

Hong Kong—application for injunction to restrain arbitrator continuing to act as arbitrator dismissed (Fenn v So)

Arbitration analysis: This highly unusual Hong Kong District Court action arises from an underlying arbitration in which the claimant sought to terminate the appointment of an arbitrator. The claimant then issued the writ in this action and sought an interlocutory injunction restraining the defendant from acting or continuing to act as the arbitrator in the arbitration. The hearing of that application was adjourned by consent. Subsequently, the arbitrator handed down a partial cost award. Therefore, the claimant applied again for an injunction to restrain the arbitrator from acting as arbitrator. The application was dismissed as there were no material change in circumstances between the adjournment by consent and the second application. Written by Andrew Rigden Green, partner and co-head of International Arbitration in Asia, at Stephenson Harwood, Hong Kong.

Fenn Kar Bar Lily v So Shiu Tsung Thomas [\[2020\] HKCU 3157](#) (subscription to Lexis® Advance required)

This analysis was first published on Lexis®PSL on 21 September 2020 and can be found [here](#) (subscription required).

What are the practical implications of this case?

The Hong Kong District Court shows that it will continue to strongly support the position of arbitrators and not restrain them from acting or giving awards on an interim basis.

The methods of challenging arbitration awards are set out in the [Hong Kong Arbitration Ordinance \(Cap 609\)](#). In this matter, the claimants in an arbitration sought to terminate the appointment of an arbitrator. While the matter has not yet been finally adjudicated, the court decided not to restrain the arbitrator from acting as arbitrator in the interim.

The reason for this decision was that the parties agreed that the matter of an injunction to restrain the arbitrator be adjourned. However, no agreement was reached on his position in the interim. The practical implication is that if such an interim restraint is required, then it must be sought at the outset and, unless there are material changes in circumstance, the court will not entertain an application for a fresh injunction.

What was the background?

Mr So was appointed as arbitrator in a Hong Kong International Arbitration Centre-administered arbitration which was commenced in 2011. The arbitration was in respect of a partnership agreement. In March 2020, the arbitrator made a partial final award in favour of the respondent. In April 2020, the respondent obtained an order of the High Court to enforce the partial award. On 2 May 2020, the respondent applied for an extension of time to make an application for an additional award, which was opposed by the claimants on 4 May 2020, and on 6 May 2020 they also applied to set aside the enforcement order. The arbitrator dismissed the additional award application on 13 May 2020.

On 19 May 2020, the claimants wrote to the arbitrator purporting to terminate his appointment as arbitrator. On the same day, the plaintiff (one of the claimants in the arbitration) commenced this action on the basis of partiality. The arbitrator wrote a letter seeking the basis on which termination of his appointment was made, but no response was received, and, on 23 July 2020, the plaintiff issued an injunction application to restrain the arbitrator from acting or continuing to act as arbitrator. The arbitrator applied to strike out the action.

By consent, the hearing of both applications was adjourned to April 2021. As part of the consent order the plaintiff demanded an undertaking that the defendant would not act as arbitrator pending the outcome of the application. This undertaking was refused by the arbitrator. The arbitrator's solicitors wrote to the plaintiff's solicitors that the agreement was 'without prejudice to the exercise of his rights and duties as arbitrator'.

On 19 August 2020, the arbitrator handed down a partial costs award and directions that the respondent file his bill of costs and that the claimants file their objections within 14 days. Consequently, the plaintiff issued the present application for an injunction on 28 August 2020.

What did the court decide?

In reaching its decision the Hong Kong District Court had to consider whether the threshold for an interim injunction had been met in circumstances where an application for the same injunction was already before the court and had been adjourned by consent.

The legal principles are that:

- there are serious issues to be tried
- the balance of convenience is in favour of grant
- damages would not be adequate

The other issue before the court was whether this second application, being the same as the first, was an abuse of process.

The court dealt first with the abuse of process. The relevant legal proposition is set out in *Beacon College Ltd v Yiu Man Hau (unrep)* HCA 4273/2001 (not reported by LexisNexis® UK)—if the applications are in substance essentially the same, the application should not be entertained unless '(1) there is a material change of circumstances; or (2) the grounds...could not reasonably be expected to be adduced at the earlier application'.

The question was whether the partial costs award was a material change in circumstances. The judge considered that the question of a costs award was in the reasonable contemplation of the parties when they agreed the adjournment by consent. No undertaking not to continue to act had been given or insisted upon. Therefore, there was no change in circumstances that demanded any exercise of discretion.

Given her decision on the change of circumstances, the judge decided there was no need to be any urgent stop gap measure to do practical justice. Further, there was no matter that could not be rectified in damages. Finally, given that the matter was already set down before the court in terms of serious issues, she would leave those to the adjourned hearing.

Case details

- Court: Hong Kong District Court
- Judge: Her Honour Judge Phoebe Man
- Date of judgment: 10 September 2020

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