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New year, more views – arbitration highlights in the Year of the Ox

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As the world welcomes in the Year of the Ox, we take a look back at 10 recent decisions that made an impact in the past year.

In the decisions, the courts considered fundamental issues such as when an arbitral award may be set aside on grounds of public policy, when the courts can step in to remove an arbitrator for apparent bias, and whether there was a valid arbitration agreement in the first place.

Mirror, mirror on the wall

The Hong Kong Court of Final Appeal has confirmed that the courts can go beyond the strict terms of an arbitral award when enforcing an arbitral award pursuant to a common law action and are not limited to mechanically "mirroring" the terms of the award itself.

Xiamen Xinjingdi Group Co Ltd. v. Eton Properties Ltd. [2020] HKCFA 32 concerned an agreement by the defendant to sell rights to develop a plot of land in Xiamen to the plaintiff. The defendant warranted it had complete control over a foreign-owned enterprise incorporated in the mainland which retained the rights to develop the land. The defendant agreed to sell its shares in the subsidiary to the plaintiff which would give it the rights to develop the land.

Shortly after the agreement, and unbeknownst to the plaintiff at the time, the defendant restructured itself so that performance of the agreement would have been impossible. The defendant purported to repudiate the agreement and started developing the land itself.

The plaintiff commenced China International Economic and Trade Arbitration Commission (CIETAC) arbitration proceedings against the defendant in August 2005. In October 2006, the tribunal awarded the plaintiff damages for breach of contract and ordered that the defendant should continue to perform its obligations under the agreement.

The Hong Kong court granted the plaintiff leave to enforce the award in October 2007 pursuant to section 2GG of the then Arbitration Ordinance (Cap. 341) (the previous provision on the enforcement of decisions of an arbitral tribunal – an award, order, or direction, which has been largely replicated in section 61 of the current Arbitration Ordinance (Cap.609) (the Arbitration Ordinance)), however a few months later, in January 2008, the defendant applied to set aside the award on the grounds that it was impossible to perform the award, only then making the restructuring known to the plaintiff. The plaintiff brought a new common law action to enforce the award as well as against other related parties.

The judge at first instance took the view that the court's role was limited to "mechanistically" treating the award into a judgment that mirrored the terms of the award and was troubled that, by asking for monetary compensation by way of damages, the court was being asked to grant relief that had not even been requested by the tribunal.

The Court of Appeal took the view that there is an implied mutual promise to honor an arbitral award and that, in a common law action, the court is not limited to merely enforcing the terms of an arbitral award and may in addition order damages or equitable compensation.

The Court of Final Appeal agreed with the Court of Appeal. By making an order at the enforcement stage, the court does not usurp the functions of the arbitral tribunal but is instead tailoring a remedy that will give effect to the award.

Key takeaways:

- The relief available in Hong Kong in a common law action to enforce is not confined to the terms of the award.

- The courts retain the discretion to consider where circumstances have changed after an award has been delivered.
- The decision again illustrates the traditional pro-enforcement stance of the Hong Kong courts in enforcement of arbitral awards.

Name confusion

A recent Hong Kong Court of First Instance judgment of *AB v. CD* [2021] HKCFI 327 set aside an arbitral award due to the lack of valid arbitration agreement between the parties. The agreement in question was made between CD and AB's parent company at that time (the previous parent company). However, AB underwent a series of restructurings and became a subsidiary of another company thereafter. AB and the previous parent company had different unified social credit codes in mainland China with different establishment dates and hence were two separate and distinct legal entities.

CD claimed that AB was party to the agreement by relying on a single clause in the definitions section of the agreement where the parent company was defined to mean "[the previous parent company] or any other affiliated entity." The court rejected CD's reliance on this "apparently wide definition" and clarified that whether AB was a party to the agreement was a matter of construction of the agreement.

The court distinguished this case from *Giorgio Armani SpA v. Elan Clothes Co. Ltd.* [2019] 2 HKLRD 313, which involved an agreement that was clearly expressed to have been made "by and between" the parent company "together with its branch offices and Affiliates", and each of these parties were referred to as a "party". There were also references to the affiliates and descriptions of the parties throughout the agreement.

However, in the present case, there was no clear indication in the agreement that AB was involved at all. Neither was there any reference to other subsidiary or affiliates of the previous parent company in any other parts of the agreement that set out the parties' rights and obligations. Hence, the court held that AB was not a party to the agreement.

The court took the opportunity to reiterate the importance of giving the opponent adequate and proper notice of arbitration in arbitration proceedings. It was held in the case that no proper notice was given to AB as the notice of arbitration and the subsequent amended notice were both served at the wrong addresses, and that the respondent named in both the notice of arbitration and amended notice of arbitration was not AB.

