

A time-barred arbitral award is a bird without wings: *CL v SCG* [2019]

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Introduction

Parties invest considerable time and expense in arbitration in the hope of obtaining a favourable award. It is easy to become tunnel-visioned and lose sight of the fact that an award must be enforced within time. An award that cannot be enforced has little value.

An action to enforce an award in Hong Kong is time-barred after the expiration of 6 years from the date on which the cause of action accrued.¹ The decision of the Court of First Instance (the “CFI”) in *CL v SCG* [2019] HKCFI 398 clarifies when the cause of action accrues and sheds light on the implications of Article 2 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the “Arrangement”), which prohibits an applicant from enforcing an award in Mainland China and Hong Kong at the same time. It serves as a reminder that it is important to strategise for enforcement of an arbitral award before it is too late.

Background

In 2005, CL commenced arbitration of various disputes under a contract with SCG, a mainland company, under the Hong Kong International Arbitration Centre Administered Arbitration Rules. On 17 February 2011, CL obtained a partial award whereby SCG was ordered to forthwith make payment of US\$2 million to CL (the “Award”).

Several months later, SCG having failed to respond to CL’s repeated demands for payment pursuant to the Award, CL applied to the Shenzhen Intermediate People’s Court (the “Shenzhen Court”) to enforce the Award. SCG contested the enforcement. In March 2015 (more than 4 years after the Award), the Shenzhen Court rejected CL’s application. CL then applied to the Guangdong Higher People’s Court (the “GHPC”) for retrial. In March 2016, the GHPC rejected CL’s application.

In February 2018 (nearly 7 years after the Award), CL successfully applied to the CFI for leave to enforce the Award against SCG on an *ex parte* basis. SCG subsequently applied to set aside the order granting leave on the basis that CL’s action to enforce the Award was time-barred. SCG’s case was that the limitation period commenced from May 2011, being 3 months after it was given a reasonable time to honour the Award.

Issues

CL argued that its action was brought within time:

1. Time started to run only in March 2012, when SCG contested CL’s application to enforce the Award before the Shenzhen Court, thus manifesting a clear and unequivocal intention not to be bound by the Award.
2. Alternatively, the accrual of the cause of action was suspended on 7 July 2011 when CL

¹ Section 4(1)(c), Limitation Ordinance (Cap. 347)

tried to enforce the Award in the Shenzhen Court and only resumed on 1 March 2016 when the GHPC rejected the application for retrial. CL contended that it would be contrary to public policy to hold that a successful party to an arbitration should be prevented from enforcing the award in Hong Kong by operation of section (4)(1)(c) of the Limitation Ordinance because it had attempted to enforce the award in Mainland China only in accordance with Article 2 of the Arrangement.

When did the cause of action to enforce the Award accrue?

The CFI held that the lack of response on the part of SCG to CL's various demands for payment under the Award should not indefinitely defer and postpone the accrual of CL's cause of action. The cause of action arose when SCG failed to make payment within a reasonable time of the publication of the Award and demand being made.

What is a reasonable time for payment and performance under an award depends on the terms of the award as well as the circumstances of the case. Taking into account the fact that SCG, a mainland company, was ordered to make payment to a bank account in Hong Kong "forthwith", the CFI held that a reasonable time for payment lapsed 21 days after the date of the first demand for payment (i.e. 18 March 2011). Therefore, the last day when CL could have brought the action to enforce the Award was 8 April 2017.

It is notable that by 8 April 2017, the GHPC had already rejected CL's application for a retrial and CL could have brought an enforcement action in Hong Kong within time. However, it did not do so until February 2018.

Was the cause of action suspended during the Mainland proceedings?

The CFI accepted that, given Article 2 of the Arrangement, CL was not able to apply to enforce the Award in Hong Kong until the Mainland

proceedings were finally determined on 1 March 2016. While that might be unfair, the CFI noted that there is no express provision in the Arrangement, the Arbitration Ordinance, or the Limitation Ordinance, that time for enforcement of an award should be suspended when a successful party applies for enforcement in Mainland China. Such circumstances could only be remedied by statutory amendment. In the meantime, applicants will have to consider withdrawing or procuring determination of the application in Mainland China, before applying for enforcement in Hong Kong prior to the expiry of the relevant limitation period.

Conclusion

The decision clarifies that the cause of action to enforce an award accrues when the defendant fails to honour the award within a reasonable time. What will be a reasonable time, if not specified in the award, will depend more broadly on the terms of the award and the circumstances of the case.

The decision also highlights the dilemma that a successful party to an arbitration may face where the losing party has assets in Mainland China and Hong Kong and enforcement actions may take place in both jurisdictions. Article 2 of the Arrangement requires that party to choose between the two jurisdictions. It will need to consider carefully where it should first bring an enforcement action, taking into account not only where the losing party has most of its assets but also the efficiency of the court system and the arbitration-friendliness of the jurisdiction concerned. It is also crucial to monitor closely the progress of the enforcement proceedings and be flexible with the enforcement strategy.

This case emphasises the importance of enforcement at the very outset of negotiating an arbitration agreement. The location of a counterparty's assets will be an important factor to take into account in order to assess the challenges, and perhaps time required, to enforce an award, whether obtained in the same jurisdiction or in another seat, in the relevant local courts. If the award is obtained in another seat, the

arrangements for enforcement of awards between that seat and the jurisdiction in which the counter-party's assets are located will also have to be properly considered. These are an important element of the contractual risk each party assumes when entering into the underlying arbitration agreement, but may often be barely considered if at all at that initial stage. Of course, whatever arbitral procedure has been

chosen by the parties, once a successful party has its award, it will need to keep under constant review its options for enforcement and be prepared to adapt its strategy to take into account factors over which it may have little control, such as the efficiency of local courts. Once a claim is time-barred, there is very little that can be done to resuscitate a bird without wings.



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