Hong Kong Court Sets Aside Default Judgment in Favour of Arbitration—*Tongcheng Travel Holdings Limited v. OOO Securities (HK) Group Limited* [2024] HKCFI 2710

21 October 2024

INTRODUCTION

The Hong Kong courts, acting in accordance with both the New York Convention[1] and the Arbitration Ordinance,[2] will stay proceedings brought in breach of an arbitration agreement. Where appropriate, the courts will also set aside default judgments (obtained where no defence has been filed) in order for parties to have their disputes decided in arbitration.

Tongcheng Travel Holdings Limited v. OOO Securities (HK) Group Limited [2024] HKCFI 2710 concerned an application to set aside a default judgment and to stay the proceedings in favour of arbitration. The Hong Kong Court of First Instance traversed the principles for setting aside judgments in default obtained where the parties had agreed to arbitrate. The judgment also set out the courts' approach to references to non-existent arbitral institutions and seemingly conflicting dispute resolution provisions where the parties' dispute resolution clause simultaneously referred to arbitration before "*the relevant legally authorised body in Hong Kong*", and also agreed that the Hong Kong courts would "*have exclusive jurisdiction over the parties*".

BACKGROUND

Tongcheng Travel Holdings Limited, a company incorporated in Mainland China entered into an investment management agreement ("IMA") with OOO Securities (HK) Group Limited, a Hong Kong-incorporated licensed securities firm, on 27 November 2018.

The IMA related to the management of about USD 30 million of Tongcheng's assets. Tongcheng alleged that the parties had orally agreed that the maximum term of the

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1 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

2 Hong Kong Arbitration Ordinance (Cap. 609).

IMA would be three years, and that Tongcheng could withdraw its assets after the first two years of the IMA. However, the written terms of the IMA reflected that it would continue until both parties agreed in writing to terminate the IMA.

In March 2020, Tongcheng requested a partial withdrawal of the managed assets, and that OOO provide a plan for the return of the remainder of the assets. OOO did not respond or comply, and by written notice on 4 January 2022, Tongcheng informed OOO in writing that it was terminating the IMA and demanded that the managed assets be returned to Tongcheng in full.

Tongcheng then commenced proceedings before the Hong Kong courts on 27 September 2022. OOO did not acknowledge service or file a notice to defend the action in the Hong Kong courts. Tongcheng obtained judgment in default against OOO for the payment of the sums (with interest and costs) on 22 January 2024. OOO then brought its application to set aside the default judgment and stay the proceedings in favour of arbitration on 2 April 2024.

Notably, although OOO did not participate in Tongcheng's proceedings before the Hong Kong courts, it commenced its own action against Tongcheng on the same day (27 September 2022).

THE COURT'S JUDGMENT

In considering OOO's application, the Court followed the approach in *Dah Chong Hong (Engineering) Ltd v Boldwin Construction Co Ltd* HCA 1291/2002. It first considered the application for stay on the basis that if the stay application was successful, the default judgment will also be set aside and the court would not consider the merits of the defence. If, on the other hand, the stay will or is likely to fail, then a defence which has a real prospect of success has to be shown in order for the court to set aside the default judgment.

In deciding the stay application, the question for the Court was whether there was a *prima facie* case that the parties were bound by an arbitration agreement. The exercise involves considering: (i) whether there was an arbitration agreement; (ii) whether the arbitration agreement was valid; (iii) whether there was a dispute between the parties; and (iv) whether the dispute fell within the arbitration agreement. Only factors (i) and (ii) were in dispute before the Court.

The Court considered that there was a valid arbitration agreement, even though the arbitration clause provided for the reference of disputes "*to the relevant legally authorised*

body in Hong Kong for arbitration in accordance with the arbitration rules presently in force at the time of submission to arbitration". The Court considered that the Hong Kong International Arbitration Centre (HKIAC) was a "*relevant*" and "*legally authorized*" body for arbitration in Hong Kong and therefore fell within the arbitration clause. The Court also considered that even if the HKIAC were not such a body, the expressed intention to arbitrate in Hong Kong would be "*sufficient and adequate for there to be a valid and operable arbitration agreement which can be performed in Hong Kong*".

Nor did the clause preceding the arbitration clause granting the Hong Kong courts "*exclusive jurisdiction over the parties*" conflict with the validity of the arbitration agreement. Considering the construction of similar provisions in both English and Hong Kong case law, the clauses were to be "*reconciled to mean that the Hong Kong court is to have supervisory jurisdiction over the arbitration in Hong Kong*".

The Court also rejected Tongcheng's argument that by commencing its own proceedings in the Hong Kong courts, OOO had waived or abandoned its agreement to arbitrate, both because those proceedings have not been served on Tongcheng and because the parties had agreed in the IMA that it was not to be amended except in writing signed by both parties. That agreement extended to any variation or amendment of the arbitration agreement.

Having found the existence of a valid arbitration agreement, the Court ordered the mandatory stay of the proceedings in favour of arbitration. The Court also considered the factors for the setting aside of a default judgment under the relevant civil procedure rules, concluded that it would be a proper exercise of the Court's discretion to set aside the default judgment, and did so.

COMMENT

The Court's approach in dealing with applications for stay in support of arbitration is to "*emphasise the twin icons of party autonomy and minimal court interference as far as arbitration agreements are concerned*". Where the parties have agreed "*that their dispute under the IMA should be referred to arbitration*", then "*that is what should happen and the Court will not usurp the function and duties of the arbitral tribunal to decide the dispute on the merits, including any dispute as to the jurisdiction of the tribunal*." Remarkably, the Court enforced the arbitration agreement despite both parties having commenced litigation.

This case exemplifies the difficulties that can be caused by carelessly drafted dispute resolution provisions. Tongcheng relied on the potentially contradictory jurisdictional

clause and reference to a non-existent arbitral institution to argue that there was no agreement to arbitrate. Even though courts may, and in this case did, ultimately dismiss such challenges, they can waste much time and substantial costs. In other cases, poorly drafted clauses may simply be unsalvageable.

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