HCCT 31/2019

[2019] HKCFI 2172

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 31 OF 2019

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IN THE MATTER of a Final Award on Merits (save as to costs) dated 25 February 2019 in HKIAC/A16115 made by the HKIAC

and

IN THE MATTER of a Final Award on Interest and Costs dated 26 June 2019 in HKIAC/A16115 made by the HKIAC

and

IN THE MATTER of section 81 of the Arbitration Ordinance (Cap 609) and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration

and

IN THE MATTER of Order 73 of the Rules of the High Court (Cap 4A)

BETWEEN

X Plaintiff

and

JEMMY CHIEN Defendant
(also known as CHIEN, CHING YU or 簡慶裕)

Before: Hon Mimmie Chan J in Chambers

Date of Hearing: 30 August 2019

Date of Decision: 5 September 2019

D E C I S I O N

Background

1. By its Originating Summons issued on 18 June 2019, the Plaintiff in these proceedings applied to set aside an arbitral award on merits dated 25 February 2019, and an award on interest and costs dated 26 June 2019 ("**Awards**") made in an arbitration in Hong Kong ("**Arbitration**"). The Plaintiff is a BVI company which manufactures and supplies power tools and power adapters ("**Products**") for industrial customers. It is within a group known as the X Group of companies ("**Group**"), the parent company in Taiwan ("**Parent**") being listed on the Taiwanese Stock Exchange. The Defendant is a Taiwanese national.

2. The Arbitration concerns a dispute between the Defendant as Claimant, and the Plaintiff as Respondent, arising under a Service Agreement dated 26 April 2010 ("**Service Agreement**") made between the parties, whereby the Defendant agreed to provide product, marketing and promotion services ("**Services**"), in exchange for a commission of 5% on the payment received from customers and buyers of the Products sold by the Plaintiff. Under clause 7 of the Service Agreement, the parties agreed to refer all disputes relating to the Service Agreement to arbitration in Hong Kong, according to Hong Kong arbitration rules, if such disputes cannot be resolved by negotiation ("**Arbitration Agreement**").

3. In the Arbitration, the Defendant as Claimant sought payment from the Plaintiff/Respondent of US$388,437.09 and RMB 9,325,125.03, as commission outstanding and payable by the Plaintiff under the Service Agreement. The arbitral tribunal ruled in favor of the Defendant, ordering the Plaintiff to pay the commissions claimed. In the Award on merits, the tribunal dealt with the Plaintiff's challenge to its jurisdiction, on the basis that there was no valid arbitration agreement between the Plaintiff and the Defendant, as the Defendant was not the true party to the Service Agreement, but had signed the same as agent for his principal, Mr Philip Chen ("**Chen**"), who was the true party to the Service Agreement. The Plaintiff claimed that the Defendant was made a party to the Service Agreement, to conceal the fact of Chen's interest under the Service Agreement, as Chen had a conflict of interest by virtue of his capacity as the Vice President of a company ("**3rd Party**") which acted as an intermediary that ordered products from the Group and resold them to its customers, and the performance of the Service Agreement by Chen himself would be prejudicial to the interests of the 3rd Party and in conflict with Chen's duties to the 3rd Party.

4. These claims of the Plaintiff were denied by the Defendant, who maintains that he was the true party to the Service Agreement. According to the Defendant, he merely delegated the performance of the duties under the Service Agreement to Chen, who acted as the Defendant's agent. The Defendant reiterated that he was entitled so to delegate the performance of the Service Agreement to Chen, as it was not a contract for the Defendant's personal services.

5. By these proceedings, the Plaintiff applied to set aside the Awards, on the grounds that: (1) there was no valid arbitration agreement between the parties; and (2) the Awards are in conflict with the public policy of Hong Kong.

