Module 9:
Interim Applications & Pre-emptive Remedies

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Interim Applications: General

- Interim measures by tribunal (ss.35-36 AO) or by court (s.45 AO):-
  - Maintain or restore the status quo pending determination of the dispute
  - Prevent or refrain a party from taking any action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself
  - Preserve assets out of which a subsequent award may be satisfied
  - Preserve evidence that may be relevant and material to the resolution of the dispute
- E.g. interlocutory injunctions, freezing orders, anti-suit injunctions & measures to preserve evidence
- Other common interim applications: stay of proceedings (s.20(1) AO); security for costs (s.56(1)(a) AO); discovery applications (s.56(1)(b) AO)

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Security for Costs

- An arbitral tribunal must not make an order for security only on the ground that a claimant is outside jurisdiction (s.56(2) AO)
- Chartered Institute of Arbitrators' guidelines on applications for security for costs (Art.1(2)):-
  - The prospects of success of the claim(s) and defence(s)
  - The claimant's ability to satisfy an adverse costs award and the availability of the claimant's assets for enforcement of an adverse costs award
  - Whether it is fair in all of the circumstances to require one party to provide security for the other party's costs
- Under what circumstances it would be ***unfair*** to order one party to provide security for costs? (cf. Art.4)

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Security for Costs (cont'd)

- 深圳正高金屬製品有限公司 v Iu Ho Construction Engineering Co Ltd [2021] HKCFI 1253
  - P: completed and supplied aluminium handset panel system formwork for certain projects and claims against D the outstanding balance in the sum of $24.9 million
  - D: counter-claims damages for defects and breaches of the 4 alleged oral agreements in the sum of $74.4 million
  - D offered an undertaking that ***in the event that*** P was ordered to pay security and fails to do so within the time limit set by the court (as extended, if applicable), D would withdraw its counterclaim in its entirety (para 17)

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Security for Costs (cont'd)

- G Lam J (now Lam JA):-
  - The defence to P's claim and D's counterclaim would raise exactly the same issues and would have to be tried in any event in the course of determining the counterclaim
  - Amount of D's counterclaim ***three times*** amount of P's claim
  - "Application should… be refused when the cost[s] incurred by the defendant for the purposes of the defence might equally and perhaps preferably be regarded as costs necessary to prosecute the counterclaim"
  - "It is pertinent to ask ***whether in the particular case the counterclaim is a cross-action*** or operates as a defence, that is to say merely operates as a defence"
  - "A defendant should not be required to give security for costs if he is only defending himself from the plaintiff's claim"

Security for Costs (cont'd)

- The Court further held that ***the conditional undertaking offered by D would be insufficient*** in the circumstances (para 17-21):-
  - ***Apex Engineering & Contracting Ltd v Hong Kong Switchgear Ltd***, HCA 1188/2010 (20 November 2012) at para 23, per DHCJ Woo:

    " … if the defendant only agrees to his counterclaim that exceeds his defence to be stayed in case the plaintiff's claim is stayed by reason of the latter's failure to comply with the order for security for costs, which means **that the conditionally stayed counterclaim can or will be revived upon the plaintiff's compliance with the order and the defendant in such an event is allowed to pursue his counterclaim against the plaintiff, it will offend the rule that the court will not order security in favour of an attacking defendant. The situation would be very different if the defendant agrees to drop his counterclaim altogether and only maintains his set-off as a defence**. In such a case, the rule of protecting a defendant from an impecunious plaintiff in defending the claim instead of assisting the defendant to recoup costs for pursuing his own claim (by way of a counterclaim or an independent claim separate from the action he faces) will not be traversed."

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Security for Costs (cont'd)

- ***Hong Kong Zhixin Financial News Agency Ltd v China Maple Leaf Educational Systems Ltd*** [2019] HKCFI 2921 at para 37, per K Yeung J:

  "… the Undertaking will only bite if (1) P is ordered to give security, (2) P fails to put up the security ordered, and (3) P's claim is stayed or dismissed as a result. **But if P is ordered to put up security but is able to do so, both the claim and the counterclaim will proceed. I agree with Mr Li that it will be unfair in that scenario to order only P to put up security when D is 'at least as much also an attacker or plaintiff**' which has raised issues common to those framed by the RASoC and beyond."

