

Set Aside Application Shredded: Hong Kong Court Refuses Set Aside Application in Joint Venture Dispute

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Thomas Walsh, Lei Shi (Clifford Chance)

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This post looks at a recent Hong Kong High Court judgment by Mimmie Chan J (*Arjowiggins HKK2 Ltd v X Co* [2016] HKEC 2472) firmly rejecting a set aside application, brought by a paper producer in relation to an HKIAC award for USD 24 million against it, and which led to indemnity costs being ordered against the applicant.

The clear lesson from the judgment is that any party considering challenging an arbitral award in Hong Kong should think carefully before doing so as the Hong Kong courts, and Mimmie Chan J in particular, show little patience for unmeritorious or technical attempts to resist enforcement. Moreover, parties must raise any objections during the underlying arbitration proceedings rather than seeking to hold them in reserve or uncover them after the fact.

The Arjowiggins Case

The Claimant in the underlying arbitration proceedings was French-based *Arjowiggins*. The Respondent was Shandong Chenming Paper Holdings. *Chenming* is one of the largest paper producers in China and is referred to as "X Co" in the judgment.

Arjowiggins and Chenming entered into a JV Contract in 2005, establishing a JV Company in the Mainland to manufacture high-margin paper products. Both the contract and the arbitration agreement were expressly governed by PRC law.

The arbitration agreement provided that disputes arising out of or in connection with the JV Contract:

"shall be referred to and finally resolved by arbitration in Hong Kong in accordance with the Arbitration Rules of the Hong Kong International Arbitration Centre (the "HKIAC Rules")...".

Alongside the main JV Contract, Chenming and the JV Company (i.e. not Arjowiggins) entered into a Steam Supply Contract under which the Chenming agreed to supply the JV Company with steam for use in the production process.

In 2012 Arjowiggins initiated HKIAC proceedings against Chenming, seated in Hong Kong. In

November 2015 the arbitral tribunal of Dr Michael Moser, Professor Lu Song and Christopher Lau SC (Chair) rendered an award in favour of Arjowiggins as Claimant in the amount of USD 24 million.

Chenming then initiated set aside proceedings in Hong Kong on three separate grounds, namely (i) the alleged invalidity of the arbitration; (ii) lack of jurisdiction; and (iii) improper constitution of the arbitral tribunal. These are addressed further below.

The invalidity ground

The first ground alleged by Chenming was that the arbitration agreement was invalid under Article 16 of the PRC Arbitration Law.

Article 16 provides that any arbitration agreement must include (i) the parties' intention to arbitrate disputes; (ii) the matters to be arbitrated; and (iii) the Arbitration Commission selected by the parties. Here, as accepted by both parties, it was clear that HKIAC was not expressly identified as the 'Arbitration Commission' in the arbitration agreement.

Mimmie Chan J rejected this first ground. She accepted the Claimant's argument that the HKIAC was identifiable as the 'Arbitration Commission' from the HKIAC Rules themselves. Further, she found that that the parties had reached a "*supplemental agreement*" which named the HKIAC when they adopted the HKIAC's amended Terms of Appointment in the arbitration proceedings. Finally, Mimmie Chan J reiterated the point she has made in a number of other recent judgments, that a party must raise any objection without undue delay and that failure to do so shall be deemed a waiver of its right to object. In particular, she noted that Chenming had not raised any objection during the proceedings and had even raised counterclaims against Arjowiggins.

Further, the Court took particular issue with Chenming's expert, finding that he had effectively behaved as a "hired gun" and that he had "*failed to give his opinion as an independent expert of the Court, and has simply reargued the case of the Respondent as advanced by the Respondent's team, of which [the expert] formed a part, in the PRC proceedings and in the arbitration.*"

The jurisdiction ground

The second ground on which Chenming sought to set aside the arbitral award was that the tribunal did not have jurisdiction, as the JV Company had submitted to the jurisdiction of the PRC courts in relation to a separate dispute between the JV Company and Chenming (i.e. not involving Arjowiggins).

The Court rejected this as it was evident that the parties, the contractual relationships and the issues in the two sets of proceedings were separate and distinct.

The composition ground

The third ground was that the default appointment of Chenming's party appointed arbitrator and the Chairman was allegedly not in accordance with the parties' agreement, as they were appointed by the HKIAC Council and not the Chairman of the HKIAC.

In her wholesale rejection of this argument, Mimmie Chan J referred to *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* (in liq) (No 1) [2012] 4 HKLRD 1 and noted that it has long been established in Hong Kong that unmeritorious technical points or minor procedural complaints are not sufficient to set aside awards. Further, and as a final 'shredding' of Chenming's argument, she noted that the Chairman of the HKIAC is a member of the HKIAC Council.

Commentary

This case reiterates the arbitration-friendly message that the Hong Kong courts, and Mimmie Chan J in particular, have advanced for many years now. It demonstrates that the Hong Kong courts will continue to resist undeserved challenges to awards, punishing them with indemnity costs as was the case in Arjowiggins.

Interestingly, the judgment comes just weeks after Mimmie Chan J *did* set aside an HKIAC award on the basis that the Respondent, who had been arrested and detained incommunicado in the PRC for the duration of the arbitration, had not been given proper notice and was unable to present his case. That judgment, whilst rare, is a neat counterparty to the Arjowiggins case as it demonstrates that the Hong Kong courts are not just arbitration friendly but highly sophisticated and will exercise their power where required. However, no such exercise was warranted in the Arjowiggins case.