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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.3). CLOUT documents are available on the UNCITRAL website at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available on the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, by individual contributors, or by the UNCITRAL secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

Cases relating to the UNCITRAL Model Law on International Commercial Arbitration (MAL)

1. Case 2071: MAL 2A; 16(3); 34(2)(a)(i)

Canada: Court of Appeal for Ontario (Fairburn, MacPherson, and Miller JJ.A.)
Russian Federation v Luxtona Ltd
2 June 2023
Published: 2023 ONCA 393
Available at: www.canlii.org/en/on/onca/doc/2023/2023onca393/2023onca393.html

Abstract prepared by Joshua Karton

[**Keywords**: *jurisdiction; preliminary determination; courts; award – enforcement; award – setting aside; uniform interpretation*]

Russian Federation v Luxtona Ltd clarifies the standards applied by courts when, pursuant to Art. 16(3) MAL, they "decide the matter" of an arbitral tribunal's jurisdiction following a preliminary decision by the tribunal, including whether new evidence may be admitted that was not submitted to the arbitral tribunal. The decision also makes observations about courts' implementation of the "uniformity principle" in Art. 2A MAL, and about the relationship between proceedings under Art. 16(3) and set-aside proceedings under Art. 34.

Luxtona, a Cyprus-registered corporation, prevailed in an Energy Charter Treaty arbitration against the Russian Federation seated in Toronto. The applicable law was the Ontario *International Commercial Arbitration Act*, which implements the MAL. The tribunal issued a partial award, finding that it had jurisdiction over the dispute. The Russian Federation immediately applied to the Ontario Superior Court under both Art. 16(3) and Art. 34(2)(a)(i) MAL, seeking alternatively to have the court decide the matter of the tribunal's jurisdiction or set aside the tribunal's award on jurisdiction.

In the court proceeding, the Russian Federation sought to introduce fresh evidence relating to the question of jurisdiction, which it had not presented to the arbitral tribunal. In an interlocutory order, the Superior Court held that new evidence could be introduced, but then the presiding judge was reassigned and the new judge questioned the legal basis for that ruling. The new judge held that the Russian Federation could only introduce new evidence if it could meet the stringent test in Canadian civil procedure for admission of fresh evidence in an appeal. The Russian Federation appealed the decision to the Ontario Divisional Court, which held that Art. 16(3) applications are proceedings *de novo*, at which parties may introduce fresh evidence as of right. Luxtona sought and was granted leave to appeal the Divisional Court's decision to the Court of Appeal for Ontario (ONCA). The ONCA denied the appeal in full.

At the Court of Appeal for Ontario (ONCA), Luxtona argued that respect for competence-competence requires that parties be incentivized to present all relevant evidence to the tribunal, so that fresh evidence should not admitted in a "decide the matter" court proceeding. Citing academic commentary and case law from several jurisdictions, the ONCA held that the competence-competence principle requires that a tribunal should normally have the first opportunity to rule on its jurisdiction, but does not require that any "special deference" be paid to the tribunal's ruling (para 34).

With respect to its reference to international case law, the ONCA observed:

> … the "uniformity principle" set out in Article 2A(1) of the Model Law makes international decisions strongly persuasive in Ontario. The very nature of international arbitration makes it highly desirable that Ontario's regime should be coherent with those of other countries, especially (but not exclusively) those that have also adopted the Model Law. The weight of international authority shows that the competence-competence principle does not limit the fact-finding power of a court assessing an arbitral tribunal's jurisdiction. (para 35)

The ONCA relied in particular in the UKSC's decision in *Dallah v Pakistan*, which dealt with set-aside proceedings. However, it took pains to point out that courts in Model Law jurisdictions have adopted the reasoning of *Dallah* (citing *S Co v. B Co*, [2014] 6 HKC 421; *AQZ v. ARA*, [2015] SGHC 49; *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, [2016] SGCA 57; and *Lin Tiger Plastering Pty Ltd. v. Platinum Construction (Vic) Pty Ltd*, [2018] VSC 221). Based on these authorities, which the ONCA characterized as constituting a "strong international consensus", the Court held that both applications to decide the matter of a tribunal's jurisdiction and applications to set aside arbitral awards are proceedings *de novo*. Therefore, courts presiding over such proceedings are not restricted to the evidential record before the tribunal. However, if a party "participated fully" in the arbitration, "its failure to raise a piece of evidence before the tribunal may be relevant as to the weight the court should assign that evidence" (para 42).

