

Cordells Rompotis

Case Note - December 2016

Rejection of a Set Asia Application: Arjowiggins HKK2 Limited v X Co

The Hong Kong Court of First Instance firmly rejects a set aside application under the Arbitration Ordinance.

Background

By a contract entered into between the parties in 2005 it was agreed that a joint-venture company be established in the Mainland to manufacture paper products. Under the JV Contract, the Respondent undertook that the JV Company "shall have a continuous and stable supply of power, water, steam and wastewater treatment facilities at affordable rates in accordance with the terms and conditions of each of the Related Contracts". Pursuant to the JV Contract, the Respondent and the JV Company entered into a separate agreement for the supply of steam.

The JV Contract contained an arbitration clause which provides that "any dispute arising out of or in connection with this Contract ... shall be referred to and finally resolved by arbitration in Hong Kong in accordance with the Arbitration Rules of the Hong Kong International Arbitration Centre".

Disputes soon arose as to whether the Respondent was entitled to terminate the supply of steam to the JV Company. A number of actions were commenced in Hong Kong and in the PRC:

(a) in 2008, the Respondent commenced proceedings in Shougang, PRC against the JV Company under the Steam Supply Contract;

(b) in 2010, the Respondent commenced proceedings in Weifang, PRC for the dissolution of the JV Company, with the JV Company being dissolved as a result of an order of the Weifeng Intermediate Court; and

(c) in 2012, the Applicant commenced Arbitration in Hong Kong, with the Tribunal (in 2015) finding in favour of the Applicant and awarding it damages of RMB¥167,860,000.

The Applicant sought to enforce the Award in Hong Kong. The Respondent brought an application under section 81 of the Arbitration

Ordinance to set aside the Award on the basis that:

(a) the arbitration agreement between the parties is not valid under the law to which the parties have subjected it (pursuant to s.81(1) of the Arbitration Ordinance / Article 34(2)(a)(i) of the Model Law);

(b) that the Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (pursuant to s.81(1) of the Arbitration Ordinance / Article 34(2)(a)(iii) of the Model Law); and

(c) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (pursuant to s.81(1) of the Arbitration Ordinance / Article 34(2)(a)(iv) of the **Model Law**).

Applicable Law

The choice of the substantive law of the JV Contract was not in dispute - Article 23.1 provided that PRC law applied. Although there was no express choice of law in the Arbitration Agreement, the JV Contract provided that "[t]o the extent [the Arbitration Agreement] is deemed to be a separate agreement independent from [the JV Contract], Article 23.1 concerning governing law ... are incorporated herein by reference". It was not disputed, and the Court accepted, that the applicable law of the Arbitration Agreement was also PRC Law. The Court also found that Hong Kong law governed the conduct of the arbitral proceedings including the recognition and enforcement of the Award.

Validity Of The Arbitration Agreement

The Respondent's main contention was that the Arbitration Agreement was invalid under PRC law because the HKIAC was not identified as the arbitral institution in the Arbitration Agreement.

The foundation of the argument was Article 16 of the PRC Arbitration Law, which provides that the arbitration agreement must include the parties' consensus to arbitrate their disputes; (ii) the scope of the arbitration; and (iii) the "Arbitration Commission" selected by the parties. Further, under Article 4 of the Interpretation of the Supreme People's Court on the PRC Arbitration Law, the mere stipulation in the Arbitration Agreement for HKIAC arbitration is only a reference to its arbitral rules, and "shall be regarded as not stipulating the arbitration body, unless the parties reach a supplemental agreement or are able to determine an arbitration body based on the agreed arbitration rules".

Mimmie Chan J rejected the argument for the following reasons:

(a) The crucial consideration under Chinese law is whether an arbitral institution can be ascertained or determined. In the absence of an express choice of arbitral institution or other "deeming provisions", the reference to the institutional rules (ie. the HKIAC rules) is not automatically construed as an implied choice of that arbitral institution. It does not follow, however, that the arbitration agreement itself is necessarily invalid.

