HCCT 31/2019

[2020] HKCFI 286

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

Before: Hon Mimmie Chan J in Chambers

Date of Hearing: 23 September 2019

Date of Decision: 4 March 2020

D E C I S I O N

Background

1. This is the substantive hearing of the Plaintiff's application to set aside an arbitral award on merits dated 25 February 2019 ("**Award**") and an award on interest and costs dated 26 June 2019, collectively referred to as "**Awards**", and the Defendant's cross application to enforce the Awards.

2. On 5 September 2019, this Court handed down its decision on the Defendant's application for security ("**Security Decision**"). The nomenclature in the Security Decision is adopted in this Decision.

3. The relevant facts of the dispute are set out in the Security Decision, and will not be repeated here. To recap, the application to set aside the Award is as stated in the Amended Originating Summons ("**OS**"), that there was no valid arbitration agreement between the Plaintiff and the Defendant, and that the Award is in conflict with the public policy of Hong Kong.

Whether there was an arbitration agreement

4. The legal principles applicable to an application to set aside an arbitral award by way of challenge to the existence of an arbitration agreement and the jurisdiction of the arbitral tribunal are not in dispute. They are as set out in the case of *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, applied in *S Co v B Co* [2014] 6 HKC 421. The standard of review by the Court of the tribunal's ruling on jurisdiction is one of "correctness".

5. It must be emphasized, however, as the Court did in *Z v A*, unreported, HCCT 8/2013, 30 January 2015 (at paragraphs 21 to 22 of the decision), that this does *not* mean an unwarranted and unlimited review of the merits of the findings made by the tribunal:

"21. This being a jurisdiction challenge under s 34 of the Ordinance and Article 16 of the Model law, it has been established that the Court has to decide on the correctness of the ruling by the arbitral tribunal of its own jurisdiction (*Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763). Notwithstanding the fact that the Court decides this on a de novo basis, it is important to bear in mind that the reviewing Court recognizes its limited and narrow role, of confining the scope of the review and its intervention to true questions of pure jurisdiction only. In the case of *The United Mexican States v Cargill Incorporated* 2011 ONCA 622 (Court of Appeal for Ontario), the Canadian court highlighted these matters:

> '44. It is important, however, to remember that the fact that the standard of review on jurisdictional questions is correctness does not give the courts a broad scope for intervention in the decisions of international arbitral tribunals. To the contrary, courts are expected to intervene only in rare circumstances where there is a true question of jurisdiction.
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> 45. In the domestic law context, courts are warned to ensure that they take a narrow view of what constitutes a question of jurisdiction and to resist broadening the scope of the issue to effectively decide the merits of the case …
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> 46. This latter approach is magnified in the international arbitration context. Courts are warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction. In my view, the principle underlying the concept of "powerful presumption" is that courts will intervene rarely because their intervention is limited to true jurisdictional areas. To the extent that the phrase "powerful presumption" may suggest that a reviewing court should presume that the tribunal was correct in determining the scope of its jurisdiction, the phrase is misleading. If courts were to defer to the decision of the tribunal on issues of true jurisdiction, that would effectively nullify the purpose and intent of the review authority of the court under art 34(2)(a)(iii).
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> 47. Therefore, courts are to be circumspect in their approach to determining whether an error alleged under art 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal.
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> 48. One challenge for a reviewing court is to navigate the tension between the discouragement to courts to intervene on the one hand, and on the other, the court's statutory mandate to review for jurisdictional excess, ensuring that the tribunal correctly identified the limits of its decision-making authority. Ultimately, when deciding its own jurisdiction, the tribunal has to be correct. …

> 50. The second challenge for the court is to limit its review to determining whether the award 'contains decisions on matters beyond the scope of the submission' and not to review the merits of the decision itself. …
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> 53. The role of the reviewing court is to identify and narrowly define any true question of jurisdiction. The onus is on the party that challenges the award. Where the court is satisfied that there is an identified true question of jurisdiction, the tribunal had to be correct in its assumption of jurisdiction to decide the particular question is accepted and it is for the court to determine whether it was. In assessing whether the tribunal exceeded the scope of the terms of jurisdiction, the court is to avoid a review of the merits.' (Emphasis added)

> 22. Hence, it is necessary and important that the present challenge should be confined to the sole question of whether the Arbitrator has jurisdiction to deal with the dispute and the issues submitted to him in the Arbitration, and the Court should not review the Arbitrator's decision which goes to the merits of the dispute."

