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Arbitration in Hong Kong: The Year of the Dog in Hindsight

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As an arbitration hub, Hong Kong has an enviable pedigree. The territory boasts a modern workable arbitration law, robust legal system, and a cohesive arbitration community. It is routinely ranked highly in indices of economic freedom; judicial independence; and perceived arbitration friendliness.

In the Year of the Dog, Hong Kong's authorities and institutions have continued to build on this legacy[1)] Its legislature brought into force reforms permitting third party funding for arbitration; its home grown arbitration institution, the HKIAC, released new rules; and its courts handed down a number of pro-arbitration decisions.

Third party funding

On 1 February 2019, the territory formally brings into effect amendments to its Arbitration Ordinance (Cap. 609) ("**AO**"). The new provisions abolish the common law doctrines of maintenance and champerty insofar as they apply to Third Party Funding (or "**TPF**") for arbitrations in Hong Kong.

Readers will know that TPF is the funding of legal proceedings in return for financial reward by a third party which does not otherwise have an interest in the proceedings. The funder provides funding on a non-recourse basis, only receiving a return if the claim is successful. Hong Kong's reforms have the effect that the territory now joins a number of other jurisdictions including Singapore, Australia, and England and Wales, which permit TPF for arbitration.

(Sensibly, the updated AO also permits the funding of services in Hong Kong in respect of arbitrations seated outside the territory. This reflects the fact that Hong Kong's legal community also represent clients in arbitrations seated in other jurisdictions.)

The amendments have been some years in the making (see the author's posts in previous years). Although the law was formally amended as early as 2017 it was only following the publication in December 2018 of a code of practice, under section 98P of the AO, (the "**Code**") that the amendments were brought into force.

The Code stipulates duties on funders relating to *inter alia*: capital adequacy; conflicts of interest; confidentiality; privilege; disclosure and funding agreement provisions. These obligations are for

the most part reflective of provisions contained in mandatory or voluntary codes in other jurisdictions. Under section 98R of the AO, failure to comply with the Code does not, in itself, render a funder liable to judicial or other proceedings. However, it is admissible in evidence, and any failure to comply with the Code may be taken into account if relevant to a question being decided in such proceedings.

It is instructive to compare Hong Kong's reforms with those recently entering into force in Singapore, another jurisdiction which now permits TPF for arbitration. The Singaporean reforms apply only to a fairly narrow class of funders with funding at their "principal business". By contrast, the Hong Kong's amendments have wider application, permitting funding by any party to a funding agreement which does not otherwise have a legal interest in the arbitration (section 98J of the AO). The difference in approach perhaps explains why the Department of Justice, took the time to consult and develop the comprehensive Code before the new AO took effect. Singapore, which progressed its own reforms more rapidly, as yet has no wide ranging code of conduct of this sort. However, the professional funders identified in the Singaporean legislation will to some degree be sophisticated entities with well-established funding practices, which take account of funding practices in other jurisdictions (such as those set out in the England and Wales Association of Litigation Funders' Code of Conduct).

Arbitration institutions in Hong Kong

Hong Kong is home not only to the HKIAC, but also the Asia office of the ICC, and since 2012, the CIETAC Hong Kong Arbitration Centre ("**CIETAC HKAC**"). Each of these institutions is continuously refreshing its arbitration offerings.

Notably, in 2018, the HKIAC issued new Administered Arbitration Rules. A full update on the new rules was previously published on this blog. However, in summary, the new provisions: facilitate electronic document submission by parties on to secured online repositories (Articles 3.1(e), 3.3, 3.4 and 13.1); for the first time allow a party to commence emergency arbitration ("EA") prior to the filing of a Notice of Arbitration (Article 23.1 and Schedule 4); reduce the time frames for the EA process (Article 23.1 and Schedule 4); introduce an early determination procedure (Article 43); broaden the scope for single arbitration under multiple contracts (Article 29); and, in another first, introduce a default time limit for rendering an award — three months after the closure of proceedings or the relevant stage of the proceedings (Article 31.2). The changes are fairly incremental in nature. Nonetheless they reinforce the HKIAC's intention to stay at the cutting edge of international best practice.

