

HONG KONG / JUDGMENT

A v. B

[2025] HKCFI 6367

COURT

Court of First Instance

DECIDED

23 December 2025

CASE / FILE NUMBER

HCCT125/2024

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HCCT 125/2024

[2025] HKCFI 6367

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 125 OF 2024

BETWEEN

A

Plaintiff

and

B

Defendant

Before:

Deputy High Court Judge Jonathan Wong in Chambers (Not open to Public) (Paper Disposal)

Dates of Submissions: 8, 22 and 23 September 2025

Date of Decision: 23 December 2025

DECISION

ON

COSTS

Introduction

The Plaintiff (“P”) commenced these proceedings against the Defendant (“D”) on 17 October 2024. By a summons dated 4 February 2025 (“Summons”), D applied to stay the present proceedings in favour of arbitration, which application was eventually acceded to by P and an order was made to that effect on 25 August 2025 shortly before the substantive hearing of the Summons on 1 September 2025.

However, the parties were unable to agree on the issue of costs. Initially, the position advocated by P was that the costs of the action (including the costs of the Summons) be in the cause of the intended arbitration proceedings. The foregoing position is no longer maintained by P. Whilst P no longer disputes that it should pay costs to D, it says that the costs should not be taxed on an indemnity basis but should be taxed instead on a party-and-party basis.

Conversely, D seeks costs of the Summons (but does not seek any costs in relation to the action) on an indemnity basis.

The outstanding issue of costs was ordered to be dealt with on the papers. I have since received helpful submissions from Mr Vincent Li for P and Mr Clavin Cheuk for D. This is my decision on the issue of costs.

The contractual arrangement between P and D

D was at all material times the main contractor for Contract X (“Contract X”) for the construction of the Third Runway Concourse at the Hong Kong International Airport (“Main Works”).

D and P entered into 2 subcontracts (“Subcontracts”) on or about 25 January 2022 and a supplemental agreement on 27 June 2023 (“SA”).

There is no dispute between the parties that Clause 18 of the General Conditions of the Subcontracts, as amended by the Special Conditions of the Subcontracts (“GC 18”), is a dispute resolution clause mandating the parties to refer any disputes in connection of the Subcontracts to arbitration. In particular, and relevant for present purposes, GC 18(4) provides as follows:

“Any reference to arbitration under sub-clause (1) hereof shall not be opened until after:-

- i. The Completion or alleged completion of the Main Works or termination of the Contract X and this Sub-Contract; and
- ii. written consent of the Contractor has been given therefor.” (emphasis added)

Commencement of the present proceedings

By inter alia a letter dated 30 December 2023, D (on P's case) wrongfully determined P's employment. P says that it is entitled to claim for outstanding sums of over HK\$107 million and damages for breach of the Subcontracts and the SA.

Since the purported determination of P's employment under the Subcontracts, P had been requesting for settlement of the Subcontracts' final accounts. On 19 June 2024, P's solicitors proposed mediation, which proposal was rejected by D's solicitors on 3 July 2024.

As the proposal to mediate was not accepted, by a letter dated 3 October 2024 ("3/10/24 Letter"), P's solicitors wrote to D's solicitors seeking D's consent to commence arbitration.

By a letter dated 10 October 2024 ("10/10/24 Letter"), D's solicitors replied to the 3/10/24 Letter, in which the merits of Ps' allegations were criticized. Although not stated expressly, it is plain that no consent to commence arbitration was forthcoming from D.

Feeling that no further alternatives were available and in an attempt to ease its cashflow, P commenced the present proceedings on 17 October 2024. The Statement of Claim was only filed on 7 January 2025.

In a letter from D's solicitors dated 15 January 2025 to P's solicitors ("15/1/25 Letter"), the grounds for staying these proceedings were set out in, inter alia, the following terms:

"[4] [After referring to the terms of GC 18(4) in the preceding paragraph,] [it] is clear that, as of the date of this letter, the works under the Contract X... have not been completed and remain ongoing. Also, the Contract X has not been terminated. In these circumstances and without any admission to the alleged claims made by [P], it is our client's position that:-

- a. any disputes arising from the Sub-Contracts... should be finally resolved by operation instead of Court Proceedings; and
- b. any arbitration proceedings between the parties should only be commenced after the Completion or alleged completion of the works under the Contract X or termination of the Contract X and the Sub-Contracts. None of these conditions are satisfied.

[5] Thus, we consider [P's] present Court proceedings to be in contravention of the parties' agreement under [GC 18]. We also take the view that any request for commencement of arbitration at this stage under the Sub-Contracts is pre-mature. We refer to the [3/10/24 Letter] and the [10/10/24 Letter]...

[6] We have instructions from our client to take out an application to the court to stay the current court proceedings in favour of arbitration to be commenced in a manner compliant with the requirements under [GC 18], and to seek costs from your client on an indemnity basis. However, as an attempt to save both parties' time and costs, in lieu of an application to stay the Court proceedings, we are instructed to seek your client's agreement and undertaking that [P] shall take out a consent summons to stay the Court proceedings in

favour of arbitration to be commenced [in compliance with GC 18].