6. The scope of the Court's review must be limited to true questions of jurisdiction and the Court must be cautious not to stray into the merits of findings of fact and law made by the tribunal, on issues unrelated to or not necessary for the question of jurisdiction.

7. It is not disputed by the parties that the underlying Service Agreement made between the parties, under which disputes had arisen, is governed by PRC law, whereas the Arbitration Agreement contained in clause 7 of the Service Agreement is governed by Hong Kong law.

8. The Plaintiff's contention is that the Defendant was *not* the true party to the Service Agreement, as he had signed it as agent for Chen, the principal and true party to the Service Agreement. The Plaintiff alleges that the Service Agreement was in truth a sham to conceal Chen's involvement, whereby the Defendant was never meant to be the true party, and enforcement of the Award would be giving effect to a sham and would be contrary to public policy in Hong Kong.

9. The Plaintiff relies on the fact that prior to the execution of the Service Agreement, there had been no relationship between the Defendant and the Plaintiff and the Group of which the Plaintiff forms part. By contrast, the Plaintiff had all along been dealing with Chen in its sale of the products. The Service Agreement was signed by the Defendant next to the words "Party B" and "Representative", such that according to the Plaintiff, the Defendant was clearly described and had signed as a representative of a contracting party. The Plaintiff further relies on the evidence in the Arbitration, that the Defendant had not participated in the negotiation of the Service Agreement, had little knowledge of its terms and the duties and obligations provided thereunder, and never had any communication with the Group. It is common ground that it was Chen who had performed the services under the Service Agreement, and the Plaintiff relies on the Defendant's evidence that there was no detailed agreement between the Defendant and Chen as to how the profits under the Service Agreement would be shared between them.

10. In the Award on merits, the arbitrator found that the Defendant was the true party to the Service Agreement and therefore the Arbitration Agreement. His analysis was set out in paragraphs 108 to 115 of the Award on merits. At paragraph 109, the arbitrator found that under PRC law governing the Service Agreement, the Defendant was the true party and that the Service Agreement was signed by the Defendant without any qualification. He referred to the following:

> "a. The Service Agreement clearly states that Mr Jemmy Chien is " 乙方 " in the preamble, as well as in the signature block.
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> b. The Service Agreement does not explicitly or impliedly indicate that Mr Jemmy Chien was not contracting in his personal capacity; that he was signing on behalf of Mr Philip Chen; or that Mr Philip Chen would be performing the Service Agreement.
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> c. The Claimant is personally liable for the obligations under the Service Agreement. There is nothing in the Service Agreement that negates the Claimant's personal liability in express or implied terms."

11. At paragraphs 110 and 111 of the Award, the arbitrator considered the position under Hong Kong law and set out his analysis of the Service Agreement and the evidence as follows:

> "110. For completeness, the Tribunal also applies the factors under Hong Kong Law for determining whether or not a party contracted personally, or merely as agents for a third party (base on case law submitted by the Parties) are as follows:
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> a. Did the party sign the contract in its own name, or was it listed as an agent of another party (i.e. qualification that the contract is entered for the benefit or on behalf of another party)?
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> b. Was any party held out to another party as an agent (whether explicitly or impliedly)?
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> c. Who issued invoice payments under the contract?
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> d. Who issued request for payments under the contract?
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> e. To whose bank account was (any) payment transferred to ? Likewise, who is the party making such payments?
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> f. Who issued the termination notice of the contract? Likewise, who were the parties named in the termination notice?
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> 111. Applying these factors (in the same way as they were applied to determine the Tribunal's jurisdiction over R2 in section 4.2.2(a)) to the current case,
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> a. Mr Jemmy Chien signed in his own name, not as *"responsible for"* or *"on behalf of"* Mr Philip Chen. Likewise, R1 was signing in its own name and in its own capacity. This points to both R1 and the Claimant signing in their personal capacity, and not as agent of another party;
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> b. The partial payments for commissions in invoices no. F131-1810 and F141-1010 were by *"order of"* X BVI (or R1) to Mr Chien Ching-Yu's (or Mr Jemmy Chien) bank account at the Hong Kong and Shanghai Banking Corporation. This factor militates toward finding that <u>both</u> R1 and the Claimant are true parties to the Service Agreement;
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> c. Requisitions for payments *("请款发票")*of the two tranches of USD164,480.16 commissions were issued in the name of Mr Jemmy Chien and not Mr Philip Chen. However, the e-mail attaching the requisition was sent by Mr Philip Chen without copy to Mr Jemmy Chien;

