

Arbitration — Arbitral award — Setting aside — Leave to enforce — Scope of submission of arbitration — Public policy (*ARJOWIGGINS HKK2 LTD v X CO*)

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Arbitration analysis: The applicant ("HKK") and the respondent ("X Co") formed a joint venture in Mainland China ("JV"). After the breakdown of relationship between the former partners, X Co commenced arbitration in Hong Kong seeking for exclusive possession of the documents in the joint venture. During the course of the arbitration, the JV was placed in liquidation. The Tribunal dismissed X Co's claim but asked for further submission on the disposal of the documents. The Tribunal ordered the documents to be delivered up to the compulsory liquidation group. HKK applied to the Hong Kong court to set aside the award under section 81(1) of the Hong Kong Arbitration Ordinance (Cap 609) (which incorporates article 34(2)(a)(iii) of the United Nations Commission on International Trade Law Model Law). The Hong Kong Court of First Instance set aside the award on the ground that the order made by the Tribunal was beyond the jurisdiction of the Tribunal. Written by Andrew Rigden Green, partner, head of International Arbitration in Greater China, at Stephenson Harwood, Hong Kong.

ARJOWIGGINS HKK2 LTD v X CO [2022] HKCU 307 (subscription to Lexis+ US required)

What are the practical implications of this case?

- Arbitration proceedings in Hong Kong are adversarial in nature and the proper course of proceedings should be dictated by the parties, as opposed to an inquisitorial approach taken by the Tribunal in the present case. Arbitral tribunals must conduct the proceedings in accordance with the pleadings submitted by the parties.
- Despite the informal nature of arbitration proceedings, they must be conducted with due process and fairness to the parties. In particular, each party must be allowed to know in advance the claims and remedies sought by the other party.
- To avoid "trial by ambush", the parties to an arbitration agreement should set out an agreed list of issues to clearly define the scope of the reference which will determine the conduct of the proceedings.

What was the background?

In 2005, HKK and X Co (the "**Parties**") formed the JV. The relationship between the Parties broke down and became deadlocked. In 2010, X Co applied to the Mainland Court for judicial dissolution of the JV. There were various contractual disputes in arbitration and in 2014, a liquidation committee was formed to manage the dissolution of the JV. There were disputes as to the dissolution and in June 2019, an order for compulsory liquidation of the JV was made and a "compulsory liquidation group" was appointed (the "**CLG**").

X Co commenced arbitration in Hong Kong in 2018 (the "**Arbitration**"), alleging that (1) it was entitled to take exclusive possession of and to preserve the books and documents of the JV (the "**Documents**") under PRC laws; (2) its entitlement to the Documents was a form of proprietary right, which entitled it to sue HKK for the delivery up of the Documents and (3) the Parties were bound under PRC laws and the joint venture contract (the "**Contract**") to obligations of good faith and fair dealing, such that HKK should hand over the Documents to X Co. X Co sought an order for the return and examination of the Documents.

Whilst the Tribunal found that the Documents were in HKK's possession, it also found that (1) X Co's obligation to preserve the Documents does not turn into a right to obtain the Documents; (2) the JV retained the proprietary right to the Documents and (3) whilst the Contract imposed obligations on the Parties to cooperate in the liquidation of the JV and to abide by PRC laws, these obligations do not give any right to X Co to call for delivery of the Documents.

The Tribunal then invited submissions from the Parties on what orders the Tribunal should make in relation to the disposal of the Documents. X Co claimed that the Documents should be delivered to the CLG. HKK

submitted that (1) the Tribunal had no jurisdiction to make any order which is beyond the matters referred to in the Notice of Arbitration and (2) the CLG was not in existence prior to commencement of the Arbitration and that X Co had never sought any relief that the Documents should be delivered to the CLG.

The Tribunal concluded that (1) the question of the remedies which are available to X Co concerned a matter as to the rights and obligations of the Parties under the Contract and thus was within the jurisdiction of the Tribunal; (2) even if a remedy was not asked for, the Tribunal was within its duty to act in accordance with the arbitration agreement and (3) the Parties were given equal treatment by making further submissions. Accordingly, the Tribunal ordered that the Documents were to be delivered up to the CLG (the "**Award**").

HKK applied to the Hong Kong Court to set aside the Award and X Co made a cross-application for leave to enforce the Award.

What did the court decide?

HKK's application was based on the following:

- The orders made in the Award were decisions on matters beyond the scope of the submission to the Arbitration
- Enforcement of the Award would be contrary to the public policy of Hong Kong as HKK was barred from adducing further evidence relevant to the disposal of the Documents

Hong Kong Court set aside the Award and dismissed X Co's application to enforce the Award.

The Award was beyond the scope of the Parties' submission to the Arbitration

The Court found that the fact that an issue may be within the wide scope of the arbitration agreement does not necessarily mean that the issue is within the scope of the actual reference of the particular dispute to the tribunal in the particular arbitration. The claim made was X Co's entitlement to the Documents but not based on HKK's breach of its obligations under the Contract.

Despite the Tribunal's intention to assist the Parties, the Court found that the Tribunal should have separated the question of whether the Parties were given a fair and reasonable opportunity to present its case from the question of whether the Tribunal had jurisdiction to act and to decide on the dispute.

The Court also noted the informal nature of arbitration but found that a 'trial by ambush' has no place in an arbitration. A party to arbitration is entitled to know in advance the claims and remedies sought by the other party so as to enable them to consider all possible defences. Therefore, the Court found that, facts of HKK's possession of the Documents and of the liquidation of the JV pleaded in the submissions, did not provide a sufficient basis for X Co to have a claim to call for HKK's performance of its obligations under the Contract.

The Court did not make any finding on whether enforcing the Award was contrary to the public policy

The Court concluded that the fact that the Award was outside the scope of the reference is sufficient to set aside the Award.

Case details

- Court: Hong Kong Court of First Instance
- Judge: Honourable Madam Justice Mimmie Chan
- Date of judgment: 12 January 2022

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