Kluwer Arbitration Blog

Recent Developments in Hong Kong Arbitration

Ling Yang (Hong Kong International Arbitration Centre) · Tuesday, October 17th, 2023

For the sixth year, our Blog is providing live coverage of Hong Kong Arbitration Week. We are privileged to kick off with a contribution from Dr. Ling Yang, Deputy Secretary-General of HKIAC and Chief Representative of the Shanghai Office.

Over the years, dispute resolution (especially, arbitration) in Hong Kong has witnessed great openness, professionalism, and innovation. In a recent landmark case, the Hong Kong Court of Final Appeal (the "HKCFA") has distinguished between the concepts of "admissibility" and "jurisdiction". The **Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017** (the "TPF Amendment") and **Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022** jointly established a much broader and flexible range of fee frameworks for international arbitration in Hong Kong. Furthermore, at the fourth anniversary of the promulgation of the **Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region** (the "Interim Measures Arrangement"), users have given positive feedback through the submission of 101 applications for interim measures. Such judicial and legislative initiatives ensure that international business will continue to perceive Hong Kong as an arbitration-friendly jurisdiction, which has always been at the forefront of innovation and reform. This article provides an overview of these three latest legal developments in Hong Kong and at HKIAC.

Hong Kong Courts Rule on Compliance with Multi-Tiered Dispute Resolution Clauses

On 30 June 2023, the HKCFA, in a landmark ruling in the case of **C v D [2023] HKCFA 16**, held that pre-conditions to arbitrations set out in multi-tiered dispute resolution clauses, such as the requirement to conduct negotiation or mediation prior to commencement of an arbitration, are to be treated as matters concerning "admissibility" rather than "jurisdiction". This ruling is significant when juxtaposed with the provisions of the **Hong Kong Arbitration Ordinance (Cap. 609)** (the "Ordinance") and confirms the pro-arbitration tendencies of the Hong Kong judiciary. Under Sections 34 and 81 of the Ordinance, Hong Kong courts may undertake a *de novo review of* an award rendered by an arbitral tribunal and subsequently set it aside in the event a party pleads before them that the arbitral tribunal lacked "jurisdiction" to hear the claim. In contrast, if the plea

raised by a party is one of the "admissibility" of a particular claim before the arbitral tribunal, the courts cannot re-examine the merits of the claim or subsequently set aside the award.

The primary issue before the Hong Kong Court of First Instance ("HKCFI") was whether the question of compliance with the multi-tiered dispute resolution procedure set out in the agreement should be characterized as a question of "admissibility" of the claim or one of "jurisdiction" of the arbitral tribunal and whether judicial determination of such a question should depend on the application of Section 81 of the Ordinance. The HKCFI **concluded** that compliance with pre-arbitration conditions is a question of "admissibility" rather than "jurisdiction".

On appeal, the HKCFA, citing numerous academic works and international authorities, held that non-compliance with pre-conditions in a multi-tiered dispute resolution clause relates to the "admissibility" of the claim rather than the "jurisdiction" of the arbitral tribunal. The HKCFA refrained from examining the arbitral tribunal's decision. The HKCFA also held that this presumption would apply in the absence of unequivocal language to the contrary.

In its ruling, the HKCFA echoed the observations of Lord Hoffmann in Fiona Trust v Privalov [2015] EWHC 527 (Comm) that parties, particularly in the case of international contracts, wanted disputes to be "*decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law*". This interpretation was also consistent with the legislative purpose of the Ordinance, which is to resolve disputes fairly and efficiently through arbitration. Therefore, the HKCFA concluded that the issue did not fall under either Section 34(2)(a)(iii) or (iv).

This ruling explicitly clarifies, for the first time at the CFA level in Hong Kong, the distinction between "admissibility" and "jurisdiction". It provides a compelling way for courts of other common law jurisdictions to harmonize their existing case law. However, it is worth mentioning that the classification of issues concerning the interpretation and enforcement of multi-tiered dispute clauses as matters of admissibility is not "absolute". Such classifications would still be dependent on a case-by-case interpretation of the relevant arbitration agreements and the common will of the parties recorded in such agreements.

Outcome Related Fee Structures ("ORFS") for Arbitration in Hong Kong

In 2017, by way of the TPF Amendment, Hong Kong legislators amended the Arbitration Ordinance and the Mediation Ordinance to allow for the use of third-party funding in arbitration and mediation, carving it out from the common law doctrines of maintenance and champerty.

Subsequently, the Hong Kong International Arbitration Centre ("HKIAC") amended its **2018 Administered Arbitration Rules** (the "2018 HKIAC AAR") to allow and regulate the use of third-party funding. Article 44(1) of the 2018 HKIAC AAR now provides that a party receiving third-party funding must immediately disclose the existence of the funding agreement and the identity of the third party. Further, an exception to the confidentiality obligation under Article 45 was added, wherein a disputing party may disclose information regarding the arbitration to non-parties for the "*purpose of having, or seeking, third party funding for arbitration*".

HKIAC Case Statistics demonstrate that since 2020, parties have made disclosures of third-party

funding in 81 arbitrations administered by HKIAC under the 2018 Rules and 2 arbitrations administered by HKIAC under the UNCITRAL Arbitration Rules. This suggests that flexibility in fee structure is welcomed by users of HKIAC arbitration.

