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Hong Kong Court of Final Appeal confirms robust approach to costs in unsuccessful set aside applications

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In the latest instalment of *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd*, the Hong Kong Court of Final Appeal has confirmed that parties who unsuccessfully challenge arbitral awards will generally be ordered to pay costs on the indemnity basis. This is a relatively rare and robust approach, compared to the majority of common law jurisdictions (for example, England and Wales and Victoria, Australia), which adopt the position that costs are ordinarily awarded against the unsuccessful party on a “party-and-party” basis, unless special circumstances can be established by the successful party. The Hong Kong Appeal Committee’s decision of 16 August 2013 means that the Hong Kong Court of Appeal’s decision on costs [[hyperlink](https://kluwerarbitrationblog.com/blog/2012/10/29/the-loser-pays-it-all-hong-kong-court-of-appeal-confirms-principle-of-indemnity-costs-for-failed-set-aside-application/)] now stands as the law in Hong Kong on the usual basis for costs in unsuccessful set aside applications. This decision reinforces, once again, the emphasis placed by the Hong Kong courts on the finality of the arbitral process.

On 9 May 2012, the Hong Kong Court of Appeal unanimously overturned the first instance decision in *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd CACV 136/2011*. The Court of First Instance, in that case, had ordered the set aside of an ICC arbitral award for alleged violations of Article 34(2)(a) of the UNCITRAL Model Law.

After the Hong Kong Court of Appeal had declined in June 2012 to grant leave to appeal from its judgment, *Pacific China* applied directly to the Hong Kong Court of Final Appeal 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”. The Hong Kong Court of Final Appeal did not accept that *Pacific China* was entitled to be granted leave to appeal, and dismissed the application on 19 February 2013.

In a separate decision on costs on 23 July 2012 (click here for a copy of the judgment), the Hong Kong Court of Appeal also made clear that where a party has been unsuccessful in setting aside or resisting enforcement of an arbitral award in Hong Kong, in the absence of special circumstances, that party should pay costs on an indemnity basis. The Court agreed with the approach of Reyes J in *A v R* [2009] 3 HKLRD 389 and its own approach in *Gao Haiyan & Anor v Keeneye Holdings*

Ltd & Anor (No 2) [2012] 1 HKC 491 in holding that, given that the parties had agreed to arbitration, applications by a party to set aside an arbitral award or to resist enforcement should be exceptional events. Where a party unsuccessfully makes such an application, the Court stated that it is fair that the unsuccessful party should expect to pay costs on a higher basis.

In its submissions, Pacific China had referred to the Australian decision of *IMC Aviation Solutions Pty Limited v Altain Khuder* [2011] VSCA 248, in which the Victorian Court of Appeal declined to adopt the approach of Reyes J in *A v R* and found that there was nothing in the Victorian civil procedure statute or in the nature of enforcement proceedings for arbitral awards which, of itself, calls for costs being awarded against an unsuccessful party on a basis different from that on which they would have been awarded in other civil proceedings. The Hong Kong Court of Appeal carefully considered the reasons of the Victorian Court of Appeal, but remained of the view that the Hong Kong courts can and should order costs on the indemnity basis.

Pacific China applied for leave to appeal to the Hong Kong Court of Final Appeal on costs, but this application was rejected by the Appeal Committee on 16 August 2013 on the basis that Pacific China's application disclosed no reasonable grounds for leave to appeal.

The decision of the Hong Kong Court of Final Appeal on costs brings welcome certainty to the law in relation to the basis on which costs will generally be ordered in unsuccessful set aside applications in Hong Kong. The strong indication that Hong Kong courts will, in principle, award indemnity costs against a party that applies unsuccessfully to set aside, or resist enforcement of, an arbitral award is yet another example of the Hong Kong judiciary's strong support for arbitration. Along with the substantive decision in *Grand Pacific*, which confirmed that the Hong Kong courts will be slow to interfere with both the procedural decisions of arbitral tribunals and arbitral awards, these decisions are an important reminder that disappointed parties should carefully consider the potential costs consequences before launching challenges to arbitral awards in Hong Kong – or be prepared to pay the (high) price of failure.

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