> d. The termination notice of the Service Agreement was issued by R2 to Mr Jemmy Chien without copying Mr Philip Chen, without any qualification or specification that Mr Jemmy Chien was acting on behalf of Mr Philip Chen, or a request that Mr Jemmy Chien inform Mr Philip Chen of the termination; and
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> e. Neither Mr Jemmy Chien nor R1 held out explicitly as another party's agent."

12. At the hearing before this Court, Counsel for the Plaintiff argued that the arbitrator had erred in applying the "literal approach" of contractual interpretation under PRC law, in determining whether the Defendant was contracting in his personal capacity as principal. It was argued that in construing the Service Agreement, the arbitrator should have given proper consideration to the factual matrix, including the history of the prior dealings between the Plaintiff and Chen; Chen's position as Vice President of the 3rd Party and his possible breach of duties to the 3rd Party if he were personally to contract for the Plaintiff's sale of the products; the Defendant's total lack of involvement in the negotiation and performance of the Service Agreement, and the other extrinsic evidence which is admissible, in order to identify the proper party to the contract. If he had done so, the Plaintiff argued that the arbitrator would have concluded that the Defendant was not a party to the Service Agreement and the Arbitration Agreement.

13. It has to be borne in mind that it was the arbitrator who had heard the evidence of the Defendant and the witnesses called for the Plaintiff, on the negotiations for the Service Agreement, the signing thereof by the Defendant, the services provided by Chen under the Service Agreement, and the dealings between Chen and the Defendant. The credibility of the Defendant's evidence is a question entirely for the arbitrator. The arbitrator made findings of fact on the basis of the evidence produced before him in the Arbitration and the submissions made by Counsel on such evidence.

14. On construction of the Service Agreement, I maintain the observations made in paragraphs 11 to 14 of the Security Decision. Reading the Service Agreement as a whole, I cannot agree that the agreement is ambiguous in its identification of the Defendant as "Party B" to the Service Agreement, and as the party who bore the obligation of performing the services to be provided thereunder. The only suggestion of the Defendant acting as an agent, as relied upon by the Plaintiff, is the Defendant signing in a space in the execution clause, which has the words "Party B" and "Representative" typed in. On my reading of the execution clause and the way the Service Agreement was signed by each of the Plaintiff and the Defendant, it objectively shows that the person who had signed for Party A had signed as representative of the named company, whereas the Defendant himself had signed as "Party B".

15. There is no other reference in the Service Agreement to the Defendant entering into the agreement as agent, or in any capacity other than on his behalf. The Defendant emphasized that he was able to delegate the performance of the services to Chen, as he in fact did.

16. There is dispute between the Plaintiff and Defendant as to whether parol evidence is admissible to identify Chen as the true party, in contradiction to the express terms of the written Service Agreement which state the Defendant as the party, and as the one assuming the duties and being entitled to the benefits of the Service Agreement.

17. *Homburg Houtimport BV v Agrosin Private Ltd* [2004] AC 715 and *Lee Fu Wing v Yan Po Ting Paul* [2009] 5 HKLRD 513 are authorities relied upon by the Plaintiff, to support the contention that extrinsic evidence is admissible to show that one or more of the contracting parties to an agreement were actually agents for other persons, even where the relevant contract is in writing. The cases highlight the fact that the identity of the parties to a contract is fundamental, going to the very existence of the contract itself, and is not merely a term or condition of the contract. Even the judgment in *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 which is relied upon by the Defendant shows that where it is claimed that the person to the written agreement is *also* acting as the agent of another, extrinsic evidence can be adduced of that fact as this does not involve the contradiction of the document. Lord Hobhouse's judgment in *Shogun* also recognized that where the contents of the agreement are "insufficient unequivocally" to identify the party, or if the identification is non-specific, evidence can be given "to fill any gap".

