

## Arbitration — Stay — Arbitration clause — Loan agreement — Action for dishonoured cheque (T v W)



**Arbitration analysis:** The plaintiff (T) made a loan to the defendant (W) pursuant to a loan agreement which contained an arbitration clause. W provided a cheque in part payment of the loan, however, it was dishonoured, T brought an action against W on the cheque in the Hong Kong court. W applied to stay the court action in favour of arbitration under section 20(1) of the Hong Kong Arbitration Ordinance (Cap 609) (which incorporates article 8 of the United Nations Commission on International Trade Law (the "Model Law")). The Hong Kong Court of Appeal upheld the first instance decision to refuse the stay. The Hong Kong Court of Appeal applied the principle set out in *CA Pacific Forex Ltd v Lei Kuan Leong* that an arbitration clause contained in an underlying agreement would only apply to a bill of exchange with express wording.

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*T v W* [2022] HKCU 233

### What are the practical implications of this case?

- As a general rule a cheque or bill of exchange will be considered to be an independent obligation from the underlying agreement.
- In determining whether an arbitration clause in an underlying agreement applies to cheques and bills of exchange, the clause is to be construed in the context of the agreement as a whole against the factual matrix, which includes all relevant circumstances. For an arbitration clause in an underlying agreement to apply to cheques or bills of exchange clear and express language will be required.
- The availability of early determination procedure (broadly equivalent of summary judgment) in modern arbitration rules is not sufficient to persuade the Hong Kong court that payees should be deprived of their right to sue on dishonoured cheques or bills of exchange.
- This decision continues the line of jurisprudence in Hong Kong that express wording is required for an arbitration clause to be incorporated into negotiable instruments. In the case of *OCBC Wing Hang Bank v Kai Sen Shipping Co Ltd* [2020] HKCU 408, the Court also considered that, under Hong Kong law, express wording is required to incorporate an arbitration clause into a bill of lading.

### What was the background?

By a written agreement dated 21 March 2017, T agreed to lend \$5 million to W to be repaid on 21 March 2018, with monthly interest payable. W drew a cheque post-dated 21 March 2018 in the amount of \$5 million for repayment of the principal. It was also agreed that the monthly interest would be settled in cash.

The repayment date was extended to 21 September 2019 by a written agreement (the "**Loan Agreement**"). W issued a new cheque for \$5 million post-dated 21 September 2019 (the "**Cheque**"). Following that, a supplemental agreement was entered into, in which W undertook to repay the interest in cash on 4 February 2020.

On 10 March 2020, T presented the Cheque for payment and the Cheque was dishonoured. Subsequently, T issued a writ against W. W applied to the Hong Kong Court of First Instance ("**CFI**") to stay the action in favour of arbitration on the basis of the arbitration clause in the Loan Agreement, which states that "...*This loan agreement is subject to the laws of Hong Kong. In case of any disputes, they shall be dealt with through arbitration in Hong Kong*" (the "**Arbitration Clause**").

The CFI dismissed W's application and held that (1) following *CA Pacific Forex Ltd v Lei Kuan Leong* [1999] 1 HKLRD 462, the presumption against taking bills of exchange into arbitration should not be rebutted unless there was a plain manifestation in the arbitration clause that it was to apply to bills of exchange; (2) the parties had intended the Cheque to act as security and that the word "disputes" in the Arbitration Clause only refers to disputes relating to the Loan Agreement and the parties' claims and liabilities thereunder; and (3) there were good commercial reasons to agree that disputes in relation to the Cheque were not to be resolved by arbitration.

W appealed to the Hong Kong Court of Appeal ("**CA**").

## What did the court decide?

W's appeal was based on the following:

- The *CA Pacific* decision is plainly wrong as its reasoning is based on a German law case and that *CA Pacific* has been overtaken by the decision in *Fiona Trust & Holding Corporation & others v Privalov & others* [2007] UKHL 40
- Alternatively, the approach to construe the arbitration clause in the *CA Pacific* decision is restrictive as it only considers the language of the clause to the exclusion of other circumstances

As W does not dispute that, if the *CA Pacific* approach is applicable, the Arbitration Clause will not apply to an action on the Cheque, therefore, W's appeal solely depends on whether *CA Pacific* is still good law.

## CA dismissed W's appeal.

### Hong Kong Court refuses to depart from the *CA Pacific* decision

Whilst the reasoning of *CA Pacific* was based on *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713, in which the construction of the arbitration clause was undertaken applying German law, the position as to English law was also considered by Lord Russell in the said case. In *CA Pacific*, the approach in Hong Kong taken is also the same.

The CA was not satisfied that the 'one-stop shop dispute resolution' presumption from *Fiona Trust* represents a development of law to the extent that the Court should depart from the legal position set out in *CA Pacific*. The *Fiona Trust* decision considers that the Court should give effect to an arbitration clause to its commercial purpose, which is, where businessmen have entered into an agreement with an arbitration clause, their purpose is to have their disputes to be resolved with arbitration. However, *Fiona Trust* was not a case concerned with bills of exchange. The CA re-affirmed the principle that a bill of exchange is a separate and distinct contract from the underlying transaction and that there must be express wording for an arbitration

clause to be incorporated into a bill of exchange. Further, the CA also reinforced that this approach is consistent with the intention of rational businessmen, who will not readily forgo their rights on a dishonoured cheque, including the right to sue in court for judgment.

### Approach taken in *CA Pacific* is not restrictive

The approach in construing an arbitration clause in *CA Pacific* is not meant to be restricted to examining only the language of the clause, but instead, the clause should be construed in the context of the agreement as a whole against the factual matrix, which includes all relevant circumstances.

### Case details

- Court: Hong Kong Court of Appeal
- Judge: Honourable Madam Justice Kwan, V-P and Honourable Justice Lam, JA
- Date of judgment: 14 January 2022

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