

The Court's Flexible Scope of Relief in the Enforcement of Arbitral Awards

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Introduction

While litigation and arbitration stand as separate dispute resolution mechanisms, the court system often plays an important part in the arbitral process, especially in the enforcement of arbitral awards. However, what is the scope of relief that a court may grant in the enforcement of an award? Is the court limited by the scope of the award itself, or may it grant wider relief and alternative remedies?

These questions were considered by the Hong Kong Court of Final Appeal ("**CFA**") in *Xiamen Xinjingdi Group Co Ltd v Eton Properties Limited & Others* [2020] HKCFA 32 in the context of a common law action of enforcement. The CFA rejected the argument that it was limited to "mechanistically" converting an award into a judgment in terms of the award, instead adopting a more flexible approach to the remedies it could employ to achieve enforcement.

The CFA's decision is demonstrative of a willingness to facilitate the practical enforcement of arbitral awards, which serves to enhance the appeal of international arbitration as an effective means of dispute resolution.

In this Update, we look at the key elements of the CFA's decision and its implications on the law of arbitral enforcement.

Brief Facts

The Defendants had entered into an agreement ("**Agreement**") with the Plaintiff to sell their shares in a wholly-owned subsidiary ("**D3**"), which owned the right to develop and use a plot of land. The Defendants failed to perform the Agreement. Pursuant to the arbitration clause in the Agreement, the Plaintiff commenced arbitration against the Defendants before the *China International Trade Arbitration Commission*.

The arbitral tribunal found in favour of the Plaintiff, awarding the Plaintiff damages for breach of contract and ordering the Defendants to continue to perform the Agreement ("**Award**"). The Plaintiff invoked the summary procedure provided by section 2GG of the Hong Kong Arbitration Ordinance ("**Ordinance**") and obtained leave to enforce the Award.

However, by this point, the Defendants had transferred their beneficial ownership of D3 to a related entity, and the land had been developed, causing an impediment to the enforcement of the Award on its terms. The Plaintiff thus brought a common law action ("**Action**") against the Defendants and other related parties to enforce the Award, seeking (among other remedies) a declaration of constructive trust and an award of damages or equitable compensation.

The Court of First Instance dismissed the Action, but the Court of Appeal overturned its decision, allowing the Plaintiff to elect between damages and the continued performance of the Agreement, with the Plaintiff ultimately electing for damages. Notably, the relief granted exceeded the scope of the relief in the Award.

The Defendants appealed against the decision of the Court of Appeal, arguing that:

- The Court of Appeal had acted beyond its jurisdiction as it could only enforce an award "mechanistically" by making an order which mirrored the award;
- The award of damages by the Court of Appeal essentially allowed the Plaintiff to "outflank" the arbitral regime as the Action fell within the scope of the arbitration clause; and
- The award of damages was fundamentally inconsistent with, and barred by, the extant Award.

Holding of the CFA

CFA dismissed the Defendants' appeal, rejecting the restrictive approach proposed by the Defendants in relation to the scope of remedies that could be granted by the court in the enforcement of the Award.

Mechanistic argument

CFA accepted that the summary procedure provided by section 2GG of the Ordinance required the enforcing court to act mechanistically by entering judgment in terms of the award. However, a common law action for enforcement would not be subject to the same limitation; it differed from the summary procedure in the Ordinance as the plaintiff would be required to prove its case.

CFA thus clarified that, in a common law action to enforce an arbitral award, the court would not be constrained by the requirement that the judgment must be in the terms of the award.

Outflanking argument

CFA held that the Action did not fall within the scope of the arbitration clause in the Agreement, clarifying that the implied promise to honour the Award existed as a contractual obligation separate and distinct from the obligations created by the underlying contract.

CFA highlighted the distinction between the determination of contractual parties' mutual rights and liabilities and the enforcement of an award, with the former being a matter for the arbitrators (assuming the existence of an arbitration agreement) and the latter being a matter for the court.

It was further clarified that, at the enforcement stage, in an action on the implied promise to honour an arbitral award, the enforcing court may grant relief appropriate to the award.

- For example, a monetary award may simply be enforced with a judgment treating the award as a debt.
- Conversely, a non-monetary award may be enforced by fashioning an appropriate remedy chosen from the full range of remedies available in an ordinary common law action.

Extant award argument

Finally, CFA rejected the argument that the Court of Appeal was wrong to award damages as it was fundamentally inconsistent with the Award. CFA highlighted that the relief granted in common law actions fell within the enforcement jurisdiction of the court and not within the jurisdiction of the arbitral tribunal, and thus did not require adjustment to achieve consistency with the terms of the award.

As such, the alleged "extant award" presented no obstacle to the enforcing court awarding the Plaintiff damages for breach of the implied promise to honour the Award, even if such remedy went beyond the scope of the remedy granted in the Award.

Concluding Remarks

CFA's decision provides a measure of assurance to disputants seeking the court's assistance in the enforcement of an arbitral award. It clarifies that, outside of the summary process, the court has the flexibility to choose from an array of available remedies so as to ensure the award may be effectively enforced; it will not be unduly restricted by the specific relief contained in the award itself.

While it remains to be seen whether the Singapore courts will apply CFA's decision, it is perhaps notable that the Singapore courts have – similar to the Hong Kong courts – established a pro-arbitration reputation, demonstrating inclination towards facilitating enforcement and recognition of awards.

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