International Arbitration

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Introduction

Arbitration in Hong Kong has thrived and Hong Kong is often the preferred seat in arbitration agreements, especially in cross-border deals with a connection to Hong Kong or the People's Republic of China ("**PRC**"). According to the 2015 International Arbitration Survey by Queen Mary University of London and White & Case, Hong Kong is ranked the third-most preferred and used seat worldwide, and the most favoured seat outside of Europe.

Arbitration in Hong Kong is governed by the Arbitration Ordinance ("**AO**") which is modelled on the UNCITRAL Model Law. Section 3 of the AO expressly provides that subject to the observance of safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and that the Hong Kong Courts should interfere in the arbitration of a dispute only in very limited circumstances as expressly provided for in the AO.

Hong Kong Courts have consistently adopted a pro-arbitration and pro-enforcement stance and have emphasised in numerous judgments that they will only interfere in limited circumstances.

Hong Kong's pro-arbitration and pro-enforcement environment is attractive to commercial parties as it offers them certainty and confidentiality. The judge in charge of the Arbitration and Construction List summarised the relevant principles which are of importance when determining cases in relation to arbitration:

1) "*The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.*
2) *Under the Arbitration Ordinance ("Ordinance"), the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.*
3) *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.*
4) *Enforcement of arbitral awards should be "almost a matter of administrative procedure", and the courts should be "as mechanistic as possible"...*
5) *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…*
6) *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…

7) *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…*

8) *Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of bona fide…*

9) *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...*

10) *The Court of Final Appeal clearly recognized…that parties to the arbitration have a duty of good faith, or to act bona fide.*[1]"

These principles, as summarised by Mimmie Chan J. in 2015, remain at the forefront of the Hong Kong Courts' mind.

Earlier this year, the Hong Kong Court again reinforced its favourable attitude towards arbitration by commenting that "*parties should be entitled to expect that the [Hong Kong] Court will enforce arbitration agreements and arbitral awards made pursuant thereto as a matter of course*",[2] in considering whether a costs dispute between a solicitors' firm and its client should be arbitrated.

Separately, in ***Lasmos Limited v Southwest Pacific Bauxite (HK) Limited***,[3] a service company alleged that a company failed to pay for services rendered under the agreement and sought to wind up the company on the basis the company should be deemed to be insolvent due to its failure to pay. The Companies Judge of the Hong Kong High Court held in January 2018 that if a company disputes the debt relied on by the petitioner and the contract under which the debt is alleged to arise contains an arbitration agreement that covers any dispute relating to the debt, and the company takes the steps required under the arbitration agreement and files evidence at Court to demonstrate this, then the winding-up petition should be dismissed, unless there are exceptional cases which justify a stay of the winding-up petition instead of an immediate dismissal.

Further, to ensure that the AO's objectives are respected, the Hong Kong Courts have the discretion to penalise a party's unsuccessful challenge to the validity of an arbitration agreement or an arbitral award with an order to pay the successful party's legal costs on an indemnity basis.

As Hong Kong continues to foster and develop arbitration, Hong Kong arbitral awards are also readily enforceable in multiple foreign jurisdictions as a Convention Award via the New York Convention.[4] There is also a mechanism to enforce Hong Kong arbitral awards in the PRC via the Arrangement Concerning Mutual Enforcement of Arbitral Awards.

Further, to maintain its international status in the arbitration sphere, Hong Kong has also recently enacted legislation to allow for third parties to fund arbitration in Hong Kong and clarify that disputes of intellectual property rights can be arbitrated.

Arbitration agreement

To minimise disputes in relation to the validity of the arbitration agreement when a dispute subsequently arises, parties should exercise caution in drafting the arbitration agreement.

Whilst an arbitration agreement can be either written or oral (as with any contract), an oral arbitration agreement does not attract any special protection under the AO, but is merely enforceable as a contract at common law. Under the AO, the arbitration agreement must be in writing and must specify that the parties agree to submit all or certain disputes to arbitration.

It is not necessary for the terms of the arbitration agreement to be included in the same document as the other contractual terms, but it is good practice to do so.

Further, whilst the AO provides for default mechanisms where the parties have no prior agreement on various procedural aspects, it is worthwhile to consider and specify the parties' agreement on the following matters when negotiating the arbitration clause:

1) the applicable substantive law;
2) the applicable procedural rules / administrative institution;
3) the seat of arbitration;
4) the number of arbitrators; and
5) the language to be used in the arbitration proceedings.

Arbitration procedure

Arbitration in Hong Kong may be *ad hoc* or administered by an institution.

Ad hoc arbitrations are arranged solely between the parties and the arbitrators. Parties may either adopt a specific set of arbitration rules or the rules drawn up by the parties themselves, whereas institutional arbitrations are governed by specific arbitration organisations.

Parties are at liberty to choose a particular set of arbitration rules applicable to their arbitration. The most commonly used institution in Hong Kong is the Hong Kong International Arbitration Centre ("**HKIAC**") and the most commonly used rules in Hong Kong are the HKIAC Administered Arbitration Rules (the "**HKIAC Rules**").

