X V. Y

2021-01-19 [2021] HKCFI 147 HCCT62/2018

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[2021] HKCFI 147

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 62 OF 2018

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IN THE MATTER OF Section 84 of the Arbitration Ordinance (Cap 609) and Order 73 , rule 10 of the Rules of the High Court (Cap 4A)

and

IN THE MATTER OF an Arbitral Award dated 4 January 2018 by Teresa Cheng (鄭若驊), Chung-Teh Lee (李宗德) and Peter Thorp

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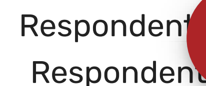
BETWEEN

X

Applicant / Claimant in the Arbitratio

and

Y



Respondent

Respondent

in the Arbitration

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Before: Hon Mimmie Chan J in Chambers

Dates of Written Submissions: 7, 21 & 28 December 2020 & 8 January 2021

Date of Decision: 19 January 2021

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D E C I S I O N

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Background

1. The Applicant X seeks leave to appeal against my Decision of 5 November 2020 (" **Decision** "), whereby I set aside the Enforcement Order made on 9 October 2018 granting leave to the Respondent Bank to enforce an arbitral Award published on 4 January 2018. The abbreviations made in the Decision are adopted.

2. The Enforcement Order was set aside on the grounds, firstly, that the Award dealt with matters not falling within the terms of the submission to arbitration, and/or contains a decision on matters beyond the scope of the submission; and secondly, that the Bank had been unable to present its case in the Arbitration.

3. X now seeks to appeal, on 3 grounds stated in the draft Notice of Appeal.

Should leave to appeal be granted?

4. The 1st ground is that the Court had misconstrued the nature of X's claim in the Arbitration and failed to give effect to party autonomy by binding X to an arbitration agreement to which it was not a party. X highlighted the fact that its claim in the Arbitration was a contractual claim against the Bank for the return of assets in the Account upon the termination of the Mandate, which was governed by Taiwanese law. It was argued that the Court had wrongly found the centre of gravity of the dispute to be the Pledge, and that the Pledge was at the commercial centre of the security relationship created amongst the Bank, the Trustee, X and Y, on the basis of which it was decided that the Tribunal had no jurisdiction to find that the Pledge was invalid. X emphasized that the only dispute in the Arbitration between X and the Bank was governed by the dispute resolution clause in the Mandate, and X should not be bound by any agreement under the Pledge to submit disputes thereunder on the validity of the Pledge to arbitration in Singapore.

5. The 2nd ground is that the Court erred in finding that the legality of the Trustee's execution

of the Pledge under its governing law was an issue required for the determination of the Arbitration, and that the subject dispute in the Arbitration fell outside the scope of the Arbitration Clause. X argued that the decision of the Tribunal was only that the pledge of X's assets is not binding on X as a matter of capacity of a Taiwanese insurance company regulated by Taiwanese insurance law. Such a decision on the validity of the Pledge was only made as against X, as having no effect against it, and was not outside the jurisdiction of the Tribunal. This, it was argued, is distinct from the validity of the Pledge between its contracting parties – being the Trustee and the Bank. The Decision is said not to have upset the contractual obligations between X and the Bank.

6. The nature of X's claims made in the Arbitration and the remedies it seeks were considered and analyzed in the Decision (from paragraphs 26 to 28). X pleaded in the Request that the Bank was liable to return the balance in the Account to X on the basis that the Pledge was void under Singapore law for lack of consideration. Properly analyzed, it was clear that the real issue in dispute between the Bank and X in the Arbitration was the validity of the Pledge, and whether the Bank could rely on the Pledge to retain the assets upon termination of the Mandate. On that basis, the Court considered that the validity of the Pledge was at the centre of gravity of the parties' dispute and that, contrary to the submissions made by X, the Tribunal did make determination on the enforceability of the Pledge and only from the perspective of Taiwanese law, when this should be governed by Singapore law and to be determined by the Singapore Court.

