

Insights

HK COURT OF APPEAL SET ASIDE ARBITRAL AWARD FOR THE ABSENCE OF UNDERLYING DISPUTES

NO DISPUTE, NO JURISDICTION

Aug 22, 2024

SUMMARY

In CMBICDHAW Investments Limited v CDH Fund V Limited Partnership & others [2024] HKCA 516 (judgment date: 10 July 2024), the Hong Kong Court of Appeal (**CA**) addressed an appeal regarding the Court of First Instance's (**CFI**) decision to set aside parts of an arbitral award due to the absence of a relevant dispute. The disputed portions included a declaration of non-liability and additional comments made by the arbitrator. The CA determined that no relevant dispute existed to establish the arbitrator's jurisdiction and that there was an abuse of process.

THE ARBITRATION AND THE AWARD

The case originated from a co-investment agreement between CMBICDHAW Investments Limited (**CMB**), and CDH Fund V Limited Partnership (**Fund**) and CDH Grand Cattle Holdings Limited (**Cattle**), to invest in a target company referred to as "**HC**" (**Agreement**). The Agreement was negotiated by "**Q**" (representing CMB) and "**L**" and "**X**" (representing Fund/Cattle). L was HC's managing director, and X was an employee of HC at the material times.

In 2020, CMB commenced proceedings in the Hong Kong High Court against L, X, "**C**" (HC's controlling shareholder and director), and CDH Investments Management (Hong Kong) Limited (**Management**), alleging fraudulent misrepresentations made by the defendants that induced CMB to enter into the Agreement (**HC Proceedings**). Importantly, no claims were made in those court proceedings against Fund/Cattle.

In response, Fund, Cattle, L, X, and Management initiated arbitration proceedings against CMB, seeking an anti-suit injunction and a declaration of non-liability (**Arbitration**). CMB challenged the arbitrator's jurisdiction, arguing that L, X, and Management had had no contract with CMB and that there was no dispute between CMB and Fund/Cattle. The arbitrator refused to grant an interim anti-suit injunction but declined to decide on the jurisdiction challenge at the outset.

In 2022, the arbitrator issued an award (**Award**) declaring that while he had jurisdiction over Fund and Cattle, he lacked jurisdiction over L, X, and Management. The arbitrator also ruled that Fund and Cattle had “*no liability to [CMB] with respect to the allegations arising out of the [HC Proceedings], and that all such allegations in so far as they are made against [Fund and Cattle] are false*”, and provided additional comments “*in the hope that [the] comments may provide some assistance in the [HC Proceedings]*” (**Additional Comments**).

CMB’S CHALLENGE AND THE APPEAL

CMB successfully applied to set aside parts of the Award, including the declaration of non-liability and the Additional Comments. The CFI ruled that the arbitrator lacked jurisdiction regarding the impugned parts of the Award, but the CFI did not address arguments regarding whether the Award was against public policy.

L, X, and Management appealed, and the CA considered the appeal *de novo*.

LACK OF JURISDICTION

The CA discussed the meaning of “dispute” in the context of arbitration. Key observations included:

- The term “dispute” should be interpreted broadly and not overly legalistically.
- A dispute can exist without a formal legal claim; what is required is an assertion or adoption of a position by one party that is expressly or by implication rejected or at least not accepted by the other, or a difference of opinion about the central issues.
- For there to be a dispute, there must be something in the nature of an assertion by one party. Where the two parties are in a state where they neither agree nor disagree about the true position, there is no real dispute.
- Some cases have suggested that silence in response to a claim or assertion is insufficient, and a rebuttal or denial of the claim or assertion is necessary. (We discuss this observation further, below, in the “key takeaways” section.)
- The existence of a dispute should be assessed at the commencement of arbitration.
- A dispute may arise and continue to exist unless both liability and quantum are unequivocally admitted.

