

CONSTRUCTION | OCTOBER 2021

HONG KONG COURT STAYS PROCEEDINGS IN FAVOUR OF ARBITRATION WHERE NO 'CLEAR INTENTION BY THE PARTIES TO CONCLUSIVELY AND UNRESERVEDLY ABANDON THE ARBITRATION AGREEMENT'.

The Hong Kong court has re-emphasised its pro-arbitration stance by staying proceedings in favour of arbitration in circumstances where the respondent accepted the existence of an arbitration agreement but argued that the parties had agreed to abandon it in favour of litigation.

The court noted that the onus on an applicant seeking a stay of proceedings is to establish a prima facie case of the existence of an arbitration agreement. Once the applicant has discharged that burden, the stay ought to be granted even if questions of admissibility and jurisdiction remain. Such matters are for the tribunal. If the respondent contends that the parties have abandoned their arbitration agreement, the court must be satisfied that there was a clear intention to conclusively and unreservedly do so. In this case, the intention was conditional. Since the conditions had not been fulfilled, the court held there was no concluded and certain agreement to abandon arbitration and the court proceedings must be stayed.

*The information in this document written by Ben Bury, Partner, HFW, was first published by Lexis®PSL on 11 October 2021'.

What are the practical implications of this case?

Arbitration is a consensual process. Therefore, just as parties can agree to arbitrate, they can also agree to change their minds and refer their disputes to litigation in the courts. This case considered what is needed to prove this change of mind in the context of an application to stay court proceedings in favour of arbitration.

It is generally accepted that the issue as to whether or not an arbitration agreement has become inoperative is governed by ordinary contractual principles and application of the conflicts of laws principles of the law of the seat. Accordingly, the court's decision is also relevant to parties' intention to create legal relations and in the context of whether an agreement to abandon legal rights may fail for uncertainty.

The court separately considered an application by the applicant's guarantor for a case management stay of a claim for payment under a surety bond, which did not contain an arbitration clause. The court's decision is therefore relevant to the issues that will be considered when determining whether to stay proceedings to serve the administration of justice in general.

What was the background?

The respondent issued proceedings against the applicant for damages arising out of the applicant's alleged breach of a contract for construction of a development in Yuen Long, Hong Kong. The respondent also issued proceedings against the applicant's guarantor under a surety bond.

The construction contract contained an arbitration clause and the applicant therefore sought to stay the proceedings relating to the construction contract pursuant to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration, incorporated into section 20(1) of the Hong Kong Arbitration Ordinance, which provides as follows:

'A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the

dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.'

In its defence, the respondent accepted that there was an arbitration agreement between the parties, but argued that it was inoperative because the parties had agreed to abandon the clause in favour of litigation. The respondent relied on an exchange of correspondence between the parties in which the applicant invited the respondent to consider litigation and the respondent replied to 'confirm our agreement to your proposal for all disputes and differences arising out of or in connection with the Contract to be litigated in the Hong Kong Courts rather than being arbitrated'.

There was no arbitration agreement in the surety bond between the respondent and the applicant's guarantor, but the guarantor also sought a case management stay on the basis that it would be just to stay the claim in the event of a stay of the main action under the substantive contract. The guarantor provided an undertaking in writing that it will be bound by the outcome of the arbitration between the respondent and the applicant under the construction contract.

What did the court decide?

The court ordered a stay of both sets of proceedings.

As regards the proceedings under the construction contract, the court rejected the respondent's argument that there was a consensus reached that the parties would litigate their disputes and would abandon the agreement to arbitrate. The court held that there must be a clear intention to abandon a binding arbitration agreement.

Although the respondent wrote to the applicant to confirm its agreement to the applicant's proposal to litigate, the respondent had proposed in the same letter certain amendments to the dispute resolution clause in the construction contract. Those amendments had not been accepted. The agreement to litigate was therefore conditional and there was no concluded and certain agreement unless and until the conditions were fulfilled.

The respondent contended that an agreement is not incomplete merely because it leaves something which still has to be determined between the parties: *New World Development Co Ltd v Sun Hung Kai Securities Ltd* (2006) 9 HKCFAR 403. However, the court considered *New World* did not apply as there was no ascertainable and determinate intention to litigate in this case. Instead, it appeared 'objectively clear' from the correspondence that the agreement to litigate was subject to the respondent's written consent, and on the parties agreeing to all the relevant changes to dispute resolution clause.

The court accepted that questions of admissibility and jurisdiction may remain, but invoking the well-known doctrine of *kompetenz kompetenz*, the court said it is for the arbitral tribunal to decide on its jurisdiction and on whether the parties had complied with the agreed procedure and timing for the arbitration.

As regards the application for a case management stay of proceedings under the surety bond, the court concluded that a stay would 'serve the ends of justice between the parties and the administration of justice by the Court'. The 'important and distinguishing feature in this case' was that the applicant's guarantor had provided an undertaking in writing that it will be bound by the outcome of the arbitration between the respondent and the applicant. This meant that the risk of inconsistent findings on common facts and issues as to the applicant's breach of the construction contract could be avoided.

Case details

- Court: Hong Kong Court of First Instance
- Judge: Madam Justice Mimmie Chan
- Date of judgment: 21 September 2021

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