7. The analysis leading to the finding that the Tribunal did not have jurisdiction to decide the validity and effect of the Pledge is set out in the Decision, and summarized at paragraphs 56 to 58 of the Decision. I will not repeat the analysis and reasons here. Such determination is not a review of the correctness of the Tribunal's decision on the merits, but a determination on whether it had exceeded its jurisdiction, which cannot be made without examining the reasoning of the Award.

8. In seeking leave to appeal, X has to show that the appeal has reasonable prospects of success (*American International Group Inc v Huaxia Life Insurance Co Ltd* , HCCT 60/2015, 6 December 2016; *China International Fund Ltd v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Ltd* [2015] 4 HKLRD 609 at para 33). This means that the prospects of succeeding must be "reasonable" and therefore more than "fanciful", without having to be probable (*SMSE v KL* [2009] 4 HKLRD 125). The Court explained in *Wynn Resorts (Macau) SA v Mong Henry* unreported, HCA 192/2009, [2009] HKEC 1293 that to meet the reasonable prospect of success test, an applicant is required to show more than just an arguable case, but an appeal that has merits and ought to be heard, although he does not have to demonstrate that the appeal will probably succeed. When Lam VP referred to the "reasonable prospect of success" threshold in *China International Fund Ltd v Dennis Lau & Ng Chun Architects & Engineers (HK) Ltd,* His Lordship observed (at paragraph 33 of his judgmen

it was not a very high threshold. However, His Lordship did point out, at paragraph 54 of his judgment, that the first instance judge would be more familiar with the case and the arguments of the parties, when granting leave. Although His Lordship was making the observation in the specific context of section 81 of the Ordinance, both sections 81 and 84 provide for decisions which are only appealable with the leave of the Court, and there should not be any real distinction.

9. X's intended appeal against the finding that the Tribunal had no jurisdiction turns (*inter alia*) on the meaning of the Arbitration Clause in the Mandate, construed in the context of the dealings between the parties, and the meaning and reasoning of the Tribunal's decision on the Pledge being void *ab initio* for violating validity provisions under the law of Taiwan. Having regard to the submissions which had been made by the parties at the hearing and for the application for leave to appeal, it cannot be said that the intended appeal has merely fanciful prospects of success. There are arguably some merits in the intended appeal which ought to be heard.

10. As for the appeal on the 3 rd ground, that the Bank was *not* unable to present its case, I refuse leave to appeal.

11. In deciding that the Bank had not been given the fair opportunity to present its case on the nature of Article 146, its effect on the validity of X's subscription to the AB Trust, and the consequences of such subscription being held to be invalid, this Court reviewed the pleadings served in the Arbitration, the issues raised in dispute in the context in which they were raised, the submissions made by both parties and the timing of such submissions made, the questions raised by the Tribunal as highlighted by X, the expert evidence and the issues in agreement between them. The determination that the Bank was unable to present its case in the Arbitration was not simply on the basis that the expert for X had agreed, in the course of cross-examination, that if a tribunal decided to use "Y" instead of "X" as the basis of its decision, there was a surprise judgment. Taiwanese law on surprise judgments was only one of the matters taken into consideration by this Court. The question of whether the Award should be enforced on the ground of due process and fairness to the parties is to be determined by the court of enforcement, in accordance with notions of justice recognized by this Court.

12. As Counsel for the Bank pointed out, assessment of whether there was procedural unfairness in the Arbitration is a broad and multi-factorial exercise dependent on the Court's analysis of the documentary evidence, and it would be unlikely for the Court of Appeal to interfere with the decision of the judge at first instance (*Trust Risk Group SpA v AmTrust Europe Ltd* [2017] 1 CLC 456). This is also recognized in the judgment of the Court of Appeal in *China International Fund Ltd v Dennis Lau & Ng Chun Man Architects & Engineers (HK)*

13. The intended appeal against the Decision that the Bank had been unable to present

case has no reasonable prospects of success.