18. However, it is doubtful whether the Plaintiff's emphasis on the admissibility of extrinsic evidence can assist the Plaintiff's application. It is clear from paragraphs 112 to 115 of the Award on merits that the arbitrator *had* considered the parol evidence relied upon by the Plaintiff in the Arbitration, but concluded that even with the admission of such extrinsic evidence, he was not persuaded that the Defendant had not entered into the Service Agreement in his personal capacity.

19. In this regard, I agree with the arbitrator's conclusion that the evidence of the Defendant's unfamiliarity with the terms of the Service Agreement, the fact that the services were performed by and delegated to Chen, the fact that Chen had at one stage wanted to replace the Defendant as a direct party to the Service Agreement, do not prove that the Defendant had never intended, at the material time of the contract, to enter into the Service Agreement as a party in his personal capacity. Nor do the fact that there had been a long history of dealings between the Plaintiff and Chen, that the Defendant was only told of the termination of the Service Agreement by Chen and that the Defendant had relied on Chen as a witness for the Arbitration, either individually or in conjunction, render it improbable or unbelievable that the Defendant had contracted the Service Agreement on his own behalf.

20. The decision on whether the Defendant was a party, on construction of the Service Agreement as a whole, is a finding of law made on the basis of the facts found by the arbitrator as to the negotiations, the respective role played by the parties, and the manner of their performance of the Agreement. The arbitrator was the best person to decide on questions of the parties' intention, on the basis of the testimony from the witnesses he heard, and the documentary evidence which the parties produced in the course of the Arbitration.

21. In deciding on the correctness of the arbitrator's decision on the existence of the Service Agreement and the Arbitration Agreement between the Plaintiff and the Defendant, and his consequential conclusion on jurisdiction, it is not the role of the Court to review the merits or correctness of the arbitrator's findings of credibility and of fact. On reading the Award on merits, I cannot conclude that the arbitrator had made any mistake in finding that there was a valid agreement between the Plaintiff and the Defendant personally.

Whether enforcement of the Arbitration Agreement and Awards would be contrary to public policy

22. For any application to set aside an arbitral award which is founded on evidence by affidavit, Order 73 r 5(4)(b) RHC requires every affidavit to be used to be served with the OS. O 73 r 5(4) (a) also requires the OS to state the grounds of the application.

23. The OS issued in these proceedings simply states that the Award is in conflict with the public policy of Hong Kong. The affidavit of Wong Wai Ching ("**Wong Affidavit**") made on behalf of the Plaintiff, and which was served with the OS, only states that "if the Arbitration Agreement contained in the Service Agreement is enforceable, the Court would be enforcing a sham agreement whereby the Defendant was never meant to be the true party", and allowing the Award to stand would be to give effect to a sham agreement. This is the only ground of public policy on which the application can be allowed to be based. Neither the OS nor the Wong Affidavit served with the OS state that performance of the Service Agreement would involve Chen committing conduct which is illegal under the laws of Taiwan.

24. As a preliminary point, the Arbitration Agreement is separate from the underlying Service Agreement. Allegations of fraud or illegality affecting the underlying contract do not render an arbitration agreement null and void, or render the dispute unarbitrable. The real question is whether the arbitration clause in the agreement can be impeached by the existence of fraud or illegality.

25. Even if the services set out in the Service Agreement were intended to be, and were at all material times carried out by Chen, that does not affect the existence, enforceability or validity of the Arbitration Agreement. 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 under the Service Agreement is to be arbitrated between the Plaintiff and the Defendant. Clause 7 of the Service Agreement can be objectively and commercially construed to mean an independent arbitration agreement between the Plaintiff and the Defendant, that any dispute as to the capacity in which either of them acted should be arbitrated between them. Enforcement of such an arbitration agreement would not be enforcing a sham, nor against public policy.

