

Arbitrator's exercise of phantom jurisdiction

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In *CMB v Fund, Cattle and Management* [2023] HKCFI 760, the Hong Kong Court of First Instance ruled that a pre-emptive arbitration should be set aside as there was no dispute between the immediate parties to the arbitration and the award was beyond the arbitrator's jurisdiction.

Background

*Unless there is a dispute, there is nothing to refer to arbitration.*¹

CMB, Fund and Cattle entered into a co-investment agreement (**Agreement**). CMB was to invest US\$10 million for a minority equity stake in a company. The Agreement was governed by Hong Kong law and contained an ICC arbitration clause,² covering all disputes between the parties arising out of or related to the Agreement. In dealings

- 1 *CMB v Fund, Cattle and Management* [2023] HKCFI 760 at [43].
- 2 At [5].

Pre-emptive arbitration should be set aside

→ The Hong Kong Court rejected pre-emptive arbitration on the basis that if there is no dispute, there is no arbitration



高等法院
THE HIGH COURT

with CMB, Fund was represented by a Mr Li and Cattle was represented by a Mr Xiong, neither of whom were parties to the Agreement.

CMB as claimant issued proceedings in Hong Kong against Mr Li and Mr Xiong, and the managers of the company in question (**Management**) for failing to properly manage the investment, alleging these defendants had made fraudulent misrepresentations to CMB and that they had conspired by unlawful means to defraud CMB. Neither Fund nor Cattle were parties to the court proceeding.³ Mr Li, Mr Xiong and Management all submitted to the jurisdiction of the court in the proceeding, for the determination of the claims made against them.

Approximately one month after CMB issued the court proceeding, on 3 July 2020, Fund, Cattle, Mr Li, Mr Xiong and Management (**Arbitration Claimants**) commenced a Hong Kong-based arbitration against CMB. The Arbitration Claimants sought amongst other things a permanent and interim anti-lawsuit injunction stopping the court proceeding and various declarations, including that the Arbitration Claimants were not liable to CMB in the court proceeding and that the court proceeding was an abuse of process.

In response, CMB pointed out that Management, Mr Li and Mr Xiong had no arbitration agreement with CMB, and, especially, CMB had no dispute with either Fund or Cattle, being the parties to the Agreement.

On 10 March 2022, the arbitrator issued the award whereby he found that Mr Li, Mr Xiong and Management were not parties to the Agreement and therefore he had no jurisdiction to grant the injunctions to restrain the court proceeding.⁴ Additionally, the arbitrator found the court proceeding was not a breach of the Agreement by CMB and no damages for breach should be awarded.⁵

The arbitrator then went on to grant declarations for Fund and Cattle, being of the view he had jurisdiction to do so *in so far as they seek declarations of non-liability as regards their own position*⁶ and made a declaration that all such allegations arising out of the Agreement in the court proceeding were false. The arbitrator also made comments on the quality of evidence by CMB and Mr Li in the court proceeding,⁷ and awarded costs against CMB.

CMB applied to set aside the parts of the award containing the declarations and the adverse costs award.

Decision of the Court of First Instance

Justice Chan in the Court of First Instance reviewed the whole award in context and found the arbitrator did not have jurisdiction to make the declarations.⁸ For there to be a valid arbitration process there had to be a real dispute between the parties to the Agreement. That was not present in this case as no claims were directly made against Fund or Cattle in the court proceeding.

The arbitrator confused the issue of jurisdiction and power to grant relief, granting the declarations because “Fund and Cattle appeared to have a legitimate interest in the declaratory relief sought”.⁹ Before considering that question, the arbitrator needed to consider whether there was a live dispute which conferred jurisdiction on him.

The judge highlighted primary differences between the Court and the arbitral tribunal.¹⁰

As Mr Barlow pointed out on behalf of CMB, the essential difference between the Court and the arbitral tribunal is that the former has unlimited and inherent jurisdiction, whereas the tribunal has to rely on the existence and scope of the arbitration agreement to exercise his jurisdiction and powers.

3 At [7], [17] and [44].

4 At [27].

5 At [28].

6 At [29].

7 At [31]–[34].

8 At [37].

9 At [38], [46] and [54].

10 At [53].

CMB's refusal or failure to sign a draft consent award prepared by lawyers acting for Fund and Cattle did not evidence a dispute between the parties.¹¹ CMB had already protested the arbitrator's jurisdiction and CMB was able to challenge the arbitrator's ability to make any award under the Agreement.

Irrespective of how wide the arbitration clause was framed, it could only cover disputes which involved the parties to the Agreement (ie, CMB, Fund and Cattle) and not claims made by CMB against third parties such as Management, Mr Li and Mr Xi (in the court proceeding). *It would be artificial for an arbitration to be commenced in order to compel a party to admit a claim never made by him.*¹²

In determining whether there was a dispute, Justice Chan referred to the analysis in *Mustill & Boyd Commercial Arbitration*:¹³

...even if a claim is not essential for a dispute, there must nevertheless be something in the nature of an assertion by one party, and a situation in which the parties neither agree nor disagree about the true position is not one in which there is a dispute. The editors also referred to cases to point out that silence in the face of a

claim does not raise a dispute, as what is required is a rebuttal or denial of the claim.

The Court of First Instance (High Court) accordingly set aside the impugned parts of the award and ordered Fund, Cattle and Management to pay CMB's costs on an indemnity basis.¹⁴

Conclusion

The decision of the Court of First Instance shows that from a first

principles approach, a dispute must exist before an arbitration agreement can be engaged. There is no jurisdiction for an arbitration which begins pre-emptively. Despite a party's interest in obtaining relief in regard to the underlying matter, this is not sufficient to confer jurisdiction on an arbitral panel. A dispute which falls within the confines of the arbitration agreement is needed, even in arbitration-friendly jurisdictions such as Hong Kong.

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11 At [21], [24] and [50].

12 At [1].

13 At [48], Lord Mustill and Stewart Boyd *Mustill & Boyd Commercial Arbitration* (2nd ed, LexisNexis Butterworths, London, 2001) at 128.

14 At [62].