

Hong Kong—enforcement, specific performance, and public policy (G v S)

This analysis was first published on Lexis®PSL on 11 June 2021 and can be found [here](#) (subscription required).

Arbitration analysis: The Hong Kong Court of First Instance (the court) determined an application by the unsuccessful respondent (S) in a China International Economic and Trade Arbitration Commission arbitration seated in Mainland China (the Arbitration). An arbitral award handed down on 3 July 2020 required S to (i) continue to perform its obligations (the specific performance order) under a 2018 co-operation agreement (the Agreement); (ii) pay certain marketing costs, (iii) provide samples, and (iv) pay costs. On 25 September 2020, the court granted an enforcement order of the award in favour of the applicant (G). S applied to have the enforcement order set aside on the grounds that (i) the enforcement of the specific performance order was contrary to public policy; (ii) the other orders were outside the scope of the arbitration agreement. The court was also required to consider whether the orders contained in an arbitral award could be severable and enforced separately. The application was dismissed. Written by Andrew Rigden Green, partner and head of International Arbitration, Greater China, Stephenson Harwood, Hong Kong.

G v S [\[2021\] HKCU 2493](#) (Lexis® Advance subscription required)

Note: other Hong Kong judgments referred to in this analysis are not reported by LexisNexis® UK.

What are the practical implications of this case?

The court will be circumspect in setting aside an enforcement order on the grounds of public policy. Specifically, the court would not refuse to enforce an arbitration award which did not prevent a party from exercising its lawful rights under an agreement.

Whether a party is entitled to terminate an agreement on the basis of breach of contract is a matter to be determined according to the dispute resolution mechanism contained in the relevant agreement. In relation to an award granting specific performance, even if the performance of the relevant agreement would be impossible, this is not a ground to refuse enforcement of the award (*Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* [2009] 4 HKLRD 353). Questions of the continued performance of the agreement, or the entitlement to terminate, are to be resolved in accordance with the dispute resolution mechanism stipulated in an agreement.

Where there are parts of an arbitral award which are objectionable or defective, the other parts which stand good are severable or can be carved out and are enforceable on their own (*JJ Agro Industries (P) Ltd v Texuna International Ltd* [1992] 2 HKLR 391).

What was the background?

The dispute arose from a distributorship agreement concluded in 2018 (the Agreement) superseding an earlier agreement from 2017. G commenced the Arbitration against S for breach of contract and applying for specific performance. The award was issued on 3 July 2020 in favour of G. The award contained the following orders requiring S to:

- continue to perform its obligations under the Agreement (ie, the specific performance order)

- bear the marketing costs incurred by G (marketing costs order)
- provide G with €890,833.27 worth of sample products or pay the equivalent to G (alternative relief order), and
- pay to G arbitration costs and fees (costs and fees order)

G sought to enforce the award in Hong Kong by way of an enforcement order made by the court. S applied to set aside the enforcement order on the basis that the specific performance order was contrary to public policy as it precluded S from relying on its lawful right to terminate the agreement by compelling it to perform its obligations under the agreement which S had, subsequent to the Arbitration, terminated and which termination was now subject of a new arbitration in Mainland China (the New Arbitration) commenced by G to seek damages and loss of profits for the termination of the Agreement. S argued that enforcing the specific performance order would be inconsistent with the claims made by G under the New Arbitration.

S also argued that the marketing costs order and the alternative relief order were made outside the scope of the arbitration agreement as they arose under the 2017 agreement which was subject to Hong Kong High Court jurisdiction. It was also argued that the costs and fees order should be set aside as it arose out of those other orders.

What did the court decide?

The application was dismissed. The court rejected S's argument that the specific performance order was contrary to public policy as the award did not prohibit S from relying on new grounds to terminate the Agreement. The court considered that whether S was entitled to terminate the Agreement on the basis of breaches not dealt with in the arbitration, or on the basis of events after the date of the award, or any other basis, was a matter to be determined in accordance with the dispute resolution mechanism contained in the Agreement.

Further G confirmed that it had accepted S's repudiatory breach of the Agreement and was pursuing claims in the New Arbitration and therefore no longer sought to enforce the specific performance order.

The court held that it would not have been contrary to Hong Kong public policy to allow the enforcement of the specific performance order as the award did not prevent S from relying on its lawful rights of termination. The question of lawfulness of those rights was to be determined under the dispute resolution clause of the Agreement, ie in the New Arbitration.

Given G had in any event abandoned the enforcement of the specific performance orders the court addressed whether (i) it was necessary for the whole award to be enforced, or only part or parts of it could be enforced, and (ii) whether the tribunal had jurisdiction to make the other orders.

Severability

Taking into account Section 84 of the Hong Kong Arbitration Ordinance and applying the decision in *JJ Agro Industries (P) Ltd v Texuna International Ltd* [1992] 2 HKLR 391, the court granted leave to G to enforce other severable parts of the award without the specific performance order.

Jurisdiction

The court held that the intention of the parties was for the Agreement to supersede the 2017 agreement and the wording 'any dispute which arises between the parties out of or in relation the Agreement' was sufficiently to cover the dispute as to the marketing costs payable and the samples to be supplied which both arose out of or in relation the Agreement.

Case details:

- Court: Hong Kong Court of First Instance
- Judge: Mimie Chan
- Date of judgment: 24 May 2021

Andrew Rigden Green is a partner and a head of International Arbitration, Greater China, Stephenson Harwood, Hong Kong. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.

Want to read more? Sign up for a free trial below.

FREE TRIAL