Kluwer Arbitration Blog

Post-Chinese New Year Review of 2014 Arbitration Developments in Hong Kong

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Notwithstanding 2014's political and constitutional upheavals, arbitration in Hong Kong has continued its successful trajectory as a popular and well-regarded means of alternative dispute resolution. Recent Hong Kong court decisions and developments at the Hong Kong International Arbitration Centre (HKIAC) reinforce the pro-arbitration attitude of the courts and HKIAC's position as a world-class arbitral institution.

Case law

Stay of a winding-up petition in favour of arbitration

Quiksilver Greater China Ltd v Glorious Sun JV Ltd [2014] 4 HKLRD 759 marked the first time a Hong Kong court stayed a petition to wind up a solvent company so that an underlying shareholder dispute could be resolved in accordance with an arbitration agreement between the shareholders. US-based surfwear maker Quiksilver had formed a Hong Kong-based joint venture with Chinese fashion company Glorious Sun. Lacklustre business performance, however, saw Quiksilver looking for an exit in the form of a sale of shares in the joint venture to Glorious Sun. Having failed to reach a consensus on the terms of a replacement licence agreement to allow Glorious Sun to continue marketing Quiksilver's products, Glorious Sun commenced arbitration to enforce the share sale. Quiksilver then filed a petition with the Hong Kong courts to wind up the joint venture.

In the Court of First Instance, Harris J ordered a stay of the winding up proceedings in favour of arbitration. He rejected Quiksilver's argument that Hong Kong's Arbitration Ordinance (Cap 609) did not apply to winding up petitions and that the court did not have a residual jurisdiction to stay such a petition. He decided that although arbitrators could not grant winding up orders, the question whether a shareholder's conduct was inconsistent with a shareholders' agreement and the matters that founded a winding up petition could be determined by an arbitrator. The judge was not persuaded by Quiksilver's argument that its winding up petition represented the exercise of a class right granting an inalienable right of access to the court. A petition by a creditor to wind up a company on grounds of insolvency could not be stayed because it invoked a class right available to all creditors, whereas the situation was different in relation to a winding up petition of a solvent company on the 'just and equitable' ground under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). If, however, Quiksilver were to prevail in the arbitration, the stay would be lifted so that the winding-up order could be granted.

This decision illustrates the court's intolerance of parties' attempts to circumvent arbitration agreements and to avoid resolving disputes by arbitration even where they have previously agreed to do so. Parties should not attempt to invoke the court's jurisdiction by filing a winding up petition, as arbitrators can adjudicate on the bases founding the petition, even if they do not have the authority and jurisdiction to grant winding-up orders.

Arbitration agreement not 'inoperative' through performance of prior arbitration

In *T v TS* [2014] HKLRD 772, Mimmie Chan J held that arbitration agreements are not 'discharged' or 'inoperative' purely through the performance of a prior arbitration obligation, as one or more disputes can arise out of the same arbitration agreement.

A dispute between the parties had originally been the subject of arbitral proceedings referred to a Hong Kong-seated arbitral tribunal. The tribunal had issued an award dismissing the claims of the plaintiff (the claimant in the arbitration) and awarding damages to the defendants (the respondents in the arbitration). The award was upheld by the Court of First Instance in subsequent setting aside proceedings but was not honoured by the plaintiff, which then commenced a second arbitration against the defendants, arguing that the first tribunal had failed to deal with an aspect of the claim. The plaintiff also brought concurrent proceedings in the Court of First Instance, arguing that the arbitration agreements had been discharged as a result of the first arbitration and were therefore 'inoperative' to stay the court proceedings.

The plaintiff's plainly paradoxical argument in bringing a second arbitration, whilst claiming that the arbitration agreements had been spent, did not persuade the court. The judge stayed the court proceedings and ordered that the plaintiff pay costs on an indemnity basis, seeing its actions as an "abortive and unmeritorious" attempt to "challenge, or to frustrate enforcement of or compliance with a valid award" and that such actions should not be encouraged.

This decision has been largely welcomed by practitioners as a sensible and commercial approach, sending out a warning to parties who choose to ignore the full effect of arbitration agreements. It also confirms the general pro-arbitration attitude of the Hong Kong judiciary.