Finally, the ONCA considered the relationship between jurisdictional questions that reach the court under Art. 16(3) and under Art. 34 MAL. It held that, while these proceedings are distinct, they are alike in that neither is an "appeal" or a "review", so courts acting under either provision decide *de novo* and owe no deference to arbitral tribunals' prior decisions on their own jurisdiction. In addition, the two provisions should be interpreted harmoniously since the grounds for setting aside a jurisdictional award under Article 34(2)(a)(i) also apply under Article 16(3).

2. Case 2072: MAL 17; 17J

Hong Kong SAR High Court (Court of First Instance)
HCCT 60/2019; [2019] HKCFI 2793
GM1 & GM2 v. KC
14 November 2019
Original in English
Reported in [2020] 1 HKLRD 132
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=125570&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAI, National Correspondent

[**Keywords**: *arbitral tribunal; injunctions; interim measures; jurisdiction; procedure*]

In this case, the Court made clear that an anti-suit injunction falls within the scope of "interim measures" under section 35 of the Hong Kong Special Administrative Region (SAR) Arbitration Ordinance (Cap. 609), herein referred as the Arbitration Ordinance (corresponding to article 17 MAL) and section 45 of the Arbitration Ordinance (that deal with court-ordered interim measures).

The plaintiffs requested from the arbitral tribunal an anti-suit injunction to require the defendant to take all necessary steps to withdraw or seek a stay of the legal proceedings it had commenced against the plaintiffs in mainland China, and to restrain the defendant from commencing or pursuing other proceedings otherwise than by arbitration in accordance with the arbitration agreement, and until further order of the arbitral tribunal in the ongoing arbitration proceedings between the first plaintiff and the defendant. The arbitral tribunal could not deal with the interim application in light of a challenge to its constitution, and the plaintiffs therefore turned to the Court.

The Court pointed out that under section 35 of the Arbitration Ordinance, adopting article 17 MAL, "interim measure" was defined in article 17(2) MAL to mean any temporary measure by which, at any time prior to the issuance of the award by which the dispute was finally decided, a party was ordered to take action, or to act, including an order to maintain or restore the status quo pending determination of the dispute, and an order to take action that would prevent, or refrain from taking action that was likely to cause current or imminent harm or prejudice to the arbitral process itself.

The Court found that an injunction to enforce the positive promise of a party to arbitrate disputes and the negative right not to be vexed by foreign proceedings could be viewed as an interim order which maintained the status quo of parties which had

already commenced their arbitration, as in this case, in accordance with the rights conferred under their arbitration agreement. The anti-suit injunction restrained a party from commencing proceedings instituted in breach of the arbitration agreement, the continuation of which must inevitably prejudice the arbitral process, the tribunal's conduct of the arbitration, and the orders to be made by the tribunal in the process. The Court also referred to *The Angelic Grace* [1995] 1 Lloyd's Rep 87 and other authorities to support its undoubted jurisdiction to restrain a party from taking or continuing proceedings in a foreign court in breach of an agreement to refer the dispute to arbitration. As such, the Court held that the injunction sought fell within the scope of the Court-ordered interim measures covered by section 45 of the Arbitration Ordinance [regarding article 17J MAL].

The Court also considered that it could and should grant the injunction, in order to recognize and enforce the plaintiffs' prima facie right not to be vexed by having to resist the defendant's proceedings in mainland China. The arbitral tribunal should be allowed to rule on its own competence and jurisdiction, and its decision could then be reviewed by the Hong Kong Court as the supervisory court. When an award was made by the arbitral tribunal and was sought to be enforced in mainland China, it would be open to the defendant to resist enforcement if the arbitration agreement could be challenged before the mainland Court. The Court therefore considered that it had jurisdiction, and that it was fair and just to grant an interim anti-suit injunction against the defendant pending and until the conclusion of the adjourned hearing for substantive arguments.