- [7] Please seek your client's agreement to the proposal set out in §6 above as soon as possible and in any event before the close of business next Monday (20 January 2025.)"

As no agreement was forthcoming from P, D took out the Summons on 4 February 2025. P chose to contest the Summons and it was only on 31 July 2025 that P started to negotiate with D to dispose of the Summons by consent.

P's Submissions

P asks the court to take the following matters into account on the issue of costs.

First, it is said that the terms of GC 18 gave rise to financial hardship on the part of P, and P's claim had been "locked up" since December 2023 when D issued the purported notice of termination.

Secondly, it was only when D took out the Summons on 4 February 2025 that an undertaking was proffered that D would give consent to commence arbitration after completion or termination of the Contract X.

Thirdly, given the factual matrix, P (it is said) reasonably took the position that GC 18 was null and void, inoperative and incapable of being performed. In particular, P relies on D's evidence that the Main Works would only reach completion in about mid-2027, which means that the disputes between P and D will not be adjudicated upon for some time still.

Generally, Mr Li says that, under RHC Order 62, rule 5(1)(e), I should take D's conduct into account on the issue of costs. He submits that D was unreasonable in refusing mediation in June 2024, and was also evasive, if not oppressive, in failing to respond to P's request for consent to commence arbitration before these proceedings were instituted.

The applicable principles

Chimbusco International Petroleum (Singapore) Pte Ltd v Fully best Trading Limited [2016] 1 HKLRD 582 is an authority for the proposition that the practice is to order indemnity costs in proceedings arising out of in connection with arbitral proceeding:

"[13] As emphasized by the arbitration judge in A v R (Arbitration: Enforcement) and as endorsed by the Court of Appeal in Gao Haiyan v Keeneye Holdings Ltd (No 2), the objectives of the Civil Justice Reform must also be borne in mind when the question of costs is considered. In Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 2) [2012] 4 HKLRD 569, the Court of Appeal referred in its judgment to the decisions of the Victorian Court of Appeal, as to whether indemnity costs are wrong in principle, and came to the considered view that the Hong Kong Court should give effect to and recognize the practice of specialist judges in charge of the Construction and Arbitration List to order indemnity costs in proceedings arising out of or in connection with arbitral proceedings. In connection with this practice of ordering indemnity costs save in special circumstances, Tang VP observed:

‘Nor do I believe that this practice is wrong in principle. It might be regarded as wrong in principle, if notwithstanding Civil Justice Reform and its implications, indemnity costs could only be awarded when special circumstances are established. However, I believe indemnity costs may be awarded under O 62 r 5 (1) in an unsuccessful application to set aside an arbitral award or to resist enforcement “to ensure fairness between the parties”. Unless such practice is wrong in principle, we cannot interfere.

Nor can I agree that such practice amounts to an abrogation of discretion. The practice has left room for special circumstances; what are special circumstances in this context have to be worked out in due course. However, I cannot accept that the fact that the challenge was reasonably arguable is a special circumstance. That would neutralize the practice.’

[14] I see no reason at all to differentiate between unsuccessful attempts to resist enforcement of an arbitral award made under an arbitration agreement, and unsuccessful attempts to resist enforcement and recognition of the arbitration agreement itself. The reasons and observations made by Reyes J in *A v R*, that recourse should not be made to the Court, that parties should comply with arbitration awards made under the arbitration agreement, all apply with equal force to a case where a party to the arbitration agreement unmeritoriously seeks to challenge the arbitration agreement, and refuses to refer the dispute to arbitration in accordance with the agreement. Parties to an arbitration agreement should expect that the Court will recognize and enforce the arbitration agreement, and if they take the risk of instituting court proceedings in breach of such an agreement, they should expect to pay costs on a higher scale if they fail in their attempt to impeach the agreement.

15. The observations made by Reyes J and the Court of Appeal as to the need to further the objectives of the CJR are equally applicable, as justification for awarding costs on an indemnity basis where there are challenges to an arbitration agreement. Unmeritorious challenges to an arbitration agreement, and the use of court proceedings when the parties have agreed to have their rights and disputes resolved by arbitration cannot be conducive to the underlying objectives of the CJR, bearing in mind the duties of the parties, and their lawyers, to assist the Court in the cost-effective and efficient resolution of a dispute, and to ensure the fair distribution of the resources of the Court.” (emphasis added)

In *Chimbusco*, indemnity costs were ordered against the plaintiff as the defendant was successful in obtaining a stay of the court proceedings in favour of arbitration.