- ***Mau I Business Centre Ltd v Tenford Holdings Ltd***, DCCJ 731/2008 (26 August 2008) at para 29, per DDJ Richard Khaw:

  "… given the conditional undertaking offered by the Defendant, the court still has to decide, as a matter of principle, if discretion should be exercised in favour of ordering security for costs. It is because the court is required to take into account the effect of the Defendant's counterclaim (which still exists) and cannot second-guess whether the Plaintiff will comply with an order for security, if granted. Hence, I am of the view that **this conditional undertaking does not take the Defendant's case any further in this application**."

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Security for Costs (cont'd)

	Case	Undertaking offered by D
(1)	***Apex Engineering & Contracting Ltd v Hong Kong Switchgear Ltd***	"(a) payment into court in the sum of HK$517,250 (to cover up to the trial) within the next 28 days; or (b) alternatively, payment into court by the Defendant of the $181,115.60 sum due to the Plaintiff from them as the Plaintiff's payment for security for the Defendant's costs up to stage of the preparation of witness statements, or such other stage and sum as this Honourable Court deems fit, **and that pending the provision of such security both the Plaintiff's Claim and the Defendant's Counterclaim be stayed**; …" (para 4)
(2)	***Hong Kong Zhixin Financial News Agency Ltd v China Maple Leaf Educational Systems Ltd***	"**D would not pursue its counterclaim if P's claim is stayed/dismissed for failure to put up the security for costs ordered** " (para 36)
(3)	***Mau I Business Centre Ltd v Tenford Holdings Ltd***	"In response to the Plaintiff's argument in this respect (which I think is valid), the Defendant informed me in the hearing that **should the Plaintiff's action be stayed due to its failure to make payment into court for the amount of security ordered, the Defendant would undertake not to pursue its counterclaim.**" (para 26)

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Security for Costs (cont'd)

- In ***Iu Ho*** (supra), the Court only ordered P to give security for D's costs after D indicated at the hearing that **D would unconditionally abandon its counterclaim** and would only rely on the substantive pleaded allegations for the purpose of its defence
- Implications of the case for the applications for security for costs before an arbitral tribunal:-
  - To decide whether it is fair to order a claimant to give security for costs, the tribunal may consider **if a defendant is equally "an attacker"** in the circumstances
  - Even a defendant offered a conditional undertaking to abandon the counterclaim, the tribunal would still be entitled to consider the application on the basis that **a claimant could comply with any order for security and the counterclaim would proceed**

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Interlocutory Injunctions

- Conditions of granting an interim injunction pursuant to Art. 17A of ML (s.36 AO):-
  - Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed, if the measure is granted
  - There is a reasonable possibility that the requesting party will succeed on the merits of the claim
- Cf. the ***American Cyanamid*** principles – more detailed?

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Freezing Orders

- Obtaining urgent interim relief before the arbitral tribunal – see ***GE Transportation (Shenyang) Co Ltd v Lu Jinxiang*** (unrep., HCMP 1792/2013, 22 January 2014) at paras 7-12:-
  - Arbitration proceedings already commenced
  - P applied to the tribunal ***on notice*** to the other side(s) for relief in the form of an interim arbitral award and order preventing the dissipation of assets
  - P then applied to the court ex parte under O.73 r.10(1)(c) for leave under s.61 AO to enforce the interim arbitral order
- Preliminary orders under Art.17B and 17C ML without notice to any other party (ss.37-38 AO)
  - But notice will be given to the other side ***immediately*** after the application for the preliminary order(s)
  - Preliminary order(s) **not** subject to enforcement by court

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Freezing Orders (cont'd)

- Mareva injunction applications in aid of HK or foreign arbitration proceedings are often made to the court (see ss.45(2)&(5) AO)
- ***Company A and Ors v Company D and Ors*** HCCT 31/2018; [2019] HKCFI 367, at paras 64-66 (per Recorder Eugene Fung SC)
  - When deciding whether to grant a Mareva injunction sought in aid of an arbitration under s.45 AO, ***the Court applies the same general principles governing the grant of a Mareva injunction***, i.e. a plaintiff has to show a good arguable case, that there is a real risk of dissipation of assets, and that the balance of convenience is in favour of the grant of the injunction
- Better off for the party to apply to the court in the first place?

