

SETTLED OR NOT? AN ARBITRATION AGREEMENT EXTENDS TO A SETTLEMENT DISPUTE

GURKHAS CONSTRUCTION LTD V CRAFT FAÇADE TECH (HONG KONG) CO LTD (FORMERLY KNOWN AS EFT-CRAFT CO LTD) [2021] HKDC 1166

Background

Section 20(1) of the Arbitration Ordinance (AO) provides for a mandatory stay of court proceedings in favour of arbitration where certain conditions are satisfied. In *Gurkhas Construction Ltd v Craft Façade Tech (Hong Kong) Co Ltd (formerly known as EFT-Craft Co Ltd)*¹, which concerned an application for a stay in favour of arbitration, the main question was whether a claim arising out of a settlement agreement (which contained a non-exclusive jurisdiction clause in favour of Hong Kong courts) fell within the ambit of the arbitration agreement in the underlying contract. The District Court (Court) answered the question in the affirmative and ordered a stay in favour of arbitration.

The decision illustrates the court's approach in deciding whether a dispute comes within the ambit of an arbitration agreement. It also serves as a reminder of the importance of careful drafting of dispute resolution clauses in interrelated agreements and reinforces Hong Kong's status as an arbitration-friendly jurisdiction.

Facts

Craft Façade Tech (Hong Kong) Co Ltd (formerly known as EFT-Craft Co Ltd) (Defendant) was a contractor for an external façade renovation project. Gurkhas Construction Ltd (Plaintiff), operating a business providing skilled labour for building construction projects, provided services to the Defendant for the project as per the purchase orders placed by the Defendant. Each of the purchase orders contained the Defendant's standard "General Terms and Conditions" which included an arbitration agreement that applied to "any dispute, difference or claim ("Dispute") [that] arises out of or in connection with this agreement ... unless otherwise agreed between the parties" (Arbitration Agreement).

It was the Plaintiff's case that a sum of HK\$1,492,753.80 (Outstanding Sum) was outstanding under 4 purchase orders placed by the Defendant around 2018. After rounds of negotiations, in 2020, the Defendant

purportedly acknowledged the Outstanding Sum and agreed to settle the Outstanding Sum by a certain date, failing which the Plaintiff would be entitled to take legal action for recovery of the Outstanding Sum plus interest and the Defendant would irrevocably waive and forgo any defence, contention, reduction or set-off in respect of the Outstanding Sum. The purportedly agreed terms were set out in a letter issued by the Plaintiff's lawyers to the Defendant (Settlement Agreement), which was countersigned on behalf of the Defendant. The Settlement Agreement also stated that it should be governed by the laws of Hong Kong and that "the parties to this settlement hereby irrevocably undertake to submit themselves to the non-exclusive jurisdiction of the courts of Hong Kong Special Administrative Region to resolve any dispute arising out of or in connection with this settlement" (Jurisdiction Clause).

When the Defendant failed to repay as per the Settlement Agreement, the Plaintiff commenced legal action before the Court to enforce the Settlement Agreement. The Defendant denied its liability to pay and challenged the validity and enforceability of the Settlement Agreement. Apart from filing a substantive defence, the Defendant applied to the Court for a stay of the court proceedings on the basis that the disputes should, in any case, be resolved by arbitration pursuant to the Arbitration Agreement in the purchase orders, which formed part of the contract between the parties.

At issue was whether the following conditions for a stay in favour of arbitration under section 20(1) of the AO were satisfied: (1) there is an arbitration agreement between the parties; (2) the arbitration agreement is not null and void, inoperative or incapable of being performed; (3) there is a dispute or difference between the parties; and (4) the dispute or difference is within the ambit of the arbitration agreement.

Decision

The Court had little difficulty in finding that, at least *prima facie*, the first three conditions were satisfied:

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there was an arbitration agreement which was valid and enforceable; and there was a dispute between the parties as there was no clear and unequivocal admission by the Defendant, both of liability and quantum.

The real question in issue was whether the present dispute (i.e. whether the Defendant was liable to pay under the Settlement Agreement) came within the ambit of the Arbitration Agreement. To decide whether the dispute was covered by the Arbitration Agreement, the Court would first construe the Arbitration Agreement and then analyse the nature of the dispute by reference to the claim which is made.

