

# Legal Update

## Hong Kong Court's Guidance on Correction of Arbitral Awards, Additional Awards, and Applications to Set-Aside or Resist Enforcement

In *SC v OE*<sup>1</sup>, the Hong Kong Court of First Instance (Court) provided valuable guidance on the circumstances in which an arbitral award may be corrected, or an additional award issued, under section 69 of the Arbitration Ordinance (Cap. 609) (Ordinance). It also provides a cautionary tale for parties involved in multiple applications to set-aside and/or resist the enforcement of substantially the same arbitral award in Hong Kong.

### Background

OE1 and OE2 (together OE) entered into an agreement (Agreement) with SC. The Agreement contained an arbitration clause stating that all disputes would be settled in Hong Kong by arbitration.

OE alleged that SC had breached the Agreement, and referred this dispute to arbitration in May 2016. The arbitral tribunal (Tribunal) then issued a Final Award on liability (Award) in April 2019, which found that SC had breached the Agreement, ordered SC to pay the costs of the arbitration, and stated that "*all other claims and reliefs sought by the Parties are rejected*".

Within 10 days of the Award, OE applied to the Tribunal under section 69 of the Ordinance seeking:

- i. A correction of the Award, in accordance with article 33(1) of the UNCITRAL Model Law (Model Law);  
or
- ii. The issue of a further award, in accordance with article 33(3) of the Model Law,

on the basis that the Tribunal had failed to address OE's claims for (a) a perpetual licence regarding certain intellectual property covered by the Agreement (Licence); and (b) injunctions regarding SC's breach of certain provisions in the Agreement (Injunctions). OE asserted that such a failure was inconsistent with the Tribunal's findings regarding SC's breaches and the validity and enforceability of relevant terms in the Agreement in the body of the Award.

SC objected to OE's application alleging that the Award expressly rejected "*all other claims and reliefs sought by the Parties*" which covered the relief sought by OE, and, in any event, the Tribunal did not have the power to correct the Award, or issue a further award.

In June 2019, the Tribunal issued an “*Addendum to the Award*” (Addendum), which stated that:

- i. The Tribunal had already found and concluded in its Award that SC had breached the Agreement;
- ii. The relief which OE requested flowed naturally from these findings and conclusions;
- iii. The Tribunal should have repeated a summary of its findings and provided a declaration for the relief sought by OE in the Award; and
- iv. SC had not argued against the grant of such relief in SC’s closing submissions.

On this basis, the Tribunal stated that it had made a “*mistaken omission*” in failing to provide declarative relief regarding the Licence and grant the Injunctions sought by OE, and proceeded to award this relief.

Following the issue of the Addendum in June 2019, SC applied to the Court in September 2019 to set aside parts of the Addendum under section 81 of the Ordinance, on the basis that the arbitral procedure was not in accordance with the parties’ agreement, or not in accordance with the Model Law (relying on article 34(2)(a)(iv) of the Model Law), and further on the ground of public policy (article 34(2)(b)(ii)) (Setting Aside Application).

OE responded by:

- i. applying for leave to enforce the Award, as amended by the Addendum, under section 84 of the Ordinance (Enforcement Application);
- ii. in a separate action, seeking leave to enforce the parts of the Award, as amended by the Addendum, which were not challenged in SC’s Setting Aside application (Partial Enforcement Application).

SC then opposed OE’s Partial Enforcement Application, employing additional arguments beyond those raised in its Setting Aside Application.

## Issues Before the Court

All the applications were heard together by direction of the Court. The issues for the determination of the Court were:

- i. Whether the Tribunal had power to correct the Award by the Addendum;
- ii. Whether the Tribunal was *functus officio* (i.e., had no further powers, due to fully performing its duties) when it issued the Addendum;
- iii. Whether the Award as corrected by the Addendum should be set aside or enforced;
- iv. Whether the Award should be enforced without the challenged parts.

