

Case Bulletin: 2019/12

Anti-suit Injunction for Arbitration

In our case law bulletins “Different Types of Injunctions” and “Injunction in Aid in Aid of Foreign Proceedings”, we look at different types of injunctions concerning assets. We look at another type of injunction commonly referred to as an anti-suit injunction, which is often sought to restrain someone from commencing or pursuing foreign proceedings.

The Court of First Instance has power under section 45 of the Arbitration Ordinance (Cap. 609) and section 21L of the High Court Ordinance (Cap. 4) to grant an anti-suit injunction as an interim measure in relation to arbitration proceedings, see *GM 1 & Another v KC* [2019] HKCFI 2793. This decision reinforces the pro-arbitration approach of the Hong Kong courts.

I. Background

The Plaintiffs applied for an anti-suit injunction requiring the Defendant to withdraw an action in the Court of Suzhou, and restraining the Defendant from commencing or pursuing existing or future proceedings on the Mainland or elsewhere, otherwise than by an arbitration afoot between the 1st Plaintiff and the Defendant.

II. Key Points

1. The Court has jurisdiction to grant an injunction to restrain foreign proceedings in breach of an arbitration agreement. The starting point in justifying the relief sought is that without an injunction, the plaintiff will be deprived of its contractual rights to arbitrate disputes in the situation in which

damages are manifestly an inadequate remedy.

2. The jurisdiction is discretionary and is not exercised as a matter of course, but the defendant will need to show good reasons why it should not be exercised.
3. Where arbitration is chosen, courts should start the interpretation of an arbitration clause 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.
4. The fact that a foreign court will not grant a stay, or the Defendant may not be able to discontinue or withdraw the Mainland Proceedings after its case has been accepted is not sufficient to refuse an anti-suit injunction. However, the possibility of issue estoppel was not discussed in the judgment.

III. Findings

In considering the Defendant's contention and evidence to the effect that Mainland court has jurisdiction to entertain an action for a declaration that the arbitration agreement is void, or did not take effect, before an arbitral award is made, the Judge decided to recognize and enforce the Plaintiff's *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. An interim anti-suit injunction was ordered in favour of the Plaintiffs. The judge considered that the arbitral tribunal should be allowed to rule on its own competence and jurisdiction, and its decision can be reviewed by the Hong Kong Court, if necessary. When an arbitral award is made 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. In the circumstances, the Court found it just and fair to grant an interim injunction to restrain the Defendant from pursuing non-arbitral proceedings even against the 2nd Plaintiff not being a party to the arbitration agreement.

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