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**Insights**

# HK COURT OVERRULES ARBITRATOR'S DECISION REGARDING COMPATIBILITY OF ARBITRATION AGREEMENTS

INTERPRETATION OF "*MUTATIS MUTANDIS*" - WHAT ARE THE "*NECESSARY*" CHANGES TO BE MADE?

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## SUMMARY

In *SYL v GIF* [2024] HKCFI 1324 (date of judgment: 20 May 2024), the Hong Kong Court of First Instance ("**the Court**") set aside an Interim Award made by the arbitral tribunal ("**Tribunal**") in an HKIAC-administered arbitration. The award related to an unsuccessful jurisdictional challenge made before the Tribunal.

A single arbitration was commenced in relation to three separate but related contracts. The Court was required to analyse the meaning and effect of "*mutatis mutandis*" in a Loan Agreement context / relationship, where two related Security Deeds provided that the dispute resolution provision in the Loan Agreement applied "*mutatis mutandis*".

The Court agreed with the plaintiff on both of what had been labelled by the parties as (i) the "Compatibility Ground" (that the arbitration agreements in the three contracts are incompatible with one another), and (ii) the "Agreement Ground" (that the composition of the Tribunal was defective because the appointment had not been done in accordance with the parties' agreement under the three contracts). The Court therefore set aside the Interim Award made by the Tribunal.

Following on from our earlier article on *AAA, BBB, CCC v DDD* [2024] HKCFI 513 (which covered the situation where there is a group of related contracts and two or more of those contracts have different dispute resolution clauses), this case of *SYL v GIF* addresses the opposite situation where the same dispute resolution provision applies "*mutatis mutandis*" to separate but related contracts (i.e. purports to have the same dispute resolution clauses but "*with all necessary changes having been made*"). The case of *SYL v GIF* demonstrates neatly that the "*mutatis mutandis*" drafting "shortcut" might not result in disputes in all related contracts being able to be brought in a single arbitration.

## BACKGROUND

The dispute in *SYL v GIF* arose out of three separate but related contracts in a loan agreement context / relationship:-

1. Loan Agreement – between the Lender (Defendant / D) and the two Borrowers (Plaintiff 1 and Plaintiff 2 / P1 and P2)

2. Security Deed A (January 2020) – between the same parties, i.e. the Lender D, and the two Borrowers P1 and P2

3. Security Deed B (July 2020) – between **different** parties, the Lender D, Borrower P1, together with two other companies (Other Mortgagors) (i.e. **Borrower P2 was not a party** to Security Deed B)

In Security Deed B, the "Mortgagors" were P1 and the Other Mortgagors, and the "Obligors" also were P1 and the Other Mortgagors.

The Loan Agreement provided a dispute resolution clause that:-

> " *… Each of the parties hereto irrevocably … agrees that any dispute or controversy arising out of, relating to, or concerning any interpretation, construction, performance or breach of this Agreement, shall be settled by arbitration to be held in Hong Kong which shall be administered by the Hong Kong International Arbitration Centre ("HKIAC") in accordance with the Hong Kong International Arbitration Centre Administered Arbitration Rules … There shall be three (3) arbitrators,* ***with one arbitrator to be appointed by the Borrowers and one arbitrator to be appointed by the Lender****. If the aforesaid two arbitrators fails to agree on the third arbitrator, the HKIAC Council shall select the third arbitrator, who shall be qualified to practice law in Hong Kong …*" (emphasis added)

Note that the Borrowers on one side, and the Lender on the other, were to nominate a "wing arbitrator" respectively.

Both Security Deed A and Security Deed B contained an identical dispute resolution clause:-

> "*The dispute resolution provision in the Loan Agreement applies mutatis mutandis to this Deed.*"

Each of the above dispute resolution clauses was a separate arbitration agreement, and relying on the three arbitration agreements, the Lender D commenced a single arbitration under multiple contracts pursuant to Article 29 of the HKIAC Administered Arbitration Rules 2018. One of the requirements of Article 29 was that the arbitration agreements under which those claims are made must be "*compatible*" (and it was this that formed the basis of the Compatibility Ground – see below).

The Borrowers P1 and P2 (or together Ps) objected to having a single arbitration under multiple contracts. After further correspondence between the parties and HKIAC, the HKIAC decided that the single arbitration *prima facie* had been validly commenced under Article 29, and that any jurisdictional challenge would be dealt with after the Tribunal was constituted. D nominated a "wing arbitrator", which was approved by the HKIAC. The HKIAC invited Ps jointly to designate an arbitrator with the two Other Mortgagors under Security Deed B. The Ps nominated an arbitrator, but the Other Mortgagors **did not** nominate an arbitrator (and it was this that formed the basis of the Agreement Ground – see below).

