Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: Investor Information Rights: All Bark and No Bite? Managing Their Effectiveness

Noble Mak, Ching Suen (Davis Polk & Wardwell, Hong Kong Solicitors) · Friday, October 20th, 2023

On October 17, the second day of Hong Kong Arbitration Week 2023, Davis Polk hosted a panel discussion entitled "*Investor Information Rights: All Bark and No Bite? Managing Their Effectiveness*".

The panel considered a hypothetical case study covering the life cycle of an equity investment into a renewable energy company and explored the legal and practical considerations for investors when negotiating and enforcing information rights.

The panel comprised a Chartered Arbitrator, Mary Thomson of Pacific Chambers; an advocate, Aisling Dwyer of Maples Group; an investor, William Hay, former General Counsel of a major Hong Kong-based private equity firm; and the Bing AI chatbot powered by ChatGPT. Jonathan Chang, Counsel and co-head of Davis Polk's international arbitration practice, moderated the panel discussion.

Information Rights and Why They Matter to Investors

Information rights typically provide investors with financial and operational data regarding the investee company, as well as access to management to discuss the state of the company. Mr. Hay explained that the extent of information rights may vary. Where the objective of the investment is to partner and work with the investee company, there would usually be more robust rights.

In ChatGPT's view, information rights enable investors to make informed decisions, monitor and assess a company's financial health and business outlook, and exercise control over the company's future strategy.

Issues to Consider During Negotiations

Statutory Rights

Ms. Dwyer explained the differences between the Cayman statutory information rights available to shareholders of an exempted limited company as compared with limited partners of an exempted

limited partnership. The former have relatively limited statutory information rights, while the latter enjoy expansive rights, as they are entitled to access the books and records, as well as true and full information regarding the business and financial condition of the exempted limited partnership.

Mr. Hay supplemented that, under section 220 of the Delaware General Corporation Law, investors have a broad right to access any information that may reasonably lead to evidence of misfeasance in a company. Such entitlement is assiduously enforced by the courts.

Negotiating Contractual Rights

ChatGPT made recommendations on how conflicting interests between an investor seeking broad information rights and an investee company wanting to reduce the burden of compliance should be managed in negotiations. Among other things, ChatGPT advised striving for an agreement that fosters trust, collaboration, and long-term growth.

Mr. Hay added that entrepreneurs and investors may sometimes be frustrated if they try to negotiate information rights in too much detail, and that a "reasonably requested" catch-all can often bridge the difference. Mr. Hay observed that, in practice, the commercial relationship is as important as the legal documents. In practice, many investors have sufficient commercial leverage to obtain information through their ability to add value to the invested company through operational improvements, introduction to wider networks, and support in exit through IPO or trade sale.

Ensuring Meaningful Relief

Ms. Thomson set out a three-stage analysis when considering obtaining relief for a breach of information rights: first, whether express provision to arbitrate has been made in the investment agreement; second, whether the investment agreement has incorporated helpful rules and regulations, such as the HKIAC Administered Arbitration Rules (the "**HKIAC Rules**"); and third, how to obtain meaningful remedies through domestic law. She noted that both Hong Kong and Singapore are strong seats due to their rivalry with each other, which sparks innovation. In Hong Kong, it is generally easy to obtain enforcement, and the HKIAC Rules, supported by the Arbitration Ordinance, provide for expedited arbitrations in cases of exceptional urgency.

Ms. Thomson explained that when seeking injunctive relief, it is necessary to show that (a) the usual relief of damages is not adequate when set against the likely harm of not granting the relief, and (b) there is a reasonable possibility of succeeding on the merits. In the context of enforcing information rights, this could involve demonstrating that the requested information is required urgently (for example, prior to a material corporate reorganisation) and an *ex parte* order is warranted. Parties are likely to comply with an interim order enforcing information rights because non-compliance with an interim order may be viewed negatively by the tribunal eventually deciding the merits of the case.

Mr. Hay explored the perspective of a headstrong entrepreneur and noted that non-compliant parties may be unpredictable. As such, he recommended that investments be structured in a way that provide investors with a financial remedy in event of a breach, such as the right to repayment of the investment, which can be used as leverage when dealing with a breach of information rights.

Ms. Dwyer also indicated that it can be difficult to prove loss stemming from breach relating to denying access to information. In terms of the type of claim that an investor could potentially bring in the Cayman Islands (outside of an action under the agreement providing for the information rights), an investor could bring a just and equitable winding up where relief other than a winding up could also be sought, such as a buy-out order. However, this type of action could be hugely damaging to the relationship and the investment.

Ms. Dwyer observed that in the case of a just and equitable winding up, refusal to provide information is rarely the only complaint of a petitioner, and usually a general loss of trust and confidence amongst the shareholders or in management will have also occurred. The issue of loss of trust and confidence could be subject to arbitration, whilst Cayman courts retain jurisdiction on the issues of whether it is just and equitable to wind up the company and the related relief. This position was confirmed in a recent Privy Council decision.[1)]

Ms. Thomson suggested that mediation could be another mechanism within a stepped or escalation clause that could help parties maintain relationships and expedite a resolution of their differences. However, such clauses should be properly drafted to avoid satellite litigation.

Conclusion

While establishing breaches of information rights is typically straightforward, the panelists recommended incorporating explicit contractual remedies to provide for practical ways of enforcing those rights in the event of a breach.

This concludes our coverage of Hong Kong Arbitration Week 2023. More coverage from Hong Kong Arbitration Week is available here.

References

?1 *FamilyMart China Holding Co Ltd (Respondent) v Ting Chuan (Cayman Islands) Holding Corporation (Appellant)* [2023] UKPC 33.

This entry was posted on Friday, October 20th, 2023 at 8:49 am and is filed under Artificial Intelligence, Contract Drafting, Corporate disputes, HK Arbitration Week, HKIAC, Hong Kong, Private Equity
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.