On the facts, the CA concluded that no dispute falling within the scope of the arbitration agreement existed when the arbitration was commenced. The CA found that the arbitrator conflated the question of jurisdiction over Fund/Cattle with the question of the legitimate interest of Fund/Cattle in declaratory relief. Given that CMB had not asserted, and had confirmed that it was not asserting,

any liability on the part of Fund/Cattle in any forum, the CA found no relevant dispute upon which the arbitrator's jurisdiction could be founded. CMB's refusal to agree to a consent award involving a non-liability declaration was considered irrelevant, because the existence of a dispute should be assessed at the commencement of arbitration.

Furthermore, the CA considered Fund/Cattle's pursuit of a non-liability declaration to be an attempt to clothe the arbitrator with jurisdiction by engineering a dispute that had not, in fact, arisen. The CA remarked that an attempt to seek a declaration of non-liability tends to point to the artificiality of the suggestion that there was a dispute and should have set alarm bells ringing.

PUBLIC POLICY GROUND

Regarding the public policy ground, the CA held that there had been a clear abuse of process in commencing and pursuing the Arbitration to trial in respect of matters that are subject to determination in ongoing court proceedings involving parties who are strangers to the arbitration agreement:

- L, X, and Management, not being parties to the arbitration agreement, commenced the Arbitration after being sued in the HC Proceedings, doing so not only in their names but also as the controllers or directing minds of Fund and Cattle.
- The clear purpose of the Arbitration was to have the issues raised in the HC Proceedings dealt with in the Arbitration.
- The claimants in the Arbitration maintained and pursued their claims to trial notwithstanding the submissions by L, X, and Management to the court's jurisdiction (by abandoning their application for a stay of the HC Proceedings).
- The CA found no legitimate purpose for the actions of the claimant in the Arbitration, given that the court had exclusive jurisdiction, rendering any findings by the arbitrator incapable of, and having no weight or relevance in determining the issues in the HC Proceedings.

The CA took the view that, by making the Additional Comments in the above circumstances, the arbitrator risked giving the impression of seeking to "poison the well" for the HC Proceedings.

KEY TAKEAWAYS

The CA's ruling provides some useful and clear guidance on the boundaries of an arbitrator's jurisdiction:

- Seeking a declaration of non-liability without an actual dispute may indicate efforts to fabricate a dispute to clothe the arbitrator with jurisdiction that does not in reality exist.

- Parties should not seek to pursue proxy claims on behalf of non-contracting parties regarding matters that properly fall to be decided in another forum.
- The ruling reinforces the notion that an arbitrator’s jurisdiction is founded upon the existence of a relevant dispute at the arbitration’s commencement.
- The ruling also serves as a caution against an arbitrator overstepping the boundaries of their jurisdiction when making observations or comments within awards.

The CA’s judgment offers important guidance in respect of the existence of a “dispute” in the context of arbitrations. The judgment confirmed that a dispute may arise, among others, by implication from non-acceptance of an assertion or position, but in one comment the CA suggested that a dispute might not arise simply on the basis of silence in the face of a claim or assertion. There is well established case law in both England and Hong Kong that, in the context of arbitration, a dispute will exist unless there is a clear and unequivocal admission not only of liability but also of quantum. (See *Tommy CP Sze & Li & Fung (Trading) Ltd* [2003] 1 HKC 418.) In the writer’s view, the CA’s judgment in *CMBICDHAW* was not seeking to overrule this general proposition, and instead should be read in the context of the fact that negative declaratory relief was being sought in the arbitration with which that appeal was concerned. To borrow the University Boat Race example in *Hayter v Nelson & Home Insurance Co* [1990] 2 Lloyd’s Rep. 265 where the English commercial court explained that a dispute would exist between two men who argue over whether it was Oxford or Cambridge who won the University Boat Race in a particular year, the situation in *CMBICDHAW* was more akin to one man asserting that it was one University that won but the other said nothing and neither agreed nor disagreed with what was said.

The judgment gives useful and practical guidance for arbitration practice in Hong Kong, clarifying the importance of the existence of genuine disputes in establishing and forming the basis of an arbitrator’s jurisdiction.

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