In 2022, Hong Kong legislators continued the reformation of arbitration fee structures. Following **extensive consideration**, the **Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022** and the **Arbitration (Outcome Related Fee Structures for Arbitration) Rules 2022** (collectively, the "Rules") came into force on 16 December 2022. The Rules primarily (1) establish three types of fee agreements, namely, conditional fee agreements ("CFAs"), damages-based agreements ("DBAs"), and hybrid damages-based agreements ("Hybrid DBAs") with general conditions and specific conditions required for ORFS agreements for arbitration; (2) clarify that ORFS related agreements are not prohibited by the common law doctrines of maintenance, champerty, and abetment; and (3) stipulate the rules regarding the validity, enforceability, and disclosure of such agreements. The Rules further prescribe general conditions for the operation of ORFS and special conditions for different categories of ORFS. Compared with the 2018 HKIAC AAR, the Rules have more stringent requirements when it comes to disclosure. The lawyers must inform all parties including the arbitral institution in writing about the fact that an ORFS agreement has been made and the name of the client. The notice must be provided within 15 days of the agreement being made or at the time of the commencement of arbitration. However, the precise terms of the agreement need not be disclosed. In addition, it is the client's obligation to disclose the early termination of the ORFS agreement (within 15 days of such termination).

Overall, the Rules make arbitration fee structures in Hong Kong more flexible, which in turn allows parties to satisfy their financial needs and also consolidates Hong Kong's position as a global hub for dispute resolution.

101 Applications under the Interim Measures Arrangement in its Fourth Year of Enforcement

On 1 October 2019, the Interim Measures Arrangement came into effect. The Arrangement has become the preferred pathway for seeking interim measures between Mainland China and Hong Kong. (*See* previous posts **here**, **here**, **here**, and **here**)

According to **HKIAC statistics**, by 11 October 2023, HKIAC has issued Letters of Acceptance in respect of 100 applications. 94 applications were made for the preservation of assets, two were for the preservation of evidence, and four were for the preservation of conduct. All applications were made in arbitrations that had already commenced. The total value of assets requested to be preserved amounted to RMB 27.4 billion or approximately USD 3.8 billion.

Among the 100 applications, HKIAC is aware of 69 decisions issued by Mainland courts. Of these 69 decisions, 65 granted the application for preservation of assets upon the applicant's provision of security, four rejected such applications. The total value of assets preserved by the 65 decisions amounted to RMB 15.8 billion or approximately USD 2.3 billion.

HKIAC's statistics also show that parties to HKIAC-administered arbitrations have submitted applications for interim measures to 36 different Mainland courts in 28 cities. This also

demonstrates the scale of mutual cooperation between Mainland China and Hong Kong when it comes to the preservation of the integrity of arbitral proceedings.

Looking back on the past, the first interim measure (under the Interim Measures Arrangement) was granted by the Shanghai Maritime Court on 8 October 2019. In the fourth year of the enforcement of the Arrangement, **an application disclosed by the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center** became the 100th application made under the Interim Measures Arrangement. This milestone categorically demonstrates the practicality and popularity of the Arrangement.

It is worth noting that both Chinese and international parties benefit from the Interim Measures Arrangement. For the convenience of its users and to provide them with a better understanding of the operation of the Interim Measures Arrangement, HKIAC has prepared the **PRC-HK Interim Measures Arrangement: Frequently Asked Questions** in seven languages and continues to update them on a regular basis. The promulgation of the Interim Measures Arrangement has enabled users to continuously expand their practical knowledge regarding the application and granting of interim measures by the Mainland courts. Besides, the Interim Measures Arrangement has provided the Mainland courts with an excellent opportunity to demonstrate their pro-arbitration stance to the international arbitration community.

Apart from the recent legislative and judicial developments in Hong Kong' arbitration regime, HKIAC has been employing state-of-the-art technology to improve case management and enhance convenience and efficiency. HKIAC launched **HKIAC Case Connect**, an online case management platform in October 2021. As of 13 September 2023, at least 34 arbitral tribunals and 80 parties have benefited from the online case management system. There will be **a panel discussion** relating to the effect of AI and international arbitration at the ADR in Asia Conference, the flagship event of Hong Kong Arbitration Week 2023.

Conclusion

As an international dispute resolution hub, Hong Kong has continuously improved its infrastructure based on common law tradition. The unique judicial assistance arrangements between Mainland China and Hong Kong have made it an "expert" in resolving disputes involving Chinese interests. Users have been witnessing HKIAC as international best practice, Asia specialist, and China expert over the years. Recently, Hong Kong's great potential in some emerging sectors, such as cryptocurrency, has become increasingly evident. In the future, dispute resolution service in Hong Kong will continue to meet the needs of the users, contributing to a more peaceful world.[1)]

More coverage from Hong Kong Arbitration Week is available here.

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References

?1 Thanks to Zhibei Feng for her contribution to this blog post. The views expressed herein are personal and do not reflect the views or the position of the Hong Kong International Arbitration Centre. The author reserves the right to amend her position if appropriate.

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