As regards the potential “harshness” of an arbitration clause on terms similar to those of GC 18 on a party’s financial situation, I refer to *Kinli Civil Engineering Ltd v Geotech Engineering Ltd* [2021] HKCFI 2503. The relevant arbitration clause considered in *Kinli* is as follows (Decision §3):

“If in the course of executing the Contract, any disputes or controversies arise between (G) and (K) on any question and the parties are unable to reach agreement, both parties may in accordance with the relevant arbitration laws of Hong Kong submit the dispute or controversy to the relevant arbitral institution for resolution, and the arbitral award resulting from arbitration in the HKSAR shall be final and binding on both parties, and unless otherwise agreed by both parties, the aforesaid arbitration

shall not be conducted before either the completion of the main contract or the determination of the subcontract.”

G was the main contractor and K was G’s subcontractor. At Kinli §§30-31, Mimmie Chan J observed as follows:

“[30] The provision for arbitration to be commenced only after completion or substantial completion of works under a construction contract, or after determination of the contract for a contractor’s works, commonly appears in standard form construction contracts in use in Hong Kong. The objective of such a provision is to ensure that the contractor should continue to proceed with the works despite a dispute having arisen, and not to bring progress of the works to a halt and cause delay in the performance of the contract in question as well as the performance of other contracts/subcontracts in the entire construction project. Under such a provision, arbitration shall not be commenced unless and until the contract is completed, or if there is agreement between the parties. It is of course open to the parties to expressly agree for specified disputes to be excluded from the relevant provision.

[31] The mere existence of the Proviso in the Clause cannot mean that there is no commercial object which can be achieved, or render any arbitration agreement contained in the Clause to be “unworkable” as K contends. To the extent that K argued that it would be unfair for disputes on interim payments and extensions of time to be deferred until completion of Works and the determination of the Contract, the Court cannot rewrite the Contract or the Clause for the parties. As is clear from the authorities, there may well have been a valid and commercial quid pro quo for the Proviso to have been agreed, of which the Court is not aware. Moreover, as referred to above, the parties could have agreed and provided for a carveout provision from the Proviso, if it was considered necessary and appropriate, for disputes as to the validity of instructions for Works, or for extensions of time, to be dealt with at such time and by such specific dispute resolution procedure other than arbitration as may be stated in the Clause. This the parties failed to do, and in the absence of such provision, there is no reason for the Court to depart from the position which is expressly stated in the Clause, namely, for disputes to be arbitrated upon completion of the Main Contract, or termination of the Contract. Needless to say, it is of course also open to K to terminate the Contract on the ground of any breach on the part of G of any of its duties under the Contract, and thereafter to commence arbitration.” (emphasis added)

Analysis

I do not agree with Mr Li that the factors set out at section 4 above assist P, for the following reasons.

First, although there are differences between GC 18 and the arbitration clause considered in Kinli, I am of the view that the observations made at Kinli §31 (the underlined passage above) remain apposite. It is not the function of the court to rewrite the parties’ bargain because of the professed harshness asserted by P.

Secondly, and related to the above, P's initial position that GC 18 was null and void, inoperative and incapable of being performed can only be regarded as overly-ambitious as an argument which, if pursued, would have defeated D's application for stay. The foregoing is especially true when the onus of D is only to establish a prima facie case of the existence of an arbitration agreement (Kinli §§5-7 and 32).

Thirdly, I do not regard there is any element of unreasonable in the D's conduct. By virtue of the terms of GC 18, D was plainly entitled to regard P's attempt to have its claim litigated as premature. It is pertinent to note that the conditions to be satisfied under GC 18 for arbitration to be commenced are cumulative (ie, relevantly (1) Completion or alleged completion of the Main Works or the termination of the Contract X and (2) written consent of D has been given therefor). Given that P accepts that the Main Works will not be completed until mid-2027, it seems to me clear that the first condition has not been satisfied. As such, I do not consider there is anything in P's complaint that no undertaking to give consent was forthcoming from D until the Summons was taken out. Unless and until the first condition of GC 18 was satisfied, there was simply no utility for consent to be given. Conversely, were it suggested that D should give consent for arbitration to be commenced despite the first condition of GC 18 not having been satisfied, I do not see how it can be said that D should voluntarily depart from the contractual bargain reached between the parties.

Fourthly, as pointed out by Mr Cheuk, D's position was clearly set out in the 15/1/25 Letter but P decided to contest the Summons fully (including the filing of evidence in opposition) until shortly before the substantive hearing in September 2025.

In my view, a proper exercise of the court's discretion is to accede to the costs order pursued by D.

Conclusion

For the above reasons, I accede to the order proposed at D's submissions dated 8 September 2025 §2, namely the costs of and occasioned by the Summons, including all costs reserved and the costs of the submissions lodged for the purpose of the costs issue, be paid by P to D forthwith on an indemnity basis, to be taxed if not agreed.

(Jonathan Wong)

Deputy High Court Judge

Mr Vincent LI, instructed by Messrs. Zebra H Y Kwan & Partners, for the Plaintiff

Mr Calvin CHEUK, instructed by Messrs. Johnson Stokes & Master, for the Defendant

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Prepared on 29 October 2026 · Esheria