

## Hong Kong court stays proceedings even when they are not covered by an arbitration agreement *MAK v LA* [2022] HKCFI 285



### Arbitration – employment contracts – jurisdiction of Labour Tribunal – stay

In this recent decision the Hong Kong court has demonstrated a particularly pro-arbitration stance, adopting a broad interpretation of arbitration provisions in an employee bonus scheme, extending it beyond one particular year, staying its own proceedings in favour of arbitration for matters covered by the arbitration clause, and stayed other related claims pending the outcome of the arbitration. The Hong Kong court positively encouraged the parties to agree to extend the arbitration clause to these residual claims.

In the recent case of *MAK v LA*, the Court of First Instance granted an application for stay of all court proceedings in favour of arbitration. The Court also invited the parties, during the stay of the proceedings, to agree on whether a residual claim that is outside the scope of the arbitration agreement should also be submitted to the same arbitral tribunal, so as to avoid the risk of inconsistent findings by the Court.

### Background

MAK a former employee of LA commenced court proceedings against his former employer on the basis that he had not been awarded a discretionary bonus for 2019 and had been prevented from participating in LA's staff profit sharing scheme (the "**Scheme**"). MAK had been awarded discretionary bonuses for 2016, 2017 and 2018. These included share units in various funds managed by LA ("**Units**"). The Units were to be vested over a period of 3 years ("**Deferred Shares**"). MAK claims that upon termination of his employment, LA failed to vest the unvested Deferred Shares. He therefore claims (1) the immediate vesting and redemption of unvested Deferred Shares, valued at HK\$1,658,856.29; (2) the redemption of vested Deferred Shares; (3) the discretionary bonus for 2019 in the sum of HK\$3,347,288.72; (4) alternatively payment on quantum meruit basis for his contribution for the year 2019 and (5) interest.

MAK had first commenced proceedings against LA in the Labour Tribunal (the "**Tribunal Proceedings**"). LA asserted in its defence that any dispute in connection with the Scheme should be submitted to arbitration. The Tribunal Proceedings were transferred to the High Court for the purpose of any stay application in favour of arbitration. On 8 February 2021 MAK filed his statement of claim. On 11 May 2021, LA issued an application for the proceedings to be stayed to arbitration (the "**Summons**") pursuant to section 20(1) of the Arbitration Ordinance (Cap. 609) (the "**Ordinance**") and filed its defence on the following day.

### The Decision

#### ***Jurisdiction of the Labour Tribunal***

Under Hong Kong law the Labour Tribunal has jurisdiction as of right over employment disputes for sums of money. However, Section 20(2) of the Ordinance expressly provides that if the dispute is within the jurisdiction of the Labour Tribunal and there is an arbitration agreement, the Court may refer the parties to arbitration if it is satisfied that (1) there is no sufficient reason why the parties should not be referred to arbitration and (2) the party requesting arbitration was ready and willing to do all things necessary for the proper conduct of the arbitration.

The Court decided that (1) MAK's claim for the discretionary bonus for 2019, was a claim for a sum of money; however, (2) the claim for the redemption of the Deferred Shares was not. The claim for the discretionary bonus was therefore within the jurisdiction of the Labour Tribunal, whereas the claim for the redemption of Deferred Shares was not. In addition, the Court considered that it was relevant that the

calculation of the said discretionary bonus was connected to MAK's claim of the Deferred Shares.

#### Whether there is an arbitration agreement

LA issued a letter of employment in November 2010, which states that MAK may be eligible to discretionary bonus and to participate in the Scheme (the "**Letter of Employment**"). The Letter of Employment expressly provides for the submission to the exclusive jurisdiction of the Hong Kong Courts in relation to any dispute arising out of the employment. When MAK received bonuses from LA, these were confirmed by way of bonus award letters. For the year of 2016, the bonus award letter dated 17 May 2017 (the "**2017 Letter**") which confirmed participation in the Scheme. The letter was agreed, acknowledged and countersigned by MAK but contained no arbitration clause.

On 16 June 2018, LA issued a similar letter in respect of the bonus payment and Scheme participation and its terms for 2017 (the "**2018 Letter**"). Clause 9 of the 2018 Letter provides that any dispute arising out of this agreement is to be referred to arbitration in Hong Kong, by reference to a sole arbitrator to be appointed by LA.