The same principle of construction under contract law applies when it comes to an arbitration agreement. The Court would give effect to what a reasonable person that has all the knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract, having regard not only to the individual words used, but to the agreement as a whole. Further, in construing the Arbitration Agreement, the Court started from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal unless the language makes it clear that certain questions were intended to be excluded from the tribunal's jurisdiction. In the Court's view, the language of the Arbitration Agreement (i.e. "*any dispute, difference or claim [that] arises out of or in connection with this agreement*") was wide enough to cover all disputes other than one entirely unrelated to the transaction covered by the purchase orders.

As regards the nature of the dispute, whilst the Defendant was also disputing its liability to pay under the relevant purchase orders, the root of the dispute was indeed whether the parties had reached a settlement and whether the Settlement Agreement was binding and enforceable against the Defendant.

While the enforcement of the Settlement Agreement is a separate cause of action to a claim in respect of breach of the terms of the purchase orders, the authorities are clear that a new cause of action is not of itself a bar to arbitration under an arbitration clause in a separate agreement. The question therefore remained whether the present dispute fell within the ambit of the Arbitration Agreement. The Court's view was that the Arbitration Agreement did not make it clear that any questions, such as the effect of any attempted settlement, would be excluded from the arbitral tribunal's jurisdiction. Starting from the presumption in favour of one-stop adjudication, the Court considered, at least *prima facie*, that the parties had intended that the

same arbitral tribunal should determine their disputes as to whether they had reached an amicable settlement resulting in the Settlement Agreement.

The Plaintiff sought to rely on the Jurisdiction Clause to argue that the parties have submitted to the non-exclusive jurisdiction of Hong Kong courts for the resolution of the present dispute. In particular, the Plaintiff pointed out that the Arbitration Agreement would apply "unless otherwise agreed by the parties".

The Court took reference from cases where there is an arbitration clause and a non-exclusive jurisdiction clause in interrelated agreements. It has been consistently held by Hong Kong courts that the arbitration clause would be favoured over the non-exclusive jurisdiction clause and would be upheld. The Court came to the view that the Jurisdiction Clause did not override the Arbitration Agreement. The Jurisdiction Clause might have been added to clarify that the settlement was governed by Hong Kong law. Further, it might be construed as fixing the supervisory court of the arbitration or for the purposes of post arbitral enforcement given that the seat of arbitration was agreed to be Hong Kong. The Jurisdiction Clause also did not constitute a clear and unequivocal indication that the Arbitration Agreement did not apply. Nor did it impose a positive obligation on the parties to resolve all disputes only in Hong Kong courts. On these bases, the Jurisdiction Clause was not inconsistent with the Arbitration Agreement and should not be construed to be a clear agreement that disputes be dealt with otherwise than by arbitration.

Takeaways

When drafting dispute resolution clauses in interrelated contracts, it is important to consider what possible disputes could arise and how such disputes ought to be resolved, and how the multiple dispute resolution clauses may operate in parallel with one another. As this case reminds us, a new cause of action under one contract is not of itself a bar to arbitration under an arbitration agreement in a separate contract, especially if the arbitration agreement is drafted widely (e.g. words such as "disputes arising out of or in connection with" are adopted). In particular, where there is an arbitration agreement and a non-exclusive jurisdiction clause in interrelated contracts, the arbitration agreement would generally be favoured over the non-exclusive jurisdiction clause under the presumption of one-stop adjudication. Thus, should parties to an arbitration agreement intend to deal with certain disputes (whether under the same contract or interrelated contracts) otherwise than by arbitration, clear and unequivocal drafting would be necessary.

This case also shows that the threshold for a stay in favour of arbitration is relatively low. The test is whether there is at least a *prima facie* or plainly arguable case that the four conditions for a stay in favour of arbitration are satisfied. At the stage of a stay application, the court need not finally resolve the issue whether the arbitral

tribunal has jurisdiction, which is a matter for the arbitral tribunal to decide. The decision reinforces the fact that Hong Kong remains an arbitration-friendly jurisdiction, with the modern trend of the courts being to uphold arbitration agreements and to facilitate arbitrations and not to intervene unless necessary.

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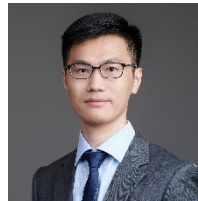
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