CD further raised the issue of estoppel by claiming that AB was estopped and debarred from applying to set aside the arbitration award because it misled CD and the tribunal into believing that it was the same company as the previous parent company.

The court rejected CD's claim and reiterated that AB, which denied being a party to the agreement, had no obligation to participate in the arbitration. Instead, it was the claimant's responsibility to identify the proper respondent and verify its name, especially when there was doubt. Blame should not be put on AB or the previous parent company for the confusion.

Key takeaways:

- It is a matter of construction of the relevant agreement in determining who is a party to the agreement.

- Claimants in arbitration proceedings should always identify the proper respondents and verify their names.
- There are serious consequences if service is defective. Service of notice of arbitration must be carried out with extra care as failure to give proper service of notice of arbitration is a ground for setting aside an arbitral award or refusing enforcement – particularly, the names of the parties and addresses of service should be carefully checked.
- The key issue is to demonstrate that the notice of arbitration has been served or could be deemed to have been served.
- This case follows the Hong Kong Court of First Instance case of *Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd* [2016] HKEC 2128, where an award was set aside on the ground that the respondent was not afforded an opportunity to present its case. In *Sun Tian Gang*, the respondent was incarcerated in mainland China and did not receive the notice of arbitration and other documents, hence rebutted the presumption that they were deemed to be served.

Cardinal duty

In the United Kingdom Supreme Court judgment of *Halliburton Company v. Chubb Bermuda Insurance Ltd*. [2020] UKSC 48, the court considered an application to remove an arbitrator for apparent bias.

This is the leading English law case for arbitrator conflicts and one of the most significant decisions in English arbitration law in the last few years.

The court considered that the fundamental concern behind Halliburton's complaint was valid but dismissed Halliburton's complaint on the relevant facts. In arriving at this conclusion, the court emphasized the importance of arbitrator impartiality in London-seated arbitrations.

The dispute arose out of insurance claims regarding the explosion of the Deepwater Horizon oil rig in the Gulf of Mexico in 2010. Halliburton, which had provided cementing and well-monitoring services, was insured by Chubb under a Bermuda Form liability insurance policy. Halliburton settled its legal claims and then sought to recover these payments from Chubb under the policy. Chubb refused to pay out, so Halliburton commenced arbitration proceedings against Chubb.

Under the terms of the arbitration clause, which provided for London-seated arbitration, Halliburton and Chubb each appointed one arbitrator but, as they could not agree on the third arbitrator (to act as chairman), he was appointed by the High Court.

The chairman disclosed involvement in prior arbitrations involving Chubb. Neither side took issue with the multiple appointments.

Subsequently, and without Halliburton's knowledge, the appointed arbitrator then accepted arbitrator appointments in two further arbitral references – in Arbitration 2 he was appointed by Chubb, and in Arbitration 3 the subject matter was the Deepwater Horizon with the same facts but arose out of a different policy.

Halliburton found out and requested the chairman to resign. The chairman offered to resign whereas Chubb insisted that he remain.

Halliburton applied to the High Court under section 24(1)(a) of the Arbitration Act 1996 (the 1996 Act) to have the arbitrator removed as arbitrator for apparent bias on the ground, "that circumstances exist that give rise to justifiable doubts as to his impartiality" .

The High Court and the Court of Appeal refused Halliburton's application. The High Court ruled that there were benefits of multiple appointments. The chairman had a reputation for integrity, since there were no concerns at the time of his appointment, so there was no obligation to disclose. Accordingly, the chairman was not removed. The Court of Appeal held there was a legal duty to disclose new appointments like these and this duty was breached, but the chairman was not removed for apparent bias due to his integrity and repute.

Halliburton appealed to the Supreme Court.

The principal issues raised in the appeal were:

- Whether and to what extent an arbitrator's acceptance of appointments in multiple references concerning the same or overlapping subject matter (in this case, liability insurance claims arising out of the oil rig incident) with only one common party (in this case, Chubb) could give rise to the appearance of bias?
- Whether and to what extent an arbitrator can accept such appointments without disclosing them?

In deciding the principal issues, the Supreme Court considered an arbitrator's core duties of impartiality and of disclosure, and how far an arbitrator's obligation to respect privacy and confidentiality constrains the ability to make disclosure.

The duty of impartiality is a "cardinal duty" of an arbitrator and is enshrined within section 33 of the 1996 Act which sets out an arbitrator's general duty to "act fairly and impartially as between the parties". The test for whether an arbitrator has shown impartiality or apparent bias in section 24(1)(a) of the 1996 Act (i.e., "that circumstances exist that give rise to justifiable doubts as to his impartiality") is the same as that at common law, and is an objective test.

