Hong Kong Court Refers Parties to Arbitration in Dispute Involving Jurisdiction and Arbitration Clauses

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Parties entering into related contracts should carefully consider how future disputes ought to be resolved. This post will look at a recent Hong Kong decision in *Bluegold Investment Holdings Limited v Kwan Chun Fun Calvin* [2016] HKEC 532 ("Bluegold Case") involving the construction of inconsistent dispute resolution clauses in related contracts. We will also discuss how to avoid jurisdictional disputes in this context, and associated cost and delay.

The Bluegold Case

The plaintiff, a BVI company ("P"); another BVI company (the "Company"); the defendant, the Company's founder and director ("D"); and several of the Company's subsidiaries, entered into a Subscription Agreement ("SA"). Under the SA, the Company was to issue Notes to P of an aggregate amount of US$10 million ("Notes") and a warrant to subscribe for shares in the Company. D, the Company, and its subsidiaries were to use their best endeavours to conduct a qualified IPO within three years, failing which P was entitled to require the Company to redeem the Notes. D executed a separate Guarantee promising, as primary obligor, to pay P the amounts payable in respect of the Notes.

The SA contained a broadly drafted arbitration clause providing for HKIAC arbitration in Hong Kong regarding any dispute "arising out of or relating to" the SA. The Note certificate incorporated that arbitration clause. The Guarantee, on the other hand, contained a jurisdiction clause under which D "irrevocably submits to the non-exclusive jurisdiction of the Hong Kong courts".

Relying on the jurisdiction clause in the Guarantee, P commenced proceedings against D in the Hong Kong Court of First Instance for the sum of US$10 million plus interest payable under the Guarantee. D requested the court to stay the proceedings and refer the dispute to arbitration in accordance with section 20(1) of the Hong Kong Arbitration Ordinance ("AO") because the dispute was the subject of the arbitration clauses of the SA and Notes.

Section 20(1) of the AO provides, in essence, that where a plaintiff brings an action in court which is the subject of an arbitration agreement, the court must refer the parties to arbitration, if a party so requests, unless the court finds that the agreement is null and void, inoperative or incapable of being performed. The party requesting such a stay has to demonstrate, among other things, that there is a

prima facie or plainly arguable case that the action is brought in the same matter which is the subject of the arbitration clause. Unless the point is clear, the court will not decide the matter but stay it and refer the parties to arbitration, so that the tribunal can decide whether or not it has jurisdiction.

The court stayed the proceedings and referred the parties to arbitration:

- P had not disputed that the Guarantee was to secure both the Company's obligations under the Notes and performance of the parties' obligations under the SA. The event that called for payments from D under the Notes and Guarantee was the non-occurrence of the qualified IPO under the SA.
- Whether D breached the Guarantee could not be determined without identifying whether there was a breach of the Company's and D's obligations under the SA regarding the qualified IPO. The arbitration clause in the SA which also applied to the Notes was broadly drafted to include any dispute relating to the SA and Notes, and it was sufficiently broad to include P's claim as to whether there was a breach by D as guarantor to make payment under the Note in the event the qualified IPO did not occur.
- The court was not satisfied that the existence of the jurisdiction clause in the Guarantee was sufficient to exclude or displace P and D's intention expressed in the arbitration clauses that their disputes as to the payment obligations under the Notes in the event of a breach by the Company of its obligations under the Notes and SA were to be resolved by arbitration. The court noted that it was arguable that the jurisdiction clause could operate in parallel with the arbitration clauses, for example, in that the jurisdiction clause fixed the supervisory court of the arbitration.

Commentary

In multi-contract scenarios, a dispute is likely to arise from or involve questions about more than one contract. However, where parties are bound by several contracts with inconsistent clauses, there is no presumption that an arbitration clause in one contract was intended to cover disputes under another contract. The question is a matter of construction. To avoid the risk of fragmented disputes and parallel proceedings, potentially in more than one jurisdiction and with inconsistent outcomes, parties should adopt a dispute resolution process with identical requirements for all contracts. When adopting arbitration, parties should in particular bear the following points in mind:

- Parties should consider entering into a standalone arbitration agreement covering all relevant contracts and incorporate that agreement by way of reference into each of the contracts.
- If parties choose to include separate arbitration clauses into each of the contracts, the clauses should be compatible (i.e. they provide for the same arbitral institution, set of arbitral rules, arbitral seat, number of arbitrators). Further, the parties should define the scope of the clauses broadly and clearly express their intention that each of the clauses also covers disputes arising from the related contracts.
- Parties should choose arbitral rules which offer regimes for multi-contract and – where applicable – multi-party disputes (e.g. the HKIAC or ICC Rules) to ensure that such disputes can be arbitrated in an effective and efficient manner (e.g. enabling a party to bring in a single arbitration claims arising out of or in connection with more than one contract, or allowing consolidation of two or more arbitrations into one, or allowing an additional party to be joined to an arbitration). Where parties include arbitration clauses into each of the contracts, such regimes only work properly if the clauses are compatible.
- If parties wish to adopt different dispute resolution processes in related contracts, they should make clear that an arbitral tribunal or court to which a dispute under one contract is referred also has jurisdiction to consider the dispute if it involves questions about a related contract which contains a different dispute resolution clause. Otherwise, parties run the risk that

disputes will be fragmented and that a tribunal appointed under one contract may not have jurisdiction to consider a dispute that involves questions about a related contract. This might ultimately result in parallel proceedings, potentially in more than one jurisdiction and with inconsistent outcomes.

Conclusion

The *Bluegold* Case is an important reminder that it is critical for parties to consider carefully, at the contract drafting stage, which subject matters they intend to submit to arbitration and, where a transaction involves multiple contracts, how to adequately deal with the resolution of potentially complex multi-contract disputes.