6. The Defendant applied on 19 July 2019 to dismiss the Plaintiff's application to set aside, for leave to enforce the Awards, and further seeks security under O73 r 10A RHC as a condition for the further conduct of the Plaintiff's setting aside application. The Defendant also seeks security for his costs of the proceedings, on the basis that the Plaintiff is a company resident abroad.

7. The substantive hearing of the application to set aside has been fixed for 23 September 2019, whereas the application for security came up for hearing by this Court on 30 August 2019.

Applicable legal principles

8. The legal principles applicable to determination of an application for security are not disputed between the parties. They are as set out in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 at 212, applied in *Guo Shun Kai v Wing Shing Chemical Co Ltd* [2013] 3 HKLRD 484 and *Dana Shipping and Trading SA v Sino Channel Asia Ltd* [2017] 1 HKC 281, and will not be repeated here.

The strength of the argument that the Award is invalid

9. The strength of the argument that the Award is invalid, as perceived on a brief consideration by the court, is the first important factor to be considered on an application for security. As Staughton LJ explained in *Soleh Boneh*, if the award is manifestly invalid, there should be an adjournment and no order for security, and if it is manifestly valid, there should be either an order for immediate enforcement, or else an order for substantial security. In between where there are various degrees of plausibility in the argument for invalidity, the court must be guided by its preliminary conclusion on the point.

10. On my preliminary consideration of the grounds set out in the Originating Summons, I cannot agree with the Plaintiff that the Awards are manifestly invalid.

Whether there was an arbitration agreement between the parties

11. There is no dispute, that the Plaintiff signed the Service Agreement as Party A, and the Defendant signed it as Party B. The Plaintiff was described as Party A to the Service Agreement, and the Defendant was described as Party B, desirous of supplying the relevant services to the Plaintiff as Party A. There is no reference in the Service Agreement to the Defendant acting as agent for any third party, nor any indication of the Defendant contracting in any capacity other than on his own behalf. I agree with the Defendant, that there is no ambiguity in any of the provisions of the Service Agreement with regard to either the capacity, or the obligations, of the parties as described.

12. The Plaintiff relies on the fact that in the space provided for the parties' execution of the Service Agreement, the typing which appears describes the parties as: "Party A: (blank) Representative: (blank)" and "Party B: (blank) Representative: (blank). The name of the Plaintiff, which is a limited company, was typed next to "Party A", and its representative, one Kao Ching Shing, signed next to "Representative". The signature of the Defendant appeared in the space next to "Party B" and "Representative". (The signatures are appended to this Decision.) On this basis, the Plaintiff argued that the Defendant was described, and had signed, as a representative of Party B.

13. On the Plaintiff's case, the indication that a person has signed as representative, namely, as agent for or on behalf of a principal is a very strong indicator, or the dominating factor, of capacity.

14. It would appear that the format of the signature clause was used without making any distinction between the corporate entity and the individual signing the Service Agreement. The Defendant put his signature in the space next to both “Party B” and “Representative”. The Plaintiff argued that this is an indication that the Defendant was “Representative”. However, objectively read, it can equally mean that the Defendant was himself “Party B”.

15. The Plaintiff claims that the arbitrator was wrong in finding on the facts that the Defendant was the proper party to the Arbitration Agreement, had failed to consider at all the Defendant’s signature and its designation of representative, and had failed to consider the factual matrix in deciding the Defendant’s capacity under, and “the true identity” of the parties to the Agreement.

16. The arbitrator reasoned in the Award on merits that under Mainland law which is the law applicable to the Service Agreement, the Defendant is prima facie the true party to the agreement. The arbitrator referred to the Defendant signing without any qualification as to his capacity, his being stated as Party B in the preamble and the signature block, the absence of any indication in the Service Agreement of his capacity as agent in signing or performing the Agreement, and the fact that the Defendant is personally liable for the obligations assumed under the Service Agreement.

