

Interim anti-suit relief granted in support of Hong Kong arbitration (X v ZPRC)

28/05/2020

Arbitration analysis: The Hong Kong Court of First Instance considered an application for two permanent anti-suit injunctions seeking to restrain court proceedings in Mainland China in favour of Hong Kong arbitration. Ultimately, the permanent anti-suit injunctions were not granted; however, the court held that it was just and convenient to continue interim injunctions pending the decision of the tribunal on jurisdiction. The judgment deals with judicial comity between HKSAR and Mainland China, jurisdictional gateways for anti-suit injunctions under section 21L of the High Court Ordinance (HCO) and Order 11 rule 1 of the Rules of the High Court (RHC), the jurisdiction of the court to grant such permanent relief, and whether it is just and convenient to grant a permanent injunction. Her Honour Judge Chan also considered some important issues for arbitration: (1) the question of the law applicable to an arbitration agreement; (2) whether the arbitration agreement in the contract between X and ZPRC could be extended to Y, a company related to X; and, (3) the question of the tribunal's exclusive jurisdiction to rule on the validity and existence of an arbitration agreement. Written by Andrew Rigden Green, partner, co-head of International Arbitration in Asia, at Stephenson Harwood.

X & Anor v ZPRC & Anor [\[2020\] HKCU 1014](#) (subscription to Lexis Advance® required)

What are the practical implications of this judgment?

Extension of arbitration agreement to a non-party

Careful consideration of drafting and construction of an arbitration clause is required to ascertain whether an arbitration agreement can be extended to non-parties. In this context, the arbitration agreement was extended to a non-party.

The law applicable to the arbitration agreement

The law governing the main contract is a strong indicator of the law that is applicable to the arbitration agreement. However, where an arbitral seat in a different jurisdiction is chosen, it may be arguable that the law with the closest connection with the agreement to arbitrate is the law of the seat.

The jurisdictional gateways for a permanent anti-suit injunction

Although the jurisdictional gateways for the Hong Kong court to grant injunctions are narrow, the court has ruled that they will be construed in the spirit that they were intended and that the threshold is that of a good arguable case rather than proof on the balance of probabilities.

Comity between HKSAR and Mainland China

The court emphasized that an anti-suit injunction does not impinge on comity, no disrespect is aimed at the foreign court. The object of the anti-suit injunction is to hold the parties to their contractual bargain.

Competence of the arbitral tribunal as to its jurisdiction

The court ruled that even if another court has jurisdiction to rule on the validity of an arbitration agreement, object and intent of the arbitration clause is that the parties have agreed with one another to submit their differences to the chosen tribunal, not any other court.

What was the background?

Alleged breaches

X and ZHK (a Hong Kong company) entered into an International Swaps and Derivatives Association (ISDA) agreement in respect of derivative trading transactions between them. ZHK is a subsidiary of ZPRC (a Mainland Chinese company). ZPRC issued a guarantee in favour of X guaranteeing ZHK's performance of the ISDA agreement. X and Y are affiliated companies in the same group.

Arbitration clause

The guarantee was governed by English law with arbitration in Hong Kong. The arbitration clause provided that 'any dispute, claim, difference or controversy arising out of, relating to or having any connection with this guaranty[...]shall be referred to[...]arbitration administered by the Hong Kong International Arbitration Centre'. The arbitration clause in the ISDA agreement was identical to the guarantee.

Arbitrations

Disputes as to ZHK's liability under the ISDA agreement arose and a demand for payment was made by X to ZPRC under the guarantee. Two arbitrations were commenced in January 2019 by X, one under the guarantee against ZPRC and one under the ISDA agreement against ZHK. ZPRC asserted that the guarantee had not come into force as it was understood that as a condition precedent to the obligations that approval of the State Administration of Foreign Exchange would be obtained but it had not been.

Mainland proceedings

In June 2019 ZPRC commenced proceedings in Mainland China against both X and Y regarding whether or not there was a valid arbitration agreement between X and ZPRC.

