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HONG KONG COURT REFUSES TO GRANT ANTI-SUIT INJUNCTION TO RESTRAIN A PARTY FROM PRESENTING WINDING-UP PETITION IN CAYMAN WHERE THERE IS AN ARBITRATION AGREEMENT

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In a recent case *Hyalroute Communication Group Limited v Industrial and Commercial Bank of China (Asia) Limited* [2025] HKCFI 2417, Recorder William Wong SC refused to grant an anti-suit injunction against a winding-up petition in the Cayman Islands when there is an arbitration agreement in the underlying loan agreement. In reaching this conclusion, the Court analysed whether the Cayman winding-up petition breached the arbitration agreement in question, and concluded that it did not, because the Cayman proceedings would not have the effect of "finally" resolving the dispute within the meaning of the arbitration agreement.

BACKGROUND

Myanmar Fiber Optic Communication Network Company Limited ("**MFOCN**") is a fiber optic communications company in Myanmar and a subsidiary of the Plaintiff, Hyalroute Communication Group Limited. On or around 27 July 2018, MFOCN and another of the Plaintiff's subsidiaries entered into a term loan facility agreement (the "**TFA**") (as borrowers) with the Defendant, Industrial and Commercial Bank of China (Asia) Limited (as the lender) and the Plaintiff (as the guarantor).

To mitigate the political and commercial risks of investing in Myanmar, the Defendant also entered into an insurance agreement with the Multilateral Investment Guarantee Agency ("**MIGA**"). This agreement covered specific risks, including war, civil disturbance and restrictions on the transfer of currency.

Under the TFA, if the Plaintiff made an application to the Defendant in relation to a Covered Risk (the "**Covered Risk Application**"), the Plaintiff's obligation as guarantor would be suspended in relation to any default caused by the relevant Covered Risk. This suspension would only cease if, among other things, the Defendant rejected the Covered Risk Application, or MIGA determined that it was not liable to compensate the Defendant.

On 7 August 2018, MFOCN drew down a US$100 million loan under the TFA. On 1 February 2021, a military coup took place in Myanmar. The military conflicts caused severe losses to MFOCN, rendering it unable to repay the loan according to the repayment schedule.

On 11 February 2021, the Plaintiff made a Covered Risk Application to the Defendant, requesting that its obligations as guarantor under the TFA remain suspended and contended that it was not liable repay the loan to the Defendant.

It emerged from the judgment that MIGA terminated the insurance policy on 11 October 2022 because the Plaintiff had failed to pay the premium on time.

The Defendant served a statutory demand on the Plaintiff on 22 November 2024 in respect of the sums allegedly owed under the TFA (being US$95,506,631.05), in anticipation of commencing a winding-up petition against the Plaintiff in Cayman.

In response, the Plaintiff applied to the Hong Kong Court for an anti-suit injunction to restrain the Defendant from presenting the winding-up petition. Around the same time, the Plaintiff also commenced an arbitration against the Defendant in Hong Kong. By the time the anti-suit injunction application was heard, the arbitration was ongoing and HKIAC was in the process of appointment of the third arbitrator.

LEGAL PRINCIPLES AND PARTIES' POSITIONS

The legal test in Hong Kong for whether to grant anti-suit injunction on a contractual basis is quite settled: the Court will generally uphold the parties' contractual bargain where there exists a binding and valid arbitration agreement (or an exclusive jurisdiction clause). The burden lies on the defendant to show compelling reasons why the anti-suit injunction should not be granted. The Court also confirmed a well-established principle that in proceedings to enforce an arbitration agreement, the Court does not look at the substantive merits of the underlying dispute.

The TFA contains a broad arbitration agreement at Clause 43.1 which mandates the parties to resolve their disputes by way of arbitration in the Hong Kong International Arbitration Centre ("**HKIAC**") as follows:

> *"43.1 Arbitration*
>
> *(a) Any dispute, controversy or claim arising in any way out of or in connection with this Agreement (including (i) any issue regarding contractual, pre-contractual or non-contractual rights, obligations or liabilities and (ii) any issue as to the existence, validity, breach or termination of this Agreement) (a "Dispute") shall be referred to and finally resolved by binding arbitration administered by the Hong Kong International Arbitration Centre ("HKIAC") …*
>
> *(c) The seat of the arbitration shall be Hong Kong. This arbitration agreement shall be governed by the laws of Hong Kong ..."*

The Plaintiff argued that the dispute plainly falls within the ambit of the arbitration agreement and the Defendant would act in breach of the arbitration agreement by presenting the winding-up petition. Therefore, an anti-suit injunction should be granted unless the Defendant can demonstrate strong reasons to the contrary.

The Defendant, on the other hand, argued that it would not be acting in breach of the arbitration agreement by presenting the winding-up petition because (i) the terms of the arbitration agreement do not cover Cayman winding-up proceedings, (ii) presentation of a winding-up petition by itself is not a breach of arbitration agreement, and (iii) any eventual winding-up order by the Cayman Court will not, as a matter of Cayman law, have the effect of determining the parties' rights and obligations. Further, the Defendant also submitted that there are strong reasons for not granting the anti-suit injunction for public policy considerations.

The Court was therefore tasked with answering a critical question that often arises in cross-border disputes involving arbitration and winding-up petition, namely, whether presentation of the winding-up petition in Cayman constitutes a breach of the arbitration agreement.

