

July 2023

Hong Kong court lifts stay of proceedings for spent arbitration agreement

ZS Capital v Astor [2023] 3 HKC 512



Summary

This case involved an application to lift a stay in favour of arbitration in St Kitts & Nevis. The Hong Kong court of first instance granted the application on the basis that the arbitration agreement was spent. The court clearly illustrated when an arbitration agreement would be considered as spent relying on the principle that the handing down of a final award renders a tribunal *functus officio*.

This case also demonstrates the difference in the court's approach towards application for stay of the action and the awards when a set aside application is also made. Somewhat unusually, the lifting of stay for arbitration on this occasion has once again demonstrated the pro-arbitration attitude of the Hong Kong court.

ZS CAPITAL FUND SPC & ORS v ASTOR ASSET MANAGEMENT 3 LTD & ANOR — [2023] 3 HKC 512

What are the practical implications of this case?

This case clearly illustrates that if all disputes among the parties have been ruled upon by the tribunal, and awards have been made, then the arbitration agreement is spent. Also, while there is no express reference to this in the judgment, the decision that the Tribunal has nothing further to address once the final award is made is clearly in line with the principle that a final award renders the tribunal *functus officio* (the expiration of mandate).

This case also demonstrates the differences in applications for stay of the action when an application to set aside award is also made. Here, the court was clearly reluctant to grant a stay of action, and the court's observation that the 1st Defendant had not applied to "stay the awards" suggested a difference of approach towards the two types of stay. The differences can be explained by reference to legislation and policy intention: s.20 of the Arbitration Ordinance [Article 8 of the Model Law] does not address a stay of the action when a final award has been made since there would not be any further proceeding unless the award is set aside, but applications for stay of award is expressly provided by s.86(4), 89(5), 98D(5) of the Ordinance [relating to enforcement] to prevent conflict of outcomes between the enforcement order and the set aside order.

Finally, while normally the grant or extension of stay in favour of arbitration is regarded as pro-arbitration, on this occasion the lifting of the stay by the Hong Kong court demonstrates its respect for arbitration tribunals as it declined to second-guess the tribunal's findings and awards and clearly expressed that the awards would be regarded as final, operative, and binding unless and until they are set aside.

What was the background?

The underlying dispute arose from loan agreements between the Plaintiffs and the Defendants under the Money Lenders Ordinance (Cap. 163) (the "MLO"). The plaintiffs' action against the 1st Defendant in these proceedings was stayed in favour of arbitration in St Kitts & Nevis. The Tribunal issued two awards, both of which held that the parties' disputes should proceed to be determined in the Hong Kong court.

The 1st Defendant complained that the Tribunal had refused to exercise its jurisdiction to adjudicate most of the issues and had applied to set aside both awards in the Court of Jamaica, which is the seat of the arbitration, and sought the arbitration to be commenced *de novo* before a new tribunal.

The Plaintiffs applied to lift the stay and on the grounds that the arbitration agreement was spent and could no longer be performed after the Tribunal ruled on the dispute and made the Awards. The 1st Defendant argued that the Hong Kong proceedings should be stayed as it has applied to set aside such awards in the supervisory court and the arbitration proceedings have not ended yet, citing *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKC 335.

The 2nd Defendant did not oppose the lifting of the stay.

What did the court decide?

The judge first considered the arguments of the Plaintiff and held that the agreement has been spent, as the Tribunal had ruled on the dispute and issued two awards, which ruled that arguments about the MLO should be resolved by the Hong Kong court. As a result, the Tribunal had nothing further to address and the basis of the stay was gone.

The judge also found that the 1st Defendant's application to set aside the Awards did not affect the fact that they were operational and binding, and it may apply for a further stay if and when the Awards are set side in the future.

The court then turned to discuss and reject the 1st Defendant's reliance of authorities to assert that the proceedings in Hong Kong court should stay pending the determination of an application to set aside an arbitral award. In terms of *Gao Haiyan*, the 1st Defendant argued that the arbitration agreement could be extended to an agreement that the arbitration is supervised by the relevant court of the seat of arbitration, but the Court held that in the meantime the other party was still free to proceed on the basis of the award as made by the arbitral tribunal. The judge also held that other authorities cited by the 1st Defendants were not authorities for its position.

Case details

- Court: Court of First Instance
- Judge: Cheng J
- Date of judgment: 13 April 2023

Contact us



Andrew Rigden Green

Partner

T: +852 2533 2761

E: andrew.rigden@green@shlegal.com

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