May 18 2022

Where do the courts stand on agreements to arbitrate any dispute in employment contracts?

Howse Williams | Employment & Immigration - Hong Kong

PATRICIA YEUNG

The Court of First Instance's recent decision in *MAK v LA*[(1)] has clarified the jurisdiction of the labour tribunal in situations where an employment contract contains an agreement to arbitrate any dispute. Consistent with the pro-arbitration stance that the Hong Kong courts normally adopt, the Court gave the arbitration agreement a broad interpretation and stayed residual claims pending the outcome of the arbitration.

Facts

The plaintiff (the employee) was the CEO, CFO and head of compliance of the defendant company, LA. After the termination of his employment, the employee commenced court proceedings against LA, claiming that a discretionary performance bonus for 2019 was withheld from him, and that he was entitled to the vesting and redemption of share units granted under a staff profit-sharing scheme (the scheme) from 2016 to 2018.

While the employee's letter of employment provided for the exclusive jurisdiction of the Hong Kong courts and tribunals over any dispute arising out of his employment, the letter for the 2016 bonus (the 2016 bonus letter) awarded under the scheme did not contain a dispute resolution clause. The letters for the 2017 bonus and the 2018 bonus (the 2017 bonus letter and 2018 bonus letter, respectively) awarded under the scheme stated that "any disputes arising out of or in connection with this agreement" were to be referred to a sole arbitrator appointed by LA from the Hong Kong International Arbitration Centre's list of approved arbitrators. The 2017 bonus letter was signed by both parties, but the employee did not countersign the 2018 bonus letter.

The employee first commenced proceedings against LA in the labour tribunal. His claims were for the redemption of deferred shares and payment of the discretionary bonus for 2019. LA challenged the labour tribunal's jurisdiction and argued that the dispute in relation to the scheme should be submitted to arbitration.

The proceedings were transferred to the Court, and LA subsequently sought a stay of the proceedings pending arbitration, on the ground that the parties' arbitration agreement excluded the Court's jurisdiction.

Decision

In making its decision, the Court had to resolve the below four issues.

Did an arbitration agreement exist?

LA was held to have established a prima facie case that a valid arbitration agreement existed in relation to the terms of the employee's participation in the scheme.

It argued that the Court was bound by Chapter 609 section 20 of the Arbitration Ordinance (AO), which stipulates that if an action is brought in a matter that is the subject of an arbitration agreement, and if a party so requests, the court will refer the parties to arbitration unless it finds that the agreement is:

- null and void;
- inoperative; or
- incapable of being performed.

The Court rejected the employee's argument that the arbitration agreement was unconscionable and unenforceable on the ground that LA had the exclusive right to appoint the sole arbitrator in the arbitration clause. The Court found that an arbitrator, despite being nominated by LA, would still be under a statutory duty to act impartially. The Court, therefore, found no basis to support the allegation that the arbitration agreement was "null, void, inoperative or incapable of being performed".

In addition, the Court found that the prima facie existence of a valid arbitration agreement was not negated by the fact that the employee had not signed the 2018 bonus letter. On that basis, the Court referred to section 19(2) of the AO, which states that an arbitration agreement will fulfil the requirement to be in writing if it is in a document, regardless of whether it was signed by the parties.

Did the arbitration agreement in the 2017 bonus letter extend to the 2016 bonus letter and the unsigned 2018 bonus letter?

The Court held that the arbitration clause in the 2017 bonus letter was broad enough to extend to the disputes under the 2016 bonus letter and 2018 bonus letter.

All three bonus letters dealt with the same subject matter: the employee's entitlement to share units under the scheme. The Court thus applied the same approach as in *Fiona Trust & Holding Corporation v Privalov*:[(2)] a jurisdiction agreement contained in one contract should extend to a claim made under another contract. This is based on the presumption that commercial parties are likely to have nominated a particular tribunal to determine their disputes.

The Court found that the dispute over the scheme had the closest connection with the terms and conditions of the employee's participation in the scheme, which were explicitly set out in the relevant bonus letters, rather than the letter of employment. Therefore, in

the absence of any agreement that provided the contrary, the terms and conditions in the 2017 bonus letter extended to the 2016 bonus letter and 2018 bonus letter.

Did the claim for deferred shares fall within the labour tribunal's exclusive jurisdiction?

Section 20(2) of the Labour Tribunal Ordinance (LTO) also provides that if such a dispute is within the jurisdiction of the labour tribunal and there is an arbitration agreement, the Court may refer the parties to arbitration if it is satisfied that:

- there is no sufficient reason why the parties should not be referred to arbitration; and
- the party requesting arbitration was ready and willing to do all things necessary for the proper conduct of the arbitration.

Under paragraph 1 in the schedule that is provided for in Chapter 25 of the LTO, the labour tribunal's exclusive jurisdiction encompasses "a claim for a sum of money, whether liquidated or unliquidated, which arises from the breach of a term . . . of a contract of employment". The Court decided that the claim for the redemption of deferred shares did not constitute a claim for a sum of money; therefore, it was not within the exclusive jurisdiction of the labour tribunal.

As LA was ready and willing to proceed with the arbitration and the issue was not within the exclusive jurisdiction of the Labour tribunal, the Court referred the claim to arbitration in accordance with their agreement.

Should residual claims be stayed?

The remaining parts of the employee's claim (ie, the discretionary performance bonus for 2019) did not fall under any of the bonus letters and was, therefore, governed by the letter of employment (which provided for the exclusive jurisdiction of the Hong Kong courts). This part of the claim was not referred to arbitration. LA applied for the claim to be stayed under the Court's inherent jurisdiction on case management grounds.

The general legal position is that, where a plaintiff commences proceedings based on their right to do so, they should not be deprived of the right to continue proceedings in the absence of good reasons to the contrary, and that a management stay should only be granted in rare and compelling circumstances.[(3)]

The Court found that the residual claim overlapped with the claim for deferred shares; therefore, it was appropriate to stay the claim until the determination of whether the employee was entitled to the deferred shares under the scheme.

Comment

The Court, in this case, adopted a flexible approach to the arbitration agreement contained in the 2017 bonus letter by extending it to cover the claim under the 2016 bonus letter and the 2018 bonus letter. It also ordered a stay in the residual claim pending the outcome of the arbitration of the claim for deferred shares, highlighting the Court's likely pro-arbitration stance.

This decision is significant as it clarifies the Court's position on conflicting dispute resolution clauses. Further, it serves as a reminder of the importance of adopting clear and consistent dispute resolution provisions and that parties who include arbitration agreements in employment contracts should expect them to be enforced.

For further information on this topic please contact Patricia Yeung at Howse Williams by telephone (+852 2803 3688) or email (patricia.yeung@howsewilliams.com). The Howse Williams website can be accessed at www.howsewilliams.com.

Endnotes

(1) [2022] HKCFI 285.

(2) [2007] 4 All ER 951.

(3) *China Shanshui Cement Group Ltd v Tianrui (International) Holding Co Ltd* [2020] HKCFI 3043.