

August 2023

## Arbitrability – stay of proceedings in favour of arbitration Falcon Insurance v Bing Lee [2023] HKCFI 1129



### Summary

A dispute arose in respect of proceedings initiated by an insurer (the plaintiff) seeking a declaration of non-liability. The insurance policy in question was subject to an arbitration clause and the defendant applied for a stay of the proceedings in favour of arbitration. The plaintiff argued that given the claim was for a declaration under the relevant statute, it was non arbitrable and thus no stay should be granted.

The Hong Kong Court of First Instance granted an order for stay in favour of arbitration and applied the following principles:-

1. The fact that arbitral tribunal may not have powers to grant certain relief exclusively reserved to the courts does not make the subject matter non arbitrable.
2. If there is a *prima facie* or plainly arguable case that the parties are bound by an arbitration agreement, the matter should be stayed for the arbitral tribunal to determine its own jurisdiction.
3. The perceived lack of merits of any defence does not mean there is no genuine dispute that should be referred to the contractually agreed resolution forum (i.e., arbitration).

*Falcon Insurance Co (Hong Kong) Ltd v Bing Lee Crane-Lorry Transportation Co Ltd & Anor* [2023] HKCFI 1129 (MP)

## Practical implications

This case demonstrates the pro-arbitration stance adopted by the Hong Kong courts' when determining the arbitrability of a dispute.

The court reaffirmed that the requirement to grant a stay for arbitration under s.20(1) of Arbitration Ordinance (Cap. 609) ("**AO**") is mandatory, provided that certain conditions are satisfied. One such condition is that the court does not find "the agreement is null and void, inoperative or incapable of being performed".

In particular, the court noted that arbitral tribunals may not have powers to grant certain relief exclusively reserved to the courts does not make the subject matter non arbitrable or render the arbitration agreement inoperative. However, while acknowledging the strong public interest in upholding arbitration clauses, the court also took into consideration whether granting a mandatory stay under s.20(1) of AO will undermine the statutory regime that reserves such powers to the courts.

The court also emphasised that an applicant only needs to demonstrate that there is a *prima facie* case or it is plainly arguable, that the parties are bound by an arbitration clause. If this point is established, the court should refrain from resolving the issue and instead stay the proceedings in favour of arbitration, allowing the arbitral tribunal to determine its own jurisdiction.

## Background

This case involves an accident caused by the defendant's lorry crane, the plaintiff was the motor insurer of the defendant at the material time.

Following the accident, one of the injured persons brought a Personal Injury Claim against the defendant. On 18 May 2022, the defendant's lawyer served a notice to the plaintiff to seek a contribution and an indemnity.

The plaintiff considered that their insurance policy was rendered void as the defendant had breached the "Clean Claims Warranty". Consequently, the plaintiff initiated the present proceedings, seeking a declaration of non-liability under the insurance policy. In response, the defendant sought a stay of the proceedings in favour of the arbitration clause contained in the insurance policy.

## Court's decision

The court ordered a stay of all further proceedings between the plaintiff and the defendant. In light of the stay, the merits of the plaintiff's claim for declaration were not reviewed by the court.

In assessing whether a stay of proceedings in favour of arbitration under AO s.20(1) should be granted, the court considered the following 4 questions outlined in the case *Chu Kong v Lau Wing Yan* [2018] HKCA 1010:-

### Question 1 - Is the arbitration clause an arbitration agreement?

This question is satisfied on the basis that the arbitration clause of the insurance policy ("**Arbitration Clause**") provided that all differences arising out of the policy shall be determined by arbitration. Furthermore, the Arbitration Clause specifies that an arbitration award is a condition precedent for any right of action.

### Question 2 - Is the Arbitration Clause null and void, inoperative or incapable of being performed?

The plaintiff argued as the declaratory relief sought under s.10 (3) of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap.272) ("**MVIO**") can only be granted by the court, rendering any arbitration agreement purporting to refer a dispute under s.10(3) inoperative and/or incapable of being performed. The plaintiff also argued the policy was null and void due to the breach of the "Clean Claims Warranty".

Having considered the Singaporean case *Tomolugen Holdings v Silica Investors Ltd* [2016] 1 SLR 373, the court ruled that the fact that arbitral tribunal may not have powers to grant certain relief exclusively reserved to the courts does not make the subject matter non arbitrable. Further, the mandatory stay under s.20 of AO was not in consistent with and did not undermine the regime of s.10 of MVIO.

The court did not proceed to deal with the "Clean Claims Warranty" as this is an arbitrable matter.

### **Question 3 - Whether there is a dispute or difference between the parties?**

Citing *Re Lam Kwok Hung Guy* [2022] 6 HKC 534, the court held that even if the judge has perceived a lack of merits, that does not imply that there is no genuine dispute between the parties should be referred to their contractually agreed dispute resolution forum (i.e., arbitration in this case).

The plaintiff argued that the defendant's failure to respond to the plaintiff's disclaimer letter regarding the traffic accident constituted a deemed waiver. The court held as no claim has yet been made by the defendant, it is arguable whether the time under the deemed waiver had started to run against the defendant, which constitutes a dispute under the Arbitration Clause.

### **Question 4 - Is the dispute or difference within the ambit of the Arbitration Clause?**

The court noted that the Arbitration Clause was drafted in wide terms which covered "all difference arising out of the policy". As such, the validity and enforceability of the Policy were covered by the Arbitration Clause and this question is satisfied.

## **Case Details**

- Court: Hong Kong Court of First Instance (Miscellaneous Proceedings)
- Judge: B Chu J
- Date of Judgment: 28/4/2023

## Contact us



### Andrew Rigden Green

Partner

T: +852 2533 2761

E: [andrew.rigden@shlegal.com](mailto:andrew.rigden@shlegal.com)

Stephenson Harwood is a law firm of over 1300 people worldwide, including 190 partners. Our people are committed to achieving the goals of our clients – listed and private companies, institutions and individuals.

We assemble teams of bright thinkers to match our clients' needs and give the right advice from the right person at the right time. Dedicating the highest calibre of legal talent to overcome the most complex issues, we deliver pragmatic, expert advice that is set squarely in the real world.

Our headquarters are in London, with eight offices across Asia, Europe and the Middle East. In addition, we have forged close ties with other high quality law firms. This diverse mix of expertise and culture results in a combination of deep local insight and the capability to provide a seamless international service.

© Stephenson Harwood LLP 2023. Any reference to Stephenson Harwood in this document means Stephenson Harwood LLP and its affiliated undertakings. The term partner is used to refer to a member of Stephenson Harwood LLP or a partner, employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Stephenson Harwood LLP's affiliated undertakings.

Full details of Stephenson Harwood LLP and its affiliated undertakings can be found at [www.shlegal.com/legal-notices](http://www.shlegal.com/legal-notices).

Information contained in this briefing is current as at the date of first publication and is for general information only. It is not intended to provide legal advice.

Unless you have consented to receiving marketing messages in relation to services of interest to you in your personal capacity, the services marketed in this message are offered only to the business for which you work.