

Hong Kong Arbitration Development: Arbitration Award Set Aside by Hong Kong Court



April 2022

In the recent case of *Arjowiggins HKK2 Ltd v X Co* [2022] HKCFI 128 the Hong Kong Court of First Instance set aside an arbitral award on the ground that an order made by the tribunal in the award was out of the scope of the parties' submissions to arbitration and thus beyond the jurisdiction of the tribunal.

What happened leading to the court action

1. The applicant in the case is ARJOWIGGINS HKK2 LTD ("**HKK**") and X CO ("**X Co**") is the respondent. They were partners to a joint venture set up in Mainland China (the "**JV Co**") pursuant to a joint venture agreement ("**JVA**").
2. Following the breakdown of the relationship between them, X Co applied to the PRC court for judicial dissolution of the JV Co resulting in the order issued by the PRC court of dissolution of the JV Co and formation of a liquidation committee in 2014.
3. In 2018 X Co commenced arbitration before Hong Kong International Arbitration Centre ("**HKIAC**") against HKK (the "**Arbitration**").
4. In its claims submissions in the Arbitration, X Co sought an order from the tribunal for the delivery up of the JV Co's account books and other documents ("**JV Co's documents**") by HKK to X Co based upon its case that (a) it was entitled, as the former Chinese party in the JV Co, to take exclusive possession of JV Co's documents upon its dissolution; (b) it was entitled to sue HKK for the delivery up of the JV Co's documents pursuant to the PRC law; and (c) HKK had possession, custody or control over the JV Co's documents but, in breach of the PRC law, refused to hand over the same to X Co despite its demands.
5. In its Defence, HKK denied the allegations and claims made by X Co and claimed, relying upon the PRC law, that during the liquidation process until its deregistration, the JV Co was still in existence and remained the owner of the JV Co's documents and the liquidation committee was the proper organ to have possession of the JV Co's documents.
6. It is also clear, from the pleadings, that X Co maintained its claims that *it* was entitled to possession of the JV Co's documents.
7. In its partial final award delivered on 19 May 2020, the tribunal found that (a) the JV Co's documents were in the possession, custody or control of HKK; and (b) X Co did not have any right to call for delivery of the JV Co's documents to itself as it claimed in the Arbitration, and the compulsory liquidation group ("**CLG**", which was formed under the order of the

PRC court after the commencement of the Arbitration) had the right to possession of the JV Co's documents. Based on the above findings the tribunal should have, according to HKK, dismissed X Co's claims in the Arbitration.

8. However, the tribunal pointed out that, in view of its findings above on HKK being in possession of the JV Co's documents, HKK as a party to the JVA had a duty to ensure that the terms of the JVA in relation to liquidation are complied with and that it must cooperate with X Co to facilitate the liquidation of the JV Co.
9. The tribunal then invited the parties to make further submissions as to what orders (if any) it should make in relation to the disposal of the JV Co's documents.
10. This invitation/request appeared to be a lifeline for X CO, who then requested in one of its further submissions that the JV Co's documents should either be delivered up to X CO for X Co to make copies prior to delivery of the same to the CLG or alternatively delivered up to the CLG directly.
11. HKK disagreed with X Co and stated in its further submissions that the tribunal had no jurisdiction to make any further orders except to dismiss X Co's claims for relief in the Arbitration with costs. It further argued that delivery of the JV Co's documents to the CLG was not included in X Co's initial claim and should not be considered by the tribunal. Thus, HKK believed that the tribunal's jurisdiction only covered the matters raised in the Notice of Arbitration and nothing more. Further it was never raised as an issue of the Arbitration the way in which the JV Co should be "properly liquidated".
12. In its Final Award handed down on 5 August 2020, the tribunal ordered that X Co was entitled to the remedy of procuring the delivery up of the JV Co's documents to the CLG. In reaching its conclusion the tribunal ruled that (a) it had jurisdiction over the remedies sought by X Co as the question of such remedies concerned a matter as to the rights and obligations of the parties under the JVA; and (b) even if a remedy was not asked by a party, it was the tribunal's duty to act in accordance with the remit given to it by the parties' arbitration agreement and having given equal treatment to the parties by giving them the opportunity to make further submissions on the appropriate orders to be made following the Partial Final Award.

What the court decided

- (1) HKK applied to the court of the first instance to set aside the Final Award on the grounds that (a) the orders made by the tribunal in the Final Award were decisions on matters beyond the scope of the submission to Arbitration and thus should be set aside under section 81 (1) of the Arbitration Ordinance ("**Ordinance**") and Article 34(2)(a)(iii) of the Model Law and (b) enforcement of the Final Award would be contrary to the public policy of Hong Kong.
- (2) The court set aside the Final Award and the orders made in it. X Co's cross application to enforce the Final Award was dismissed. T
- (3) The court set aside the Final Award, holding that:
 - (a) The Arbitration only covered the question of whether X Co was entitled, as it claimed in the Notice of Arbitration, to the delivery up to itself of the JV Co's documents during

the liquidation process of the JV Co. So, later asking that the documents be delivered up to the CLG was inconsistent with the initial claim.

- (b) The fact that an issue or matter (here the question of the parties' rights and obligations to a proper liquidation of the JV Co) may be within the wide scope of the arbitration agreement does not necessarily mean that the issue or matter is within the scope of the actual arbitration reference submitted for arbitration. A line is to be drawn between what may be agreed in a contract and what have been agreed to be submitted for arbitration.
- (c) It would be unfair to ambush a party in arbitration because the tribunal permitted the other party to advance new legal consequences that were not identified in the initial pleadings served for the arbitration.
- (d) The court further said that it was not raised as an issue in the Arbitration as to X Co's claims of its right to proper liquidation of the JV Co. Parties to arbitration should know beforehand all the pertinent claims and remedies each side seeks. This way, they will consider all possible defences and decide on the full extent of evidence to be introduced instead of getting caught unaware.
- (e) On the above there was no need for the court to express its view on the additional ground of "public policy" raised by HKK to set aside the Final Award in view of its finding that the orders made by the tribunal in the Final Award fell outside the scope of the arbitration reference agreed by the parties,

What lessons to be learnt

The following points may be noted by parties to arbitration and tribunals in such references:

- (a) The scope of arbitration reference should be determined by the parties themselves, not by the tribunal and the tribunal should be careful, not raising issues or making decision on issues beyond the parties' agreed scope of references.
- (b) Should a tribunal raise points/issues which go beyond the agreed scope of arbitration reference by the parties, objection should be raised by the parties (which seems to have been taken by HKK in this case) to preserve the right to challenge the award in the future, failing to do so might be inferred as having agreed to such decisions by the tribunal.
- (c) The fact that arbitration is not as formal as litigation does not mean that fairness and due process should take a backseat. All parties in arbitration must know, as much as possible, the claims and remedies the other party will seek. They must be clearly stated and pleaded at the outset of the hearing.