

Hong Kong courts: pro-arbitration in principle and in practice

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The pro-arbitration approach of Hong Kong courts is one of the key attributes that underpins Hong Kong's position as an attractive venue for commercial dispute resolution. The judiciary maintains a policy of minimal intervention and routinely supports the arbitral regime by upholding its independence and finality.

This article considers:

- Two recent judgments which emphasise the strong support that the Hong Kong courts provide to the arbitration process.
- Other important developments in the arbitration regime in Hong Kong.

Recent case law concerning applications to set aside enforcement of arbitral awards and to stay court proceedings in favour of arbitration

The two judgments discussed below reinforce the progressive approach of the Hong Kong judiciary, in that they place a strong emphasis on the limited supervisory role that the courts play in any arbitral process and assure parties that enforcement will generally not be refused.

T v C HCCT 23/2015 decided on 14 March 2016 by the Honourable Madam Justice Mimmie Chan

In this case, the application of C to set aside an order granting leave to T to enforce an award on the grounds of public policy was dismissed by the Hong Kong Court of First Instance.

Background. The underlying dispute arose under a contract for the supply of coal made between C as supplier and T as purchaser. In the original arbitration proceedings commenced by T against C in Malaysia, the arbitral tribunal ordered C to pay to T damages for the breach of contract.

The Proceedings. On 10 June 2015, the Court of First Instance granted leave to T to enforce the arbitral award in Hong Kong. C sought to set aside the order on the grounds that it would be contrary to public policy under section 44(3) of the Arbitration Ordinance (Cap. 341) (now repealed) (Old Ordinance) to enforce the award as the documents relied upon by T and the arbitral tribunal were forged and created as a result of fraud.

Meanwhile, C had also applied to the Malaysian courts to set aside the award. However, the application had been refused and C consequently appealed.

In the present application, C also sought to rely on section 44(2)(f) of the Old Ordinance in support of his application on the basis that the award ' ' had not yet become binding' ' by virtue of his appeal pending before the Malaysian courts. This ground was, however, subsequently abandoned.

Issues and Ruling. Under section 44(3) of the Old Ordinance (that is, section 89(3) of the Arbitration Ordinance (Cap. 609) (Ordinance)), which is currently in force, the enforcement of an award rendered in a member state of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 may be refused if either:

- The award is in respect of a matter that is not capable of settlement by arbitration under the law of Hong Kong.
- It would be contrary to public policy to enforce the award.

Justice Chan relied on various Hong Kong decisions such as *Qinhuangdao Tongda Enterprise Development [1993] 1 HKLRD 173*, *Hebei Import & Export Corp v Polytech Engineering Co Ltd [1999] 2 HKCFAR 111*, *A v R (Arbitration: Enforcement) [2009] 3 HKLRD 389* and *Xiamen v Eton Properties Limited & Another [2009] HKLRD 353* to emphasise the restrictive scope of the term ' 'contrary to public policy' '.

Justice Chan, relying specifically on the judgment of the Court of First Instance in *A v R*, stated that it is in the interests of public policy to uphold an agreement made between parties to submit their dispute to arbitration, and as a matter of comity, to enforce an arbitral award, which is binding on the parties and enforceable under and in accordance with the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. .

In response to C's argument that the enforcement of the award should be refused as it was tainted with fraud, Justice Chan applied the threshold test confirmed in *Karaha Bodas Co LLC v. Perusahan Pertambangan Minyak Dan Gas Bumi Negara [2009] 12 HKCFAR 84*, which requires the applicant setting aside an award to show that it has a real prospect of success in persuading the judge to find that the award had been obtained by fraud. Justice Chan took the view that C had failed to adduce sufficient evidence of the alleged fraud.

