

Explicit Language in Subsequent Dispute Resolution Clause Needed to Affect Existing Arbitration Proceedings

The Singapore Court of Appeal has, in *CNA v CNB and another* [2024] SGCA(I) 2, held that to affect an arbitration that was already afoot, a dispute resolution clause needed to be explicit in its terms if it was to remove the original jurisdictional foundation previously agreed between the parties to the arbitration.

This update takes a look at the Court of Appeal's decision.

Our Partners Chan Hock Keng and Jill Ann Koh acted for the respondents in successfully resisting the setting-aside applications before both the Singapore International Commercial Court at first instance and the Court of Appeal.

Our Comments

The well-settled presumption of “one-stop” adjudication is premised on the assumption that parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal rather than different tribunals.

It could be argued that this also means that a *different* dispute resolution clause in a *subsequent* agreement should be construed to mean that the parties intended to terminate or supersede the dispute resolution clause in the original agreement, such that the dispute resolution clause in the later agreement would apply to all disputes arising out of both agreements.

But would it? Would the presumption of “one-stop” adjudication apply to affect legal proceedings that are already underway for breaches allegedly committed prior to the change of the dispute resolution clause?

In the wake of the Court of Appeal's decision, it is now clear that the presumption of “one-stop” adjudication has its limits in cases involving a change of a dispute resolution clause in a subsequent agreement. The new dispute resolution clause can affect ongoing proceedings only if its terms are sufficiently clear in prescribing that effect. Failure to do so could suggest a deliberate attempt to conceal the fact that the party seeking the change was trying to fabricate a jurisdictional objection. This could (as in this case) result in that party being precluded from sustaining a jurisdictional objection based on the new dispute resolution provision in the proceedings that are already afoot.

Background

CNA (the appellant in this appeal) was a co-owner of the copyright in a computer game together with CNB, whose rights were later succeeded by CNC. CNB and CNC were the respondents in the appeal.

By a software licensing agreement dated 29 June 2001 (**SLA**), the copyright of the computer game for the People's Republic of China (**PRC**) was licensed exclusively by CNA to the predecessors of CND / CNE. Clause 8.04 of the SLA (**ICC Clause**) provided for Singapore law as the governing law and for disputes to be submitted to arbitration in Singapore under arbitration rules of the International Chamber of Commerce (**ICC**).

CNA was subsequently added as a joint licensor of the SLA *via* a supplementary agreement executed on 14 July 2002 (**SA**). Through the SA, CNB also entrusted the exercise of all its co-licensors' rights to CNA. The term of the SLA was extended through various extension agreements.

In May 2017, CNB commenced an ICC arbitration against CND and CNE for breaches of the SLA. CNA was later joined as an additional respondent to the ICC arbitration.

The SLA was due to expire on 28 September 2017. On 30 June 2017, CNA and CND / CNE entered into another extension agreement (**Extension Agreement**) which provided, among other things, for an extension of the SLA. However, the Extension Agreement, for the first time, also amended the governing law of the SLA from Singapore law to PRC laws and further changed the dispute resolution clause to arbitration in the PRC (Shanghai) under the rules of the Shanghai International Arbitration Centre (**SHIAC Clause**). CNB was not a signatory to the Extension Agreement.

Pertinently, the SHIAC Clause in the Extension Agreement did not refer to or make any provision for the ICC arbitration which had already been commenced and was ongoing.

In addition, CNB was not consulted by CNA about the Extension Agreement or any of its terms, including the SHIAC Clause. In the Extension Agreement, it was stated that CNB had entrusted all its co-licensors' rights to CNA.

CND and CNE then relied upon the SHIAC Clause to assert that the ICC tribunal had no jurisdiction to adjudicate CNB's claims.