An arbitrator in London-seated arbitrations has a legal duty of disclosure under section 33 of the 1996 Act. This duty also gives rise to an implied term in the arbitrator's contract with the parties that he will act fairly and impartially. An arbitrator is obliged to disclose facts or circumstances known to them which would or might reasonably cause the objective observer (having considered the facts) to conclude that there was a real possibility that the arbitrator was biased.

The Supreme Court noted there may be circumstances in which an arbitrator's acceptance of appointments in multiple arbitral references involving a common party and the same or overlapping subject matter would, without more, give rise to an appearance of bias. Whether such an appointment does so in fact, will depend on the facts of the case, the terms of the arbitration clause and the customs and practices in the relevant field of arbitration.

Where there is a common party to two overlapping arbitrations, there is a possibility it might obtain an advantage in the first arbitration by having access to information about the common arbitrator's responses to the evidence or arguments advanced in the second arbitration.

Accordingly, the arbitrator was under a legal duty at that time to disclose to Halliburton his appointment in the subsequent arbitration involving Chubb, as well as the fact that it arose out of the same incident and was a party-appointment. In failing to make that disclosure, the arbitrator breached his legal duty of disclosure.

However, no apparent bias was found on the part of the arbitrator. This was because, among other reasons, the arbitrator's failure to disclose was an oversight at a time when it was not clear whether English law imposed a legal duty of disclosure; the subsequent arbitrations had commenced several months after the Halliburton arbitration, which would normally be expected to be heard first – there was no question of the arbitrator having received any secret financial benefit and there was no basis for inferring ill-will on the part of the arbitrator towards Halliburton.

Key takeaways:

- There is a legal duty of disclosure where it would or might reasonably lead a fair-minded observer to conclude a real possibility of bias. Confidentiality cannot excuse a failure to disclose when the test requires a duty to disclose. Arbitrators must do so or decline the appointment.
- The test and the removal of arbitrators for apparent bias is the same test as the removal for a judge: whether a fair-minded observer would conclude there to be a real possibility of bias. Hong Kong has adopted the same test for bias (see for example, the Hong Kong case of *Gao Haiyan v. Keeneye Holdings Ltd* [2012] 1 HKLRD 627). This is applied by institutions like the Hong Kong International Arbitration Centre (HKIAC) in challenges to arbitrators. According to the HKIAC, as of 22 February 2021, there have been 28 challenges, 20 of which have been rejected, four withdrawn, three arbitrators resigned, and one is still pending.
- In *Halliburton*, there was no express agreement between the parties on arbitrator disclosure, whether by arbitral rules or otherwise. The arbitration agreement provided for ad hoc arbitration. Most institutional rules, such as Article 11(4) of the HKIAC Administered Arbitration Rules (HKIAC rules), deal with an arbitrator's duty of disclosure of any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.
- Multiple appointments are not per se impermissible. However, the acceptance by arbitrators of multiple appointments in multiple references with an overlapping subject matter and a common party may give rise to a real possibility of apparent bias. Whether it does so will be fact-specific and depend on the arbitration clause in question and the customs and practices in the relevant field of arbitration.
- For Hong Kong-seated arbitrations, section 25 of the Arbitration Ordinance already imposes a duty on the arbitrator to disclose such circumstances before and throughout their appointment. The judgment is therefore consistent with the Hong Kong position in this regard.

As good as cash

The Hong Kong court in *T v. W* [2020] HKCFI 2918 was asked to decide whether a dispute over a cheque was the same matter as the subject of an arbitration clause in a loan agreement and should be referred to arbitration.

In March 2020, the plaintiff issued a writ claiming the sum of HK\$5 million against the defendant as due and payable under a cheque drawn by the defendant on 16 May 2019 and post-dated 21 September 2019. The defendant applied to stay the proceedings to arbitration, relying upon an arbitration clause contained in a loan agreement between the parties. The agreement was governed by Hong Kong law and provided that any dispute should be arbitrated in Hong Kong.

According to section 20(1) of the Arbitration Ordinance, "a court before which an action is brought in a matter which is the subject of an arbitration agreement" shall, if a party so requests, refer the parties to arbitration unless it finds the agreement to be null and void, inoperative, or incapable of being performed. The onus is on the defendant, being the applicant for stay, to show that there is a prima facie or plainly arguable case that the parties are bound by an arbitration agreement.

The Honorable Madam Justice Mimmie Chan said it was clear from the authorities that the cause of action on a cheque is separate to the cause of action on the underlying contract. Bills of exchange had always been regarded as the equivalent of cash.

