

Hong Kong High Court Stays Litigation in Favor of Arbitration

by Steven C. Nelson

On 27 November 2017, the High Court of Hong Kong issued a judgment in which it again demonstrated its willingness to uphold an arbitration agreement, despite arguments that the arbitration agreement had been superseded by a supplemental agreement.

Background

The judgment¹ concerned an application to stay proceedings under section 20 of the Arbitration Ordinance (Cap 609) ("**Stay Application**"), which gives effect to Article 8 of the UNCITRAL Model Law, which states:

"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 not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed."

In this case, the plaintiff as purchaser, the 2nd, 3rd and 4th defendants together as sellers, and the 1st defendant agreed inter alia to negotiate for the acquisition by the plaintiff of an 80% shareholding of and in the 1st defendant and another company from the 2nd, 3rd and 4th defendants by an agreement dated 19 June 2015 ("**the June Agreement**"). The parties entered into a further agreement dated 30 November 2015 which supplemented and varied the June Agreement ("**the November Agreement**"). It was the relationship of those two agreements that gave rise to the Stay Application.

The June Agreement contained at Clause 8.1 an **arbitration** clause in the following terms:

This Letter of Intent shall be governed by the laws of Hong Kong Special Administrative Region. Any dispute arising from this Letter of Intent or in connection therewith shall first be resolved by consultation and negotiation among the parties, failing with [sic] any party may submit the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules

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then enforce [sic] at the Hong Kong International Arbitration Centre in Hong Kong. The award of the arbitration panel shall be final and binding upon the parties.

The November Agreement, Clause 3 of which amended the parties' obligations under the June Agreement, also contained at Clause 4.1 the following terms:

4. APPLICABLE LAW

4.1 The conclusion validity interpretation and performance of this Supplemental Letter of Intent and any dispute arising therefrom shall be governed by the laws of the Hong Kong Special Administrative Region of the People's Republic of China, and the parties agree to submit to the non exclusive jurisdiction of the Hong Kong Special Administrative Region.

Reasons for Decision

The question before the Court was whether there was a binding or operative arbitration agreement pursuant to which the High Court action must be stayed pursuant to section 20 of the Arbitration Ordinance (Cap. 609). In order to succeed in a stay application, the applicant must show that the action before the Court is "*in the same matter*" that is the subject of the arbitration agreement and not purely "*related*" to it or "*involved*" in it. The focus is on the substance of the dispute and not the pleadings.

The Court, in determining the question whether a stay should be granted, followed the principles in *Tommy CP Sze v Li & Fung (Trading) Ltd* [2003] 1 HKC 418, which sets out 4 questions:

- i. Is there an arbitration agreement between the parties?;
- ii. Is the clause in question capable of being performed?;
- iii. Is there in reality a dispute or difference between the parties?; and
- iv. Is the dispute or difference between the parties within the ambit of the arbitration agreement?

In applying the above principles, the Court had to determine whether the jurisdictional reference in Clause 4.1 of the November Agreement superseded or replaced the arbitration agreement Clause 8 of the June Agreement.

The Court concluded that Clause 4.1 of the November Agreement is not an amendment to the June Agreement since it was not addressed in Clause 3 of the November Agreement; rather it is a governing law clause which sits, even if not entirely happily, in parallel with the Arbitration Agreement in Clause 8.1 of the June Agreement. In reaching its decision, the Court referred to, *inter alia*, *AXA Re v Ace Global Markets Ltd* [2006] EWHC 216 (Comm), wherein Gloster J held that a clause providing for English law to be the governing law and for any dispute thereunder to be referred to the jurisdiction of the English courts operated in parallel with the arbitration provisions of the agreement by fixing the supervisory court of the arbitration. In that case, Gloster J had no difficulty in finding there was no inconsistency between the two clauses:²

“I accept Mr Berry’s submission that the fact that there are two clauses, with an express choice of English law, both in the jurisdiction clause and in the arbitration clause, does not result in any inconsistency. I accept Mr Berry’s submission that Mr Green’s arguments are, in effect, based on a so called presumption against surplusage in a contract. However, it is well recognised that there is no presumption against surplusage in a commercial contract and no conclusions can be drawn from the presence of two express choices of English law. In my judgment, in a commercial contract such as this, one should not be surprised to see parties stating clearly in a belt and braces way, the intention that English law is to apply.”

The Court emphasised the principle that absent overwhelming evidence of an unequivocal waiver, a stay in favour of arbitration should be ordered since to do otherwise would be to usurp the function of the arbitration tribunal, which is empowered by Article 16.1 of the UNCITRAL Model Law to rule on its own jurisdiction, including any objection as to the existence or validity of the Arbitration Agreement and as to whether disputes had arisen concerning the contracts: *Paladin Agricultural Ltd v Excelsior Hotel (Hong Kong) Ltd* [2001] 2 HKC 215.

Comment

This decision by Sherrington J is consistent with previous decisions³ demonstrating the Hong Kong Courts’ willingness to uphold arbitration agreements and to grant stays in favour of arbitration absent a clear and unequivocal agreement of the parties to proceed otherwise. The case thus stands as another example of the refusal of the Hong Kong Courts to usurp the function of an arbitral tribunal to determine its own jurisdiction in the first instance, so that only the *prima facie* or “plainly arguable” existence of a valid arbitration agreement needs to be established in order to justify a stay in favour of arbitration. It reflects the strong pro-arbitration stance of the Hong Kong Courts, demonstrating yet again why Hong Kong is the third busiest seat of international commercial arbitration in the world and the gold standard of judicial support for arbitration.

Another aspect of the decision that may surprise readers unfamiliar with Hong Kong law is the extent to which the Hong Kong courts still rely on English law and precedents. Even though appeals from their judgments no longer lie ultimately to the Privy Council in London, Hong Kong judges closely follow English common law, according precedential weight to cases decided not only by the English courts but also by those of other commonwealth jurisdictions, notably including Australia, New Zealand and Singapore.

¹ *NEO Intelligence Holdings Ltd V. Giant Crown Industries Ltd. And Others* HCA1127/2017.

² At paragraph 32.

³ *Polytec Overseas Ltd and another v Grand Dragon International Holdings Co Ltd and others* [2017] HKCFI 604; and *Bluegold Investment Holdings Ltd v Kwan Chun Fun Calvin* [2016] HKCFI 415.

