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Arbitration in Hong Kong: Looking Back at the Year of the Sheep

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2015 was an eventful year in Hong Kong arbitration. The Hong-Kong based institutions shepherded through several reforms, the local courts issued several pro-arbitration decisions, and a long-awaited Law Reform Commission paper opened the door to third-party funding for arbitration.

Third party funding for arbitration in Hong Kong

Readers will be aware of the increasing popularity of third-party funding in international arbitration proceedings in many jurisdictions, including the UK, US and Australia.

However, Hong Kong has been relatively slow in coming into the fold. Recent court decisions have confirmed that litigation (as distinct from arbitration) funding is prohibited by the doctrines of champerty and maintenance. It is true that the judiciary suggested, as early as 1997, that funding of arbitration proceedings may be permissible. However, the law on this issue remains woolly.

Consistent with Hong Kong's position as a leading international arbitration centre, the judicial authorities are reviewing the issue. On 19 October 2015, a sub-committee of the Hong Kong Law Reform Commission issued a consultation paper on third party funding for arbitrations in Hong Kong. The sub-committee made four recommendations:

1. The Arbitration Ordinance be amended to provide that Third Party Funding for arbitration taking place in Hong Kong is permitted under Hong Kong law.
2. "Clear ethical and financial standards for Third Party Funders providing Third Party Funding to parties to arbitrations taking place in Hong Kong" should be developed.
3. The Commission invited submissions as to the nature, provenance, content of such ethical and financial standards and how they should be enforced.
4. The Commission invited further submissions as to whether, and on what basis, a Third Party Funder should be directly liable for adverse costs orders, or orders to provide security for costs.

The sub-committee's support of third party funding is understandable. However, it is rightly concerned that Hong Kong should not "ram" home changes in this new area of law without introducing corresponding safeguards. The consultation period having ended in January 2016, the more detailed recommendations are eagerly awaited.

One area of interest is whether the sub-commission will recommend the mandatory disclosure of funding arrangements. This is a controversial area. There are arguments in favour of requiring a funded party to notify the nature of its funding to the tribunal and to the other party to proceedings (as is already recommended in the IBA Rules on Conflict of Interest in International Arbitration). Such disclosure requirements would avoid arbitrator conflicts and allow for proper determination of whether security for costs should be awarded. However, they also raise concerns for the funded party, which may find funding harder to obtain or else see itself as more liable to an adverse security for costs order.

It is not yet clear if the sub-committee will propose that the new safeguards will be introduced by statute or else by way of a voluntary code of conduct agreed by funders themselves. However, the sub-committee has expressed reservations regarding the self-regulatory approach, citing the lack of "critical mass" of third party funders based in Hong Kong.

HKIAC

The HKIAC introduced a number of initiatives in 2015 with a view to maintaining both Hong Kong's prominence as an arbitration centre, and the institution's own status as a pioneer in international arbitration.

On 20 November 2015, the HKIAC became the first international arbitration institution to open a representative office in China. In a press release the HKIAC confirmed that the office, located within the Shanghai Pilot Free Trade Zone, shall focus on liaising with local institutions, and providing logistical support for arbitration hearings taking place in the mainland. However, for the time being, the new office will not provide case administration services. Indeed it is currently unclear under PRC law whether non-Chinese entities are permitted to accept and administer PRC-seated arbitrations. Provisions of the Arbitration Law suggest that only Chinese arbitral institutions can administer arbitrations in mainland China. On the other hand, in a recent decision, the Chinese Supreme People's Court upheld the validity of a clause providing for China-seated ICC arbitration.

There is some evidence that other arbitral institutions may flock to the mainland, the SIAC having recently established its own arm, and the ICC also having expressed interest in doing so.

The HKIAC has also introduced several other innovations, including: a new evaluation system allowing participants to rate the conduct of their arbitral proceedings and the performance of their arbitrators; and the introduction of a practice note on the consolidation of arbitration proceedings.

The efforts of the institution have not gone unrecognized. The Queen Mary University of London/White & Case International Arbitration Survey, published in October 2015, found it to be the most preferred arbitral institution outside of Europe and the third best arbitral institution worldwide. It was also named to be the most improved arbitral institution over the past five years.

CIETAC Hong Kong

While CIETAC, China's leading arbitration institution, established it's Hong Kong Arbitration Center (HKAC) in September 2012, the HKAC's authority to accept and administer cases was only formalised in the 2015 edition of CIETAC's rules.

Accordingly, it was only from 1 January 2015, when those rules came into effect, the HKAC began accepting cases in its own right, so supplementing its existing role of offering logistical support to

cases administered by other CIETAC entities. HKAC accepted 5 cases in 2015. Its first award was rendered by Hong Kong-based arbitrator James Rogers.