The position in Hong Kong is the same as in English law – a bill of exchange is not valid if it incorporates an arbitration clause. To hold otherwise would make a very substantial inroad upon the commercial principle on which bills of exchange have always rested. There had to be a plain manifestation in the arbitration clause that it is to apply to bills of exchange for the presumption to be rebutted.

The court rejected the defendant's arguments that it should follow the modern pro-arbitration trend and favor the one-stop resolution presumption, that disputes arising out of the same relationship should be determined by the same tribunal unless there is clear language to exclude any particular dispute.

The court dismissed the defendant's argument that the cheque and the loan agreement formed part of the same, single transaction. It seemed clear that the parties had intended the cheque to be offered and retained as security for the defendant's repayment of the loan on the due date. The language in the arbitration clause did not indicate that the agreement to arbitrate extended to claims made and disputes as to the parties' rights and liabilities under the cheque.

As rational business people, the parties must have had high regard for the importance and value of a cheque being issued and held as security "as good as cash."

Key takeaways:

- A cause of action on a cheque is separate to the cause of action on the underlying contract. The cheque itself is a separate contract.
- When considering whether proceedings should be stayed to arbitration, the court will consider whether the language in the arbitration agreement is sufficiently clear and whether the intention of the parties can be clearly discerned.
- While it is possible for an arbitration clause to be drafted wide enough to cover a claim made under a bill of exchange, there must be a plain manifestation in the arbitration clause that it is to apply to bills of exchange if the presumption against taking bills of exchange into arbitration is to be rebutted.
- The court adopted a commercial approach to the application of *Fiona Trust and Holding Corp v. Privalov* [2007] UKHL 40. Even if the construction of the arbitration agreement should indeed start with the presumption of one-stop dispute resolution, there are good commercial reasons for the parties here to agree otherwise. The parties as business persons must have realized and accepted that the plaintiff has a generally quicker and easier recovery procedure for the sum due under the cheque, by instituting legal proceedings and seeking summary judgment.

Forgery claim failure

The applicant in *Shenzhen Honeycomb System Co. Ltd. v. HCT Technologies (Hong Kong) Co. Ltd.* [2020] HKCFI 3175 sought leave of the court to enforce an award dated 20 June 2017 in arbitration proceedings commenced in mainland China against the respondent (HCT).

In May 2020, the court ruled against HCT's application to strike out and dismiss the proceedings on the basis that the action had not been commenced with due authority on the part of the applicant (SHS). Under section 92 of the Arbitration Ordinance, a mainland award is enforceable in Hong Kong in the same way as a court judgment. Section 95(2) provides that enforcement of a mainland award may be refused if the person against whom it is invoked proves that the agreement was not valid or that enforcement of the award would be contrary to public policy.

HCT opposed enforcement on the ground that the underlying agreement relied upon by the applicant was forged and was entered into without HCT's authority. Mimmie Chan J reminded HCT that these were serious allegations and noted the manner in which the allegations had been presented to the court.

Evidence was presented in the form of two affirmations given by a director of HCT in mainland China, neither of which was notarized or even signed before any witness or lawyer in the mainland. The affirmations were in English and signed in Chinese but there was no declaration made by HCT's Hong Kong lawyer that the affirmations had been explained to the director or translated to him.

On the basis of the bare and untested assertions made in the affirmations, the court had no hesitation in dismissing HCT's claims of forgery. The assertions essentially relied on the fact that one of the shareholders and directors of HCT (who was also a director of SHS) had been removed from HCT's business in July 2015 but had refused to return to HCT the company chop and seals.

The court found however that there were business dealings between the parties, and that overseas customers placed orders for products manufactured by SHS and that payment was made by the customers to HCT. HCT had also paid US\$2 million to SHS in an earlier arbitration based on the same agreement in 2015. HCT had taken no action to challenge or set aside the earlier award on the basis of the agreement being forged. Instead, HCT chose to make payment. In the court's view, the conduct of HCT in making payment under the first award and making subsequent payments were all consistent with the existence of a genuine and effective agreement.

The court also dismissed HCT's arguments that the agreement was not signed and only contained the chops of the parties. From her experience of dealing with evidence of mainland contracts, Mimmie Chan J could not accept the feature to be so rare or unusual that it had to mean the agreement was a forgery.

Taking all the circumstances and evidence into account, the court held that HCT had failed to produce sufficiently cogent evidence to prove the agreement was forged and that there was no valid arbitration agreement between the parties to confer jurisdiction on the tribunal. The public policy challenge therefore fell away.