3. Case 2073: MAL 9; 17; 17J

Hong Kong SAR High Court (Court of First Instance)
HCCT 31/2018; [2018] HKCFI 2240
Company A & Ors v Company D & Ors
3 October 2018
Original in English
Unreported
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=117990&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAI, National Correspondent

[**Keywords**: *courts; injunctions; interim measures; judicial assistance; judicial intervention; procedure; protective orders; jurisdiction*]

In this case, the plaintiffs applied to the Court for appointment of receivers as an interim measure in aid of the arbitration seated in Singapore, when the company subject to the intended receivership order itself was not a party to the said arbitration. The Court considered section 35 of Hong Kong SAR Arbitration Ordinance (Cap. 609), herein referred as the Arbitration Ordinance (corresponding to article 17 MAL), regarding the power of arbitral tribunal to order interim measures, section 21 of the Arbitration Ordinance (corresponding to article 9 MAL) regarding arbitration agreement and interim measures by the Court, as well as the implications of the express exclusion of article 17J MAL in section 45(1) of the Arbitration Ordinance.

The facts of the case were complex. Simply put, the plaintiffs and the first and second defendants entered into two agreements (containing an arbitration clause in favour of arbitration seated in Singapore pursuant to the ICC Rules) pursuant to which the said first and second defendants were to acquire R Co.. R Co. at the material times held shares in the Thai Co., the first and second defendants were special corporate vehicles established by X. The defendants failed to pay and plaintiffs commenced the arbitration in Singapore. Various interim injunctions were obtained from the courts and emergency arbitration, including an injunction by the Hong Kong SAR Court restraining the third Defendant (being the recipient of shares in Thai Co. from R Co. (via various intermediaries)) from dealing with the shares in Thai Co.. There appeared to be further changes in ownership in the third defendant and that prompted the plaintiffs applying for the receivership order.

The third defendant resisted the receivership application on the ground that the Court did not have jurisdiction to make any order against a third party to the Arbitration. The third defendant argued that the Court's jurisdiction to grant interim measures in aid of arbitrations was purely statutory and conferred under section 45 of the Arbitration Ordinance, which expressly excluded article 17J MAL, meaning that the Court was not intended to have the usual powers it had in relation to legal proceedings. Taking into account the object and principles of the Arbitration Ordinance, and as a matter of statutory interpretation, the interim measures under section 45 could only be granted against a party to the arbitration and not any third parties. The Arbitration Ordinance was premised on the fundamental principle that arbitration was a consensual agreement between parties to submit their disputes to arbitration by a tribunal. The third defendant contended that it would be grossly unjust for the Court to extend its jurisdiction to third parties, particularly when no appeals lay from any order of interim measure made by the Court by virtue of section 45(10). It could not have been intended that the Court should extend its jurisdiction to a third party and its assets, who might have no connection with Hong Kong at all, without any right of appeal.

The Court found that the exclusion of article 17J MAL as stated in section 45(1) of the Arbitration Ordinance, was not to limit court-ordered interim measures. As shown in the drafting history of the Arbitration Ordinance, the intention was to separately provide for the courts' power and procedures for granting interim measures in support of arbitral proceedings under section 45(2)–(7) of the Arbitration Ordinance. Besides, despite the strong argument in favour of construing references to "parties" in the Arbitration Ordinance as parties to the arbitration agreement and process, bearing in mind the purpose and objective of section 3(1) of the Arbitration Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration, section 45 should not be so narrowly construed.

The Court also pointed out that the grant of interim remedy was discretionary, and it remained open to the Court to consider whether it would be appropriate to exercise its powers on the facts of each particular case. It might be right that such power should not be exercised lightly against a third party to the arbitration, and only on clear evidence and strong grounds that the order should be made. Nevertheless, the Court did not agree that it had no jurisdiction under section 45 of the Arbitration Ordinance to make such an order in the appropriate case.

