



Hong-Kong

Hong Kong Court refuses to stay tortious court claim in favour of arbitration

In a recent decision dated February 2023, a Hong Kong Court held that a tortious claim was not covered by the scope of the arbitration clause and therefore rejected an application to stay the court proceedings in favour of arbitration (*Li Wenjun v Chen Chunhui & Another* [2023] HKCFI 405).

In this case, the Plaintiff brought a state court claim against the Defendants alleging that she had been conspired against and deceitfully induced by the 1st Defendant's false and fraudulent representations into transferring her shares without consideration. The relevant Share Transfer Agreement was governed by PRC Law and contained the following arbitration clause (original text in Chinese):

“Any dispute arising out of the performance of this agreement shall be resolved through amicable negotiation between the parties; if such negotiation fails, either party shall have the right to submit to the Hong Kong International Arbitration Centre for arbitration in accordance with its effective arbitration rules at the time of the signing of this agreement.”

The 1st Defendant (the “Defendant”) applied for a stay of these court proceedings in favour of arbitration, pursuant to section 20 of the Arbitration Ordinance (Cap. 609), which incorporated Article 8 of the UNCITRAL Model Law, according to which “[a] court before which an action is brought in a matter which is the subject of an arbitration agreement shall [...] refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

A key issue that the court examined was whether, on proper construction of the clause, the dispute between the parties fell within the ambit of the arbitration agreement. The Defendant (who bears the burden of proof) had to show that there is a prima facie or plainly arguable case that the parties are bound by the arbitration clause covering their existing dispute. If this is the case on a prima facie basis, the ongoing court proceedings should be stayed in favour of arbitration and the state court should leave it to the arbitral tribunal to determine its own jurisdiction.

The very first sentence of the arbitration clause was held to be the most critical part, i.e., “any dispute arising out of the performance of this agreement”. The question was therefore whether tortious disputes constitute disputes “arising out of the performance” of the

agreement. The court accepted Plaintiff's PRC law expert's interpretation, who answered this question in the negative and stated that the clause should be construed to refer to disputes arising from a party's failure to perform its obligations under the agreement or to comply with its terms, and thus, did not cover tortious disputes. Plaintiff's PRC expert cited a 2020 Supreme People's Court decision, which held that a very similarly worded arbitration clause did not cover a tortious dispute.

Furthermore, in any event, the Court held that the Defendant had waived his right to arbitrate as his conduct had been plainly inconsistent with his application to seek a stay of the proceedings. In fact, the Defendant had, inter alia, failed to rely on the Share Transfer Agreement when it was first introduced before the Hong Kong Court, even though he was legally represented at all times and was aware of the existence of such agreement and the arbitration clause provided therein.

As a result, the Court dismissed the Defendant's application to stay proceedings in favour of arbitration.

For any further practical support in relation to arbitrations in Hong-Kong, please contact:

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