Key takeaways:

- Claims of fraud and serious misconduct must be plainly established by inferring from proved facts. The court is not entitled to choose between guesses on the ground that one explanation seems more likely than the other.

- The more serious the allegation, the less likely it is that the event occurred and so the stronger should be the evidence before the court concludes the allegation is established, on a balance of probability.

Arbitrator knows best

The court also dismissed the public policy ground for challenge to an arbitral award in *X v. Jemmy Chien* [2020] HKCFI 286. This was notwithstanding the plaintiff's argument that the underlying agreement was a sham and that implementing it would entail the commission of a criminal offence in Taiwan.

The plaintiff applied to set aside an arbitral award on merits and a separate award on interest and costs, claiming there was no valid arbitration agreement between the plaintiff and the defendant and that the award was in conflict with the public policy in Hong Kong. The court also heard the defendant's cross application to enforce the awards.

Mimmie Chan J reviewed the legal principles applicable to an application to set aside an arbitral award. In the context of international arbitration, the courts rarely intervene because their intervention is limited to true jurisdictional areas. 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.

The underlying service agreement between the parties (under which the disputes had arisen) was governed by PRC law, whilst the arbitration agreement contained within the service agreement was governed by Hong Kong law.

The court considered first, who were the proper parties to the agreements. The plaintiff contended that the defendant was not the true party to the service agreement, as the defendant had signed it as agent for [Philip] Chen, the principal and true party to the service agreement. The plaintiff alleged that the service agreement was in truth a sham to conceal Chen's involvement, that enforcement of the award would be giving effect to a sham and would be contrary to public policy in Hong Kong.

The plaintiff relied on the fact that prior to the execution of the service agreement, there had been no relationship between the defendant and the plaintiff and the group of which the plaintiff formed part. According to the plaintiff, the defendant was clearly described as a "representative" of a contracting party. The defendant had not participated in the negotiation of the service agreement, had little knowledge of its terms and never had any communication with the group.

In the award on merits, the arbitrator found that the defendant was the true party to the service agreement and therefore the true party to the arbitration agreement as well. The plaintiff argued that the arbitrator had erred in applying the "literal approach" of contractual interpretation under PRC law in determining whether the defendant was contracting in his personal capacity as principal. Had the arbitrator considered the factual matrix, he would have concluded that the defendant was not a party to either the service agreement or the arbitration agreement.

Mimmie Chan J said the arbitrator had made findings of fact on the basis of the evidence produced before him in the arbitration. The only suggestion of the defendant acting as agent was the defending signing in a space in the execution clause which had the words "Party B" and "Representative" typed in. An objective reading of the execution clause showed that the person who had signed for "Party A" had signed as representative of the named company, whereas the defendant himself had signed as "Party B".

The decision as to whether the defendant was a party, was a finding of law made on the basis of the facts found by the arbitrator as to the negotiations. The arbitrator was the best person to decide on questions of the parties' intention. It was not the role of the court to review the merits or correctness of the arbitrator's findings of credibility and of fact. Mimmie Chan J said she could not conclude that the arbitrator had made any mistake in finding there was a valid agreement between the defendant and the defendant generally.

As to the plaintiff's objection that the agreement offended Hong Kong public policy, the question was whether the arbitration clause in the agreement could be impeached by the existence of fraud or illegality. The plaintiff 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 involved an endeavor to perform an act which would be illegal in Taiwan. Yet there was no clear expert opinion that the performance of the service agreement constituted the commission of a criminal offence in Taiwan.

The court said that the ground on public policy had always been narrowly construed by the court. Non-enforcement of the awards had to be balanced against other public policy interests of upholding the agreement of parties to arbitrate their dispute, facilitating the enforcement of awards and observing obligations assumed under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards for the enforcement of arbitration awards. The court was not satisfied that the award should be set aside as sought by the plaintiff.

Key takeaways:

- This is a pro-arbitration decision of the Hong Kong courts. A party attempting to rely on the public policy defence to enforcement in Hong Kong has a high threshold to meet. The Hong Kong courts have traditionally stated that foreign arbitral awards should be given effect unless to do so would "violate the most basic notions of morality and justice" .
- Even if the ground of public policy was made out, the court has a residual discretion to refuse the setting aside of the award (*Hebei Import & Export Corp v. Polytek Engineering Co. Ltd.* (1999) 2 HKCFAR 111). The court confirmed in this case it would not, in the exercise of its residual discretion, set aside the award.
- Hong Kong courts may review the reasoning of an award to ensure that claims of illegality have been properly explored, but will generally avoid reviewing the merits of a particular award.
- It is not the role of the court to review the merits or correctness of the arbitrator's findings of credibility and of fact.
- The court also awarded costs on an indemnity basis against the plaintiff applying to set aside the award and resisting enforcement.