On 3 May 2019, LA issued a letter in similar terms to the 2018 Letter setting out MAK's bonus payment for 2018 (the "**2019 Letter**"). This letter contained the same arbitration clause as the 2018 Letter. It was not disputed that MAK did not countersign the 2019 Letter.

##### a. 2017 Bonus Award

MAK argued that the arbitration clause in the 2018 Letter should not be enforced as (1) it is unconscionable that LA was allowed to unilaterally appoint a sole arbitrator; (2) there was a total failure of consideration to support MAK being bound by the 2018 Letter; and (3) the claims are within the jurisdiction of the Labour Tribunal and that there is no sufficient reason why the parties should be referred to arbitration.

The Court stated that once a *prima facie* case is established as to the existence of the arbitration agreement, the Court is bound to refer the parties to arbitration. MAK's argument that the arbitration agreement is unconscionable was rejected as the manner of the reference and the appointment of an arbitrator is a matter of contract between parties and in any case, an arbitrator is statutorily obliged to act independently and impartially. The Court also found that there is clearly valid consideration as MAK must agree to the terms of his participation in the 2018 Letter before he can receive the benefits of the Scheme. It was also commented that, even if there was no consideration, there was an apparent consensus that disputes would be referred to arbitration given that the parties signed the 2018 Letter.

##### b. 2016 Bonus Award

The Court adopted the approach in *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951, that a jurisdiction agreement contained in one contract may, on its proper construction, extend to a claim made under another contract. As such, the Court concluded that since there is no competing jurisdiction clause in the 2017 Letter and that the language of the arbitration agreement in the 2018 Letter is wide enough to extend to the disputes between LA and MAK relating to MAK's claims in relation to the Scheme, the arbitration agreement in the 2018 Letter should also be extended to disputes arising from the shares awarded to MAK in 2016.

##### c. 2018 Bonus Award

MAK argued that he should not be bound by the terms of the 2019 Letter as he did not countersign it. However, section 19 of the Ordinance specifies that an arbitration agreement must be in writing but does not prescribe that it must be signed by the parties. The Court concluded that there is clearly an arbitration agreement in writing, and the fact that it was not countersigned by MAK does not alter the fact of the *prima facie* existence of a valid arbitration agreement.

The Court reiterated that MAK's Deferred Shares claims do not fall within the jurisdiction of the Labour Tribunal. Even if they did, the Court found against the alleged unconscionability of the arbitration clause and the purported prejudice against MAK, thus concluded that there is no sufficient reason why the parties should not be referred to arbitration.

Accordingly, the Court was satisfied that there was a *prima facie* case of the existence of a valid and binding arbitration agreement and MAK's Deferred Shares claims fall within the ambit of the arbitration agreement, the Court was therefore bound to refer the parties to arbitration.

## Residual claims

MAK's claims to the 2019 discretionary bonus and alternatively on quantum meruit basis are governed by the Letter of Employment which provides for the jurisdiction of the Court. Whilst the Court recognized the importance of not depriving a claimant the right to continue proceedings, the Court viewed that the claim to the 2019 discretionary bonus is related to the Deferred Shares claim and that the interests of the parties may be better served by arbitration as it would be more time and cost efficient. It also stated that if the parties submit the residual claim to the same arbitral tribunal, it would avoid the risk of inconsistent findings by the Court. As such, the court ordered a stay of the residual claims pending the determination of the arbitral tribunal of the Deferred Shares Claim. The Court also invited the parties to consider and agree on the possible resolution of all the claims in one forum.

## Takeaways

The Hong Kong Courts have always demonstrated its pro-arbitration stance, which has helped to solidify Hong Kong as a popular venue for commercial dispute resolution. In this particular case, the Court, citing *Fiona Trust & Holding v Privalov* [2007] 4 All ER 951, emphasizes the importance of construing an arbitration clause by giving it commercial sense and reflecting the presumed intention of the parties entering into the arbitration agreement, which is to have the disputes decided by the tribunal that is chosen by the parties. As such, the Court took a broad approach in interpreting the arbitration agreement to cover MAK's claim on the 2016 bonus awards. The Court took a further step by ordering a stay in the residual claim, despite it being subject to the Court's jurisdiction. This is not just a matter of interpretation of the arbitration agreement, but the Court's deliberate decision to make way for arbitration as it deems the procedure to be more fitting in the present context of the disputes and that the ends of justice would be better served.

The outcome of this case is also evidence of the Hong Kong Courts' willingness to uphold party autonomy in the context of arbitration.

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