

HCCT 60/2019

[2019] HKCFI 2793

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS**

NO 60 OF 2019

IN THE MATTER of an Arbitration

and

IN THE MATTER of Order 73 of the
Rules of High Court, Cap 4A and
Section 21 L of the High Court
Ordinance, Cap. 4

and

IN THE MATTER of Section 45 of
the Arbitration Ordinance, Cap. 609

BETWEEN

GM1

1st Plaintiff

GM2

2nd Plaintiff

and

KC

Defendant

Before: Hon Mimmie Chan J in Chambers

Date of 8 November 2019

Hearing:

Date of 14 November 2019

Decision:

DECISION

1. By their Originating Summons issued on 28 October 2019 (“**OS**”), the Plaintiffs in these proceedings apply for an anti-suit injunction (“**Injunction**”) to require the Defendant to take all necessary steps to withdraw or seek a stay of legal proceedings commenced by the Defendant against the Plaintiffs in the Court of Suzhou with Case No XX (“**Mainland Proceedings**”); and to restrain the Defendant from commencing or pursuing on the Mainland or elsewhere any other proceedings relating to disputes, claims, differences or controversies arising out of, relating to or having any connection with a guarantee entered into between the Defendant and the 1st Plaintiff (“**Guarantee**”), otherwise than by arbitration in accordance with paragraph 18 of the Guarantee, until further order of the tribunal in the arbitration proceedings between the 1st Plaintiff and the Defendant with case number xx.

2. There are currently pending arbitration proceedings (ie xx) between the 1st Plaintiff and the Defendant pursuant to the Guarantee, and related arbitration proceedings between the 1st Plaintiff and the Defendant’s wholly owned subsidiary. However, there has been a challenge to the constitution of the tribunal, and the application for interim measures cannot be determined by the tribunal immediately.

3. At the first half-hour hearing of the OS on 8 November 2019, I was not prepared, on the evidence served, to dispose of the OS summarily, and gave directions for further evidence to be filed by the parties, and for the matter to be fully argued. The Plaintiffs sought an interim injunction pending the substantive hearing of the OS. Judgment on the interim application was reserved, which I now give.

4. I do not agree that this Court has no jurisdiction to grant the Injunction, or the interim injunction, sought by the Plaintiffs.

5. The Defendant argued that where a party seeks an anti-suit injunction to restrain foreign proceedings based on an arbitration agreement, the proper jurisdiction basis is section 21L of the High Court Ordinance, but not section 45 of the Arbitration Ordinance. Reliance was placed on the decision of G Lam J in *Ever Judger Holding Co Ltd v Kroman Celik* [2015] 3 HKC 246. There, Lam J observed (obiter) that he had doubts whether an anti-suit injunction falls within the remedy of “interim measure” under section 45 of the Arbitration Ordinance, since an anti-suit injunction was not concerned with the institution and prosecution of arbitral proceedings, but with the restraint of pursuit of other proceedings in breach of an arbitral agreement, to be a measure “in relation to the arbitral agreement”, and “not in relation to any arbitral proceedings” within the scope of section 45.

6. With the greatest respect, I do not agree that such a narrow interpretation should be placed on sections 45 and 35 of the Arbitration Ordinance, as to the meaning of interim measures under the Model Law and the Arbitration Ordinance.

7. The power to grant injunctions to restrain foreign proceedings in breach of an arbitration agreement was examined in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 and *Donahue v Armco Inc* [2002] CLC 440. In the classic judgment of Millett LJ in *The Angelic Grace*, the following observations were made on the Court's "undoubted jurisdiction" to restrain a party from taking or continuing proceedings in a foreign court, in breach of an agreement to refer the dispute to arbitration:

"In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign court has much to commend it where the injunction is sought on the ground of *forum non conveniens* or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.

...

