



Hong Kong court grants anti-suit injunction against third party

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Philipp Hanusch and **Gillian Lam** of Baker McKenzie in Hong Kong consider a recent decision by the Hong Kong Court of First Instance restraining a non-party to an arbitration agreement from pursuing court proceedings in mainland China.

In circumstances where a non-party to a contract becomes entitled to enforce a right under that contract (for example, a company may be a beneficiary under a settlement agreement entered into between its affiliate and a counterparty), a question arises as to how and where the non-party can enforce its right. If a contract contains an arbitration clause, the Hong Kong courts can grant an order restraining a party to the contract from pursuing foreign court proceedings commenced in breach of the arbitration clause (an

anti-suit injunction). The Hong Kong courts may do so if the application is made in a timely manner and there is no good reason for denying it.

In the recent case of [*Dickson Valora Group v Fan Ji Qian*](#), the defendant had commenced court proceedings in China to claim benefits under a contract to which it was not a party. The contract provided for arbitration in Hong Kong. The plaintiff sought an anti-suit injunction against the defendant from the Hong Kong Court of First Instance.

The court granted the anti-suit injunction. It held that a non-party to a contract who becomes entitled to enforce an obligation that is subject to an arbitration clause must do so by arbitration in accordance with the contract. When considering comity in the context of the injunction, the court emphasised the importance of respecting a conscious choice of Hong Kong as a mutually acceptable neutral ground in terms of joint venture formations, governing law, and dispute resolution forum.

This case is yet another example of the pro-arbitration approach of the Hong Kong courts and their robust attitude in enforcing arbitration agreements.

Background

In 2010, M and DHE set up a joint venture company, the first plaintiff. M was owned by Mexican investors while DHE was owned by the defendant, a mainland Chinese resident. The joint venture concerned a property project in China. Following the joint venture company's incorporation, M, DHE and the joint venture company entered into a shareholders' agreement (SHA), which contained an arbitration clause providing for disputes to be settled by arbitration in Hong Kong under HKIAC rules.

In 2011, the same parties entered into an addendum to a supplementary agreement, which was expressly intended to be a "complement" to the SHA. The addendum provided that the defendant would be entitled to a success fee upon fulfilment of certain conditions. It further stated that the success fee might be paid by the joint venture company's subsidiary, the second plaintiff. The defendant was neither a party to the SHA nor the addendum.

The relationship between M and DHE subsequently broke down. In 2018, the defendant commenced proceedings in the Shenzhen Qianhai Cooperation Zone People's Court against the plaintiffs, claiming the success fee under the addendum. The PRC court subsequently granted the defendant a freezing order over the plaintiffs' assets and an execution order over some of the second plaintiff's property.

The plaintiffs challenged the PRC court's jurisdiction on the basis that the dispute was subject to the arbitration clause in the SHA, but the PRC court dismissed the challenge.

In November 2018, the plaintiffs brought proceedings in Hong Kong seeking an anti-suit injunction restraining the defendant from pursuing the PRC proceedings and commencing any similar proceedings in the PRC.

The court's decision

In deciding whether to grant the injunction, the Hong Kong court considered, among other things:

- whether the arbitration clause in the SHA was incorporated into the addendum;
- whether the defendant was bound to pursue his claim by arbitration, notwithstanding that he was not a party to the SHA; and
- whether there were good reasons not to grant the injunction.

Arbitration clause incorporated into addendum by way of reference

Neither the addendum nor the supplementary agreement contained any separate provisions on choice of law and dispute resolution. However, the supplementary agreement referred to the SHA. Under Hong Kong law, a reference to a document that contains an arbitration clause may be sufficient to constitute an arbitration agreement, provided that the reference is such as to make that clause part of the contract. Whether the addendum incorporated the arbitration clause in the SHA by way of reference was a question of interpretation and incorporation.

The Hong Kong court found that the addendum was subject to the arbitration clause in the SHA. The court noted that from a practical point of view, it would be wholly uncommercial to suggest that if there should be a dispute between M and DHE about the success fees, the parties contemplated that it would not be regulated by the choice of law clause and the arbitration clause in the SHA.

