ENFORCEMENT OF ARBITRAL AWARDS: RECENT APPROACHES IN THE HONG KONG COURT

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Hong Kong court has long been known for its "pro-arbitration" and "pro-enforcement" policy when it comes to enforcement of arbitration awards. However, in some recent cases, the court has either exercised its jurisdiction to set aside enforcement orders made in earlier ex parte applications or made some serious remarks on the conduct of parties in the proceedings. Does this signal a change in approach?

It could be perceived that the court's approach remains robust, illustrated by two recent cases where the court is well prepared to adopt a flexible approach and exercise its discretion to facilitate the enforcement of an arbitral award. However, for reasons of justice and fairness, the Hong Kong court would not shy away from refusing to enforce an award when the necessary setting-aside requirements are met, such as when elements of fraud are identified, and the relevant arbitration agreement is found to be invalid. Notably, parties should bear in mind that, as the usual practice in arbitration cases, the court would still order costs on an indemnity basis against an applicant who has failed to set aside the enforcement order made, to deter meritless applications obstructing enforcement.

In A Consortium Comprising TPL and ICB v. AE Limited – 2021, though irregularity as to the capacity of the applicant to the arbitration was raised by the respondent as a ground to challenge the enforcement of certain Dubai arbitral awards, the Hong Kong court nonetheless intervened to cure the irregularity and granted an order for enforcement. The irregularity relied upon by the respondent, in this case, is that the applicant is not a legal entity capable of suing and being sued under the laws of Hong Kong and has no capacity to institute the action.

In contesting the applicant's application for joinder and amendment to cure the irregularity, it was submitted by the respondent that enforcement of arbitral awards under the Arbitration Ordinance (Cap.609) should be as "mechanistic" as possible and the jurisdiction of the Court is limited only to entering judgment in terms of the award which in this case is an award in favour of "A Consortium comprising TPL and ICB", and not any other entity. It was argued that the court should not go behind the dispositive parts of the Awards, to second guess the intentions of the Tribunal, nor to speculate on the intention and objectives of TPL and ICB in initiating an arbitration in the name of "A Consortium".

However, the court pointed out that, in the arbitral proceedings, there was no claim in the answer submitted by the respondent that the applicant was not a legal or valid entity, nor any defence raised on the basis that the agreement was not a valid contract made with a non-existent entity which had no capacity. Evidence was filed and submissions were made in the arbitration, on the merits of the different claims made by the applicant in relation to the project concerned. Clearly, the respondent was under no doubt or confusion as to who had commenced the arbitration and made the claims against it, and it certainly did not raise such query in the arbitration.

Accordingly, Mimmie Chan J pointed out that – "I do not agree that by adopting a mechanistic approach towards enforcing arbitral awards, the Court is prevented from giving effect to an award on its plain reading... Notwithstanding the advocacy of a mechanistic approach to the enforcement of arbitral awards, the Courts have nevertheless declined to be rigid if it would be contrary to the spirit of the Ordinance which is to facilitate the enforcement of arbitration agreements and awards."

The court allowed the amendment and joinder of the relevant applicants to cure the defect of irregularity of the original applicant as to its capacity to commence the proceedings and granted leave to enforce the awards.

A similar "pro-arbitration" approach can also be seen in the recent case of Lin Chien Hsiung v Lin Hsiu Fen – 2022, where the respondent applied to set aside the enforcement order made by the court pursuant to the applicant's ex parte application. One of the respondent's key arguments is that, at the time of the applicant's ex parte application for the enforcement order, there had been material non-disclosure by the applicant in failing to disclose to the Court that the respondent had applied to a Shanghai Court to set aside the award, and that the Shanghai Court had accepted jurisdiction over the case. Although the court recognized that the applicant "did mislead the court" as to whether the applicant had applied for enforcement of the award on the mainland, etc. and on this ground, the court did order to discharge the ex parte enforcement order, it nevertheless exercised its discretion to re-grant the order discharged after having considered the other grounds relied on by the respondent.

On the non-disclosure point raised, it was held by Mimmie Chan J that "I am not satisfied that the non-disclosure of the Applicant's enforcement application on the Mainland is material to his application for enforcement in Hong Kong. Since the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR ("Supplemental Arrangement") came into effect on 27 November 2020, parties are no longer precluded from filing applications for enforcement of

arbitral awards with the courts of the Mainland and Hong Kong respectively and simultaneously."

However, one must also not take it for granted that the Hong Kong court would not reject enforcement considering its long-standing reputation of "pro-arbitration". In v. Sun Fung Timber Company Limited () – 2022, the respondent company applied to set aside an enforcement order on the ground that one of its directors (ST) was not authorised to enter into the contract which contained the arbitration clause, that the company was not given notice of the arbitral proceedings, the enforcement of the award would be contrary to public policy, and that GD (the counterparty to the contract) failed to disclose in the ex parte application for the order that the property had been sold or that the service of the documents at the property had been disputed by the company.

In setting aside the enforcement order and refusing to enforce the award, it was found that ST did not have the requisite authority to enter into the contract. Therefore, the contract to arbitrate was impeached and the company was never a party to the arbitration agreement. It was also held that the company had not been given proper notice of the arbitration and was unable to present its case in the relevant proceedings.

It was held by the court that: "...it is more probable that GD was a party to ST's plan to orchestrate an Award whereby the Company would be made liable for a debt under the Contract, which was part of the scheme to enable ST to enforce the debt by winding- up and other recovery proceedings, and otherwise to enable ST and GD to receive valuable assets of the Company, and to avoid ST's need to share such assets with NI should the Company be dissolved in the usual way."

On whether it would be contrary to public policy to enforce the award, it was said by Mimmie Chan J: "I consider that it would indeed be shocking to the conscience of the Court to permit GD to enforce the Award which I find was procured by ST in collusion with GD, or SW acting on its behalf. The arbitral process and the Award had been misused by ST with the assistance of GD, and it would be contrary to the public policy of Hong Kong to permit enforcement of such an Award."

Although the grounds relied upon by the respondent company in Sun Fung Timber are the usual grounds set out in s.95 of the Arbitration Ordinance (Cap.609), the facts of the case, "shocking to the conscience of the Court", are apparently the reason why the court ultimately rejected to enforce the award. This is a good comparison to the court's decision in A Consortium Comprising TPL and ICB and Lin Chien Hsiung, and if there is a lesson to learn, that would be the court's sensible and practical approach in looking into the substance and merits of the case, but not just certain defects or irregularities identified to obstruct enforcement.

Finally, for meritless applications obstructing the enforcement of an arbitral award, the Hong Kong court has also, in several recent cases, reiterated that the usual costs order to be made against an unsuccessful application is costs "on the indemnity basis". With these clear directions and remarks of the court in mind, parties and practitioners are encouraged to take a more sensible approach toward cases about the enforcement of arbitral awards in Hong Kong in the future.