In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in the situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case." (Emphases added)

8. These principles have been applied in Hong Kong, for example in the recent case of *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] 2 HKLRD 313. In that case, the learned Deputy Judge Field observed that the Hong Kong Court has power under both section 45 of the Arbitration Ordinance and section 21L of the High Court Ordinance to grant an anti-suit injunction as an interim measure in relation to arbitral proceedings. The Deputy Judge referred to and followed *The Angelic Grace* and other cases such as *Compania Sud Americana de Vapores SA v Hin Po International Logistics Ltd* (2016) 19 HKCFAR 586, referring also to *Ever Judger Holding*. In particular, the seminal speech of Lord Hoffman in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 was endorsed, that the construction of an arbitration clause should start with the presumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship in which they have entered to be decided by the same tribunal, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

9. On behalf of the Defendant, Leading Counsel seeks to place reliance on the judgment of the Supreme Court in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889, to suggest that even where foreign proceedings are brought in breach of an arbitration clause, "the appropriate course will be to leave it to the foreign court to recognize and enforce the parties' agreement on forum", and that there should be exceptional reasons before this Court should grant the Injunction in this case, thereby depriving the Mainland court from exercising its proper jurisdiction to decide on the validity of the arbitration agreement.

10. In *AES*, there were no arbitral proceedings on foot or proposed, and the English Court was dealing with its general jurisdiction to grant injunctions and relief under section 37 of the Senior Courts Act 1981, and the relationship between its powers under that section, and under section 44 of the Arbitration Act 1996, so far as injunctions to restrain foreign proceedings are concerned. I find nothing in the judgment which suggests a deviation from the principles set out in *The Angelic Grace*. As pointed out by Mr Gearing on behalf of the Plaintiffs, the judgment of Millett LJ was endorsed in paragraph 25 of the judgment of Lord Mance JSC, with the conclusion that “an injunction should be granted to restrain foreign proceedings in breach of an arbitration agreement on the simple and clear ground that the defendant has promised not to bring them”.

11. Lord Mance did, in *AES*, observe that the relief listed in section 44 of the Arbitration Act were orders “for the purposes of and in relation to arbitral proceedings” within the language used in the Act, and that orders restraining the actual or threatened breach of the negative aspect of an arbitration agreement (not to bring proceedings other than by way of arbitration) may be different in nature. He referred to the latter type of orders as enforcing “the negative right not to be vexed by foreign proceedings”, and “a right of a different character both to the procedural rights with which section 44 is mainly, at least, concerned”, and to the “substantive rights” to which section 44 extends. Lord Mance concluded, at paragraph 48 of his judgment, that the source of the power under section 44 of the Arbitration Act to grant injunctions is to be found in section 37 of the 1981 Act, as an injunction to restrain foreign proceedings brought in breach of an arbitration agreement is not “for the purposes of and in relation to the arbitral proceedings”, but for the purposes of and in relation to the negative promise contained in the arbitration agreement, which is enforceable regardless of whether or not arbitral proceedings are on foot or proposed.

12. Sections 45 and 35 of the Arbitration Ordinance deal with court-ordered interim measures, and the language used is different to that used in section 44 of the 1996 Arbitration Act. Under section 35 of the Arbitration Ordinance, Article 17 of the Model Law is adopted, and “interim measure” is defined in Article 17 (2) to mean any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, a party is ordered to take action, or to act. An interim measure under Article 17 (2) includes an order to:

(a) maintain or restore the status quo pending determination of the dispute: and

(b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself.

13. Section 45 of the Arbitration Ordinance should be read in the light of the object and principles of the Ordinance, as set out in section 3. The object of the Arbitration Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense, and the Ordinance is based on the important principle that the parties to a dispute should be free to agree on how the dispute should be resolved. Enforcement of arbitration agreements and arbitral awards are the primary objectives of the Arbitration Ordinance.

14. An injunction to enforce the positive promise of a party to arbitrate disputes and the negative right not to be vexed by foreign proceedings can be viewed as an interim order which maintains the status quo of parties which have already commenced their arbitration, as in this case, in accordance with the rights conferred under their arbitration agreement. The anti-suit injunction restrains a party from commencing proceedings instituted in breach of the arbitration agreement, the continuation of which must inevitably prejudice the arbitral process, the tribunal's conduct of the arbitration, and the orders to be made by the tribunal in the process. In my judgment, the Injunction sought is within the scope of the interim measures covered by section 45 of the Arbitration Ordinance, and the Court has jurisdiction to make such an order under the section. There is in any event a serious question to be tried on the Plaintiffs' claim in the OS.