## Correction of Errors

The Court agreed with SC’s submission that the Tribunal did not have the power to issue the Addendum under Model Law, article 33(1)(a), which states:

*“a party, with notice to the other party, may request the arbitral tribunal to correct in the award any **errors in computation, any clerical or typographical errors or any errors of similar nature**”* (emphasis added)

The Court held the Tribunal’s omissions regarding the Licence and Injunctions could not be considered errors in computation, clerical or typographical errors, or errors of a similar nature, even though they might have been accidental: Clerical errors, or errors of a similar nature, should not involve any mistake or omission in the thought process or analysis.

## Additional Award

However, the Court held that the Tribunal did have the power to issue the Addendum under Model Law, article 33(3), which states:

*“Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.”*

OE had made its claims for the Licence and Injunctions in its Notice of Arbitration, Statement of Case and submissions presented in the arbitration, and SC had at all material times had notice of these claims for relief. These claims had been included in the list of issues for determination by the Tribunal, as recognised in the Award. The arbitration process had been comprehensive, and SC had been afforded full opportunity to address the Tribunal on OE’s entitlement on these claims, including during the hearing on liability, post-hearing briefs on liability, and a hearing for closing submissions on liability. SC had not, at the time, taken the opportunity to challenge these claims. In these circumstances:

- i. OE’s claims for the Licence and Injunctions had clearly been *“presented in the arbitral proceedings”*;
- ii. SC had at all material times had notice of OE’s claims for relief; and
- iii. SC had been given a full opportunity to address OE’s claims.

The key issue was therefore whether OE’s claims for the Licence and Injunctions had been omitted from the Award, or if they had been dealt with by the words *“all other claims and reliefs sought by the Parties are rejected”*. The Court held that this issue was to be determined by assessing the *“true objective intent”* of the Tribunal, reading the whole of the Award in its proper context<sup>2</sup>.

The Court found that the Tribunal had in the Award set out the list of issues, analysed the arguments on the:

- i. scope of the Agreement,
- ii. designs covered by the Agreement,
- iii. relevant provisions of the Agreement, and
- iv. validity and enforceability of various provisions of the Agreement which SC was alleged to have breached,

reviewed the patents which were the subject of the OE’s claims, and concluded that SC’s acts constituted breaches of the relevant provisions of the Agreement. The Award did not in any way deal with OE’s claims for the Licence or the Injunctions to restrain SC’s breaches of the Agreement found by the Tribunal. Read as a whole and in the proper context of the findings made on the breaches of the specific provisions of the Agreement, and validity and enforceability of relevant provisions of the Agreement, the Court held that the *“true objective intent”* of the Tribunal could not have been to reject OE’s claims for the Licence and Injunctions, and that the statement in the Award that *“all other claims and reliefs sought by the Parties are rejected”* could not be read as referring to these claims, which had not been dealt with by the Tribunal. The Tribunal had therefore omitted to deal with OE’s claims for the Licence and Injunctions, and so had the power to address them by way of the Addendum, in accordance with Model Law, article 33(3).

The Court then emphasised that:

- i. This was not a case where the Addendum was inconsistent with the Award, or whether the arbitrators had second thoughts, or had evaluated evidence differently, when issuing the Addendum. The implication is that such circumstances may fall outside the scope of Model Law, article 33(3);

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<sup>2</sup> The Court referred to *Cadogan v Turner* [2013] 1 Lloyd’s Rep 630, which deals with the analogous section 57 of the English Arbitration Act 1996

- ii. One of the objectives of the Ordinance is to limit the rights of parties to arbitration agreements to resort to the courts and to ensure greater autonomy for their chosen tribunal. The powers of the Court under the Ordinance are to be exercised to facilitate the arbitration process by supporting and assisting the Tribunal and furthering the parties' choice of arbitrators, so long as there is due process. The Court stated that accordingly there were good public policy reasons for holding as it did. These statements were made in response to SC's submissions that arbitration awards should be final and not revisited on policy grounds.
- iii. Where the Tribunal has the power to amend an error or make an additional award under Model Law, article 33(3), it is neither considered to be *functus officio* nor acting in excess of its jurisdiction;
- iv. Where the Tribunal has a power to achieve a particular result, but exercises it in an incorrect way, there is no excess of jurisdiction<sup>3</sup>. Accordingly, even though the Tribunal incorrectly expressed the Addendum to be a correction of the Award under Model Law, article 33(1)(a), there was no excess of jurisdiction, because the Tribunal had the power to issue the Addendum under Model Law, article 33(3).

