

Hong Kong courts: pro-arbitration and *KB v S and Others*

Brooke Holden and Urvashi Malhotra
Gall

global.practicallaw.com/4-634-0911

It is recognised that the Hong Kong courts adopt a pro-arbitration and correspondingly pro-enforcement approach. Justice Mimmie Chan's judgment in *KB v S and Others* [HCCT 13/2015] fortifies the principles of judicial support in arbitral proceedings. The judgment sets out "ten commandments" underpinning the court's attitude towards the enforcement of arbitral awards and enshrines the court's minimal intervention approach.

This article:

- Considers the pro-enforcement approach of courts in Hong Kong in the context of the recent judgment in *KB v S and Others*.
- Examines the various factors courts consider when dealing with applications to set aside an arbitral award or to refuse enforcement of an award.
- Provides a concise overview of the procedure for applying to the Hong Kong courts for enforcement of a foreign arbitration award.

KB V S AND OTHERS

In this case, the respondents' application to set aside an order granting leave to enforce two arbitration awards against them was dismissed by the Hong Kong Court of First Instance on the grounds, among others, that the application was submitted out of time and without any supporting affidavit. This amounted to an abuse of the court's process.

The ten guiding principles

Justice Chan began her judgment by succinctly summarising the key principles behind the Hong Kong courts' attitude and approach to enforcement of arbitral agreements and awards. In view of their importance and application to the case, these principles are set out below verbatim:

- The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
- Under the Arbitration Ordinance (Ordinance), the court should only interfere in the arbitration of the dispute as expressly provided for in the Ordinance.
- Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.
- Enforcement of arbitral awards should be "almost a matter of administrative procedure" and the courts should be "as mechanistic as possible" (*Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604).
- The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way (*Grand Pacific Holdings v China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).

- In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of "must be serious, even egregious", before the court would find that there was an error sufficiently serious so as to have undermined due process (*Grand Pacific Holdings v China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).
- In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (*Xiamen Xingjingdi Group Ltd v Eton Properties Limited* [2009] 4 HKLRD 353 (CA)).
- Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of *bona fide* (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111).
- Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111).
- The Court of Final Appeal clearly recognised in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act *bona fide* (p 1201 and p 137B of the judgment).

Background

KB (Applicant) applied to dismiss or strike out the summons issued by S and two others (collectively, the Respondents) seeking to set aside the enforcement of two arbitration awards made against them.

The Applicant and the Respondents had entered into an agreement in the form of a Letter of Intent dated 12 April 2006 (LOI) in relation to the ownership of a hotel. The dispute resolution clause provided for disputes to be resolved by arbitration in Hong Kong under Hong Kong law.

In 2010, the Respondents sought to terminate the LOI, after disputes arose between the parties.

Proceedings

On 3 March 2010, the Applicant began arbitral proceedings in Hong Kong (the Arbitration) under which three awards were issued:

- The tribunal had jurisdiction to deal with the dispute (First Award).

- The Applicant was successful on liability, finding that the LOI was valid and subsisting (Second Award).
- The Respondents were ordered to specifically perform the LOI (Third Award).

Leave was granted to the Applicant on 17 June 2015 to enforce the Second and Third Awards as a judgment or order of the court (the Order).

In the meantime, the parties had begun litigation proceedings in Guangdong, China in relation to the LOI. In September 2012, the Guangdong Court held that under the relevant PRC laws, the LOI had been automatically terminated. This led the Respondents to argue in the Arbitration that the Applicant was prevented from re-litigating the validity of the LOI.

Before the Third Award, the Respondents had applied to the Hong Kong Court (*HCCT 18/2014*) to set aside the Second Award but were unsuccessful in their attempt.

Issues and ruling

The Respondents challenged the enforcement of the awards on the grounds that they were not valid and not in a form which could be entered as a judgment. The supporting affidavit also stated the same grounds and did not elaborate further or provide any detail.

The Applicant sought to strike out the summons on the basis that it was made out of time and/or that the application was frivolous, vexatious and otherwise an abuse of the court's process.

Ultimately, the Respondents' summons was struck out and an indemnity costs order was made in favour of the Applicant.

In reaching her decision, Justice Chan considered the following key issues:

- **Issuance of summons without proper supporting affidavit.** Justice Chan held that it was "...an abuse of process to issue a summons to set aside an order granting leave to enforce an arbitral award, if the summons does not even disclose a ground for setting aside...", further remarking that the lack of a proper supporting affidavit essentially undermines the very purpose of the Civil Justice Reform, the Model Law and the Ordinance, which is to facilitate the fair and expeditious resolution of arbitral disputes.

