Hong Kong’s arbitration year in review: a Christmas blog

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2011 has delivered some significant arbitration developments in Hong Kong, most of which (with some exceptions!) have been undoubtedly positive. So, what were the highlights of the Hong Kong arbitration year – and what challenges might lie ahead?

First, **Hong Kong’s new Arbitration Ordinance (cap. 609) came into effect on 1 June 2011** (blogged here). Drawing heavily on the internationally-recognised and accepted framework of the UNCITRAL Model Law, the new Ordinance was designed to provide maximum party autonomy and minimal court intervention. With a host of features including expanded provisions on interim measures and a new codified obligation of confidentiality, the new Ordinance sets a high standard in modern arbitration legislation and has been enthusiastically welcomed by the arbitration community.

Second, the Court of Final Appeal in *Democratic Republic of the Congo* v. *FG Hemisphere Associates* FACV Nos 5, 6 & 7 **clarified the law in relation to sovereign immunity in Hong Kong**. Whilst immunity will apply to the enforcement of court judgments and arbitral awards (wherever rendered) in Hong Kong, it is clear that it will not apply to arbitral proceedings (blogged here). Parties can therefore include Hong Kong arbitration clauses in their contracts with states, safe in the knowledge that sovereign immunity cannot be pleaded as a bar to the jurisdiction of the arbitral tribunal. But could sovereign immunity prevent the

courts of Hong Kong from exercising supervisory jurisdiction over an arbitration seated here? That question remains unanswered for now, but there are compelling reasons (including *obiter dicta* of the Court of Appeal in the *Congo* case) to suggest that it would not, and that the courts of Hong Kong could exercise supervisory jurisdiction notwithstanding a claim of sovereign immunity. It's also unlikely that state owned entities would be entitled to immunity before the Hong Kong courts (blogged here), restricting the cases in which sovereign immunity would be a live issue to the small number specifically involving sovereign states.

Third, **Hong Kong's pro-enforcement credentials were on clear display in a number of cases upholding the enforcement of arbitral awards in Hong Kong**. In two of the most prominent, *Shandong Hongri Acron Chemical Joint Stock Company Limited* v. *PetroChina International (Hong Kong) Corporation Limited* CACV 31/2011 and *Gao Haiyan and another* v. *Keeneye Holdings Limited and another* CACV 79/2011 (reported here), the Court of Appeal enforced arbitral awards rendered in mainland China and emphasised that the enforcing court should take a mechanistic approach to enforcement and must not review the merits of the award. The court's readiness in the *PetroChina* case to enforce against a mainland state owned entity also illustrates the judicial independence which makes Hong Kong such an attractive venue, particularly in China-related cases.

Fourth, **an international arbitral award rendered in Hong Kong was set aside by the Court of First Instance** under Article 34(2) of the UNCITRAL Model Law in *Pacific China Holdings Ltd* v. *Grand Pacific Holdings Ltd* HCCT 15/2010. This is a rare example of the power to set aside being exercised by the Hong Kong courts, in this case on the basis of procedural irregularities. The case is notable for its discussion of the circumstances in which the court's residual discretion not to set aside an award (Article 34(2) of the Model Law states that an award "*may*" be set aside) should be exercised. The court considered that the applicant in a set-aside case had to establish that "*it cannot be said that if the violation had not occurred the result could not have been different*". The judgment raised concerns for arbitrators and counsel given the frequency with which thorny procedural issues arise in practice, and the result of the appeal which is currently pending is therefore likely to be followed with interest.

Fifth, the **importance of procedural issues at the enforcement stage**, a consideration too often forgotten in the heat of the arbitration proceedings

themselves, was highlighted in the *Keeneye* and *PetroChina* cases. Keeneye demonstrated why it is imperative that a party which objects to the procedure adopted in an arbitration should object formally at the time, since a failure to do so risks being deemed later (for example, in proceedings to set aside an award or refuse enforcement) to be a waiver of the right to object. Conversely, the *PetroChina* judgment is a reminder that where the parties seek a supplementary award from the arbitral tribunal, the procedures required by law or the relevant institutional rules must be followed if the supplementary document is to be recognised as an award at the enforcement stage.

Sixth, so-called **"arb-med" procedures, where arbitrators act as mediators during the course of the arbitration, hit the headlines**. Hong Kong's new Arbitration Ordinance specifically provides for both "arb-med" and "med-arb" (where a mediator is appointed before arbitration is commenced) (reported here), but there were concerns following the judgment of the Court of First Instance in the Keeneye case that the use of arb-med procedure could increase the risk of challenge to the award or its enforcement. Whilst that concern was arguably over-stated given the very specific facts of the case, the recent judgment of the Court of Appeal reversing the first instance decision (reported here) offers some measure of reassurance and indicates that in assessing the propriety of an arb-med procedure in the context of proceedings to enforce the award, the Hong Kong courts will take account of what is considered to be acceptable practice at the seat of arbitration. It remains to be seen, however, whether arb-med will be widely adopted in Hong Kong itself, given the obligation on arbitrator-mediators under the new Arbitration Ordinance to disclose confidential information obtained in any mediation to the parties – a requirement which seems likely to encourage parties to pursue evaluative as opposed to facilitative mediation, or mediation outside the context of the arbitration, rather than to embrace med-arb.

Seventh, **Hong Kong's close ties with the mainland continue to be the source of both opportunities and challenges**. Long recognised as a unique interface between the PRC and other trading nations, Hong Kong offers arbitration users access to a legal profession which has the expertise and experience to deal with PRC-related disputes and the convenience of geographical proximity to the the mainland. At the same time, this very proximity makes the courts and the legal profession all the more keenly aware of the need to uphold, and be seen to uphold, the judicial independence which is a cornerstone of confidence in Hong Kong's

legal system.

The importance of local knowledge was highlighted in the Court of First Instance case of *Klöckner Pentaplast GmbH* v. *Advance Technology (HK) Company Limited* HCA 1526/2010, which provided a useful reminder of the **need, when drafting arbitration clauses providing for arbitration seated in the PRC, to expressly designate an administering institution**. Whilst not addressed by the court, it is also notable that the relevant arbitration clause provided for ICC arbitration in Shanghai. Whether or not such a clause is valid under PRC law remains uncertain, and it is recommended that ad hoc arbitration or arbitration under the auspices of a non-Chinese arbitration institution should not be adopted where arbitration is to take place in mainland China (discussed here).

It's encouraging that the developments above illustrate the quality and continuing development of Hong Kong as an arbitral centre: modern legislation designed to minimise court intervention in the arbitral process; pro-arbitration courts which respect the autonomy of the parties; and particular expertise in dealing with mainland China-related arbitration issues.

With other jurisdictions in the region striving to develop their own arbitration offerings, the challenge for Hong Kong is to continue to innovate and adapt. Looking ahead, the expansion and refurbishment of the Hong Kong International Arbitration Centre which is already underway, the ICC's continued support of its Asia-based secretariat in Hong Kong, and the upcoming revision of the HKIAC Administered Arbitration Rules, will all help to keep Hong Kong's arbitration facilities and legal infrastructure competitive. Along with the continued support of the courts for arbitration, such measures should ensure that arbitration in Hong Kong continues to thrive.

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