Case in Brief:

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Notice of arbitration – make it valid or the award will not stand

A recent decision in the Hong Kong Court of First Instance has demonstrated what to avoid when serving a notice to commence arbitration.

In *G v P*,[1] the applicant was unsuccessful in their bid to have an award recognised. The Court took the view that as the notice arrangements had not been followed in accordance with the parties' arbitration agreement, the award could not be said to be fair.

Background

The applicant was a licensed money lender and with the respondent as borrower, entered into a loan agreement and supplementary loan agreement. The agreements were largely similar. The supplementary agreement contained a clause instructing the parties to seek arbitration in the event of a dispute. The main agreement stated that the governing law was that of Hong Kong. In the event of any discrepancy between the two agreements, the supplementary agreement would prevail.

A dispute arose between the parties. Arbitration occurred but the respondent did not participate.

Issues

Obligation to arbitrate

The respondent argued that

1 *G v P* [2023] HKCFI 2173

Double check that address

→ The Court of First Instance could not be sure about the notice of arbitration.

the supplementary agreement's dispute resolution clause could not work as an arbitration clause. The respondent relied on an observation in an earlier decision[1] which stated that there must be an element of compulsion in the agreement. The respondent argued that this element was absent.

Justice Mimmie Chan held that it was simply a matter of construction. The use of *shall,* as was the wording here, did not mean the clause was optional to follow. The applicant had invoked the clause to refer the dispute to arbitration, this meant the respondent was now obliged to go to arbitration. In coming to this conclusion, Justice Mimmie Chan cited a recent decision in the English Commercial Court, *Aiteo Eastern E & P Co Ltd v Shell Western Supply and Trading Ltd*.[2] This decision held that once an option to arbitrate conferred on a party had been exercised, the other party was bound to arbitrate.

Notice of arbitration

The respondent then argued that the applicant had not given proper notice of the arbitration. As a result, they had not participated. Justice Mimmie Chan acknowledged this as the *core issue and determining factor* of the case. If proper notice had not been given then the respondents could rely on section 86(1)(c)(i) of Hong Kong's Arbitration Ordinance.

Justice Mimmie Chan clarified that a notice of arbitration was a document initiating the arbitration, *equivalent of a Writ of Summons in court proceedings*.

Decision

The applicant relied on the fact that the notice to commence the arbitration was emailed to an address given in the supplementary agreement. In their view, this complied with the nominated arbitration body's rules. Justice Mimmie Chan disagreed. The only evidence that the notice was served was the contents of the award. Paragraph 11 of the award stated that the notice had been given to a XYZ@CHINAT.HK. This email address was different to that given in the supplementary agreement. This was a problem for the applicant as it meant the notice was likely served to this wrong and mistyped address, rendering it counter to the arbitration body's rules.

Justice Mimmie Chan stated that although the Court takes a pro-arbitration approach, this can only be undertaken if the arbitral process is *structurally intact* and there is *due and fair process*. This was absent in this case. Without evidence of the notice being served, the award was irregular and contradictory to the terms of the parties' arbitration agreement. The award was set aside.

1 *Tommy CP Sze & Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 418.
2 *Aiteo Eastern E&P Company Ltd v Shell Western Supply and Trading Ltd* [2022] EWHC 2912 (Comm).