

Is an exclusive jurisdiction clause conclusive?



Introduction

In the recent case of *Quaestus Capital Pte Ltd v Everton Associates Ltd*, the Hong Kong Court discussed whether or not the plaintiff should be allowed to continue with its proceedings in Hong Kong when it has agreed to an exclusive jurisdiction clause in favour of the courts in London.

Background

The plaintiff entered into a loan agreement with the 1st defendant for certain non-recourse loan to be provided by the 1st defendant. At the same time, the plaintiff entered into a pledge agreement with the 1st defendant to pledge its shares in a listed company in Hong Kong as security for the loan. Both the loan agreement and the pledge agreement were governed by Hong Kong law and contained an exclusive jurisdiction clause in favour of the Hong Kong Courts.

The 1st defendant requires that the pledged shares be transferred to a brokerage account maintained by the 2nd defendant before it would make available the first tranche of loan to the plaintiff. The plaintiff therefore entered into a brokerage agreement with the 1st and 2nd defendant, and transferred the pledged shares to the account maintained by the 2nd defendant pursuant to the brokerage agreement. The brokerage agreement was governed by English law and contained an exclusive jurisdiction clause in favour of English Courts.

In the event, the plaintiff alleges that notwithstanding that no loan was made by the 1st defendant under the loan agreement, the pledged shares were disposed of without its knowledge. The plaintiff therefore commenced proceedings under the brokerage agreement in Hong Kong against the 1st and 2nd defendants, on the basis that a fraudulent scheme was carried out by them to deprive it of the pledged shares.

The Issues

In deciding this issue, the Court had looked at the following issues:

1. Whether or not the plaintiff's claim falls within the scope of the exclusive jurisdiction clause;
2. Whether or not the exclusive jurisdiction clause was impeached by the fraud alleged by the plaintiff;
3. Whether or not there was strong cause for the plaintiff to be allowed to continue the proceedings in Hong Kong.

In respect of **issue 1**, the Court concluded that as a matter of construction, the wording of the exclusive jurisdiction clause was wide enough to cover the claims made by the plaintiff in the present proceedings.

As regards **issue 2**, it is well established that a jurisdiction clause is regarded as a separate agreement from the substantive agreement between the parties. Hence, allegation of fraud directed to the substantive agreement does not necessarily invalidate the jurisdiction clause. In this regard, the Court found that there is no suggestion that the plaintiff was not aware of the jurisdiction clause or was specifically misled into agreeing to give the English courts exclusive jurisdiction. The doctrine of separability suggests that the exclusive jurisdiction clause should still be valid notwithstanding the alleged fraud.

Concerning **issue 3**, the key issue the Court considered was the potential issue of multiplicity of proceedings with the risk of having inconsistent findings, this is particularly important in case where allegation of conspiracy to defraud is made. In the present case, the brokerage agreement is ancillary to the loan agreement and the pledge agreement.

The plaintiff is pursuing its claim against the 1st defendant in Hong Kong, which has acknowledged receipt of the writ. It is in the interests of justice to have one tribunal adjudicating the plaintiff's claims against both defendants in the same suit in order to avoid the waste of costs and the potential disaster of having separate actions in different jurisdictions resulting in inconsistent findings.

Key Takeaway

In cases where the parties have agreed to an exclusive jurisdiction clause, the Court may not enforce it if there are strong reasons to do so (although the Court recognizes that the parties' intention should be respected). Nevertheless, the party in breach of the exclusive jurisdiction clause should bear in mind that the other party may have a cause of action against it for damages (e.g. any additional expenses incurred having to litigate in the current forum) resulting from its breach of the exclusive jurisdiction clause.

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