14. Counsel for the Bank argued, that unless X can demonstrate that it has reasonable prospects of success for both the ground of jurisdiction of the Tribunal and whether its decision on the legality of the Pledge was an issue required for the Arbitration, and the ground of the Bank being unable to present its case, leave to appeal should be refused. X does not accept such a contention.

15. It has to be emphasized, again, that the object of the Ordinance is expressly stated (in section 3) to be to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.

16. Even if the intended appeal succeeds on the 1 st and 2 nd grounds relied upon by X in its Notice of Appeal, and the Tribunal should be held, on appeal, to have acted within its jurisdiction when it decided that the Pledge was invalid and of no effect vis-à-vis X, I have found in the Decision that the Bank had not been able to present its case in the Arbitration. The Award would still be unenforceable, under section 86 (1) (c) (ii) of the Ordinance. A successful appeal on the 1 st and 2 nd grounds relied upon by X will make no difference to the parties so far as enforcement of the Award in Hong Kong is concerned.

17. For that reason, I consider that having refused leave to appeal on the 3 rd ground, to allow X to appeal only on the 1 st and 2 nd grounds would be against the object of the Ordinance as stated in section 3, defeating the speedy resolution of disputes by arbitration, requiring unnecessary legal expense to be incurred by the parties, and rendering the status of the Award uncertain in the interim.

18. Leave to appeal against the Decision is accordingly refused.

Summons for leave to adduce new evidence

19. In relation to X's separate summons issued on 28 December 2020, for leave to adduce the judgment of the Taiwan High Court dated 3 November 2020 (" **Taiwan Judgment** "), as evidence for the application for leave to appeal, such leave is refused. With no disrespect to the Taiwan High Court, the Taiwan Judgment (that the Tribunal did not determine the validity of the Pledge outside the scope of the Arbitration Clause) is irrelevant to the application for leave to appeal against the Decision.

20. Counsel for X referred to the Taiwan Judgment only in X's Reply Submissions served on 28 December 2020, and only to claim that the inconsistent findings of this Court and the Taiwan Court has "potential *res judicata* effect as between X and the Bank".

21. The Bank claims that it suffers prejudice if X should be allowed to rely on the Taiwan Judgment in these proceedings. On behalf of the Bank, it was argued that before the s

of Reply Submissions of X, X had shown no intention to rely on the Taiwan Judgment in these proceedings for enforcement in Hong Kong, whether in its Notice of Appeal, or otherwise. On that basis, the Bank decided not to appeal and did not appeal against the Taiwan Judgment, before the statutory deadline of 1 December 2020, and in the absence of appeal, the Taiwan Judgment became operative. If the Bank had appealed, the Taiwan Judgment would have continued to have no effect, and could potentially have been reversed by the higher court, precluding all possible reliance by X on the judgment. The Bank claims therefore that in the absence of any good explanation for the delay in the production of the Taiwan Judgment as evidence, it should not be allowed to rely on the evidence.

22. In my view, the Taiwan Judgment is simply not relevant as to whether leave to appeal should be granted, which is to be decided by the test of reasonable prospects of success on the intended appeal in Hong Kong. The Taiwan Judgment represents the views of the Taiwan Court on the Award, and has no relevance to the correctness or otherwise of the Decision. It is in any event unnecessary to refer to the Taiwan Judgment as evidence. X's summons is accordingly dismissed, with costs to the Bank (with Certificate for 2 Counsel).

Disposition

23. For all the above reasons, I refuse leave to appeal against the Decision.

24. The order *nisi* is that the costs of the application for leave to appeal are to be paid by X to the Bank, with Certificate for 2 Counsel.

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

Mr Jonathan Chang SC, Mr Martin Ho and Ms Esther Mak, instructed by MinterEllison LLP, for the applicant

Mr Bernard Man SC, Mr Justin Ho and Mr John Leung, instructed by Jones Day, for the respondent