While the Court did have jurisdiction to make an order of interim measure against a third party to the arbitration and arbitration agreement, on the facts of this case, the Court was not satisfied that the receivership order should be made against the third defendant. The plaintiffs' were not asserting any proprietary claim over the shares in Thai Co., and with an injunction that was already in place prohibiting further transfers of shares in the third defendant, the Court found that there was no evidence of risk of dissipation of the third defendant's asset or that the existing regime of remedies was not adequate. The plaintiffs' application for receivership was therefore dismissed by the Court.

4. Case 2074: MAL 7, 8

Hong Kong SAR: High Court (Court of First Instance)
HCA 146/2015
Wing Bo Building Construction Company Ltd v Discreet Limited
First judgment: 14 January 2016; Second judgment (leave to appeal summons): 18 March 2016
Original in English
Reported in [2016] 2 HKLRD 779 and [2017] 1 HKC 439
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=102224&QS=%2B&TP=JU and https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=103222&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAI, National Correspondent

[**Keywords**: *arbitration agreement; courts; judicial assistance; procedural default; procedure; validity; waiver*]

The plaintiff, a building contractor, and the defendant, a property owner, entered into a contract to construct 13 houses at the defendant's property. An arbitration clause provided that if "any dispute or difference shall arise between [the defendant] and [the plaintiff], either during the progress or after completion … of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith … shall be and is hereby referred to arbitration ...".

The plaintiff issued a final account to the defendant, but the defendant did not pay, thus the plaintiff sued. The defendant sought a stay under Section 20(1) of the Hong Kong SAR Arbitration Ordinance (Cap. 609) (corresponding to article 8 MAL). The plaintiff's case was: a dispute arose which the parties should have referred to arbitration but did not. Instead, the parties entered into a "settlement agreement" whereby the parties agreed to be bound by an amount to be identified by a jointly engaged surveying expert The expert had identified the final account figure which would be conclusive. As a result of such settlement agreement, the arbitration clause ceased to be operative (while other parts of the contract remained effective). If the appointment was of an expert but not an arbitrator, the Arbitration Ordinance had no relevance. The defendant's dissatisfaction with the final account would not constitute a *bona fide* dispute for the purposes of the arbitration agreement.

The defendant's case was that the expert's report was confined to a few minor matters and did not constitute the final account and any disputes as to the final account had to be referred to arbitration.

Court of First Instance's Judgment

Section 20(1) of the Hong Kong SAR Arbitration Ordinance (Cap. 609) (corresponding to article 8 MAL) provides for a mandatory stay of proceedings in favour of arbitration where the action is the subject of an arbitration agreement unless the court finds that the agreement is null and void, inoperative or incapable of being performed. Where the parties have expressly agreed to refer disputes or differences to be determined by arbitration, it is generally safe to assume that it is their intention to have such disputes or differences to be resolved only by arbitration The onus lies on a defendant to demonstrate a '*prima facie* case' that an arbitration agreement exists, covers the dispute and binds the parties. The court grants a stay if a defendant's evidence is cogent and arguable, and not dubious or fanciful. Unless the point is clear, the court does not resolve the issue and stays the action to arbitration so for the arbitral tribunal to rule on its own jurisdiction, *Private Co 'Triple V' Inc v Star (Universal) Co Ltd* [1995] 3 HKC 129.

The matter turned on whether the expert's assessment, jointly agreed by the parties, would create a "settlement" agreement and thus abrogated the arbitration agreement in the contract. In the circumstances, the Court held that while the parties agreed to reserve certain matters for expert assessment to help parties' narrow the dispute and achieve overall resolution, arbitration was the agreed dispute resolution mechanism

under their primary agreement. Since the defendant had established a prima facie case that disputes remained between the parties under the contract, the proper approach was to stay the proceedings for arbitration.