In July 2019 ZHK and ZPRC also commenced proceedings against Y. These proceedings were not brought to the attention of Y until January 2020. ZHK and ZPRC claim they were induced by representations made by the officers of Y to (1) enter into the ISDA agreement with X; and (2) provide the guarantee by ZPRC.

What issues were before the court?

- whether the court has the jurisdiction to grant the permanent injunction under section 21L HCO
- whether an anti-suit injunction is against comity and is disrespectful to the Mainland courts
- whether the arbitration agreements between X and ZHK and ZPRC are binding as between Y (a non-party), ZHK and ZPRC
- does the existence of a Mainland rule of law which gives the Mainland court the power to rule on the validity of an arbitration agreement deprive the arbitration tribunal of the exclusive jurisdiction to rule on the validity of the arbitration agreement

What did the court decide?

Comity and disrespect

Chan J ruled that the basis of the anti-suit injunction is the court's upholding of the contractual bargain between the parties. There is no disrespect to or interference with the foreign court, nor disregard of the principles of comity.

Jurisdiction to grant the injunction

Under section 21L HCO X and Y had to establish their claims fell within the jurisdictional gateways set out in Order 11 rule 1 RHC: the claim (1) is brought against ZHK (duly served) and ZPRC is a necessary and proper party—or (2) is to enforce a contract governed by Hong Kong law.

The court ruled that this is a 'good arguable case' test, and X and Y were not required to prove on the balance of probabilities that the case is within the gateway.

- Chan J stated that:
 - 'the spirit and intention of Order 11 rule 1 RHC is the identification of the necessary and proper party to the proceedings rather than the timing or sequence of service'
- the relevant contract is the arbitration agreement. There is no express choice of law in respect of the arbitration agreement. The guarantee is governed by English law and the choice of seat of arbitration is Hong Kong. This is a question of construction. The choice of law in the governing contract is a strong indicator of the governing law of the arbitration agreement. However, the law with the closest connection with the agreement to arbitrate is arguably the law of the seat. The choice of HKIAC administered arbitration raised a good arguable case that Hong Kong law is the applicable law

Was the arbitration agreement applicable to the claims between ZHK, ZPRC and Y?

The arbitration agreement was wide in scope and included contractual and non-contractual obligations. Trades under the ISDA agreement (guaranteed by ZPRC) fell within the arbitration agreement. Therefore, any claim relating to these trades, including whether or not they were unlawful, would be covered by the arbitration agreement.

Chan J concluded that the claims made in the July 2019 proceedings fell within the scope of the arbitration agreement. Therefore, although Y was party to neither the guarantee nor the ISDA agreement, the arbitration agreement covered those claims.

Whether the tribunal has exclusive jurisdiction to rule on its own jurisdiction

Expert evidence on Mainland law was adduced that the Mainland court has jurisdiction to determine the validity of an arbitration agreement under the Mainland Arbitration Law. ZPRC argued that this meant that the tribunal does not have the exclusive jurisdiction to determine its own jurisdiction.

Chan J dismissed this argument. She reviewed the authorities cited by counsel and concluded that the jurisdiction of the courts to consider the existence and validity of the arbitration agreement are confined to (1) the review by the supervisory court at the seat of the arbitration of the tribunal's decision on a challenge to its jurisdiction (Article 16 (3) of the Model Law), or (2) when an application is made to the supervisory court under Article 34 of the Model Law to set aside the arbitral award—or (3) a review at the enforcement stage.

The expert also explained that arbitrations outside Mainland are not subject to the Arbitration Law. Therefore, ZPRC was in breach of the arbitration agreement bringing proceedings in the Mainland.

Chan J concluded that the purpose of an arbitration clause is that the parties agree with one another to submit their differences to the chosen tribunal, not any other court even if it could have had jurisdiction.

As stated above, the permanent anti-suit injunctions sought were not granted, however, the court held that it was just and convenient to continue interim injunctions pending the decision of the tribunal on jurisdiction.

Case details

- Court: Hong Kong Court of First Instance
- Judge: Her Honour Judge Mimmie Chan
- Date of judgment: 7 May 2020

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