The HKIAC noted that there was an absence of joint designation (the Other Mortgagors did not nominate one), and the HKIAC appointed the remaining "wing arbitrator" which was not the one nominated by the Ps. The two "wing arbitrators" then jointly nominated the presiding arbitrator, and the HKIAC thereafter confirmed the constitution of the Tribunal. The Tribunal dealt with the jurisdictional challenge raised by Ps as a preliminary question, and dismissed the jurisdictional challenge in the Interim Award.

## COMPATIBILITY GROUND AND AGREEMENT GROUND

### "MUTATIS MUTANDIS"

As a matter of simple language analysis, the Court interpreted "*mutatis mutandis*" to mean "*all necessary changes having been made or with the necessary changes*". Applying this to Security Deed A was relatively straightforward – because it involved the same contracting parties as the Loan Agreement, the Lender D on the one hand has a right to designate a "wing arbitrator", and the Borrowers P1 and P2 on the other hand have a right to designate the second "wing arbitrator". However, because Security Deed B involved different contracting parties, the court noted that there were three ways in which "*mutatis mutandis*" could be interpreted for Security Deed B:-

1. First interpretation – no change at all, and the right to nominate the second "wing arbitrator" rests with the "Borrowers", i.e. P1 and P2 (even though P2 is not a party to Security Deed B)

2. Second interpretation – "Borrowers" is replaced by "Obligors", i.e. P1 and the Other Mortgagors (P2 has no right to designate an arbitrator under Security Deed B)

3. Third interpretation – "Borrowers" is replaced by "Mortgagors", i.e. P1 and the Other Mortgagors (same as second interpretation above)

The Court remarked that there would be significant differences and repercussions arising from the three interpretations and held that the more likely and commercially sensible interpretation of Security Deed B would be the second and third interpretations, i.e. P1 and the Other Mortgagors have a right to designate the second "wing arbitrator", to the exclusion of P2. This interpretation gave rise to an inconsistency in the arbitrator appointment procedure between the Loan Agreement

and Security Deed A on the one hand (P1 and P2 have a right, Other Mortgagors have no right), and Security Deed B on the other hand (Other Mortgagors have a right, P2 has no right).

### THE COMPATIBILITY GROUND

The Court then held that such an inconsistency in the arbitrator appointment procedure meant that there was no compatibility, due to the following reasons:-

- Infringement of party autonomy to impose a single arbitration in the circumstances when the underlying arbitration agreements adopt different arbitrator appointment procedures
- Infringement of parties' contractual rights – the arbitration agreements are contracts of their own right, and the parties must be bound by their choices
- There are valid concerns over whether the Lender D may gain an unfair advantage in the arbitration by refusing the Borrowers / Ps a right to designate an arbitrator of P's choice (as mentioned above, D successfully retained the arbitrator of its own choice, whereas Ps did not)

### THE AGREEMENT GROUND

The Court then held, following on from the ruling on the Compatibility Ground (second and third interpretations) above, that the Agreement Ground must also succeed. The Court held that the composition of the Tribunal was defective, and a single arbitration should not have been commenced on the basis of multiple contracts. The Court went on to analyse the first interpretation (even though strictly it was not necessary to do so) – if the right to nominate the second "wing arbitrator" rested with the "Borrowers", nomination from the Other Mortgagors would not have been necessary, but in the present case one of the reasons why the Tribunal had been constituted as it had been was that the Other Mortgagors did not jointly designate. This meant that the composition of the Tribunal was not conducted in accordance with the parties' agreement, even in the first interpretation scenario.

## BCLP TAKEAWAYS

The Lender D sought to argue that because the three contracts are interrelated, the parties can be taken to expect that if there were disputes, the disputes could and would be resolved by the same set of dispute resolution mechanisms. Despite the possible risk of fragmentation of proceedings and inconsistent awards, the Court held that this would **not** constitute sufficient justification to override what the parties had negotiated in the contracts they signed (party autonomy / parties' contractual rights).

This case highlights the importance of careful drafting and careful analysis of the dispute resolution clauses in a multiple related contracts scenario. As the Loan Agreement context / relationship above demonstrates, it is not uncommon for multiple related contracts to have different

contracting parties, and structuring dispute resolution clauses to apply "*mutatis mutandis*" does not necessarily guarantee the "compatibility" requirement for a single arbitration to be commenced under Article 29.

Although the Court in *SYL v GIF* overturned the Interim Award, the case nonetheless confirms Hong Kong's pro-arbitration and pro-enforcement approach to arbitration. The judgment applied and upheld orthodox principles of party autonomy and holding the parties to the contracts they have negotiated and signed.

## RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Business & Commercial Disputes
- International Arbitration

## MEET THE TEAM

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