Leave to Appeal Judgment

Subsequently, the plaintiff applied for leave to appeal against the above decision of the Court of first instance for granting stay to refer parties' to arbitration. The Court held that under section 20(8) of the Hong Kong SAR Arbitration Ordinance (Cap. 609), if a high court judge grants a stay under article 8 MAL (given effect to by section 20(1) of the Arbitration Ordinance), that decision would not be appealable to the Court of Appeal, hence leave to appeal was refused. Regarding the constitutionality of section 20(8), the Court was of the view that the restriction on appealing under section 20 was constitutional. It was rationally connected with legitimate aims of the legislature which were promoting finality and reducing costs and respecting party autonomy in arbitration. A stay to arbitration is not the end of the matter as the arbitrators themselves must then rule upon their own jurisdiction and such rulings themselves may be referred back to the court. The restriction on appealing was therefore not disproportionate.

5. Case 2075: MAL 12; 13

Hong Kong SAR High Court (Court of First Instance)
HCMP 325/2014
Gong Benhai v Hong Kong International Arbitration Centre
28 April 2014
Reported in [2015] 2 HKLRD 530 and [2015] 2 HKLRD 537
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=96916&QS=%2B&TP=JU

Original in Chinese and English translation

Abstract prepared by Yat Hin LAI, National Correspondent

[**Keywords**: *arbitrators – challenge of; arbitrators – independence of; challenge; conflicts of interest; disclosure; arbitral tribunal; challenge; courts; judicial assistance; judicial intervention; procedure*]

This case concerns an application by the defendant, an arbitral institution, to strike out the claims of the plaintiff. The plaintiff sought to appeal, among others, the defendant's decision of dismissing the plaintiff's challenge regarding the impartiality of two arbitrators.

Pursuant to an arbitration agreement, the plaintiff brought arbitration proceedings against a tyre factory. The arbitration was governed by the Rules of the administering institution.

The plaintiff objected to the decision of the tribunal on disclosure of documents and sought to replace two of the three arbitrators on the ground they were unfair and not impartial. According to its procedural rules, the arbitral institution rejected the challenge and served its decision on the plaintiff, on 24 December 2013.

Under section 26 of the Arbitration Ordinance (corresponding to article 13(3) MAL), any further challenge against the arbitrators should have been made to the Court within 30 days. Instead, the plaintiff sued the arbitral institution after 30 days, on 14 February.

On 11 March 2014, the arbitral institution sought to strike out plaintiff's application on the ground that it disclosed no reasonable cause of action or it was frivolous and/or an abuse of process.

First, the Court rejected the plaintiff's argument that the Model Law had no application to the arbitration or the challenge in light of section 5 of the Arbitration Ordinance, ruling that the Arbitration Ordinance applies as the arbitration agreement provides for the place of arbitration to be in Hong Kong.

Second, the Court held that the plaintiff's application was time-barred, even assuming that the application fell within section 26(1) of the Arbitration Ordinance (corresponding to article 13(3) MAL). Further, the arbitral institution was not a proper party and the plaintiff had no cause of action against it in respect of the challenge and the arbitration.

Third, the Court held that there was no substance to any of the plaintiff's claims: (1) under the challenge rules of the arbitral institution, the institution could in its sole discretion decide whether to support its determination with reasons; and (2) the plaintiff had no basis to require the arbitral institution as defendant to supply reasons for the challenge decision.

Fourth, under section 26(1) of the Arbitration Ordinance (corresponding to article 13(3) MAL), the arbitral tribunal could continue the arbitral proceedings and make an award pending a court's decision on a challenge to an arbitrator. There was no basis to order the arbitral institution as defendant to stop the arbitral tribunal from dealing with and continuing with the Arbitration.

Fifth, the Court held that there was no evidence of any justifiable doubt or any error in the disclosure decision, hence there was no grounds to challenge the arbitrators under section 25 of the Arbitration Ordinance (corresponding to article 12 MAL), neither did the plaintiff satisfy the procedure for the challenge of the arbitrators under section 26(1) of the Arbitration Ordinance (corresponding to article 13 MAL).

Finally, the Court upheld that the submissions by the arbitral institution that it was liable in law for its acts or omission in the exercise or performance of administrative function only if the act or omission was committed dishonestly. There was no basis to suggest that the arbitral institution was acting dishonestly.

