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Contractual Interpretation in Hong Kong and Singapore: What Happens When Parties Name a Non-Existent Arbitration Centre?

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In January 2023, the Hong Kong Court of First Instance in *Grand Ocean & Williams Co Limited v. Huaxicun Offshore Engineering Co Ltd (???????????????)* [2023] HKCFI 86 ("*Grand Ocean*") held that an arbitration clause, governed by the laws of the People's Republic of China ("PRC"), was void and incapable of being performed on the basis that the institution named did not exist. Without an existing institution named, the arbitration clause fell short of the requirements for a valid arbitration agreement under the Arbitration Law of the PRC. Article 16 of the PRC Arbitration Law provides that an arbitration agreement must contain three particulars, including a designated arbitral commission selected by the parties. Without this, an agreement is invalid by way of Article 18.

In the decision, Anthony Chan J referred to *Klöckner Pentaplast GmbH & Co KG v. Advance Technology (HK) Co Ltd* [2011] 4 HKLRD 262 ("*Klöckner*") in which Saunders J had held that the arbitration clause in question did not meet the requirements under its governing law of PRC law. The clause had detailed:

- how arbitrators would be nominated;
- the rules to govern the arbitration proceedings (the arbitration rules of the International Chamber of Commerce ("ICC Rules");
- the city wherein the arbitration proceedings would be conducted (Shanghai); and
- the governing laws of the agreement (the Federal Republic of Germany).

However, the clause failed to nominate the arbitral institution. Notwithstanding the parties' election of the ICC Rules, by failing to nominate an arbitration centre, the Court found the arbitration clause to be invalid under the PRC Arbitration Law.

This is where the facts of *Klöckner* and *Grand Ocean* diverge. In *Grand Ocean*, it was not that an arbitral institution had not been named, but rather it had not been named properly.

As far as can be gleaned, the Mainland lawyer who provided evidence in *Grand Ocean* was correct when they stated that there is no "???????". "???????" can be loosely translated as "Jiangsu Arbitration Commission", although throughout the decision, the Chinese characters are defined only as "Tribunal" – I will thus adopt the translation "Jiangsu Arbitration Tribunal" throughout the rest of this blog post. There is, however, the CIETAC Jiangsu Arbitration Center, a branch of the

China International Economic and Trade Arbitration Commission ("CIETAC") as well as the Nanjing Arbitration Commission/JiangSu (NanJing) International Commercial Arbitration Centre (Nanjing being the capital city of Jiangsu province).

Grand Ocean may then have been one of 2023's unluckiest arbitration decisions. Had the arbitration clause been governed by Hong Kong law instead of PRC law, the outcome may have been different. Just a few months earlier, the Honourable K Yeung J in *???, ?? and ??? and Others v. Ace Lead Profits Ltd and Another* [2022] HKCFI 3342, quoting from *Chimbusco International Petroleum (Singapore) PTE Ltd v. Fully Best Trading Ltd* [2016] 1 HKLRD 582, cited the "clear authority" of a 1993 decision that, under Hong Kong law:

> "where the parties have clearly expressed an intention to arbitrate, the agreement is not nullified even if they chose the rules of a non-existent organisation".

That 1993 decision, *LuckyGoldstar International (H.K.) Ltd v. Ng Moo Kee Engineering Ltd* [1993] 1 HKC 404, contained a lengthy discussion on the issue of poorly drafted clauses. Kaplan J identified that agreements were being written in languages not spoken natively by the drafters. The drafting issues had flow-on effects antithetical to the purpose of arbitration, such as heightened costs and further disputes. Consequently,

> "anything that can be done to ensure that arbitration clauses are clear, meaningful and effective would enhance the arbitration process quite considerably".

The Approach in Singapore

So how might we enhance the prospects of validity for poorly drafted arbitration clauses? A recent decision in the Singapore High Court, *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] SGHC 58 ("*Re Xinan*"), provides some insight. The background facts make the cases worth comparing. As in *Grand Ocean*, the contract between the parties contained a non-existent arbitral institution, this time a "China International Arbitration Center". As the contract was governed by PRC law, the party that lost the arbitration argued that the arbitration agreement was not valid as the nomination of a non-existent arbitral institution ran afoul of Articles 16 and 18 of the PRC Arbitration Law.

In *Re Xinan,* rather than allow the parties' agreement to arbitrate to become void, Philip Jeyaretnam J recognised that the parties had intended to use arbitration for any dispute arising out of their contract. The logic was simple :

> "Rational commercial parties would not deliberately choose a non-existent institution any more than they might invent a fictitious country as the seat."

With that in mind, Philip Jeyaretnam J undertook an exercise to match the name of the non-existent

arbitral institution with the name of an existing one. Drawing from a list with the names of five major Chinese arbitral institutions, Philip Jeyaretnam J identified CIETAC as being the institution intended by the parties. Like the non-existent “China International Arbitration Center”, CIETAC contains the words “China”, “International” and “Arbitration”. Philip Jeyaretnam J looked at one arbitral institution which also contained the term “China” but the inclusion of “Maritime” meant it had to be ruled out on the basis that “commercial men” would not consider a maritime arbitral institution for a commercial relationship where maritime matters were not present.

Having decided that the “[r]ational commercial parties” must have intended for the centre to be CIETAC, Philip Jeyaretnam J made the determination that an institution had been duly selected. Accordingly, Articles 16 and 18 of the Arbitration Law of the PRC had been satisfied.