Her Lordship also took into consideration the fact that C's claims of forgery had been dismissed by the arbitral tribunal as well as the Malaysian Courts. In this regard, her Lordship stated that the decision of the Malaysian court, being the supervisory court of the arbitration, on the existence and validity of the contract and the arbitration agreement between the parties and its refusal to set aside the award, should be given ' 'due weight' ' by an enforcement court (*Gao Haiyan v Keeneye Holdings Ltd [2012] 1 HKLRD 627*). The fact that there may be an appeal against the Malaysian court's decision does not alter the fact that there remains a valid and binding award.

Ultimately, Justice Chan held that there was no basis to refuse the enforcement of the award on the ground that it was contrary to the public policy of Hong Kong and accordingly dismissed C's application and ordered costs in favour of T on an indemnity basis.

Her Lordship, in her judgment, also emphasised the importance of clearly setting out the grounds for setting aside an order granting leave to enforce an arbitral award. Since C failed to state the precise grounds on which it relied in his application, Justice Chan remarked that it was an abuse of process to proceed in this way and that it was totally undesirable for the Court and the other party to the proceedings to have to speculate as to the precise ground or grounds, which form the basis of an application to set aside an arbitral award (for which leave has already been given by the Court), to be enforced as a judgment or order of the Court. Her Lordship stressed that the underlying objects of the Arbitration Ordinance, the Model Law and the CJR should not be frustrated.

Conclusion. The public policy ground is one of the most popular weapons in international arbitrations to resist the enforcement of arbitral awards. It is a nebulous concept as it varies from one country to another. The above decision is a recent example of Hong Kong's approach to public policy. It demonstrates the pro-enforcement bias of the Hong Kong courts and assures commercial parties that an arbitral award will generally not be set aside unless there are very strong grounds.



The case also serves as a warning to parties that indemnity costs will follow in the event of an unmeritorious attempt to resist enforcement in Hong Kong.

Bluegold Investment Holdings Limited v Kwan Chun Fun Calvin HCA 1492/2015 decided on 4 March 2016 by the Honourable Madam Justice Mimmie Chan

In this case, the Hong Kong Court of First Instance has ruled that the court must only be satisfied on a prima facie basis that a valid arbitration agreement applies, in order to stay court proceedings.

Background. The dispute between Bluegold and Kwan arose out of a subscription agreement and a guarantee, which secured the performance of the parties' obligations under the subscription agreement. The subscription agreement contained a standard form HKIAC arbitration clause, whereas the guarantee provided for a non-exclusive submission to the Hong Kong courts.

The Proceedings. Bluegold commenced court proceedings in Hong Kong, asserting its claims against Kwan under the guarantee. Kwan, in response, applied under section 20 of the Ordinance for a stay of the proceedings instituted by Bluegold, and for the dispute to be referred to arbitration based on the arbitration agreement contained in the subscription agreement.

Issues and Ruling. Under section 20 of the Ordinance, which gives effect to Article 8 of the UNCITRAL Model Law, a court before which an action is brought in a matter that is the subject of an arbitration agreement must (at a party's request) refer the parties to arbitration unless it is established that the arbitration agreement is null and void, inoperative or incapable of being performed.

One of the critical issues before the Court was whether Bluegold's claim under the guarantee was a matter that was the subject of an arbitration agreement. Bluegold attempted to argue that the guarantee was a separate and distinct agreement with an independent governing law and jurisdiction clause and that Kwan's obligations sought to be enforced, arose under the guarantee and not the subscription agreement.

In her analysis, Justice Chan considered that a breach of the guarantee would further necessitate a determination as to whether there was any breach of the subscription agreement, as the claims under the guarantee stemmed from the subscription agreement. Her Lordship confirmed that the onus on the applicant for a stay is only to demonstrate that there is a prima facie case that the parties are bound by an arbitration agreement.

Justice Chan held that a stay of court proceedings was justified because a good prima facie case had been established, indicating that a valid arbitration agreement existed between Bluegold and Kwan and the dispute fell within the ambit of the arbitration clause contained in the subscription agreement. Her Lordship also ruled that the jurisdiction clause in the guarantee could operate in parallel with the arbitration clause in the subscription agreement to specify the governing law of the arbitration.