6. Case 2076: MAL 8

Hong Kong SAR: High Court (Court of First Instance)
HCA 98/2013
Suzhou Quam-SND Venture Capital Enterprise & China Door Ltd v Great East Packaging International Ltd and Others
23 July 2013
Original in English
Reported in: [2013] 6 HKC 53
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=88209&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAI, National Correspondent

[**Keywords**: *arbitration agreement; courts; procedure; validity*]

This case illustrates an exception to article 8 of MAL when in reality there was no dispute between the parties that should be referred to arbitration for determination.

A written agreement was entered into whereby the guarantors (also parties to the said agreement) guaranteed to the plaintiffs the performance of the agreement. The performing party failed to perform the agreement and the guarantors in writing acknowledged the debt.

The plaintiffs commenced court proceedings against, amongst others, the guarantors pursuant to the acknowledgement of debt. The guarantors applied to stay the court proceedings in favour of arbitration.

Insofar as the application for stay of court proceedings pending arbitration is concerned, the Court referred to the four questions that needed to be answered, namely: (1) Is the clause in question an arbitration agreement?; (2) Is the arbitration agreement null and void, inoperative or incapable of being performed?; (3) Is there in reality a dispute or difference between the parties?; and (4) Is the dispute or difference between the parties within the ambit of the arbitration agreement?. The Court stated that the first, third and fourth questions must be answered in the affirmative, and the

second question must be answered in the negative for the court to grant a stay of court proceedings.

In the present case, the main issue was whether, in the light of the guarantors' acknowledgement of debt, there was a dispute between the parties. The Court rejected the unsubstantiated arguments that the acknowledgment had been procured under pressure or undue influence. It also rejected the guarantors' argument of set-off as the plaintiffs were not parties to the set-off. The Court found that the acknowledgment was unequivocal and it amounted to an admission of liability.

Thus, the Court concluded that there was in reality no dispute between the parties which could go to arbitration. The Court refused to stay the court proceedings.

7. Case 2077: MAL 34(2)(a)(ii)

Hong Kong SAR: High Court (Court of First Instance)
Pang Wai Hak & Chu Sze Sum v Hua Yun Jian & Xu Xiao Lan
HCCT 33/2011
22 June 2012
Original in English
Reported in [2012] 4 HKLRD 113
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=82374&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAI, National Correspondent

[**Keywords:** *set aside; due process*]

In this case, the Court exercised discretion not to set aside the arbitral award notwithstanding that there had been a violation of due fairness, referencing the decision *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd, CACV 136/2011 (9 May 2012).*[1]

The Applicants and the Respondents were parties to a written agreement relating to the transfer of a 50 per cent interest in a property located in Wuhan City, Hubei Province, mainland China. The agreement was governed by mainland Chinese law and the disputes arising thereunder were to be resolved by arbitration. Disputes arose regarding the performance of the agreement, with arbitration commenced soon after. The parties contended for the first time in the second hearing of the arbitration that the Respondents' claim was time-barred under mainland Chinese law. Submissions were made and evidence was adduced to address the issue of limitation.

The arbitral tribunal eventually ruled in favour of the Respondents and rejected the Applicants' limitation defence on the bases that (i) it was not pleaded ("Pleading Point") and (ii) that the factual witnesses had not given any concrete evidence on the issue ("Evidence Point").

The Applicants applied to the Court of First Instance to set aside the arbitral award on the basis that they had been unable to present their case (article 34(2)(a)(ii)). They argued that the reasons given by the arbitrator in rejecting their defence had not been raised by either party. They were arguments that the arbitrator came up with by himself. Had the points been raised with the parties at the hearing, the Applicants would have applied for an amendment of their pleadings to raise the limitation defence and dealt with the arbitrator's concern over evidence.

Upon a review of relevant cases, the Court summarized the principles governing its approach to an application to set aside an arbitration award under article 34(2)(a)(ii) of MAL:

(1) The Court is not concerned with the substantive merits of the dispute, or the correctness or otherwise of the award.

[1] See CLOUT case 2078.

(2) To justify setting aside an arbitral award, the Court has to be satisfied that a party has been denied due process.

(3) For this purpose, the conduct complained of must be serious or even egregious.

(4) It is not possible to set out exhaustively all possible situations of denial of due process. Whether there has been a denial of due process is fact sensitive.