(b) According to the Applicant's expert on Chinese law, the HKIAC can in fact be ascertained as the "Arbitration Commission" by reference to the various provisions in the HKIAC Rules which stipulates the HKIAC's administrative role in the conduct of arbitration. These include provision for the initiation of arbitration, powers to extend time limits, amend notices of arbitration, etc.

(c) Even the model arbitration clause recommended by the HKIAC did not expressly refer to the HKIAC as arbitral institution.

(d) In the absence of an express designation, it was arguable that the parties' agreement to the appointment of arbitrators was sufficient as a valid supplemental agreement for the purposes of Article 4 of the SPC Interpretation.

Jurisdiction Ground

The Respondent's second contention was that the Tribunal lacked substantive jurisdiction over the dispute by reason of the parallel proceedings commenced in Shougang and Weifang, in which the JV Company had submitted to the jurisdiction of the PRC Courts.

This argument was also rejected on the basis that the dispute in the arbitration arose out of the Respondent's alleged breach of the JV

Contract, which fell squarely within the Arbitration Agreement. Furthermore, the findings by the Chinese courts are incapable of giving rise to an issue estoppel because the subject matter, parties and remedies sought were fundamentally different from the present dispute arising under the JV Contract.

Appointment Of Arbitrator

11. The Respondent's final argument was that the default appointment of the party appointed arbitrator by the HKIAC Council was not in accordance with Article 24.2.2 of the HKIAC Rules, which provides that "the Party's arbitrator or the third arbitrator, as the case may be, shall be appointed by the Chairman of the Hong Kong International Arbitration Centre".

This argument was firmly rejected by the Court, noting that unmeritorious technical points or minor procedural complaints are insufficient to set aside an award. In any event, the Court noted that the Chairman of the HKIAC is a member of the Council which made the appointment.

Postscript

This is yet another decision from the Hong Kong courts which illustrates the difficulties faced by a party seeking to challenge a final award by way of set aside proceedings.

A consistent theme running throughout her Ladyship's judgment is the fact that the Respondent had participated in the arbitration from beginning to end, knowing of the potential defects in the proceedings, yet consciously refrained from raising or directing the matter to the arbitral tribunal's attention. This was construed by her Ladyship as clear evidence of the Respondent's submission to the jurisdiction of the HKIAC Tribunal:

"[t]here is a duty of good faith which required the Respondent in this case to bring to the notice of the Tribunal any objections it may have Not having done so, choosing instead not only to fully participate in the Arbitration ... the Respondent had deprived the Tribunal of the opportunity to rectify any alleged ... defect in the arbitral process, and is estopped and precluded now from raising this complaint and objection as to alleged invalidity and lack of arbitration agreement."

Her Ladyship also emphasized that "[o]pposition to enforcement and recognition of awards based on unmeritorious technical points or minor procedural complaints have always been viewed with disfavor by the Hong

Kong courts”, an approach which is consistent with the general pro-enforcement bias embedded under the New York Convention and Model Law regimes.

The concept of good faith referred to by Mimmie Chan J has been the subject of a number of decisions, most recently by the Hong Kong Court of Appeal in ***Astro Nusantara & Ors v PT Ayunda & Ors*** [2016] HKCA 595 (5th December 2016), which overturned the decision of the First Instance Court in respect of this issue.

Legal Notices

International arbitration forms one of the core elements of Cordells Rompotis’s practice. For full details of these services please see our website: www.cordells.com.hk

This Note does not constitute legal advice and you should not take, or refrain from taking, any action as a result of it. No responsibility can be taken for losses arising out of any such action or inaction. Always seek advice from a solicitor in respect of any legal issue which you may have.

Copyright

All rights reserved Copyright ©2017 Cordells Rompotis. No part of these notes may be reproduced in any form by any means without the written permission of Cordells Rompotis.