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Stay of proceedings

- s.20(1) AO (Art.8 ML): a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, **if a party so requests not later than when submitting his first statement on the substance of the dispute**, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed
- The four-stage test for a stay application under s.20(1) AO (see ***Chu Kong v Lau Wing Yan*** [2019] 1 HKLRD 589 (CA)) :-
  - Is the arbitration clause an arbitration agreement?
  - Is the arbitration agreement null and void, inoperative or incapable of being performed?
  - Is there in reality a dispute or difference between the parties?
  - Is the dispute or difference between the parties within the ambit of the arbitration agreement?

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Stay of proceedings (cont'd)

- Pro-arbitration approach by HK courts: ***Houtai Investment Holdings Ltd v Leung Yat Tung and Ors*** [2021] HKCFI 1504
  - P was a sub-contractor of a joint venture in respect of a tunnel project ("**the Project**") and P further subcontracted part of its own subcontract works to D4 (Marine Works) by a sub-subcontract ("**Sub-subcontract**")
  - P commenced an action in court as P alleged D4 had breached **oral agreements** in respect of the lease of P's vessels by failing to (a) pay the agreed market rent and (b) employing the vessels for work other than the stipulated tunnel project
  - D4 had previously referred the disputes with P as to the outstanding payment(s) under the Sub-subcontract and a supplemental agreement to arbitration, and **claimed that the vessels (the subject matter of P's action) were provided for D4's use under the Sub-subcontract**, so P's action should also be stayed for arbitration

Stay of proceedings (cont'd)

- Clause 22 in the Articles of Agreement of both Subcontract and the Sub-subcontract:-
  - "A dispute is deemed to arise when one party serves on the other a notice in writing (a 'Notice of Dispute') stating the nature of the dispute. The date of this Notice will be the effective date to determine the start of proceedings." (Clause 22.1)
  - "**If any dispute cannot be settled by agreement (or otherwise) then it will be referred to arbitration** and the final decision of a single arbitrator (to be appointed as required by Item 34) in accordance with and subject to the provisions of the Arbitration Rules stated in item 35. Any reference of a dispute to arbitration will be deemed to be a submission to domestic arbitration under the Arbitration Ordinance or any statutory modification to that Ordinance for the time being force." (Clause 22.2)
  - "If a dispute arises under the Subcontract and there is a related dispute under the Sub-subcontract, then provided an arbitrator has not been agreed to or appointed for the Sub-subcontract dispute the Subcontractor may, by notice in writing to the Sub-subcontractor, require that any dispute under this Sub-subcontract be referred to the same arbitrator. Providing that the same arbitrator ("the common arbitrator") is willing to accept the reference, the Sub-subcontract dispute will be determined by the common arbitrator." (Clause 22.6)

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Stay of proceedings (cont'd)

- Mimmie Chan J:-
  - The modern approach to the construction of arbitration agreements is **the presumption in favour of arbitrability and the "one-stop" adjudication approach**, at least as a useful starting point (para 20)
  - Where there are multiple related commercial agreements, each dealing with different aspects of the parties' relationship and dealings, and each containing its own provision for expressed choices of jurisdiction, law and/or mode of dispute resolution, **the proper test in ascertaining the parties' intention on how the dispute should be dealt with is to identify the nature of the claim, and the agreement which has the closest connection with such dispute and claim** (para 21)
  - P and D4 have a wider legal relationship as to Sub-subcontract Works by way of the Sub-subcontract, to which P had referred when issuing invoices of the rental charges of vessels to D4 (para 22)
  - Clause 22 does not qualify or define the "dispute" which is to be arbitrated and Clause 22.2 only provides for "any dispute" which cannot be settled by agreement to be referred to arbitration, which is extremely wide (para 26)

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Stay of proceedings (cont'd)