Case law

Hong Kong Court summarizes ten principles of enforcement of arbitral awards

In *KB v S. and Others* [2015] HKCFI 1787, Chan J laid down ten guiding principles summarizing the Hong Kong judiciary's attitude towards the enforcement of arbitration agreements and awards. These principles, which have been described as "10 commandments" of enforcement, are as follows:

- First, "the primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards".
- Second, "[u]nder the Arbitration Ordinance (Ordinance), the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance".
- Third, "the parties to a dispute should be free to agree on how their dispute should be resolved" although this freedom should be subject to "safeguards that are necessary in the public interest".
- Fourth, citing the Hong Kong Court of Appeal's approach in the 2011 *PetroChina* decision ([2011] 4 HKLRD 604), the "[e]nforcement of arbitral awards should be 'almost a matter of administrative procedure' and the courts should be 'as mechanistic as possible'".
- Fifth, following the 2012 *Grand Pacific* Court of Appeal decision ([2012] 4 HKLRD 1 (CA)), "[t]he party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way". In Grand Pacific, the Court of Appeal reinstated an arbitral award that had previously been set aside on the basis of perceived procedural impropriety, on the grounds that the alleged violations were not sufficiently important to justify such steps.
- Sixth, "the court is concerned with the structural integrity of the arbitration proceedings" and so, once again adopting the Court of Appeal's approach in Grand Pacific, "the conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined due process".
- Seventh, "[i]n considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction".
- Eighth, "[f]ailure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of bona fide". Here, Chan J cited the 1999 *Hebei Import* case ((1999) 2 HKCFAR 111) in which the Court of Final Appeal upheld enforcement of an award, finding that a party who wishes to rely on non-compliance with procedural rules should do so promptly and not proceed with the arbitration regardless, "keeping the point up his sleeve for later use".
- Ninth, again citing the *Hebei Import* decision, "[e]ven if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground".
- Tenth, and finally, the parties to the arbitration have a duty of good faith, as once again found the Hebei Import case.

Although the case in question concerned an application to enforce an arbitral award, it has since been held that the same principles would also apply in applications to set aside arbitral awards, their being "the other side of the coin" (*China Solar Power (Holdings) Ltd v ULVAC Inc* [2015] HKEC 2559).

Hong Kong Court Issues First Anti-suit Injunction in Restraint of Foreign Court Proceedings

In *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 3 HKC 246, the Court of First Instance restrained a party from pursuing Turkish court proceedings in breach of an arbitration clause. This case reportedly marked the first time a Hong Kong court granted such an anti-suit injunction to restrain foreign proceedings.

By a charterparty dated 6 October 2014, the plaintiff, who are the owners of a vessel named the 'Ever Judger' and the defendant, a Turkish company, agreed upon the carriage of a cargo of steel wire rods from China to Turkey. The charterparty stipulated that any dispute arising out of or in relation to it shall be referred to "arbitration in Hong Kong in accordance with the Hong Kong Arbitration Ordinance".

Subsequently, a dispute arose relating to the condition of the cargo upon discharge at the Turkish port. The Turkish company first initiated court proceedings in its home country and the shipowner then sought an anti-suit injunction from the Court of First Instance in Hong Kong in an attempt to stay the Turkish proceeding.

The judge found that it had the authority to grant an injunction to restrain the pursuit of foreign court proceedings brought in breach of an agreement to arbitrate in Hong Kong, provided the applicant has not delayed and there is no good reason for not doing so. This decision has provided welcome clarity on the Hong Kong position for awarding anti-suit injunctions in favour of arbitration, and has further demonstrated the Hong Kong courts' supportive approach towards arbitration.

Hong Kong Court upholds injunction in support of prospective Singaporean "hybrid" arbitration

In *Macao Commercial Offshore Ltd v TL Resources Pte Ltd* [2015] HKEC 2439, the Court of First Instance upheld an injunction in support of prospective arbitral proceedings in Singapore under a "hybrid" arbitration clause providing for proceedings administered by the SIAC under the ICC rules.

The Plaintiff and Defendant executed a Sales Agreement under which the Defendant agreed to sell to the Plaintiff a cargo of iron ore. The arbitration clause in the Sales Agreement provided that "If the dispute or matter cannot be settled by mutual accord between the Parties, such dispute or claim shall be referred to Singapore International Arbitration Centre (SIAC) for arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce".

A dispute arose between the parties. The Plaintiff first applied to the Court in Hong Kong for an ex-parte Mareva injunction, whereby the defendant was to be restrained from removing or disposing of its assets in Hong Kong. The injunction was continued on the return day on which the defendant failed to appear. Subsequently, the Plaintiff submitted its request to the ICC for arbitration in Singapore. Thereafter, the defendant applied to set aside the Injunction in the Hong Kong court.

In the decision, Judge Mimmie Chan found that notwithstanding the agreement's hybrid nature or that the Claimant had itself apparently "departed" from it by commencing proceedings before the ICC rather than the SIAC, the Court left it to the ICC tribunal to determine its jurisdiction. Judge Chan further expressed the view that it would be possible for the subsequent award to be recognised in Hong Kong.

An application to grant injunctive relief in favour of foreign-seated arbitral proceedings was to be held to a two-stage test. First the applicant must have a "good arguable case, that there is a real risk of dissipation of assets, and that the balance of convenience is in favor of the grant." Second the court must not consider it unjust and inconvenient to grant the injunctive relief. The present application satisfied both limbs.

The decision not to pre-empt tribunal decisions on jurisdiction is again typical of the stance of the Hong Kong courts. Nonetheless it underlines the fact that adopting hybrid arbitration clauses can be risky – potentially giving rise to questions over enforceability and opening the door to procedural uncertainty.

Conclusion

As Hong Kong departs the year of the sheep, it remains a leading regional arbitration venue boasting world class arbitration facilities, innovative arbitration institutions and a supportive judiciary. The steps taken by these institutions and authorities in 2015 will go some way to retaining the confidence of arbitration users. These efforts show a welcome dedication to ensure that Hong Kong stays above the herd.

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