

Insights

HK COURT CLARIFIED AND CONFIRMED THAT ORDERS FOR INTERIM MEASURES CANNOT BE CHALLENGED USING THE GROUNDS FOR SETTING ASIDE FINAL AWARDS

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SUMMARY

In *G v N* [2024] HKCFI 721 (judgment date: 11 March 2024), a Hong Kong court dismissed an application to set aside the enforcement of an interim order which an arbitrator had made requiring a party to take steps to dismiss the proceedings commenced by it against the other party and the other party's subsidiaries. In doing so, the court considered and clarified the distinction between interim measures and awards for the purpose of enforcement and setting-aside proceedings, and the separate regimes that apply to them.

THE ARBITRATION AND THE INTERIM ORDER

The arbitration arose out of a share purchase agreement entered into between G and N in October 2020, for N to allot and place additional shares in G (**SPA**). After the share placement was found by the BVI courts to be void, G commenced an arbitration against N in March 2021, seeking the recovering of the monies that had been paid by G to N in consideration for the share placement. (For a discussion of the awards rendered in the arbitration and the court's decisions to remit the awards to the arbitrator, see our previous case note.

In December 2021, G commenced court proceedings in Shenzhen against N and N's subsidiaries (**SZ Proceedings**). In response, N obtained from the arbitrator an interim order requiring G to "*take all necessary steps to dismiss*" the SZ Proceedings (**Interim Order**), and N subsequently obtained leave to enforce the Interim Order in Hong Kong (**Enforcement Order**).

G applied to set aside the Enforcement Order on two grounds: (1) that there was no evidence to suggest that N's subsidiaries were bound by the arbitration agreement or the results of the arbitration (**non-party argument**); and (2) that the Arbitrator had failed to deal with G's submissions, that the Interim Order contained decisions or matters beyond the scope of submission to arbitration, and that it would be contrary to policy to enforce the Interim Order.

THE DISTINCTION BETWEEN INTERIM MEASURES AND FINAL AWARDS

After observing that the Arbitration Ordinance provides separate regimes for the enforcement of interim measures on the one hand and final awards on the other hand, the court considered both legal literature and case law regarding the distinction between the two.

The court went on to consider the substance, form and nature of the issues that had been decided in the Interim Order. Among others, the court considered and applied the factors in *ZCCM Investments Holdings v Kansanshi Holdings* [2019] 1 CLC 770 for classifying whether an order is an interim measure or a final award.

In the present case, the court found that (a) there had been no final determination in the Interim Order of the issues or of the merits of the claims in the arbitration or in the SZ Proceedings, (b) the Interim Order did not decide the parties' substantive rights under the SPA, (c) the Interim Order did not dispose of the matters submitted to arbitration or render the arbitrator *functus officio*; and instead the arbitrator continued to act, and (d) the Interim Order was described by the arbitrator as "*an interim order in the form of an injunction*". Anti-suit injunctions, according to the court, usually are treated and granted by HK courts as an interim measure.

The court concluded that the Interim Order was to be classified as an interim order rather than a final award.

REVIEWABILITY OF THE COURT'S DECISION TO GRANT OR REFUSE THE ENFORCEMENT OF INTERIM MEASURES

The court observed that, under the regime for the enforcement of interim orders, the court may refuse to enforce an interim order only on very limited grounds, and a decision to grant or refuse leave to enforce an interim order is not subject to appeal. In particular, under Section 61 of the Arbitration Ordinance, an order or direction made by an arbitral tribunal is enforceable with leave of the court provided that, in the case of an order or direction made outside Hong Kong, the order or direction must belong to a type or description of order or direction that may be made by a Hong Kong-seated tribunal. Section 61 further provides that the court's decision to grant or refuse enforcement of the arbitral tribunal's order or direction is not subject to appeal. As pointed out by the court, such a regime is far more restrictive than the regime provided for in the Model Law.

The court held that the Enforcement Order was not subject to challenge under Section 61, and added that the grounds relied on by G did not apply to the Interim Order.

MERITS OF THE CHALLENGE IF THE ORDER WAS TO BE TREATED AS A FINAL AWARD

The court went on to consider the grounds relied on by G, if the Interim Order was to be considered a final award to which Section 81 rather than Section 61 would apply.

The court considered that the non-party argument was an issue of law, which involved the construction of the arbitration agreement and the underlying contract, and that the absence or sufficiency of PRC law evidence on the matter was not a ground for setting aside the award. As to G's contention that the Interim Order cannot be enforced or performed in the PRC, the court held that the enforceability of the Interim Order in the PRC was not a ground for setting it aside in Hong Kong. The court further noted that such a contention would amount to a claim of illegality and should have been raised in the arbitration, but G had not done so.

The court found that the arbitrator in fact had dealt with and had given adequate reasons for his decision on the non-party argument. The court emphasised that the applicant seeking to set aside an award on the ground a tribunal has failed to deal with an issue in an award faces a high threshold: the court would read the award in a reasonable and commercial way, and the court would infer that the tribunal had failed to consider an important issue only if such an inference is "*clear and virtually inescapable*".

The court held that there were no merits in G's challenges against the Enforcement Order, even if the Interim Order were to be considered a final award rather than an interim order.

KEY TAKEAWAYS AND CONCLUDING REMARKS

The court's judgment highlights the importance of the distinction between interim orders or directions and final awards for the purpose of enforcement and setting-aside proceedings, and the pro-arbitration and pro-enforcement approach under the Hong Kong arbitration legislation towards the enforcement of interim orders or directions made by arbitral tribunals in arbitrations seated in Hong Kong and overseas.

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