It is worth briefly noting one difference between *Re Xinan* and *Grand Ocean*. In *Re Xinan*, the Court was considering the enforcement of an award that had already been issued, after CIETAC had accepted and administered the arbitration. Although the Court did not expressly base its reasoning on this fact, it observed that no application had been made to CIETAC nor the arbitral tribunal to challenge the acceptance of the case nor the jurisdiction of the tribunal. In *Grand Ocean*, no arbitration had been commenced.

What Could “Rational Commercial Parties” Have Meant by “???????/Jiangsu Arbitration Tribunal”?

As discussed above, arbitral institutions do exist in China’s Jiangsu province. Would an exercise in name-matching reveal the arbitration centre intended by the parties? A simple comparison of the names reveals that both the CIETAC Jiangsu Arbitration Center and the Nanjing Arbitration Commission/JiangSu (NanJing) International Commercial Arbitration Centre share similarities with the non-existent “???????/Jiangsu Arbitration Tribunal”.

However, are there limits to how much can be read into an arbitration agreement? In *Re Xinan*, Philip Jeyaretnam J referred to a 2016 Civil Ruling of the Zhejiang Higher People’s Court. In that decision, the Court held on the facts that it was “impossible to infer a specific arbitration institution”. Philip Jeyaretnam J considered that this reflected the same principle as that of Singapore law, namely, that contractual interpretation is to be used to “ascertain whether parties objectively intended to refer to a specific arbitral instruction by the misnomer.”

This suggests that merely naming a non-existent arbitral institution will not be enough to engage Article 18 and void the arbitration agreement. Only if making an inference is impossible will an existing centre not be read in. Philip Jeyaretnam J’s observations help yet again: when considering an arbitration clause, “the court must consider what parties’ intention was, as objectively evinced from the words used in their commercial context.”

Therefore, would it be impossible to infer anything from “???????/Jiangsu Arbitration Tribunal”? That depends on how much can be ascertained from the wider agreement, or from a comparison of the function of a particular centre in relation to the nature of the dispute. In this case, the Court could have considered which of the two institutions in Jiangsu was best placed for the dispute in *Grand Ocean*, which arose from pipeline work on Lamma Island in Hong Kong.

Ultimately, in *Grand Ocean* it was held that the inability to name an existing arbitral institution

rendered the clause void. However, it is clear that the parties agreed to have their dispute resolved by arbitration. It is also clear that they named an arbitral institution, albeit one which did not exist. The approach taken in multiple decisions from Hong Kong and Singapore suggests that an attempt to read in an existing arbitral institution must at least be made.

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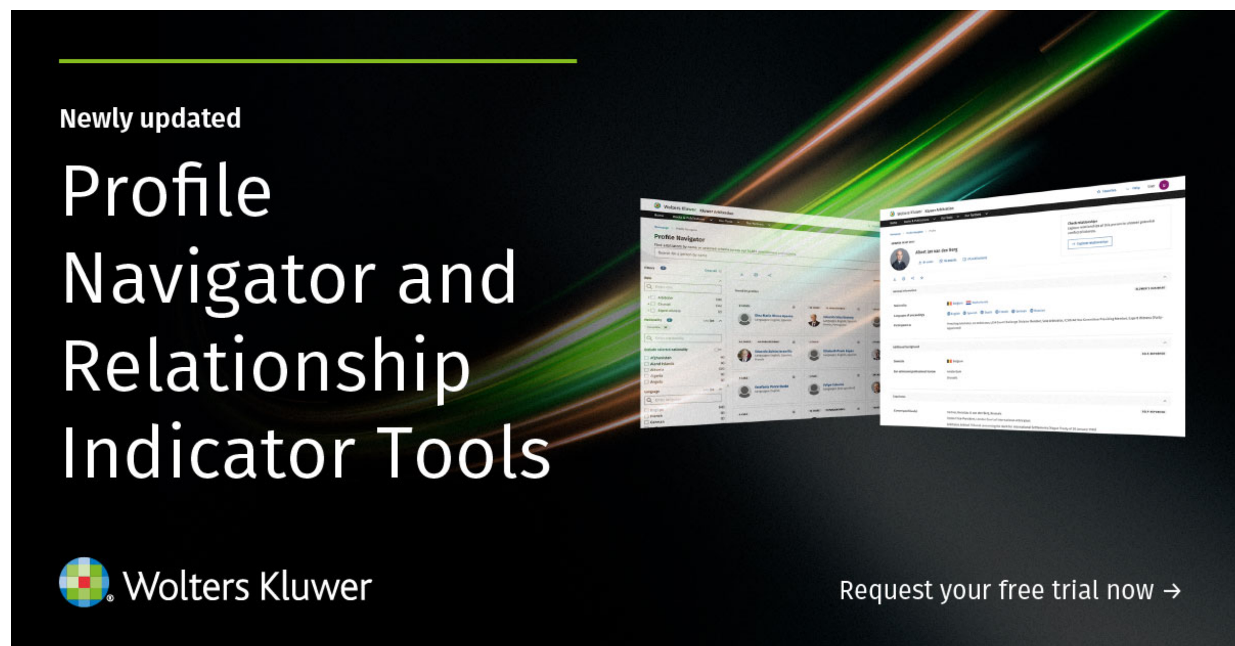

This entry was posted on Wednesday, March 6th, 2024 at 8:03 am and is filed under Arbitration clause, Arbitration institution, China, Chinese Arbitration Law, Contract Interpretation, Hong Kong, Singapore
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