper way to liquidate the JV Company had never been in issue. If such matters were in issue, the Respondent would have called for expert evidence on such matters and would have raised counterclaims in respect of what it said were the Claimant's acts of obstruction in the liquidation process. The Respondent therefore has submitted to the tribunal that the tribunal should dismiss the Claimant's belated request for delivery of the Documents to the Compulsory Liquidation Group, make no order as to the disposal of the Documents, and award the Respondent its costs as the successful party.

The tribunal nonetheless made the New Delivery Order after concluding (a) that, as a matter concerning the parties' rights and obligations under the JV Contract, the question of available

remedies was within the tribunal's jurisdiction, (b) that the tribunal was not precluded from awarding a proper remedy to a party and had a duty to do so, even though such a remedy was not asked for, and (c) that the parties had been afforded equal treatment and opportunity to make further submissions on the appropriate orders.

The Respondent applied to court to set aside the award.

## THE SETTING ASIDE DECISION

The court set aside the New Delivery Order after finding that the New Delivery Order was beyond the scope of the parties' submission to the Arbitration.

The court explained that the course of the proceedings and the relief to be granted are determined by reference to the pleadings. The fact that an issue or a matter is within the wide scope of an arbitration agreement does not necessarily mean that the issue or matter is within the scope of the submission to the arbitration.

The court emphasised that, while arbitral procedures could be informal, principles of fairness require that surprises be avoided. A party to an arbitration is entitled to know in advance, before the hearing and to as full an extent as possible, the claims and remedies that are sought against it, so that it may consider all its defences and decide on the full extent of evidence to be adduced. In the court's view, advancing new legal consequences in opening submissions amounts to a "trial by ambush" and is unfair to the ambushed party.

In the present case, the parties agreed to refer the Claimant's pleaded case concerning its entitlement and right to the Documents and the delivery to it of such Documents to the tribunal for determination. Therefore, the Respondent was entitled to prepare its defence and evidence accordingly.

The real question, the court explained, was whether the Respondent had been surprised by the claims for the alleged entitlement and right to the proper liquidation of the JV Company and for the New Delivery Order. In the court's view, the Respondent indeed had been surprised because the Respondent could not reasonably have anticipated either the claim or the New Delivery Order from the pleadings. Therefore, such matters were outside the scope of the Respondent's submission to the Arbitration.

In doing so, the court clarified that it is irrelevant that the parties had been given an opportunity to present their case and call further evidence on the New Delivery Order, or that the New Delivery Order could be made based on the evidence adduced in the Arbitration.

## BCLP PERSPECTIVE

This case serves as an important reminder to both party representatives and tribunal members to take great care when an additional claim or relief is sought to be raised only during the course of

the hearing or at a late stage of the proceedings.

The parties' pleaded cases generally serve as the boundaries of the tribunal's jurisdiction (and of course the scope of the arbitration agreement and the scope of the submission to arbitration also must be considered). Tribunals should conduct arbitral proceedings subject to such boundaries and should resist the urge commercially to bring a resolution to a dispute by granting relief that was not pleaded.

Claimants should give careful and early consideration as to whether to plead additional claims and remedies as alternative or fallback in case their primary claims and remedies fail or are rejected. It also may be advisable for claimants to seek to amend the pleadings where a previously unavailable remedy has become available due to a change in the circumstances.

Conversely, respondents should ensure that the scope of the disputes referred by the parties to a particular tribunal for determination in a particular arbitration is defined in clear manner. To this end, parties and tribunals could utilise procedural tools such as terms of reference and agreed list of issues.

## **RELATED CAPABILITIES**

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## MEET THE TEAM



### **Glenn Haley**

Hong Kong SAR

[glenn.haley@bclplaw.com](mailto:glenn.haley@bclplaw.com)

[+852 3143 8450](tel:+85231438450)



### **Horace Pang**

Hong Kong SAR

[horace.pang@bclplaw.com](mailto:horace.pang@bclplaw.com)

[+852 3143 8411](tel:+85231438411)

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