(5) One particular instance in which a party can justifiably complain that it was unable to present its case and thus denied due process is where the tribunal carried out its own investigation or inquiry on primary facts, or decided a case based on a wholly new point of law or fact without giving the parties a fair opportunity to consider and respond to such point. It may also extend to a situation "where a party is prevented from presenting his case on a procedural issue which is taken by the arbitral tribunal against him of the tribunal's own volition".

(6) The Court has a discretion not to set aside an arbitral award even if there is a violation of due process but the discretion should only be exercised where the outcome could not have been any different.

(7) In considering whether a party was "unable to present his case", the question is one of fairness in the arbitral process. It is unnecessary to show any form of dishonesty or reprehensible conduct by the tribunal or the other side.

It was held by the Court that the arbitrator ought to have given the Applicants' the opportunity to address the fact that they had not pleaded the time-barred argument in their defence before making the award. The failure to give the parties, in particular the Applicants, to present their case would be regarded as a denial of due process. That said, notwithstanding the violation of due process in the arbitration, the Court exercised its discretion not to set aside the arbitral award on the ground that the arbitrator would have reached the same conclusion finding in favour of the Respondents in view that there was no concrete evidence to substantiate the Applicants' time-bar arguments. In conclusion, the Court declined to set aside the award and dismissed the application.

8. Case 2078: MAL 18; 34(2)(a)(ii); 34(2)(a)(iv)
Hong Kong SAR: High Court (Court of Appeal)
Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd
CACV 136/2011
9 May 2012
Original in English
Reported in [2012] 4 HKLRD 1
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=81594&QS=%2B&TP=JU

Abstract prepared by [Yat Hin LAI], National Correspondent

[**Keywords:** *due process; equal treatment; procedure; award – set aside*]

This case concerns the application for setting aside an arbitral award on the basis of due process concerns.

A dispute arose between Pacific China Holdings Ltd ("the debtor" or "the plaintiff") and Grand Pacific Holdings Ltd ("the creditor" or "the defendant") in relation to a loan agreement containing an arbitration clause. Pursuant to this arbitration clause, any dispute, or claim should be finally settled by arbitration in the Hong Kong SAR under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Arbitration proceedings were commenced and an award was rendered in favour of the creditor. The debtor then applied to the Court of First Instance to set aside the award on the basis of article 34(2) of MAL claiming that it was unable to present its case (article 34(2)(a)(ii)) and/or the arbitral procedure was not in accordance with the agreement of the parties (article 34(2)(a)(iv)). The Court of First

Instance set aside the award on both bases. The creditor appealed to the Court of Appeal.

The Court of Appeal (the Court) made clear that it is not for a court to address the substantive merits of the dispute or the correctness of the award, whether concerning errors of fact or law, but that the court looks at the process itself, as it is concerned with "the structural integrity of the arbitration proceedings."

The Court referred to articles 18 and 34(2)(a) of MAL and was of the view "that only a sufficiently serious error could be regarded as a violation of article 18 or article 34(2)(a)(ii). An error would only be sufficiently serious if it has undermined due process." The Court explained that the "conduct complained of must be serious, even egregious so that one can say a party has been denied due process before a court could find that a party 'was unable to present his case'" and consequently stated that "A party who has had a reasonable opportunity to present its case would rarely be able to establish that it has been denied due process." In relation to this, the Court emphasized that an arbitral tribunal was not bound by the parties' agreed procedure, if such procedure would result in a breach of Article 18 of MAL. Furthermore, the Court held, that "regarding the discretion in any particular case will depend on the view it takes of the seriousness of the breach. Some breaches may be so egregious that an award would be set aside although the result could not be different."

In the present case, the Court did establish that "there was no violation, and in any event, the matters complained of were not sufficiently serious or egregious." Indeed, the arbitral tribunal circulated proposed terms of reference and a procedural timetable, which was signed at the procedural conference, and which was subsequently not respected. The alleged failure to present its case was consequently a result of the defendant's own lateness. The Court concluded that there was no basis to set aside the arbitral award and re-instated the award.