



## Lifting Stay of Hong Kong Proceedings Pending Arbitration

On 13 April 2023, the Hong Kong Court of First Instance released its judgment *ZS Capital Fund and Others v Astor Asset Management 3 Limited and Another* [2023] HKCFI 1047, which provides some guideline as to how the Hong Kong Court considers an application to lift the stay of proceedings that was previously granted in favour of arbitration.

### Background

In July 2020, ZS Capital Fund and others (the "**Borrowers**") as plaintiffs commenced proceedings in Hong Kong against Astor Asset Management 3 Limited and another (the "**Lender**") claiming declaratory reliefs that certain stock loan agreements (the "**SLAs**") made between the Borrower and the Lender are null and void and of no legal effect, being contrary to Sections 2 and 23 of the Money Lenders Ordinance (Cap. 163 of the laws of Hong Kong) (the "**MLO**"). Our firm represents the Borrowers in the proceedings.

In November 2020, upon the consent by the parties, the proceedings were stayed in favour of arbitration seated in St Kitts & Nevis (the "**Stay**").

Later in November 2021, the arbitral tribunal in the St Kitts & Nevis arbitration (the "**Tribunal**") issued an award concluding, inter alia, that the Tribunal has no jurisdiction to grant the reliefs sought because only the Hong Kong Court could grant relief in the circumstances that the Lender is adjudicated as an unlicensed money lender under the MLO. By a further award made by the Tribunal in February 2022, it was concluded that the Borrower's counterclaim, which involves issues relating to the enforceability of the SLAs, should also be dealt with by the Hong Kong Court to avoid inconsistent rulings.

In March 2022, the Lender lodged an appeal to the Jamaican courts (i.e. the supervisory courts of St. Kitts & Nevis) to set aside the awards on the basis that the Tribunal refused to exercise its jurisdiction to adjudicate most of the issues referred to it. The Lender also argued in the appeal that a fresh arbitration should be commenced before a differently constituted tribunal. On the other hand, the Borrower applied to strike out the appeal.

In January 2023, the Borrower applied to lift the Stay in the proceedings. The Borrower argued that the stay should be lifted because the arbitration agreement is *spent* and no longer capable of being performed. The Lender contended that it is wrong to say that the arbitration had concluded and the arbitration agreement is not spent since there is a pending appeal in the supervisory court which the subject arbitration agreement covers, and therefore the lifting of the Stay would be premature.

### Decision

The Honourable Madam Justice Yvonne Cheng held that the Tribunal has already ruled on all of the parties' disputes, and there was nothing further for the Tribunal to address in the arbitration proceedings. In the circumstances, she agreed that the arbitration agreement is spent and the basis for the Stay has gone.

The Lender submitted various authorities to argue that the proceedings in Hong Kong should be stayed pending the determination of the appeal. However, the Court found that none of the authorities support the Lender's contention, and held that the existence of the Lender's appeal to set aside the awards did not change this conclusion since the awards are still operative and binding on the parties unless and until they are set aside. If the awards were set aside in the future, it would be open to the Lender to apply for a further stay at that stage. The Stay was therefore lifted.



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## Commentary

The Court's decision to lift the Stay on the basis that the arbitration agreement was spent reflects the fundamental principle that the Tribunal is rendered *functus officio* (i.e. having fulfilled the function, discharged the office, or accomplished the purpose, and, therefore, of no further force or authority) after having determined the parties' disputes and made the awards.

The Court also confirms that the awards (including the Tribunal's decision that the parties should resolve their dispute before the Hong Kong courts) are fully operative and binding on the parties unless and until they were set aside.

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