THE COURT'S ANALYSIS AND DETERMINATION

Construction of the arbitration clause

First, the Court noted that whether foreign winding-up proceedings are in breach of an arbitration clause is a matter of proper construction of the terms of the clause, and it is trite that the Court must start with looking at the clause itself. Having considered the express language of Clause 43.1, the Court found that the phrase "*finally resolved*" incorporates concepts of *res judicata* and *estoppel*. The clause imposes a positive obligation to resolve disputes via arbitration, and a negative obligation not to resolve disputes in a non-contractual forum. In other words, a breach occurs only if the Cayman winding-up proceedings are considered to be one that finally resolve the dispute (i.e., conclusively determine the rights and obligations), which would have the effect of *res judicata*.

Applicable law

Next, it was common ground between the parties that it is a matter of applying Hong Kong law (i.e. the governing law of Clause 43.1) to decide whether the Cayman winding-up proceedings would finally resolve the dispute within the meaning of Clause 43.1, but the Court may understand the nature and effect of the Cayman proceedings by reference to Cayman law.

Despite the lack of expert evidence on Cayman law in this case, the Court considered that there is no predicament to directly consider the relevant materials on Cayman law and to apply its own knowledge and reasoning of the common law as it involved common law principles familiar to Hong Kong judges.

Position under Cayman law

The following propositions under Cayman law were distilled:

1. Under Cayman law, a consistent line of authorities hold that even where the petition debt (which is subject to an exclusive jurisdiction or arbitration agreement) is disputed, the Court should still determine the threshold question as to the genuineness of the dispute before deciding whether to grant, dismiss or stay the winding-up petition.

2. The underlying rationale is that there is a conceptual distinction between (i) the determination of the threshold question of whether there was a genuine dispute on substantial grounds and (ii) the resolution of the substantive dispute. In undertaking the threshold inquiry in a petition, the Court is not carrying out a summary judgment type analysis nor resolving or determining the substantive dispute.

3. Therefore, even where the petition is granted, the Court is not resolving the dispute in any substantive sense but is only resolving the threshold question. As such, in resolving the threshold question in favor of the petitioner, it is irrelevant that there is an exclusive jurisdiction or arbitration agreement.

4. The point can also be illustrated where the petition debt is governed by foreign law. Even if no evidence on foreign law is adduced in the petition, the threshold question can still be decided without the need to resort to foreign law.

Accordingly, the Court held that the intended Cayman winding-up proceedings do *not* finally resolve the debt dispute and the Defendant in bringing the Cayman proceedings would not be in breach of its obligation under Clause 43.1 to not have the dispute finally resolved in a non-contractual forum. The Plaintiff's application should be dismissed on this ground alone.

Other grounds for not granting the anti-suit injunction

The Court also took into account the merits of the defense. It held that the Plaintiff's defense is hopeless and frivolous based on facts including, for example, that the Plaintiff failed to submit a formal Covered Risk Application pursuant to Clause 19.2 of the TFA, it could not pinpoint when such an application was made, and importantly, MIGA's insurance had terminated. In making these observations, the Court held that it should consider merits of the case when deciding on whether to grant anti-suit injunction or not, because merits fall within the "*strong reasons not to do so*" element of the test.

CONCLUSION AND COMMENTS

This case highlights the complexity at the intersection of arbitration and cross-border insolvency proceedings. Whilst the "final resolution" distinction in this judgment arises from the specific language of the arbitration agreement in question, such a formulation is very common in arbitration agreements: indeed, it mirrors the HKIAC's model clause. Expressly stipulating that the disputes "shall" be "finally" resolved by arbitration is said to make clear the intention of the parties to arbitrate.[1] In this case, the Court effectively added a qualifier that the arbitration agreements with "final resolution" formulation only prohibit non-contractual forms of dispute resolution which have a *res judicata* effect, presumably including cause of action estoppel and issue estoppel.

1. A Guide to the HKIAC Arbitration Rules (2nd Edition), paragraph 4.18.

This judgment is likely to spark further discussions on the interplay between arbitration and winding-up proceedings. One implication from this judgment is that even if a winding-up order is granted by the Cayman court, from the Hong Kong perspective, this is not resolving the dispute in any substantive sense but is only answering the threshold question as to the genuineness of the dispute to the underlying debt. However, the line between "finally resolving" and "not finally resolving" may not always be clear. It is arguable that the Cayman court's determination that there are no genuine or substantive disputes as to the debt could be seen as effectively resolving the substantive issues.

The judge also indicated that the Plaintiff should have sought to stay the winding-up proceedings in the Cayman Islands (after the Defendant has commenced such proceedings) rather than seeking an anti-suit injunction in Hong Kong to restrain the Defendant from presenting the winding-up petition. The judge commented that the Plaintiff's tactic was caused by the diverging stance of the two jurisdictions manifested in *Re Guy Lam* and *Sian* (paragraphs 4 and 5 of the judgment). So long as the stances of key common law jurisdictions remain ununified, parties may continue to seek tactical jurisdictional advantages.

Commercial parties are unlikely to change the wording of "finally resolving" the disputes by arbitration, which is very common in arbitration agreements. This judgment by the Hong Kong court is likely to give the debtors a pause for thought when they design the overall disputes strategies across multiple jurisdictions.

If you would like to discuss this judgment or other questions, please do not hesitate to contact our Dispute Resolution specialists.

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