Defendant was bound to pursue claim in contractually agreed mode

The court considered various authorities relied on by the parties. In particular, the court relied on the English cases *The Jay Bola* and *The Yusuf Cepniglu*, which suggested that a person who became entitled to enforce a contractual obligation could only do so in accordance with its terms and, if the obligation was subject to an arbitration clause, the obligation could only be enforced by arbitration.

The court found that the defendant's rights of a success fee, if any, were derived from the plaintiff's contractual promise to DHE; the arbitration clause formed an inseparable part of that promise. Accordingly, the promise of the success fee was subject to the arbitration clause being the enforcement mechanism chosen by the parties to the contract. If the claim was not pursued in the contractually agreed mode, the plaintiffs had a right to prevent the claim against them. Unless an injunction was granted, such right would be rendered wholly ineffective and valueless.

No good reasons not to grant the injunction

The Court concluded that there were no good reasons not to restrain the Defendant from proceeding in a way that repudiated the integral condition of the right he sought to assert under the Addendum.

In reaching this decision, the court considered the following discretionary factors:

- whether the plaintiffs were guilty of inexcusable or inordinate delay in applying for the anti-suit injunction;

- whether the delay was serious when viewed against the progress of the foreign proceedings;
- whether it was abusive for the plaintiffs to make the application only after their failed jurisdictional challenge in the PRC court.

On the final factor, the Hong Kong court noted that the plaintiffs had to raise the challenge promptly as they would otherwise have been regarded as having accepted the PRC court's jurisdiction. In concluding that the plaintiffs' course of action was not abusive, the Hong Kong court took into account various matters. The following are particularly noteworthy:

- The importance of comity considerations was "reduced" in cases like the present case where the foreign proceedings were inconsistent with the contractual mode of dispute resolution. Moreover, the unambiguous policy of the Hong Kong courts in support of arbitration was to be placed in the balance against comity considerations.
- Arbitration agreements and processes require the support and protection of the courts. Importantly, the joint venture vehicle was a Hong Kong company, the contract was governed by Hong Kong law and it provided for Hong Kong-seated arbitration. This showed that the Mexican and Chinese investors had consciously chosen Hong Kong as a mutually acceptable neutral ground. Such choices were an important part of the bargain between commercial parties and should not be easily neglected or thwarted.

Implications

Parties who choose Hong Kong as the place of incorporation, Hong Kong law as the governing law of their contracts and Hong Kong as the seat of arbitration for resolving their disputes can rest assured that the Hong Kong courts will respect and protect their choice. Hong Kong courts will not hesitate to restrain a party from commencing or proceeding with foreign court proceedings in breach of an arbitration agreement unless the applicant is guilty of inexcusable or inordinate delay or there are any other good reasons for not granting an injunction.

Third parties who intend to claim a benefit under a contract that is derived from a party to that contract are subject to the dispute resolution provisions agreed by the parties to the contract unless the contract indicates otherwise.

Notably, the Contracts (Rights of Third Parties) Ordinance (Cap 623), which reformed the doctrine of privity, did not apply in this case as all relevant agreements were entered into before the ordinance came into operation on 1 January 2016. One of the ordinance's effects is that a third party may enforce a contract term if the contract either expressly provides that the third party may do so or the term purports to confer a benefit on the third party. The ordinance also makes clear that if the third party's right is subject to an arbitration agreement, the third party is treated as a party to the arbitration agreement as regards a dispute between itself and the promisor relating to the enforcement of the term.

As a consequence, contract drafters often include, sometimes by way of routine, a "boilerplate" clause excluding the operation of the ordinance. However, circumstances

may arise where the ordinance is beneficial to a business. For example, a company may wish to provide the benefit of an indemnity to its affiliates and other identified parties. Contract drafters should thus consider carefully whether any third parties should be able to claim a benefit under the contract before excluding the operation of the ordinance.

Conversely, where it is intended to confer a benefit to a third party, the contract should expressly identify the third party and provide that the third party may enforce a specific term of the contract. In complex transactions involving multiple parties and documentation, it is important to ensure that the position of the third party is clearly identified and consistent throughout all relevant agreements.

Cases referenced

Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian [2019] HKCFI

Schiffahrtsgesellschaft Detlef Von Appen GmbH v Wiener Allianz Versicherungs AG and Voest Alpine Intertrading GmbH (The Jay Bola) [1997] CLC 993; [1997] 2 Lloyd's Rep 279

Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu) [2016] 3 All ER 697