As discussed below, all three of the Hong Kong based institutions continue to position themselves to take advantage of the Chinese Belt and Road initiative, the growth of investment arbitration in Asia and other recent trends.

Case law

Hong Kong courts have, in the past 12 months, handed down a number of arbitration-related judgments. Three of the most significant are summarised below.

In *Arjowiggins v Shandong Chenming* [2018] HKCFI 93; HCCT 53/2015 (19 January 2018), the Court of First Instance ("**CFI**") granted an anti-suit injunction restraining Shandong Chenming, an unsuccessful party to arbitration, from continuing parallel litigation proceedings in the PRC mainland. Whilst anti-suit injunctions have in the past been awarded under section 45(2) of the AO, in this case, the CFI granted the relief under section 21L of the High Court Ordinance (Cap. 4). The decision underlines the Hong Kong courts' reluctance to entertain parties attempting to litigate (or re-litigate) matters which fall within the scope of an arbitration agreement.

In *Z v Y* [2018] HKCFI 2342; HCMP 1771/2017 (18 October 2018), the CFI refused to enforce a mainland Chinese award on the ground that the Tribunal had not given adequate reasons for its decision to reject evidence that the underlying agreement was invalid under PRC law. Applying *R v F* [2012] 5 HKLRD 278; HCCT 32/2011 (3 August 2012), the court found that "*the reasons may be short, so long as the factual and legal basis are explained and the reasoning is expressed to enable the parties to understand how, and why, a finding is made on a material issue, and how a conclusion is reached by the tribunal*". The case provides a sober reminder of the difficulties parties will face in enforcing in Hong Kong awards with insufficiently reasoned decisions. The author's full report on the decision can be found here.

Finally, the latest judgment in the decade-long Astro Lippo saga suggests the story will continue well into 2019. Readers will recall Astro's unsuccessful attempts to enforce five Singaporean arbitration awards in that jurisdiction, giving rise to a 2013 Singaporean Court of Appeal decision in which it restated the applicability in Singapore of the choice of remedies doctrine (see report here). In *Astro Nusantara International B.V. and Others v. PT First Media TBK* [2018] HKCFA 12; FACV 14/2017 (11 April 2018), the Hong Kong Court of Final Appeal, overturning decisions of the lower courts, allowed First Media (the Lippo entity) an extension of time to apply for leave to set aside orders granting enforcement of these awards in Hong Kong. The Hong Kong courts will now hear the substantive challenge to enforcement.

The next 12 months

Looking forward to the Year of the Pig, three trends merit particular attention.

First, Hong Kong's authorities and institutions will continue to position the territory as the preferred jurisdiction for resolving disputes arising out of the PRC's belt-and-road initiative ("**BRI**"). The BRI, which the PRC government announced in 2013 and involves an enormous investment programme over three continents, will almost certainly lead to an increase in commercial disputes along the Belt and Road region. In recent years each of the ICC, HKIAC and CIETAC has launched its BRI initiative.

Second, and relatedly, Hong Kong looks set to benefit from an expected increase in investor state disputes, brought under bilateral and multilateral investment treaties. The HKIAC, which has from 2016 implemented a policy of offering hearing and meeting rooms free of charge to parties in HKIAC administered dispute resolution proceedings involving certain states, is also understood to be currently administering at least two investment treaty claims. It is noteworthy too that in October 2017, CIETAC brought into force its own international investment arbitration rules. These specifically anticipate administration of such arbitrations by CIETAC HKAC.

A third issue which could be of significance is the ongoing trade dispute between China and the

United States, which may impact upon commercial transactions, and consequently arbitrations, in Hong Kong and the wider region.

In the Chinese Zodiac, the Pig denotes good fortune. The next lunar year looks to be one of opportunity for Hong Kong, as it seeks to maintain its unique position as a common law jurisdiction with a close cultural and geographic relationship to mainland China. The author would like to take this opportunity to wish all readers in Hong Kong and elsewhere a very Happy Year of the Pig!

References

?1 The views expressed herein are the author’s only.

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