The Court therefore gave leave for the Enforcement Application.

## Setting Aside Application

The Court held that, under Order 73, rule 5(4)(a) of the Rules of the High Court the originating summons for an application to set aside an award must state *all* the grounds relied on in the application. The only grounds set out in the Setting Aside Application were (a) that the arbitral procedure was not in accordance with the agreement of the parties; and/or (b) conflict with the public policy of Hong Kong.

In submissions, SC elaborated that its claim was that the Tribunal was *functus officio* upon the issue of the Award, and therefore had no power to correct the Award on any grounds. The issue of the Addendum was thus not in accordance with the arbitration agreement between the parties, or not in accordance with article 33(1) of the Model Law, and it would be contrary to Hong Kong public policy to enforce the Award as amended.

The Court dismissed the Setting Aside Application with costs on an indemnity basis, reiterating that the Tribunal was not *functus officio* (as the Award itself had not dealt with all of OE's claims and therefore had the power to issue the Addendum), that the Addendum had been validly issued under Model Law, article 33(3), and that accordingly enforcement of the Award as amended by the Addendum would not be contrary to Hong Kong public policy.

## Partial Enforcement Application

As the Court had already granted leave for the Enforcement Application, it was not necessary for the Court to deal with the Partial Enforcement Application. However, the Court still made the following important *obiter dicta* comments regarding SC's arguments raised in respect of the Partial Enforcement Application.

In resisting the Partial Enforcement Application, SC raised additional grounds not included in its Setting Aside Application to challenge the enforceability of the Award as amended by the Addendum, both of which must be read together. The Court stated that this was not permissible, as there was no reason that the additional grounds SC relied upon to oppose the enforcement of the Award could not have been raised at the time of the Setting Aside Application to set aside parts of the Addendum to the Award. Subsequently raising additional grounds to resist the Partial Enforcement Application was considered to be "...in bad faith to obscure, procrastinate and delay the enforcement of the Award". Further, the Court

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<sup>3</sup> *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221

found that SC had waived reliance on the additional grounds by failing to include them in the original summons for Setting Aside Application, which must set out *all* the grounds relied upon (see above).

In any event, the Court went on to state that, on the facts, it did not see any merit in the additional grounds.

## Comment

This case provides important guidance to parties in arbitrations seated in Hong Kong who wish to correct or supplement an arbitral award under section 69 of the Ordinance. It confirms that the Model Law, article 33(1)(a) is strictly to be used to correct clerical, typographical errors or computational errors, and little else. In short, the circumstances in which corrections can be made will be narrowly construed. However, it identifies Model Law, article 33(3) as a potentially useful tool for parties who believe that a tribunal has not properly addressed all of its claims in an award, or has omitted from an award relief for claims which have otherwise been dealt with by the tribunal, to enable them to ask the tribunal to make a supplemental award relating to such claims.

Parties drafting arbitration agreements should bear in mind that Model Law, article 33(3) only applies *“unless otherwise agreed by the parties”*, and so may be excluded with express language if the parties so wish.

It should also be noted that several provisions in the Agreement were instrumental in OE obtaining its desired relief. Should parties wish certain relief in the event of breaches of contract (e.g., self-executing licences, injunctions) it is prudent to include clauses in agreements that bring these into effect automatically.

Finally, it is important to be aware that, where a party makes a setting aside application, or seeks to resist the enforcement of an arbitral award, it should include *all* grounds that it intends to rely upon. If further, separate applications to set aside or resist enforcement of substantially the same arbitral award are subsequently made in Hong Kong, these will need to be limited to the same grounds unless there is a compelling or exceptional reason for allowing further grounds to be relied upon.

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