On 8 June 2020, the ICC tribunal issued its first partial award on liability finding, among other things, that the Extension Agreement was invalid because CNA had breached its fiduciary duties and its duty to consult in entering into it. As such, CNB and CNC were not bound by CNA's renewal of the SLA and the Extension Agreement was voidable. The ICC tribunal also found that CNA, CND and CNE were liable for unlawfully conspiring to injure CNB and CNC by amending the dispute resolution and governing law clause under the SLA by way of the Extension Agreement. The jurisdictional objection was also dismissed.

On 31 July 2021, the ICC tribunal issued a second partial award in which CNB and CNC were awarded legal costs and expenses in the liability phase and for interim relief applications.

CNA applied to the Singapore International Commercial Court (**SICC**) to set aside both partial awards, contending that the ICC tribunal lacked jurisdiction as the ICC Clause had been superseded by the SHIAC Clause.

The SICC's Decision

The SICC dismissed the applications to set aside the partial awards. It found that CNA owed CNB fiduciary and equitable duties under the SA in relation to the exercise of its power to alter CNB's legal relations with CND and CNE under the Extension Agreement.

The SICC also found that, in entering into the Extension Agreement, CNA had in breach of its fiduciary duty acted in haste and secrecy at CND and/or CNE's instigation as they wanted to rely on the change from the ICC Clause to the SHIAC Clause as a jurisdictional objection. CNB was therefore entitled to

(and did) avoid the Extension Agreement. As a result, the ICC Clause remained operative, and the ICC tribunal continued to have jurisdiction over the disputes referred to it.

CNA appealed to the Court of Appeal, contending that the partial awards should be set aside on the basis that the ICC tribunal had no jurisdiction to adjudicate on CNB's claims because the ICC Clause, which originally gave it jurisdiction, had been superseded by the SHIAC Clause.

The Court of Appeal's Decision

The Court of Appeal dismissed CNA's appeal.

The Court of Appeal highlighted that, in considering the effect of a dispute resolution clause in a contract entered into after an arbitration has already commenced, the question that arises is whether the language is "*sufficiently clear*" to affect the existing arbitration.

Thus, in considering the effect of the SHIAC Clause, the court would have regard to the fact that the ICC arbitration had already been commenced when the Extension Agreement was entered into. The question therefore was whether the language of the SHIAC Clause was sufficiently clear to affect the ICC arbitration proceedings that had already been commenced. The Court of Appeal found that it was not.

As a matter of construction, the language of the SHIAC Clause was not apt to remove the jurisdictional foundation previously agreed in the SLA between the parties to the ICC arbitration. To affect the ICC arbitration which was already afoot, the SHIAC Clause would have needed to be "*explicit*" in its terms. However, that was not the case, presumably (in the Court of Appeal's view) "*because it would have shone the light on precisely what CNA was trying to do – namely to fabricate a jurisdictional objection*".

In addition, the Court of Appeal found that the "*haste and secrecy*" in which CNA acted in entering into the Extension Agreement in the circumstances found by the SICC "*indicated a purpose of supporting a jurisdictional objection*" to the ICC arbitration.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



CHAN Hock Keng

Co-Head – Commercial & Corporate Disputes

d: +65 6416 8139

e: hockkeng.chan

@wongpartnership.com

Click [here](#) to view Hock Keng's CV.



Jill Ann KOH

Partner – Commercial & Corporate Disputes

d: +65 6517 8720

e: jillann.koh

@wongpartnership.com

Click [here](#) to view Jill's CV.

 Connect with WongPartnership.

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-

WongPartnership LLP
Shanghai Representative Office
Unit 1015 Link Square 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

INDONESIA

-

Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

MALAYSIA

-

Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

wongpartnership.com

MIDDLE EAST

-

Al Aidarous Advocates and Legal Consultants
Abdullah Al Mulla Building, Mezzanine Suite 02
39 Hameem Street (side street of Al Murroor Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com

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Al Aidarous Advocates and Legal Consultants
Oberoi Centre, 13th Floor, Marasi Drive, Business Bay
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

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Gruba Law
27/F 88 Corporate Center
141 Valero St., Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w grubalaw.com