Hong Kong Court of Final Appeal refuses leave to appeal in the Grand Pacific v. Pacific China case

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By Justin D'Agostino, Martin Wallace and Yi-Shun Teoh

The Year of the Snake has begun auspiciously for arbitration in Hong Kong, with a recent decision of the Hong Kong Court of Final Appeal (**"CFA"**) underlining once again the jurisdiction's arbitration-friendly credentials and the reluctance of its courts to interfere with the arbitral process and arbitral Awards.

On 19 February 2013, the CFA refused leave to appeal against the judgment of the Hong Kong Court of Appeal (**"CA"**) in *Grand Pacific Holdings Ltd. v. Pacific China Holdings Ltd.* (click here for a copy of the judgment). The CA's judgment, which has been widely applauded in the arbitration community since being handed down in May 2012, reinstated an ICC arbitral Award which had been set aside by the Hong Kong Court of First Instance (**"CFI"**).

At the core of the case were allegations by Pacific China Holdings Ltd. (**"Pacific China"**) that it had been denied an opportunity to present its case and that the procedure adopted in the arbitration was not in accordance with the agreement of the parties. Pacific China argued that these alleged procedural irregularities were in breach of Article 34(2) of the UNCITRAL Model Law, which sets out the grounds on which arbitral Awards may be set-aside (like many jurisdictions worldwide, Hong

Kong adopts the UNCITRAL Model Law as part of its legal framework for arbitration, through the Hong Kong Arbitration Ordinance (Cap. 609)). In a controversial judgment in June 2011, the CFI held that there had been breaches of Article 34(2), and set aside the Award.

The CA unanimously reversed that decision, giving a judgment in which it:

• Found that no breaches of Article 34(2) had occurred. In making this finding, the CA highlighted the wide case management powers of arbitral Tribunals which are a cornerstone of the arbitral process.

• Held that, in order for an arbitral Award to be set aside on due process grounds, it must be shown that any breaches of Article 34(2) were of a *"serious"* or even *"egregious"* nature.

• Accepted in *obiter* comments that the Hong Kong courts have a discretion not to set aside awards even where a violation of Article 34(2)(a) is established (Article 34(2) refers to the circumstances in which an Award *"may"* be set aside), if it is satisfied that the result could not have been different.

• Held that the burden is on the applicant wishing to set aside an Award to show that it had been, or might have been, prejudiced by the conduct of the Tribunal.

The CFA's recent decision concerned Pacific China's attempt to appeal against the CA's judgment. The CA itself had declined in June 2012 to grant leave to appeal from its judgment. Pacific China then applied directly to the CFA for leave pursuant to Section 22(1) of the Hong Kong Court of Final Appeal Ordinance, arguing that it was entitled to appeal both *"as of right"* and because the case involved questions of *"great general or public importance"*. At a hearing of Pacific China's application on 19 February 2013, the CFA did not accept that Pacific China was entitled to be granted leave to appeal and dismissed the application.

The CFA's decision means that the CA's judgment now stands as the authoritative statement of the law in relation to the setting aside of arbitral Awards in Hong Kong.

It is to be hoped that the confirmation by the CA of the threshold which a party must meet in order to establish a violation of Article 34(2) on due process grounds should discourage parties from pursuing unmeritorious challenges to arbitral

awards in Hong Kong. Such challenges would be particularly ill-advised in light of a separate decision of the CA (see blog post here) in which the CA cited with approval caselaw to the effect that, where a party unsuccessfully applies to set aside an Award, it should in principle expect to pay costs on a higher basis than normal, because a party seeking to enforce an arbitral Award should not have to contend with such a challenge.

Both decisions of the CA underline the Hong Kong Courts' long-standing support for arbitration and indicate that they will be slow to interfere with the procedural decisions of Tribunals, in line with international standards. They are likely to be influential in other UNCITRAL Model Law jurisdictions as well.