Winding-up petition not a means of enforcing awards

In *Re Insigma Technology Co Ltd* (HCCW 224/2013, 15 October 2014), the Court of First Instance refused to make a winding up order in respect of Insigma, a Mainland Chinese company listed on the Shanghai Stock Exchange, even though there was likely to be no other way of enforcing an arbitration award that was not recognised by the Chinese courts.

Alstom Technology Ltd, a Swiss company, filed a winding up petition in the Hong Kong courts to wind up Insigma when the latter failed to honour two awards worth US$45 million made in Alstom's favour in a SIAC arbitration seated in Singapore. The awards had been recognised in Hong Kong and England& Wales but denied recognition by the Chinese courts. Alstom argued that Insigma was unable to pay its debts and that the appointment of liquidators who would investigate the latter's affairs could identify assets in Hong Kong and other jurisdictions in order to secure payment of the awards. Alstom also argued that it was just and equitable to wind up Insigma.

Harris J stated that it would require "exceptional facts" to impose the Hong Kong insolvency

regime on an active listed company incorporated in Mainland China in circumstances where a Mainland court would not order a liquidation. He held that the Hong Kong courts could not exercise the power to wind up Insigma as none of the three core requirements established by case law were satisfied, *viz*:

- there was no sufficient connection with Hong Kong, given that most of Insigma's business was conducted on the Mainland;
- (ii) a liquidator appointed in Hong Kong was unlikely to be recognised in the Mainland, so there was no reasonable possibility of a winding up order benefiting those who applied for it; and
- (iii) Alstom's registration of an arbitration award in Hong Kong was insufficient to make it a person subject to the court's jurisdiction with a material economic interest in the winding up.

The judge remarked that although he understood Alstom's "deep sense of grievance" that it was unlikely that the awards would be honoured, the winding-up petition was, at best, speculative. Taking into account Insigma's failure to honour the awards, the judge departed from the general approach that costs should be paid on an indemnity basis and ordered Alstom to pay costs on a party and party basis.

HKIAC

HKIAC introduced a number of initiatives in 2014 with a view to maintaining both Hong Kong's primacy as an arbitral venue in the Asia-Pacific region and its own status as a pioneer and leader in international arbitration.

Inclusion of choice of law provisions in HKIAC model clauses

The HKIAC's model arbitration clauses were updated in August 2014 to include choice of law provisions. This inclusion reminds parties to consider designating an appropriate law to govern their arbitration agreement. The governing law of the arbitration agreement is important as it may impact upon the formation, existence, scope, validity, legality, interpretation, termination, effect and enforceability of, as well as the identities of the parties to, the arbitration agreement.

Where parties have failed to specify the law of the arbitration agreement, case law has been divided as to which law should apply to the agreement: the law of the substantive contract or that of the seat of arbitration. In England & Wales and Hong Kong, the courts lean towards applying the law of the contract, though the Hong Kong courts have emphasised the need to examine the particular terms of the arbitration agreement and the surrounding circumstances. In Singapore and India, however, the courts have inclined towards applying the law of the seat.

Prompting parties to choose the governing law of their arbitration agreement removes the uncertainty associated with and the need for costly and unnecessary litigation over which law should apply in the absence of a prior agreement. For example, for China-related disputes that are subject to arbitration in Hong Kong, parties could remove the ambiguity concerning the applicability of Chinese law by specifying the governing law.

Practitioners have generally welcomed this inclusion, seeing it as a way of facilitating the whole arbitral process, from the negotiation of the arbitration agreement to the enforcement of an arbitral award. This forward-thinking innovation bolsters the HKIAC's position as a leading arbitral institution and has won it the *Global Arbitration Review* Award for "innovation by an individual or organization in 2014".

