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Specific performance in arbitration: Is there a binding award?

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*In Global Mining and Gerald Metals ("***Claimants***") v China National Gold Group ("***Respondents***")* BVIHCM 2023/0070, the Respondents were unsuccessful in their applications to set aside the BVI Court's order for registration and enforcement of two final partial arbitral awards.

Background

At the conclusion of a HKIAC arbitration, the tribunal issued the "First Final Partial Award" (the "**1st FPA**") which recognised the Claimants as the rightful owner of shares in a BVI company. The Respondent was directed to transfer the shares to the Claimants at the price specified by the parties' contract.

The 1st FPA anticipated voluntary compliance by the Respondent and thus left the mechanics of the shares transfer to the parties. Having concluded that the Claimants are entitled to an order for specific performance of the obligation to transfer the shares, the 1st SPA indicated that:

"87. The Tribunal hopes that on reading this Partial Award [the Respondent] will provide to [the 1st Claimant] the details of its bank account so that the purchase price can be paid into that account and that it will not be necessary for the order for specific performance to come into effect.

88. ...If [the Respondent] fails to give details of its bank account so as to enable the Claimants to make the required payment, the Tribunal will issue an order for specific performance."

The Respondent refused to provide its bank details to the Claimants to facilitate the shares transfer as envisaged under the 1st FPA.

This prompted the Claimants to apply for specific performance compelling the Respondent to transfer the shares. Predictably, this was granted by the tribunal in a partial final award for specific performance ("**SP FPA**"). The BVI Court granted recognition of the 1st FPA and subsequently the SP FPA.

The Respondent applied to set aside the recognition orders on, amongst other grounds, that:

1. the 1st FPA which was open to being amended and supplemented was therefore *"not yet binding"* on the parties under Section 86(2)(f)(i) of the BVI Arbitration Act; and
2. the SP FPA was made *ultra vires* by a tribunal which had terminated its mandate and was likewise unenforceable.

BVI Commercial Court's decision

In summary, the BVI Court found that:

1. the original final award is a binding award notwithstanding the fact that it was open to variation and amendment; and
2. in circumstances where the tribunal had reserved its right to amend and vary the final award, it retained jurisdiction to issue a second award.

Whether the 1st FPA constituted a binding award

The BVI Court confirmed that the question of whether an award is 'not yet binding' is to be answered by reference to the 'recourse' test set out by Eder J in *Diag Human SE v Czech Republic* [2014] EWHC 1639 (Comm).

1. An award is not to be considered binding if it is subject to *'ordinary recourse'.* This refers to a *"genuine appeal on the merits of the arbitral award to a second arbitral instance or to a court"* (i.e. if the award was still open to the possibility of another decision on the merits).

2. Conversely, *'extraordinary recourse'* would not prevent the award from becoming binding. Such recourse was reserved for *"other irregularities, especially the procedural ones, tainting a final decision"* (i.e. if the award was subject to setting aside or equivalent proceedings).

What was to be made of the fact that the Claimants could return to the tribunal to amend or supplement the award and obtain a fresh specific performance award?

This, according to the BVI Court, did not represent 'ordinary recourse'. It was not a form of appeal, nor a request for review against findings or orders made by the Tribunal. The SP FPA was made pursuant to the tribunal's express reservation of power to make further orders to remedy any failure to voluntary comply with the 1st FPA. Moreover, the SP FPA was *"not a later version"* of the 1st FPA. The SP FPA was *"a separate, further award"*. As such, there was nothing to suggest that the 1st FPA was not binding.

The BVI Court explained that, where an **award** of specific performance is made (even if no **order** of specific performance is yet granted in the dispositive), the tribunal accepts control over supervision of the contract's performance. Such ongoing supervision was far removed from the concept of an appeal. It could not be right that an award which the tribunal is supervising for contractual performance would never become binding.

Whether the tribunal had jurisdiction to issue the SP FPA

The Respondents argued that the tribunal did not have jurisdiction to issue the SP FPA because it was *functus officio* after it issued the 1st FPA.

The BVI Court however rejected this argument and affirmed the course adopted by the tribunal case – that is, to make an award of specific performance and set out certain terms on which that should take place, but to reserve jurisdiction to revisit whether and how specific performance was to be effected by subsequent awards. In particular, the tribunal in question had been given statutory jurisdiction (by virtue of section 70 of the Hong Kong Arbitration Ordinance) to make orders for specific performance, which inherently entails on-going supervision of contractual performance.

Conclusion

The handling of the arbitral dispute has often been described as relay race. The tribunal takes charge of the baton and retains it until they have issued a final award. At that point, the tribunal's mandate is exhausted. The baton is passed to the court who supervises the enforcement of the award.

It is not always easy to determine when the baton passes from tribunal to the court. Where an arbitral tribunal has not made an express reservation of jurisdiction, it cannot be argued that the tribunal has done so by implication (see for example *Voltas Ltd v York International Pte Ltd* [2024] SGCA 12).

In the present case, the tribunal has clearly reserved its jurisdiction to make an order of specific performance. The BVI Court has also laid down helpful guidance on when an award is "not yet binding".

This briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen 2025.