- "In all the circumstances, and having considered **the factual matrix, the purpose of the Sub-subcontract, the connection between the lease of the vessels and the execution of the Sub-subcontract Works, it would not be reasonable for the parties as rational businessmen to have intended that disputes arising under the oral leases and those under the Sub-subcontract should be resolved in different fora**. The fact that **the Plaintiff had throughout issued invoices for the rental charges of the vessels under and by reference to the Sub-subcontract** is a reflection of the Plaintiff's understanding and intention as to the scope of the arbitration agreement contained in the Sub-subcontract, and **the close connection between the oral leases and the Sub-subcontract**." (para 33)
- A prima facie case of the existence of the arbitration clause (Clause 22) sufficiently wide in scope to cover P's claims in the court proceedings, and P's action is stayed against all Ds accordingly (para 34-37)

- Note: the court has jurisdiction (s.16(3) HCO; O.1B r.1(2)(e) RHC) to order stay even if s.20(1) AO does ***not*** apply (see ***Chok Yick Interior Design & Engineering Co. Ltd v Fortune World Enterprises Ltd***, HCA 2394/2008 & HCA 280/2009, per Saunders J)

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Anti-suit Injunctions

- ***GM1 and Anor. v KC*** [2020] 1 HKLRD 132
  - There was a dispute in relation to a guarantee ("**the Guarantee**") between P1 and D and the related arbitration proceedings in HK were pending
  - Ps applied to HK court for an anti-suit injunction to require D to withdraw or stay the legal proceedings commenced against Ps in the PRC, and to restrain D from commencing or pursuing any further proceedings in respect of the Guarantee
  - D argued that the only proper jurisdictional basis for anti-suit injunction(s) is s.21L HCO, not s.45 HCO

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Anti-suit Injunctions (cont'd)

- Mimmie Chan J:-
  - Reference made to Art.17(2)(a)(b) ML (s.35 AO) (para 12)
  - "An injunction to enforce the **positive promise of a party to arbitrate disputes and the negative right not to be vexed by foreign proceedings can be viewed as an interim order which maintains the status quo of parties which have already commenced their arbitration,** as in this case, **in accordance with the rights conferred under their arbitration agreement. The anti-suit injunction restrains a party from commencing proceedings** instituted in breach of the arbitration agreement, **the continuation of which must inevitably prejudice the arbitral process, the tribunal's conduct of the arbitration, and the orders to be made by the tribunal in the process**." (para 14)
  - An anti-suit injunction is within the scope of interim measures covered by s.45 AO accordingly

Anti-suit Injunctions (cont'd)

- ***GM1*** (supra) at para 23: the fact that the foreign court may insist on its own jurisdiction is **irrelevant** to the court of the seat of the arbitration when it deals with an arbitration provision governed by its own law
- Cf. ***Enka v Chubb*** [2020] UKSC 38; [2020] 1 WLR 4117: the choice of law of the arbitration agreement does **not** matter?
  - The contract contained an arbitration clause with London seat, but there was no provision as to the governing law of the contract and/or the arbitration agreement at all
  - By majority of 3-2, the Supreme Court held that the governing law of the arbitration agreement should be English law instead of Russian law
  - **Both majority and minority nonetheless agreed that the principles of granting an anti-suit injunction should be the same irrespective of the governing law of the arbitration agreement if the arbitration agreement is with an English seat** (para 173-185, 261, 293)

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Anti-suit Injunctions (cont'd)

- "[B]y choosing a seat of arbitration **the parties are choosing to submit themselves to the supervisory and supporting jurisdiction of the courts of that seat over the arbitration**. A well established and well recognised feature of the supervisory and supporting jurisdiction of the English courts is the grant of injunctive relief to restrain a party from breaching its obligations under the arbitration agreement by bringing claims which fall within that agreement in court proceedings rather than, as agreed, in arbitration. A promise to arbitrate is also a promise not to litigate." (para 174)

- "In granting an anti-suit injunction the English courts are seeking to uphold and enforce the parties' contractual bargain as set out in the arbitration agreement. **In principle it should make no difference whether that agreement is governed by English law or by a foreign law…"** (para 177)

- "We therefore agree with the Court of Appeal that the principles governing the grant of an anti-suit injunction in support of an arbitration agreement with an English seat do not differ according to whether the arbitration agreement is governed by English law or foreign law. **Forum conveniens considerations are irrelevant and comity has little if any role to play. The court's concern will be to uphold the parties' bargain**, absent strong reason to the contrary, and the court's readiness to do so is itself an important reason for choosing an English seat of arbitration." (para 184)

Q&A

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