Boilerplate basics

The public policy argument was explored in the context of employees' statutory compensation and insurance policies in *Lau Lan Ying v. Top Hill Co.* [2021] HKCFI 290. The plaintiff suffered an accident at work and brought proceedings against the subcontractor that employed her and the main contractor. The main contractor brought third-party proceedings against its insurer claiming an indemnity for all losses arising out of the accident. The insurer claimed that the contractor had failed to provide sufficient information to evidence its claim. In turn, the contractor claimed that the insurer had wrongly repudiated liability under the policy.

The insurer applied to have the court proceedings stayed on the basis of an arbitration clause in the policy pursuant to section 20(1) of the Arbitration Ordinance and Order 12 rule 8 of the Rules of the High Court (Cap. 4A). The clause provided that "all differences arising out of this Policy shall be determined by arbitration".

The Honorable Mr. Justice Ng was asked to consider whether "boilerplate" arbitration clauses such as the one in the policy should apply where employees exercise their right to statutory compensation from their employer.

The guiding principle on construction of a document was to discover what a reasonable person would understand the parties to mean, having regard not merely to the individual words used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects it was intended to achieve.

The phrase "all differences...arising out of this Policy" had been construed by the courts "to confer the widest possible jurisdiction and a wide meaning," and a dispute "arising out of" the contract has been held to cover every dispute except a dispute as to whether there was ever a contract at all.

The court found that there was clearly a "difference" between the parties that arose out of the policy and fell squarely within the ambit of the clause. The fact that the case was before the court in the form of third party proceedings would not have affected the analysis. The court rejected the contractor's claim that there was a need for liability and the amount of the claim to be established by adjudication, arbitration of agreement for there to be an arbitrable "difference" .

In the court's view, the third party proceedings raised a "difference...arising out the Policy" that would trigger the mandatory stay under section 20(1) of the Arbitration Ordinance. The court also rejected the submission that there was countervailing policy decisions that would point the other way. Consideration on whether a statutory claim will not be arbitrable would turn on (a) whether the statute prohibits arbitration and (b) whether it is precluded by public policy considerations, but the court said this was a "demanding test against the public policy of giving primacy to party autonomy" .

In the absence of any statutory provision reserving exclusive jurisdiction to the court and/or public policy objections that would discourage an arbitrator to adjudicate, Ng J found that there was "no basis to say a statutory claim based on a statutory right/obligation that falls within the ambit of an arbitration agreement between the parties can only be litigated before the court and cannot be referred to arbitration" . The employee's own statutory rights to compensation from the employer would not be affected and would be determined in the court proceedings in the normal way.

Key takeaways:

- The court will give a wide interpretation to the wording of arbitration clauses when deciding whether "differences" should be stayed to arbitration.
- The decision highlights the importance of wording in such clauses and underlines that even "boilerplate" arbitration clauses should not be lightly dismissed when the court considers a stay.

Mistaken belief

Finality is meant to be the hallmark of arbitration. A tribunal award may not be questioned in a court of law, except in rare circumstances. The Court of First Instance in *SC v. OEI* [2020] HKCFI

2065 considered what should happen when a tribunal makes a clerical error in an award, and then issues an addendum to clarify what it meant to order in the first place.

OE1 and OE2 entered into an original equipment manufacturer supply agreement with an arbitration clause providing for disputes to be settled by Hong Kong arbitration at the HKIAC. Disputes arose and were referred to arbitration. In April 2019, the tribunal issued a final award on liability, making findings, in the "dispositive order" section, on SC's breaches of several sections of the supply agreement in respect of filing of patents and utility models.

Shortly thereafter, OE applied to the tribunal to correct the award on the basis of the tribunal's failure to address OE's requests for a perpetual licence under the agreement and for other relief. OE asked the tribunal to correct the award pursuant to Article 33(1) of the UNCITRAL Model Law on International Commercial Arbitrations (1985) (Model Law) (incorporated into Hong Kong law by section 69(1) of the Arbitration Ordinance).

In June 2019, the tribunal issued an addendum to the award in the face of SC's objection. The tribunal confirmed that there had been a clerical error in its failure to repeat an earlier finding in the award in the dispositive order and declared that OE1 had been granted a royalty-free perpetual licence with rights to sub-licence the patents. The tribunal clarified that it had been a "mistaken omission" for the tribunal not to have set out the declaration in the order.

SC applied to the court to set aside parts of the addendum on the grounds that the arbitral procedure was not in accordance with the parties' agreement, nor in accordance with the relevant provisions of the Model Law and on grounds of public policy.