17. The arbitrator stated that even applying Hong Kong law, the Defendant was the true contracting party. He referred to the evidence of his signature, the manner in which the invoices and the requisitions for payment of commission were issued, as well as the correspondence and the termination notice exchanged between the parties. He considered that parol/extrinsic evidence is not admissible to contradict and negate the terms of the Service Agreement which provide for the express rights and obligations imposed on the Defendant. The arbitrator also stated in the Award that even with the admission of the parol evidence, he was not satisfied on the evidence that the Defendant had not entered into the Service Agreement in his personal capacity.

18. As Counsel for the Defendant has pointed out, even if the Defendant had entered into the Service Agreement as agent, he is entitled in his name to take action and enforce the Service Agreement for the Plaintiff's payment of the commission due to be paid upon the terms of the Service Agreement for the services rendered thereunder (*Bowstead & Reynolds*, paras 9-004 to 9-008; *Halsbury's Laws of England* (2019) Vol 1 at para 168). As the tribunal found, the terms of the Service Agreement are clear as to the duties and obligations imposed on the Plaintiff, and the Defendant.

19. Moreover, even if the Plaintiff's case is accepted, that the services set out in the underlying Service Agreement are to be performed by Chen, and not the Defendant, I am not satisfied that that renders the Arbitration Agreement between the Plaintiff and the Defendant to be non-existent, unenforceable, or invalid. It is open to the Plaintiff and the Defendant to separately agree that any dispute as to the performance of the services and payment therefor is to be arbitrated between the Plaintiff and the Defendant. Clause 7 can be objectively and commercially construed to mean an agreement between the Plaintiff and the Defendant,

20. For all the above reasons, on a preliminary review of the Award and the evidence to which the arbitrator had referred, and on my reading of the Service Agreement, I am not satisfied that the Awards, and the arbitrator's findings on the existence of an arbitration agreement, are manifestly invalid.

Whether the Award should be set aside on the ground of public policy

21. The ground on public policy should be narrowly construed. Non-enforcement of the Service Agreement and any award based thereon should be balanced against public policy interests in upholding parties' agreement to arbitrate their dispute, facilitating enforcement of arbitral awards, and observing obligations assumed under the New York Convention for enforcement of arbitral awards.

22. If the Court accepts that there was a valid and binding Service Agreement between the Plaintiff and the Defendant, there is no reason to refuse enforcement of the Awards on the ground that the Service Agreement was a sham, to assist Chen in avoiding the consequences of his acting in breach of his fiduciary duties to the 3rd Party, and that to enforce same would be contrary to public policy in Hong Kong.

23. At this stage, I cannot see that the public policy ground relied upon by the Plaintiff is sufficiently clear or meritorious to render the Awards manifestly invalid.

The ease or difficulty of the enforcement of the Award

24. The Plaintiff's case is that it does not have any assets in Hong Kong, but it is part of the Group which has substantial assets in Singapore, the Mainland, and elsewhere, such that enforcement of the Awards would not be rendered more difficult as a result of the short delay between the hearing of the application for security and the substantive hearing of the setting aside application.

25. These considerations are relevant, as highlighted by Staughton LJ in *Soleh Boneh International*:

> "The second point is that the court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand there are and always will be insufficient assets within the jurisdiction, the ease for security must necessarily be weakened." (Emphasis added)

26. In determining whether security should be ordered, the focus should be on whether difficulty of enforcement here is increased due to the delay, as security is not to facilitate the enforcement process by requiring assets to be brought into a jurisdiction where there were none before. Counsel submitted that if a plaintiff did not have assets in the jurisdiction in the first place, this is one factor against the grant of security, although Counsel accepts that this is not the only relevant nor the determining factor (*Weili Su v Shengkang Fei* [2019] 2 HKLRD 1214).

27. In this case, there is only a period of approximately 3 weeks between the hearing of the application for security and the substantive hearing for setting aside the Awards. Counsel for the Plaintiff submits that security should not be ordered, in circumstances when the time gap is short and the debtor is able to pay the award on evidence of its worldwide assets (as in the case of *Karaha Boda LLC v Persusahaan Pertambangan Minydak Dan Gas Bumi Negara* (2003) 2 HKC 200).

