SLAUGHTER AND MAY/

CLIENT BRIEFING

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MIND YOUR ARBI-JARGON - HONG KONG COURT GRANTS INTERIM ANTI-SUIT INJUNCTION TO RESTRAIN MULTIPLE MAINLAND COURT PROCEEDINGS

In the recent decision of *Capital Wealth Holdings Limited & Ors v 南通嘉禾科技投资开发有限公司*[1], the Hong Kong Court of First Instance (**CFI**) granted an interim anti-suit injunction to restrain the defendant from further pursuing PRC court proceedings it had commenced before the Nantong Intermediate People's Court (**NIPC**) in favour of an arbitration administered by the Hong Kong International Arbitration Centre (**HKIAC**), on the basis that there is a sufficiently strongly arguable case that the arbitration agreement concerned is governed by Hong Kong law and the arbitral tribunal formed shall have the power to rule on the validity of the arbitration agreement under the *competence-competence* principle.

This case also demonstrates the difficulties one would be facing if an arbitration clause is not properly drafted.

Background

The 1st and 2nd Plaintiffs are related companies which own Saleen Motors International LLC, an automotive manufactory business in the USA. They formed a joint venture to manufacture and sell Saleen brand vehicles with the Defendant, an investment arm of the Rugao City Government, by virtue of three joint venture agreements - a master joint venture agreement (**JVA**), a supplemental joint venture agreement (**SJVA**) and a second supplemental joint venture agreement. A Project Company was set up as the joint venture vehicle, jointly owned by the 3rd to 6th Plaintiffs (which are the 1st and 2nd Plaintiffs' wholly foreign-owned enterprises) and the Defendant. Under the joint venture agreements, the 1st and 2nd Plaintiffs were obliged to inject the assets of Saleen including its intellectual property rights and to make capital contribution of RMB 3 billion into the Project Company. On the other hand, the Defendant was obliged to make a similar capital contribution, to procure production line, favourable land acquisition and other policies for the Project Company, as well as to provide a guarantee for the Project Company's financing of up to RMB 4 billion.

Both the JVA and SJVA contain an arbitration clause to the effect that any dispute arising out of these joint venture agreements shall be resolved by the "*Hong Kong Arbitration Committee using PRC law as substantive law and Hong Kong International Arbitration Ordinance as the means to resolve such dispute*". The clause is pathological in various respects: there is no arbitration institution named "Hong Kong Arbitration Committee" and no legislation entitled "Hong Kong International Arbitration Ordinance". It is also unclear which law the parties intended to be the governing law of the arbitration agreement as the clause appears to be referring to PRC laws as the substantive law but at the same time refers to the "Hong Kong International Arbitration Ordinance".

The PRC proceedings

Disputes emerged between the joint venture parties around May 2020. As a result, on 9 June 2020, the Defendant commenced three sets of legal proceedings before the NIPC against (amongst others) the 3rd to 6th Plaintiffs for the recovery of loans and enforcement of certain share pledges (**WFOE Proceedings**).

On 28 August 2020, the Plaintiffs commenced arbitration against the Defendant before the HKIAC. This led to the Defendant commencing another legal action in the NIPC to challenge the validity of the arbitration clause (the **Jurisdiction Proceedings**).

In those circumstances, the Plaintiffs applied to the CFI for an interim anti-suit injunction to restrain the Defendant from continuing with the WFOE Proceedings and the Jurisdiction Proceedings pursuant to section 45[2] of the Arbitration Ordinance (Cap 609). The Defendant, however, did not appear before the court, notwithstanding that attempts had been made to draw

[1] [2020] HKCFI 3025

[2] Section 45 of the Arbitration Ordinance provides that the court can grant an interim measure (such as an injunction) in relation to any arbitral proceedings which have been or are to be commenced in or outside Hong Kong.

the Defendant's attention to the hearing and the materials put before the court.

Which law should govern the arbitration clause?

In order for the CFI to grant the interim injunction sought under section 45, it must first be satisfied that Hong Kong law (hence the Arbitration Ordinance) apply to the arbitration agreement in question. Deputy High Court Judge Sit, SC took the view that when deciding what should be the governing law of an arbitration agreement, the court would look at the relevant contractual clause and consider the parties' intention as to which law should apply.

The judge is satisfied that there is a sufficiently strongly arguable case that the arbitration agreement is governed by Hong Kong law, for the following reasons:

(i) PRC law has been identified as the substantive law only;

(ii) The arbitration clause expressly refers to "Hong Kong International Arbitration Ordinance" which the judge is satisfied to be intended to be a reference to the Hong Kong Arbitration Ordinance; and

(iii) Whilst the arbitration clause refers to the resolution of dispute by "Hong Kong Arbitration Centre", it is sufficiently clear to the judge that it refers to the HKIAC. As the Plaintiffs from the US and the Defendant from the PRC deliberately chose the HKIAC as a neutral forum for the resolution of their dispute, this points strongly to their intention being that the governing law of the arbitration clause should be Hong Kong law.

Whether interim anti-suit injunction should be granted?

As a matter of Hong Kong law, the court should ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of arbitration agreement where the injunction has been sought without delay and the foreign proceedings are not too far advanced, unless the defendant can demonstrate strong reasons to the contrary.