Mimmie Chan J considered the meaning of Article 33 of the Model Law, which provides that, within 30 days of receipt of the award, a party may request the arbitral tribunal to correct "any errors in computation, any clerical or typographical errors or any errors of similar nature".

There were strong policy reasons against altering an award after it has been made. The arbitral process is "intended to be a speedy and final resolution of the parties' disputes, without the costs and delays of litigation. Awards should be final and free from continuing dispute about their correctness, completeness or meaning". The errors made by the tribunal indicated that something had gone wrong in the thought process. The errors and omissions sought to be corrected by the tribunal in the addendum did not fall within the scope of Article 33 of the Model Law.

There was nothing, however, to prevent the tribunal from issuing an additional award under Article 33(3) of the Model Law. It was not in dispute that OE's claims were included in the notice of arbitration and pleadings and were included in the list of issues for determination by the tribunal.

The dispositive order should not have been silent with respect to relief granted to prevent SC profiting from its misdeeds. Considered as a whole, the additional orders made by the tribunal did not create inconsistencies in the award and did not represent a case of the arbitrators having second thoughts or evaluating the evidence differently. There were good policy reasons for the court to facilitate the arbitration process.

Key takeaways:

- Parties should make sure they review an award immediately to make sure that all the reliefs claimed and believed to have been ordered have been properly and fully incorporated.

- Where errors and omissions are found, the tribunal may have the power to make an additional award, even where its discretion to correct an earlier award is found to be lacking.

Missing the point

The Court of First Instance set aside the enforcement of an arbitration award and dismissed the party's appeal to the decision in the recent case of *X v. Y* [2020] HKCFI 2782. The case involved a company incorporated in Taiwan and a bank that advanced loans to the company.

The company pledged its assets in an account with the Singapore branch of the bank as security for current and future obligations owed by the company's subsidiary that may be due to the bank. There was a clause in the pledge stipulating that the pledge was to be construed in accordance with Singapore law and was subject to the non-exclusive jurisdiction of the courts of Singapore.

The company signed a mandate with the bank, which gave the bank absolute discretion in management of the company's assets held in the account. The mandate contained a clause providing that the mandate was to be construed and take effect in accordance with Taiwanese law. It further provided for the resolution of disputes out of or in connection with the mandate by the Arbitration Association of the Republic of China.

The company was put into receivership in 2014. The bank received notification of termination of the mandate and demand for the return of all the company's assets in the account. The bank retained the portion that was subject to the pledge and returned the remainder to the company. The parties went to arbitration and an award was made in favor of the company – the company's assets held in the account remained assets of the company. However, the arbitrators came to this conclusion merely from the perspective of Taiwanese law – the tribunal found that the deployment of the company's assets under the mandate and the pledge were prohibited under the Taiwan Insurance Act.

The court allowed the bank's application and set aside the enforcement order by the arbitrators on two grounds as follows.

The first ground – the award dealt with matters not falling within the terms of the submission to arbitration and/or contains a decision on matters beyond the scope of the submission to arbitration

The court held that where parties enter into multiple related agreements dealing with different aspects of their relationship and dealings, the proper test in ascertaining the parties' intention on how their disputes should be dealt with, was to identify the nature of the claim and the agreement which was "at the center of gravity of the dispute" or the "commercial center of the transaction."

Where the agreements involved two or more differently expressed choices of jurisdiction and/or law, there should be no presumption that a jurisdiction agreement in one contract should be intended to capture disputes in another contract. The court further commented that sensible or rational business people would not have intended for a dispute to be within the scope of two inconsistent dispute resolution agreements.

In this case, the pledge was found to have the closest connection to the parties' dispute and at the "commercial center" of the security relationship created amongst the parties with the intention that the security be provided by the company to the bank, for advances made by the bank to the company's subsidiary.

The parties' "choice of palette" for the pledge and its validity was in the Singapore courts under Singapore law. Hence, the illegality of the pledge under Taiwanese law did not necessarily render

the execution of the pledge illegal under Singapore law, as the validity of the security created by the pledge and the effectiveness of the bank's right to hold on to the assets pledged would both be subject to the final determination by the Singapore court.

The second ground – the bank had been unable to present its case in the arbitration

In this case, both parties agreed and presented their case such that the pledge was governed by Singapore law and would not be invalidated under Taiwanese law. Yet, the company raised a new argument in its post-hearing submissions about the pledge being void under Taiwanese law. The tribunal also rejected the parties' shared view prior to the post-hearing submissions and found the pledge to be void under Taiwanese law.