28. The Plaintiff has filed evidence in the form of the financial statements of the Parent, to show that the Plaintiff has no presence, business or assets in Hong Kong. It has explained that for the transmission to Hong Kong of US$164,418.16 in September 2013, the transfer had been sent from the Plaintiff's account with Bank Sinopac in Taiwan ("**Bank**"), and that only the Bank's Hong Kong office was involved to effect the transmission, without there being a bank account belonging to the Plaintiff in Hong Kong. This is not contradicted by the Defendant.

29. The Plaintiff has also filed a set of the audited financial statements of the Group. The documents exhibited show the US$120 million paid up capital of the Plaintiff, the net asset value of the Plaintiff as at 2018 (equivalent to approximately US$185 million), and the value of the Plaintiff's shareholding in its subsidiary ("**X Singapore**"). X Singapore has paid up capital of SP$85,214,000, and holds the shares of 2 valuable Mainland companies, the aggregate value of which (as disclosed in the financial statements of the Parent) is NT$4,830,021,000.

30. The Defendant argued that even if the valuation referred to by the Plaintiff was reliable, it would be extremely difficult to realize the shares of the private companies held, directly or indirectly, by the Plaintiff, and to convert such assets into cash. However, these difficulties of enforcement are inherent in the Plaintiff's enforcement of the Awards in its favor, and are not caused by any delay occasioned by the setting aside application to be heard in September 2019.

31. I also accept the submissions made on behalf of the Plaintiff, that there is no evidence of any dissipation, or risk of dissipation, by the Plaintiff of its assets. The restructuring of the Group between December 2015 and December 20l8 took place before the Awards were made in 2019. X Singapore remains the subsidiary held by the Plaintiff, and X Singapore retains its shares in the Mainland subsidiaries notwithstanding the restructuring. There is no other evidence to suggest that there is a real risk that the Plaintiff would take steps in an attempt to defeat the Defendant's enforcement of the Awards.

32. I have taken into consideration the disclosure and evidence filed of the assets of the Group and the Plaintiff, the operations of the Plaintiff and the Group, the Parent being a listed company with disclosure requirements, the absence of any evidence of risk of dissipation, and the interval of 3 weeks between the hearing of the application for security and the substantive hearing of the setting aside application. I do not find any evidence of delaying tactics on the part of the Plaintiff.

33. On the entirety of all the evidence available in this case, I do not consider that there is a real risk that enforcement of the Awards will be rendered more difficult as a result of the interim delay, such that security should be ordered as a condition for the further conduct of the setting aside application.

Security for costs

34. In the course of the correspondence exchanged between the parties, the Plaintiff had agreed to provide security for the Defendant's costs of these proceedings instituted by the Plaintiff for setting aside the Awards. It was only when the Defendant sought further security under Order 73 rule 10A, that the Plaintiff resiled from its agreement to offer security.

35. Since the Plaintiff has no assets in Hong Kong, the Defendant will have to incur additional costs to seek enforcement overseas of any order of costs that may be made in his favor, should the Plaintiff's setting aside application fail on the merits. This is one factor which can be taken into consideration in the exercise of the Court's discretion, as to whether it should order the Plaintiff to provide security for the Defendant's costs of these proceedings.

36. At the conclusion of the hearing on 30 August 2019, I ordered the Plaintiff to provide security for the Defendant's costs, in the sum of HK$500,000, to be furnished within 7 days.

37. The order nisi on costs is that the Plaintiff should pay 50% of the Defendant's costs of and occasioned by the Summons for security, and 50% of the costs of the hearing on 30 August 2019.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Clark Wang, instructed by WK To & Co, for the plaintiff

Ms Jacqueline Law, instructed by Yan Lawyers, for the defendant

Appendix