As far as the Jurisdiction Proceedings are concerned, the judge accepted that looking at the matter as a whole and notwithstanding the incorrect terminologies used, the parties intended that it should be arbitration before the HKIAC. Indeed, the parties have already commenced the HKIAC-administration arbitration, in which the Defendant also participated. Further, the arbitral tribunal, already constituted, should be allowed to rule on its own competence and jurisdiction under the doctrine of *competence-competence*, which is one of the most important powers of arbitral tribunals recognised in international arbitration. On this basis, the judge was satisfied that an interim anti-suit injunction should be granted.

The position with regards to the WFOE Proceedings is slightly trickier as those proceedings involved the 3rd to 6th Plaintiffs who are not parties to the joint venture agreements but some ancillary loan agreements which do not contain an arbitration clause. Questions arose as to whether the dispute between these Plaintiffs and the Defendant formed part of or arose from the joint venture agreements, and whether it is intended that such disputes should also be determined by the same arbitral tribunal.

In considering these questions, the judge adopted the modern approach to construction of arbitration agreement which is to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause, which is to have their disputes that may arise out of the agreement containing the arbitration clause to be decided by a chosen tribunal. Further it will be presumed that rational businessmen are likely to have intended that any dispute arising out of their relationship to be decided by the same tribunal unless the language makes it clear that certain questions were intended to be excluded from the arbitral tribunal's jurisdiction.

After examining the provisions in the joint venture agreements as well as the loan agreements, the CFI was persuaded that the defendant's financing obligations which are matters in dispute in the WFOE Proceedings fall within the scope of the joint venture agreements. As such, it was strongly arguable that the parties intended that the dispute arising from financing-related obligations for the Project Company should be adjudicated by the same arbitral tribunal. Therefore, the CFI also granted an interim anti-suit injunction with respect to the WFOE Proceedings.

It is noteworthy that the CFI made clear that the interim injunction is only directed against the Defendant in *personam* and in no way deprives the PRC court of its jurisdiction to decide on the validity of the arbitration agreement in accordance with PRC law. Therefore, if subsequently the PRC court is required to rule on the issue (for example in enforcement proceedings of the arbitral award to be made in which the losing party resists enforcement in the Mainland), its jurisdiction is not impacted by the interim injunctions.

Enka v OOO Insurance Chubb [2020] UKSC 38

At the hearing, the Plaintiffs' counsel referred to the English Supreme Court's recent decision in *Enka v Chubb*. Notwithstanding that the judge in Capital Wealth did not discuss or rely on *Enka v Chubb*, we would take this opportunity to summarise the English Supreme Court's decision.

In *Enka v Chubb*, the relevant parties entered into a subcontract for certain works relating to the construction of a power plant in Russia. The subcontract contained an arbitration agreement requiring all disputes in respect of the subcontract to be referred to international arbitration seated in London and conducted under the ICC Rules, but did not contain any express choice of law governing the substantive contract nor the arbitration agreement.

The English Supreme court, by a 3-2 majority, ruled that where parties to a contract have not specified the law that governs their arbitration agreement, then the governing law of the contract (if specified) would generally apply unless there is a good reason to depart from it. This is the case even if the law of the seat is different to the governing law of the contract. However, if the governing law of the contract is also not specified, then the arbitration agreement shall be governed by the law most closely connected with the arbitration agreement – in most cases, that will be the law of the seat of the arbitration.

It is noted that the CFI in Capital Wealth took a different approach in considering what law is the governing law of the arbitration agreement when the parties did not specify that choice in their contracts. In particular, the CFI focused largely on the parties' intention as discerned from the joint venture agreements.

Subsequent developments

After the interim anti-suit injunctions were granted, the 3rd to 6th Plaintiffs mounted a jurisdictional challenge in the WFOE proceedings and sought a stay or an adjournment of those proceedings. In response, the Defendant applied to the CFI for the discharge of the interim injunction in respect of the WFOE Proceedings (**Discharge Application**) and a limited variation of the injunctive orders in order to be in a position to respond to their jurisdictional challenge (**Variation Application**). The Defendant also seeks fortification of the undertaking as to damages (**Fortification Application**).

The Discharge Application and the Fortification Application have been adjourned for substantive hearing in January 2021. In respect of the Variation Application, given that the 3rd to 6th Plaintiffs' jurisdictional challenge was only made after the grant of the interim injunctions, the CFI recognised the risk of these parties being able to benefit from the extra step that they have taken in the WFOE Proceedings since the Defendant were restrained by interim injunctions. Having balanced all the factors, the CFI held that it would pose a lower risk of injustice to vary the interim injunction to allow the Defendant to first seek a stay or adjournment of the WFOE Proceedings and, if unsuccessful, to allow the Defendant to take steps to resist, oppose and/or respond to the jurisdictional challenge.

Takeaways

This case again confirms the Hong Kong court's pro-arbitration approach and that it is ready to grant interim anti-suit injunctions against foreign proceedings provided that the legal requirements are satisfied. To avoid unnecessary arguments on the governing law, it is advisable to include clear languages to specify which law shall apply to the substantive dispute and which law shall apply to interpret the arbitration clause.

We cannot stress enough the importance of careful drafting of the dispute resolution clause. Whilst one of the biggest hurdles in finalising an arbitration clause is to get the parties' consensus on the choice of arbitration institution, governing law of the arbitration agreement and the curial law, drafters should not lose sight of details such as the official names of the institution chosen and the legislations adopted. The consequences of getting these wrong could be as severe as what we can see from Capital Wealth – parties may end up facing satellite litigation in different jurisdictions before their substantive dispute is properly dealt with. Last but not least, it would also be interesting to keep track of the developments on this case, in particular the outcome of Discharge Application which will be heard in January 2021.

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