26. In the Wong Affidavit filed in support of the OS, the Plaintiff had only asserted that that the Court should not enforce a sham agreement "whereby the Defendant was never meant to be a true party", and that enforcing the Awards would be to give effect to a sham agreement. At the hearing, Leading Counsel for the Plaintiff argued that despite this (and the requirements set out in O73 r5(4)), what the Plaintiff was in truth saying is that the Service Agreement was a sham because it was the intention of the parties to hide what was in truth the illegality of Chen contracting with the Plaintiff for the performance of the services provided under the Service Agreement, in breach of his fiduciary duties to the 3rd Party. In these circumstances, when the Plaintiff was not intended to be the true party, he could not have been intended to have the benefit of the Arbitration Agreement either. Counsel also argued, in reliance on *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HSCFAR 544 (in particular paragraph 39 of the judgment), that the Service Agreement should not be given effect if the real object and intention of the parties at the time of the contract necessitated their joining in an endeavor to perform in a foreign country (Taiwan in this case) some act which is illegal by the law of such country.

27. Since the effect of O73 r5(4) is to require the affidavit served with the OS to frame the party's case, the facts and grounds relied upon in the application to set aside should be stated in the affidavit precisely and with the necessary particulars. This is necessary in order to give true effect and meaning to the object and principles as stated in the Arbitration Ordinance itself, and in O1A RHC. In relation to the ground of public policy, paragraph 37 of the Wong Affidavit only states the sham agreement as being on the basis that the Defendant was never meant to be the true party to the Service Agreement. No mention was made at all, to the important fact of the illegality of the Service Agreement and the fact that the object and intention of the said agreement necessitated the performance of an illegal act in Taiwan.

28. Although the Wong Affidavit exhibited and sought reliance on a legal opinion on Taiwanese law, the substance of such opinion was that Chen owed fiduciary duties to the 3rd Party under Taiwanese law, and that he would be in breach of such duties if he was the real principal and true party to the Service Agreement. This was to explain why Chen allegedly arranged for the Defendant to sign the Service Agreement, and to demonstrate that it was never intended that the Defendant should be the true party, and the Service Agreement was thus a "sham". I agree with Leading Counsel for the Defendant, that there is no clear expert opinion that the performance of the Service Agreement constitutes the commission of a criminal offence in Taiwan, or involves the commission of an illegal act there, as opposed to a breach of fiduciary duty under civil law, which gives to the 3rd Party a mere right to damages against Chen.

29. What is pertinent is that if it was true, that the Service Agreement was made between the Plaintiff and the Defendant in the circumstances claimed by the Plaintiff: allegedly as a sham and smokescreen to hide the true transactions between the Plaintiff and Chen and to divert business away from the 3rd Party, this was all with the agreement, to the knowledge and with the assistance of the Plaintiff acting in concert with the Defendant. To accept the Plaintiff's application of resisting enforcement of the Award is tantamount to permitting the Plaintiff to rely on its own wrongdoing and to avoid payment for the services rendered to it under the Service Agreement. I fail to see how public policy interests would justify the Court so doing.

30. As highlighted in paragraph 21 of the Security Decision, the ground on public policy has always been narrowly construed by the Court. Non-enforcement of the Awards has to be balanced against other public policy interests of 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.

31. In short, I am not satisfied that the Award should be set aside as the Plaintiff seeks. Even if the ground of public policy was made out, I would not in the exercise of my residual discretion (as recognized by the Court to exist, per *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 136A-B), and for the reasons set out in paragraph 29 above, set aside the Award.

Disposition

32. The Plaintiff's application to set aside the Award is dismissed, with costs on indemnity basis with certificate for 2 counsel, and I allow the Defendant's application for leave to enforce the Awards in terms of paragraphs 3 and 4 of his Summons of 19 July 2019, with costs on indemnity basis.

(Mimmie Chan)

Judge of the Court of First Instance

High Court

Mr Horace Wong SC and Mr Clark Wang, instructed by WK To & Co, for the plaintiff

Mr Douglas Lam SC and Ms Jacqueline Law, instructed by YAN LAWYERS, for the defendant