15. Even if the Injunction is rightfully and exclusively covered by section 21L of the High Court Ordinance, I cannot see how the matter can assist the Defendant. Counsel suggests that in such a case, the Court only has jurisdiction if the case falls within the gateways under Order 11 rule 1 (1).

16. The OS is for the Injunction to restrain proceedings in breach of the arbitration clause in the Guarantee. The arbitration clause provides for disputes and claims arising out of, relating to or having any connection with the Guarantee, including any dispute as to its existence, validity, interpretation, performance and breach, and any dispute relating to non-contractual obligations arising out of or in connection with the Guarantee to be referred to arbitration, administered by the Hong Kong International Arbitration Center. An arbitration in Hong Kong is governed by the laws of Hong Kong. The claim in the OS is therefore within Order 11 rule 1 (1) (d) (iii), RHC.

17. I have not lost sight of the fact that the Defendant disputes the existence and validity of the arbitration agreement, essentially on the ground that the Guarantee had not been properly or finally executed, that it could not be approved by SAFE (the relevant authority on the Mainland), and that the parties had agreed to abandon the Guarantee.

18. It is trite, and the Defendant does not dispute, that the arbitral tribunal can decide on its own competence and jurisdiction. The fact that the Defendant disputes the existence and validity of the arbitration agreement is not a ground not to stay proceedings brought for claims which fall within the scope of the arbitration agreement.

19. However, the Defendant argued that the Hong Kong arbitral tribunal does not have exclusive jurisdiction over the disputed arbitration agreement, and that the Mainland court, like other domestic courts, have jurisdiction to decide on the validity of the arbitration clause. The Defendant claims therefore that it is entitled to apply to the Mainland court at the outset, independent of the arbitration, for a declaration that the arbitration clause is void, not formed, or did not take effect.

20. The passages and authorities referred to by Leading Counsel for the Defendant as to the non-exclusive jurisdiction of the arbitral tribunal, refer to the undisputed jurisdiction of the supervisory court at the seat of the arbitration, to review the decision of the tribunal as to its jurisdiction on the basis of a valid arbitration agreement. There is no doubt that in this case, the Hong Kong court has jurisdiction to review the finding of the tribunal on its own jurisdiction (*S Co v B Co* [2014] 6 HKC 421, following *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 (SC)), either at the stage when the jurisdiction of the tribunal is challenged at the outset, and the tribunal makes a preliminary finding; or at the resistance to enforcement stage, when the tribunal has made an award on the merits, and the award and its enforcement is challenged on the ground that the tribunal lacked jurisdiction to deal with the dispute.

21. At the enforcement stage, when a successful party seeks enforcement of the award in different jurisdictions, the domestic courts in such countries will also have jurisdiction to consider the issue of whether the tribunal which made the award had jurisdiction under a valid arbitration agreement to decide the dispute in the first place. At the stage when the parties submit a dispute, or a question concerning the validity of an arbitration agreement, to a court in a country which is a party to the New York Convention (“**Convention**”), such as the Mainland court, that court will be bound under Article II of the Convention to refer the parties to arbitration – unless it finds the agreement to be null and void, inoperative or incapable of being performed.

22. The Defendant has adduced expert evidence on PRC law, to the effect that the Mainland court has jurisdiction to entertain an action for a declaration that the arbitration clause in the Guarantee is void, or did not take effect, before an award is made. That may well depend on domestic Mainland law. However, I agree, that on the principles set out in *The Angelic Grace* and applied in Hong Kong, the court in this jurisdiction can and should grant the Injunction, in order to recognize and enforce the Plaintiffs’ prima facie right, to enforce the negative aspect of its arbitration agreement with the Defendant, and not to be vexed by having to resist the Defendant’s proceedings on the Mainland. The arbitral tribunal should be allowed to rule on its own competence and jurisdiction, and its decision can then be reviewed by the supervisory court, which is this Court. When an award is made by the tribunal and is sought to be enforced on the Mainland, it will be open to the Defendant to resist enforcement if the arbitration agreement can be challenged before the Mainland court.