Pilot Scheme for Arbitration on Land Premium

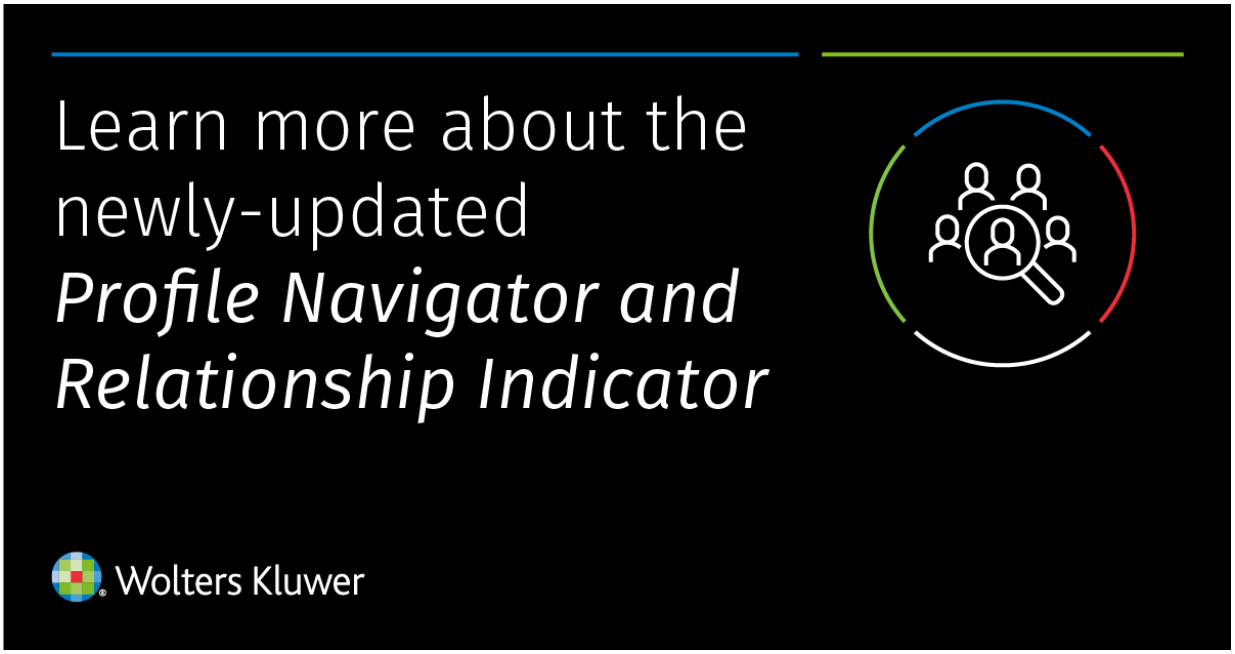
The Pilot Scheme for Arbitration on Land Premium (the Scheme), implemented as a result of the Chief Executive's January 2014 Policy Address, aims to facilitate early agreement between the Government and land developers, through the use of arbitration, on land premium payable for lease modification or land exchange applications,, in order to expedite land supply for housing and other uses.

Where land developers and the Government fail to agree upon the premium amount in discussions between them, either party may propose arbitration. A three-member arbitral tribunal comprising a retired senior judge, barrister or solicitor as the chair and two experienced professional land surveyors will be appointed. If the parties fail to appoint any arbitrators within a specified time limit, the HKIAC, as the appointing authority, will appoint the arbitrators. Land developers are deterred from walking away from the arbitral process after an award has been issued by a requirement to pay the Government 15% of the premium last assessed by its Lands Department. An award made by a tribunal under the Scheme may be set aside on the grounds listed in the Arbitration Ordinance (Cap 609) as well as on an additional ground of serious irregularity. The Scheme began running for an initial period of two years with effect from 27 October 2014 and will be subject to further review and fine-tuning.

The use of arbitration for public sector disputes is uncommon in other jurisdictions and is regarded as novel and creative. If arbitration proves to be a more efficient and flexible way of resolving public sector disputes, its use may be further explored in other areas or industries, once again placing the HKIAC at the forefront of arbitral development.

Conclusion

The consistently pro-arbitration attitude of the Hong Kong courts, the improvements to the model arbitration clauses and the creative use of arbitration to resolve public sector disputes, are but several of the developments in arbitration in 2014. While the effects of such developments remain to be seen, there is no doubt that arbitration is maturing quickly as the preferred means of alternative dispute resolution. The confidence and high regard that users, policy makers and the judiciary continue to have in arbitration in Hong Kong and in the arbitral services provided by the HKIAC will certainly be a major driving force in furthering developments in arbitration in 2015.



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