Conclusion. The decision is noteworthy as it not only confirms the prima facie standard of review for stay of court proceedings but it also reinforces Hong Kong's position as an attractive seat for international arbitration. If a party attempts to litigate a dispute that falls within the scope of an arbitration agreement, the Hong Kong courts will usually grant an application for a stay, unless the arbitration agreement is null and void, inoperative or incapable of being performed.

On a side note, the key to avoiding these common jurisdictional disputes lies in drafting straightforward and consistent arbitration agreements, particularly across suites of documents.

Other significant initiatives and developments in the arbitration regime

Some of the most significant developments in the arbitration regime in Hong Kong this year include:

Third Party Funding for Arbitrations. Champerty and maintenance remain criminal offences in Hong Kong with litigation funding only being allowed in certain cases. Whilst the courts sanction of funding arrangements is often sought and granted in civil proceedings, this is not currently possible in arbitrations.

On 19 October 2015, the Third Party Funding for Arbitration Sub-Committee of Hong Kong's Law Reform Commission published a consultation paper proposing that third party funding be permitted for arbitrations in Hong Kong. According to the Sub-Committee, a reform in this direction will ensure Hong Kong's competitiveness as an international arbitration centre, given that third party funding in arbitration is permitted in most other international arbitration centres such as England and Wales, Australia, France, Germany, Netherlands, Switzerland, Korea, the PRC, the EU and the US.

The final conclusions post-consultation are still awaited.

Consolidation of Arbitrations. The Hong Kong International Arbitration Centre (HKIAC) released a Practice Note on Consolidation of Arbitrations, which came into effect on 1 January 2016 and serves to supplement the consolidation regime contained in the 2013 HKIAC Administered Arbitration Rules. The Practice Note sets out in detail the contents and particulars required to be included in a request for consolidation and in any subsequent response.

The Practice Note is a positive development in Hong Kong's consolidation regime, which has made it easier to deal with arbitrations involving multiple claimants and multiple respondents with overlapping interests. Parties opting for HKIAC arbitration no longer need to incorporate extensive consolidation and joinder provisions within their arbitration agreement.

Costs of Arbitrations. The HKIAC has also released two updated Practice Notes on costs of arbitration, which came into effect on 1 June 2016 to supplement the provisions on costs under the 2013 HKIAC Administered Arbitration Rules (Rules). In addition to the administrative fees set out in Schedule 1 of the Rules, parties to an HKIAC administered arbitration have a choice as to the determination of the tribunal's fees, which are calculated either:

- On the basis of agreed hourly rates (subject to the terms set out in Schedule 2).
- On the basis of the amount involved in the dispute (subject to the terms set out in Schedule 3).

The updated Practice Notes relate to the provisions in Schedules 2 and 3 and replace the Practice Notes on Arbitral Tribunal's Fees, Expenses, Terms and Conditions, which came into effect on 1 November 2013. The Practice Notes set out in detail HKIAC's practice of paying fees and expenses of arbitrators, tribunal secretaries and HKIAC under the Rules. Some of the new provisions include:

- Clause 7, which indicates the amount of HKIAC administrative fees payable where the parties withdraw or terminate their case at different stages of the arbitral proceedings.
- Clause 8.7, which permits a party to seek a separate award from the arbitral tribunal for reimbursement of payment of deposit paid by the party on behalf of another party (if any).

Due to the rapid economic growth in the markets and a surge in cross-border transactions, arbitration users across the globe are demanding a robust regulatory framework and a judicial climate that is pro-arbitration. Hong Kong has been successful in recognising these demands both in principle as well as in practice.

Forward-looking reforms such as those mentioned above, the unobtrusive support of the judiciary and the positive trend of enforcement of awards reinforce Hong Kong's position as one of the most preferred and comforting forums for international commercial dispute resolution.

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