Order 73, rule 10(6) and 10(6A) of the Rules of the High Court (RHC) require an award debtor applying to set aside an order granting leave for enforcement of an award to do so within 14 days after service of the order by way of a summons supported by affidavit. Justice Chan noted that in most cases, the debtor would have been served with a notice of arbitration, participated in the proceedings and been served with the award. Logically, therefore, a party seeking to set aside the award or enforcement of an award would have prior knowledge of any irregularities in the arbitral process or any other grounds for complaint to justify bringing forward the application.

On this issue, Justice Chan also reminded practitioners that it was bad practice for solicitors to make affidavits on behalf of their clients when pertinent facts to a dispute had to be deposed.

- **Issuance of summons out of time.** The first and second Respondents' application to resist enforcement of the award was made out of time. They failed to apply for leave and attempted to justify their delay and inactivity by claiming that the Order had not been forwarded to them in time by their respective registered offices.

Justice Chan did not consider these reasons to be sufficiently compelling to allow the first and second Respondents to make their application out of time, particularly in view of the lack of merits in their application.

- **Unmeritorious grounds.** As the third Respondent's application had been made in time, the pertinent question for the court to consider was whether the grounds raised in the application were meritorious.

The court held that there was no basis for the Respondents to claim that the Second Award was invalid, considering that the court had previously rejected the Respondents' application to set it aside. The Third Award was founded on the Second Award and also remained a valid arbitral award in Hong Kong.

The third Respondent argued that it was unable to present its case in the Arbitration and had been "ignored" by the Tribunal. However, the fact that this issue had not been raised previously despite ample opportunity, led the court to remark that "by staying silent and keeping such a complaint up its sleeve", the third Respondent was not acting *bona fide*. It was held that the third Respondent had failed to identify any issue that was relevant to its liability and rights under the LOI or would have prejudiced the third Respondent in a material way.

Justice Chan commented that the court's concern was upholding the structural integrity of the arbitral process and not the substantive merits themselves. As such, the third Respondent's attempts to have the court review the merits of the Second and Third Awards were not appropriate. If indeed the Order was to be set aside, the burden was on the Respondents to present meritorious grounds for the application, which they had failed to do.

- **Breach of duty of good faith.** Justice Chan identified several issues indicative of the Respondents' failure to act in good faith, including the employment of delaying tactics, delaying and frustrating the enforcement and recognition of the Second and Third Award.

The court also stated that even if a valid ground had been established for setting aside the Order, the court would have exercised its discretion to enforce the Second and Third Award anyway (placing great emphasis on the importance of the Respondents' conduct in the case).

Conclusion

There is no doubt that Justice Chan's decision inspires confidence in parties considering arbitration as a forum for dispute resolution in Hong Kong. The decision also highlights some useful guidelines for practitioners, such as:

- The courts require strict adherence and due regard to procedure, particularly in relation to timelines. For example, it would be in the interest of clients, particularly companies, to ensure that their registered offices are able to promptly forward legal documents to the dispute handling officers. This is especially relevant to a losing party who has very little time to challenge an enforcement.
- The applications for challenge must be supported with proper affidavits setting out valid grounds (ideally provided by the party and not its lawyers).
- Parties must avoid raising complaints as to irregularities, and so on, in the arbitration proceedings at the enforcement stage.
- The courts are unlikely to sympathise with parties failing to conduct themselves in good faith.
- Indemnity costs will be imposed on parties bringing unmeritorious challenges to awards and their enforcement.

PROCEDURE FOR ENFORCEMENT OF A FOREIGN ARBITRATION AWARD

A foreign arbitration award is enforceable in the same manner as a judgment of the Court of First Instance of the High Court that has the same effect, but only with leave of the court. If leave is granted, the court can enter judgment in terms of the award. However, the

Ordinance does not prevent an enforcement of the award by action under common law.

The procedure for applying for permission to enforce an award is set out in Order 73, rule 10 of the RHC. If uncontested, enforcement proceedings may be concluded in a matter of months without involving substantial costs.

Application

An application for leave to enforce the award can be made *ex parte* to a judge in charge of the Construction and Arbitration List, although the court may direct the application to be made *inter partes*.