23. The fact that the foreign court may insist on its own jurisdiction is, as held by the English court in *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2007] EWHC 1713 (Comm), irrelevant to the court of the seat of the arbitration when it deals with an arbitration provision governed by its own law. The Mainland court may have jurisdiction as claimed by the Defendant, but the issue is whether the Defendant should be allowed, in view of the arbitration agreement, to invoke that jurisdiction.

24. Whether there are indeed special circumstances, or strong reasons, which may justify a departure from the prima facie entitlement of a party to enforce the arbitration agreement, depends on all the circumstances of the case. However, the mere fact that the foreign court will *not* grant a stay of the proceedings instituted is not sufficient to refuse an injunction (para 11/1/14C Hong Kong Civil Procedure 2020). This deals with the Defendant's argument that it may not be possible for the Defendant to discontinue or withdraw the Mainland Proceedings after its case has been accepted.

25. Although the 2nd Plaintiff is not a party to the Guarantee and arbitration agreement, anti-suit relief may be granted in relation to proceedings commenced against a third party, if the arbitration agreement can be construed to cover claims not only against the contracting party (such as the 1st Plaintiff), but also against the non-contracting affiliates or associates of the contracting party (such as the 2nd Plaintiff). In *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] 2 HKLRD 313, the court explained that as rational businessmen, the parties to the underlying contract embodying the arbitration clause would have wanted the disputes, claims, differences or controversies with affiliates of the contracting parties to be decided by the same forum, in the same manner of dispute resolution. There is a serious question to be tried that the Defendant's claims against the 2nd Plaintiff in the Mainland Proceedings in relation to the existence, validity and binding effect of the Guarantee and the arbitration agreement contained therein should be dealt with by the same arbitral tribunal.

26. The Defendant claims that no summons was issued by the Plaintiffs to seek the injunction sought for the interim of the substantive hearing of the OS. As indicated in the course of the hearing, I was prepared to treat the Plaintiffs' application as *ex parte* on notice, in the absence of the issue of a summons with the adequate 2 clear days' notice before the hearing. The interim injunction asked for is in the exact terms of the Injunction claimed in the OS, and the Defendant had been put on notice in the correspondence, of the Plaintiffs' intention to seek an interim-interim Injunction. As such, I cannot see any prejudice having been sustained by the Defendant by virtue of the absence of a summons.

27. The Defendant alleges that there was no urgency to justify the grant of an interim Injunction. The 1st Plaintiff had not yet been served with the documents supporting the Mainland Proceedings, and according to the Defendant's evidence, the 2nd Plaintiff which has been served has up to 2 December 2019 at least, to either file a Statement of Defence, or to challenge the jurisdiction of the Mainland court.

28. The 2nd Plaintiff having been served, I accept the Plaintiffs' submission that the 1st Plaintiff will likely be served very shortly with the Mainland Proceedings. In any event, since the Defendant seeks an adjournment for the OS to be substantively argued, the adjourned hearing (estimated initially to last one day) cannot take place before 2 December 2019 as there is no available date from the Court. It is in my view just to grant an interim order in terms of the Injunction, pending the substantive hearing. The fact that there may be remedies open to the Plaintiffs, by applying to the Mainland court for an extension of time to file the Statement of Defence and/or to challenge the jurisdiction of the Mainland court, does not deter the Court from granting the Injunction when the Plaintiffs have at least a *prima facie* right under the arbitration agreement, not to be required to take these steps on the Mainland, which will be contrary to the parties' consensual agreement as to how their disputes should be resolved.

29. In all the circumstances, I consider it within the jurisdiction of this Court, and that it is just and fair, to grant the interim Injunction pending and until the conclusion of the adjourned substantive hearing of the OS, and I so order, with costs of the hearing on 8 November 2019 in the cause of the OS.

(Mimmie Chan)

Judge of the Court of First Instance
High Court

Mr Matthew Gearing (Solicitor Advocate), of Allen & Overy, for the 1st & 2nd plaintiffs

Mr Anson Wong SC and Ms Stephanie Wong, instructed by Stevenson Wong & Co, for the defendant