
Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: Fraud in Arbitration – Overcoming Limitations on Tribunal Powers

Lillian Wong (Debevoise & Plimpton LLP) · Friday, October 29th, 2021

On the second day of Hong Kong Arbitration Week 2021, Debevoise & Plimpton (“**Debevoise**”) hosted a virtual panel on “*Fraud in Arbitration – Overcoming Limitations on Tribunal Powers*”, exploring the strategies that may be employed to uncover and overcome fraud in an arbitration, including by invoking judicial power in support of arbitral proceedings.

Panelists included Mr David W. Rivkin (Debevoise, New York & London and Co-Chair of the Hong Kong International Arbitration Centre), Mr Mark Johnson and Mr Gareth Hughes (Debevoise, Hong Kong), Ms Natalie Reid (Debevoise, New York), Ms Swee Yen Koh (Wong Partnership, Singapore), and Ms Chiann Bao (Arbitration Chambers, Hong Kong). The panel discussion was moderated by Mr Cameron Sim (Debevoise, Hong Kong).

Fraud in Arbitration

Mr Rivkin started the discussion by exploring the significant impact of fraud on the victim’s rights and procedural norms. Generally, fraud has the same impact in arbitration as in litigation, but the key difference is the powers available to arbitral tribunals and courts to deal with the impact of fraud. Mr Rivkin illustrated the importance of taking preemptive steps in arbitral proceedings where fraud is suspected. He provided an overview of the difficulties that may be encountered in cases involving fraud at different stages of the arbitral process, including attempts to delay procedural steps, illegitimate counter-attacks, and parties engaging in further fraud to cover up existing fraud.

Fraud and Confidentiality

Mr Johnson discussed the risk of abuse of confidentiality protections in cases concerning fraud. He explained that the confidentiality restrictions may be invoked by the wrongdoer to avoid disclosing certain information, allege that the other party has breached confidentiality restrictions in the arbitration, bury relevant information in data rooms, or even abuse redactions to documents.

Arbitral Tribunal's Powers: Adverse Inferences and Peremptory Orders

Turning to the powers of the tribunal in encouraging compliance with tribunal orders, Ms Reid highlighted the operation and effect of adverse inferences, a presumption made by a tribunal when a party fails to produce evidence it has been ordered to produce. Whether adverse inferences will be made ultimately depends on the party's advocacy and credibility. If a tribunal accepts that a document has genuinely and innocently been lost or destroyed rather than deliberately withheld, then no adverse inferences are likely to be drawn. Ms Reid further noted the difficulty that often arises in defining the precise inference that should be drawn from an unseen document. She noted that, although adverse inferences may not be sufficient to encourage compliance with tribunal orders, it can be a useful tool to help obtain the result that a party needs from an arbitral tribunal in the form of a favourable award.

Ms Bao also explained from an arbitrator's perspective the considerations that the tribunal will likely take into account when considering whether to draw adverse inferences, such as whether the non-production was intentional, any valid reason for the non-production, and the suitability and effects of the proposed adverse inferences on the final award. She suggested that the tribunal may, as a preemptive measure once noting any element of fraud in the arbitration, make reference to this power early in the proceedings to encourage evidence production.

Peremptory orders are another power available to tribunals to encourage compliance with their existing orders. Mr Hughes explained that they are orders that require compliance with an earlier order, failing which a specified sanction will apply (*i.e.*, analogous to "unless" orders in common law courts). He stressed that the terms of the orders must be carefully considered and worded to avoid opening up awards to challenges. Mr Hughes further illustrated by a case he handled that peremptory orders, even if ignored by the respondent, may still be helpful in assisting further applications to court for stronger measures (such as appointment of receivers), as it may present the court with a history of non-compliance by the respondent.

Ms Bao echoed this view and noted that the tribunal will likely take into account considerations such as the nature, consequences, and utility of the proposed terms when making peremptory orders.

Court Applications Available

Disclosure Orders

Noting the limitation of the tribunals in compelling third party disclosure, Ms Koh summarized Norwich Pharmacal orders and Bankers Trust orders, two types of common law disclosure orders that may be available to obtain information about a wrongdoer. Norwich Pharmacal orders may be used to identify a third party who has information about the wrongdoer. Bankers Trust orders are more specific and concern a court's jurisdiction to order a bank to disclose documents and correspondence relating to the account of a customer who is *prima facie* guilty of fraud.

Freezing Injunctions

Ms Reid further compared common law freezing injunctions and arbitral preservation orders. Both remedies are aimed at preventing a party from dealing with assets in dispute. She opined that the

court-ordered freezing order is often preferable, because there is less of a tip-off risk—court applications may be made *ex parte*, and the freezing injunction is immediately and directly enforceable.

Receivership

Mr Johnson explained that the role of court-appointed receivers is to take control of assets in dispute and generally to hold the ring pending the determination of claims. Whilst receivership is considered the last resort by the courts, the appointment of receivers is highly desirable in the context of fraud, because they will ensure that untrue statements are no longer put forward and likely lead to rapid monetization of an award. He further noted that although Hong Kong courts have the power to appoint receivers in support of arbitration, this is not a universal option available in all jurisdictions.

Contempt of Court

In connection with parallel court proceedings, Mr Hughes introduced contempt of court as an avenue of redress if the opposing side has breached a court order or injunction, or otherwise made a false statement to the court. Depending on the severity of the contempt, it can be punishable by imprisonment, the threat of which can be very helpful to bring wrongdoers to the settlement table. However, Mr Hughes remarked that contempt of court applies only to statements made before the court, not before an arbitral tribunal.

Tension Between Tribunal and Court

Finally, Ms Bao provided valuable insights on the tension between the tribunals and courts, from an arbitrator's perspective. She was of the view that if the application sought involves a third party or is better made *ex parte*, it may be preferable to make the application to the court, as such applications are not available in arbitration.

Conclusion

The panel discussion was very comprehensive in addressing the powers of arbitral tribunals in tackling cases involving fraud. Invoking judicial power in support of arbitral proceedings may be an important strategy in uncovering fraud. The presence of fraud risks derailing the arbitral process, but fraud can be unraveled in arbitration. By strategically utilizing the various tools available to both courts and tribunals, a party may be able not only to secure awards in their favour, but also to achieve the rapid monetization of awards obtained in these circumstances.

This concludes our coverage of Hong Kong Arbitration Week 2021. More coverage from Hong Kong Arbitration Week is available [here](#).

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The graphic features a black background with white text and a circular icon. The icon depicts a magnifying glass over a group of stylized human figures, representing a search or investigation process. The text is arranged in a clean, modern layout with horizontal lines above the main heading.

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