Documents required

The application must be supported by an affidavit making full and frank disclosure of all relevant information. Failure to do so may allow the other side to set aside the order granting leave.

For awards rendered under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), section 88 of the Ordinance provides that the affidavit in support should exhibit all of the following:

- A duly authenticated original or a duly certified copy of the award.
- The original or a duly certified copy of the arbitration agreement.
- If the award or agreement is in a language other than either or both of the official languages, a translation of it in either of the official languages certified by an official or sworn translator, or by a diplomatic or consular agent.

Grounds for refusal of enforcement

New York Convention Awards. In general, Hong Kong courts are prepared to enforce foreign awards that fall under the New York Convention, except where complaints of substance based on the limited defences set out in the Ordinance are clearly established. Even where any of the grounds for refusal of enforcement has been proven, the courts have a residual discretion to order enforcement.

Non-New York Convention Awards. The grounds for refusal of enforcement of non-Convention awards are mostly identical to the

grounds relating to Convention Awards. However, the court can also refuse to enforce a non-Convention award for any other reason the court considers it just to do so.

Common law. Under the common law procedure, courts refuse leave to enforce only if there are real grounds for doubting the validity of the award or where the award is not in a form that can be entered as a judgment.

Order

The applicant must draw up the order granting leave and include in it the provision for costs. The sealed order must be served on the defendant either:

- By delivering a copy to him personally.
- By sending a copy to him at his usual or last known place of abode or business.
- In such other manner as the court may direct.

It is permissible to serve the order out of the jurisdiction without obtaining leave to serve out.

Setting aside

The defendant can apply to set aside the order within 14 days after service of the order by way of a summons with supporting affidavit.

Enforcement

The order cannot be enforced until after the expiration of the 14-day period (*see above, Setting aside*) or, if the defendant applies within that period to set aside the order, until after the application is finally disposed of. Any appeal from a decision of the court to grant or refuse leave to enforce an award requires leave of the court.

The courts have repeatedly clarified that applications to appeal against or set aside an award, or for an order refusing enforcement, should be based on exceptional events. As can be seen from *KB v S and Others* (*see above, KB v S and Others*), unmeritorious challenges to enforcement are not viewed favourably by the courts and typically result in the imposition of an indemnity costs order against the losing party.

Practical Law Contributor profiles

Brooke Holden, Partner

Gall

T +852 3405 7671

F +852 2801 7202

E brookeholden@gallhk.com

W www.gallhk.com

Professional qualifications. Australia, Solicitor, 2004; Hong Kong, Solicitor, 2008; England and Wales, Solicitor, 2012.

Areas of practice. Commercial litigation; domestic and international arbitration; enforcement of foreign arbitral awards; fraud and asset tracing.

Non-professional qualifications. Bachelor of Laws (1st Class Honours) and Bachelor of Arts (Asian and International Studies), Griffith University, Brisbane.

Recent transactions

- Advising in relation to shareholder disputes, joint venture disputes, acquisition disputes, high value family disputes, cross-border fraud and asset tracing investigations, and obtaining various injunctions and urgent interim relief both in support of Hong Kong proceedings and in aid of foreign proceedings.
- Conducting a number of high-value, complex, arbitral proceedings in Hong Kong.

Languages. English.

Professional associations/memberships. Law Society of Hong Kong; Women in Law, Hong Kong, Australian Chamber of Commerce.

Urvashi Malhotra, Legal Analyst

Gall

T +852 3405 7638

F +852 2801 7502

E urvashimalhotra@gallhk.com

W www.gallhk.com

Professional qualifications. Singapore, Solicitor, 2015.

Areas of practice. International commercial dispute resolution: litigation and arbitration.

Non-professional qualifications. Bachelor of Laws (Honours), Kings College, London, 2012.

Recent transactions

- Acting for and advising clients in a number of complex and technical international commercial disputes involving a broad range of industry sectors including shipping, construction, aviation, oil and gas.
- Advising clients in relation to cross-border corruption-related matters and internal corporate investigations including matters involving the Foreign Corrupt Practices Act (FCPA), the United Kingdom Bribery Act, and other international anti-corruption legislation.
- Representing clients in international arbitration proceedings under international arbitration centre and trade association rules including SIAC, HKIAC, SIMC and ICSID.

Languages. English, Hindi, Bahasa Indonesia and Spanish.

Professional associations/memberships. Law Society of Singapore; Women in Law, Hong Kong.