The court stated the general rule that parties are entitled to make submissions only as they are framed in the pleadings served and as they are presented in the evidence during the arbitration and not beyond. In the event that the arbitrator considers that the parties "missed the real point" or if the arbitrator is impressed by a point that has not been raised by either party, the arbitrator is obliged to put the point to the parties by way of common fairness or natural justice, so the parties have an opportunity to deal with it.

The court found that the bank was not given a reasonable opportunity to meet the case presented by the company, and that the arbitrators' findings were a "significant departure" from the cases presented by the parties prior to the exchange of post-hearing submissions.

Key takeaways:

- Courts will give effect to the parties' "choice of palette" where multiple related agreements contain two or more differently expressed choices of jurisdiction and/or law by identifying the agreement with the closest connection with the dispute and claim.
- Parties have to be given a fair opportunity to present their own case, as well as a reasonable opportunity to know, test, and challenge their opponent's case.
- Where an arbitrator is impressed by points that were not raised by the parties, the arbitrator is obliged to put the points to the parties.

Separate obligations

The court refused an application for stay of enforcement of an arbitral award in *S v. G* [2021] HKCFI 263. Multiple arbitral and court proceedings were commenced by both parties in relation to their agreement regarding G's exclusive distributorship of S's products.

In an earlier arbitration initiated by S, arbitrators ordered an award in favor of S where G was ordered to pay damages for termination of the agreement which amount to the price for delivery of the products. G later commenced separate arbitration proceedings, claiming unliquidated damages for S's breach of an inventory clause under the agreement, under which G was entitled to continue to sell remaining products until stocks were completely depleted. In the present case, G made an application to stay enforcement of the S award and claimed to set off the sum it owed to S under another set of proceedings.

When considering whether to grant a stay of execution of enforcement of an award, the court considers all relevant circumstances of the case. The ultimate question is whether it is manifestly just and equitable to order the stay, and the court emphasized that there must be special circumstances present in order to warrant the stay.

To answer this question, a number of factors should be considered, including the nature of the claims, the extent of the identity between the claim in the judgment and the unresolved cross-claim, the strength and size of the cross-claim, the likely delay before the cross-claim can be adjudicated, as well as the risk and extent of prejudice to both parties.

In relation to prejudice, the court elaborated that it would consider whether there is abuse or manifest injustice to the judgment creditor for being denied the fruits of the judgment award until the determination of the debtor's alleged cross-claim, and the prejudice to the debtor who is ordered to make payment before the outcome of the cross-claim is known.

The court further explained the legal principles involving cross-claims and stated that a close link between the transactions which gave rise to the respective claims would be the key requirement. The connection must be so close that it would be manifestly unjust to allow the enforcement of payment against one party without taking into account the other party's cross-claim. Hence, it would be wholly insufficient for the court to allow a cross-claim from the mere fact that the claim and counterclaim arise out of the same trading relationship between the same parties.

Applying the principles above to the facts of the case, the court held that G's unliquidated damages claim did not satisfy the requirements for a cross-claim nor stay of execution. Although both claims by S and G were under the same agreement, they involved separate obligations that were not dependent on each other – the S award related to G's obligation to pay for products under specific and separate transactions with customers, whereas G's unliquidated damages claim related to G's right to sell and dispose of products that were already delivered to G.

The court also found that the prejudice that G suffered, if any, was insufficient to justify the order of stay. G claimed that the S award should be stayed as G already obtained a court order to enforce an arbitral award against S, and should be entitled to set-off against the sum that it owed S under the S award, especially considering that G was claiming for a substantially larger sum under the new arbitration that exceeded S's entitlement under the S award. G also claimed that without the order of stay, it would likely have to seek recovery against S overseas as S would likely remove funds recovered from Hong Kong and, based on past conduct, it would be unlikely for S to volunteer payment when an award is made in the new arbitration.

However, the court rejected these arguments and found that since the award for the new arbitration proceedings would not be made in at least 12 months' time, it would be unjust to compel S to wait for 12 months or even longer when it had a valid, regular, and enforceable award in its favor, particularly when it was uncertain that the outcome of the new arbitration would be a substantial award in G's favor.

Key takeaways:

- Courts will not easily order stay of execution or enforcement of an award or judgment unless special circumstances are present.
- The courts must regard it be manifestly just and equitable before ordering a stay of execution.
- There are two requirements to be met in order for cross-claims to be deducted: (1) close connection between the counterclaim and the transaction giving rise to the claim; and (2) that it would be manifestly unjust to allow one claim to be enforced without regard to the other.

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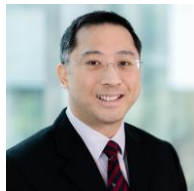
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