Generally, arbitration is commenced in Hong Kong when the claimant refers the dispute to arbitration. Under the HKIAC Rules, arbitration is deemed to be commenced once the HKIAC has received the Notice of Arbitration.

Once the arbitration procedure has commenced, the parties appoint a tribunal of arbitrators. Whilst parties are free to decide the number of arbitrators, typically a panel would consist of one or three arbitrators. Where a panel of three arbitrators is appointed, the applicant and the respondent would usually each appoint an arbitrator of their choice and the two appointed arbitrators would then jointly appoint the third arbitrator to comprise the panel. If the amount in dispute is not substantial, it is more cost-efficient to agree on appointing a sole arbitrator.

Once the sole arbitrator is appointed or the arbitral tribunal is constituted, it will first convene a preliminary meeting and issue directions to manage the case. Typical directions include the filing of pleadings, discovery of evidence, filing of factual and expert witnesses, and setting a timeline for the conduct of arbitration. It is also possible for an arbitration to be conducted on a 'papers' or 'document only' basis.

Arbitrators

In Hong Kong, parties often nominate and appoint senior members of the bar or retired judges as arbitrators. Additionally, all prospective arbitrators are required to sign a statement confirming his or her impartiality and independence. Accordingly, whilst parties often correspond amongst themselves on who would be the most appropriate candidate once a nomination has been made, challenges to the appointment of arbitrators are uncommon.

Under the AO, a challenge to an arbitrator can be made if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess the requisite qualifications agreed to by the parties. Under the HKIAC Rules, the grounds for challenge are wider, as a party may challenge an arbitrator under the same grounds as the AO, or if the arbitrator becomes *de jure* or *de facto* unable to perform his or her functions or for other reasons fails to act without delay.

Under the HKIAC Rules, such a challenge must be made within 15 days after the confirmation of that arbitrator, or within 15 days after a party becomes aware or ought reasonably to have become aware of the circumstances giving rise to a challenge. The HKIAC will determine any challenge of an arbitrator unless, upon receiving the challenge, the arbitrator withdraws or the other party agrees.

Interim relief

Under the AO, a tribunal generally has the power to grant interim measures similar to those granted by the Hong Kong Courts.

For example, a tribunal has the power to grant Mareva injunctions – which has the effect of freezing a party's assets – or an Anton Piller order, which allows for the physical collection of evidence from a party's premises. A tribunal can also require a party requesting interim measures to provide security in connection with that measure, which is similar to a Hong Kong Court's direction for fortification from a party seeking urgent injunctive relief.

The tribunal's power is derived from Sections 35 and 56 of the AO, but the parties can agree to 'opt-out' of such provisions in the arbitration agreement or subsequently.

However, even if the tribunal has the power to grant interim relief, it is important to consider whether it is more appropriate to apply to the Tribunal or to the Hong Kong Court (which also has jurisdiction to grant interim relief in aid of foreign proceedings under Section 45 of the AO) for the specific relief sought. One key factor to consider is whether interim relief is sought against a third party not subject to the arbitration agreement. If so, it may be beneficial to seek the assistance of the Hong Kong Court. Whilst a tribunal has jurisdiction to grant a Mareva injunction, local banks may act to comply with a Mareva injunction granted by a Hong Kong Court more swiftly.

Arbitration award

The tribunal may make an award at any time during the arbitration on different aspects of a dispute. If an interim measure is sought, the tribunal will usually give brief reasons for granting or dismissing the application.

The final award, which is given after the substantive hearing, is usually written in two parts.

The first part of the award typically sets out the arbitration agreement and identifies the gist of the dispute between the parties. It will name the tribunal, the hearings and record the pleadings filed and the orders and directions made. At the end, the award will spell out the orders made after hearing the parties' submission.

The second part of the award will explain the tribunal's reasoning, as Section 67 of the AO requires that the award include reasons unless otherwise agreed by the parties. If procedural challenges were raised, then the tribunal will set out its reasons as to why it decided it has jurisdiction to adjudicate the dispute. The tribunal will then go into its reasoning for its decision on the substantive dispute.

The benefit of dividing the award is that it enables parties to exhibit the first part of the award as evidence or public record while the confidentiality of the matter is reserved in the second part.

Challenge of the arbitration award

Under the AO, the adjudication of arbitration is final and there is a mechanism to convert an arbitral award into a judgment of the Hong Kong Court. This is a convenient measure that gives assurance to the successful party for prompt enforcement.

Save for very limited grounds of procedural irregularity or arbitrator's misconduct, there is a very low chance for appeal. Review based on merits is not allowed. In Hong Kong, parties may expressly agree in the arbitration agreement to the effect that an award may be appealed in certain limited circumstances, for instance if the arbitrator has made an error of law or displays apparent bias.

Enforcement of the arbitration award

An arbitral award can be enforced in Hong Kong once you obtain the leave of the Hong Kong Court and the judgment is entered in the terms of the award.

As an arbitration-friendly jurisdiction, the Hong Kong Courts hear and grant numerous applications for the recognition and enforcement of both domestic and international arbitral awards.

If uncontested, the application can be decided on the papers and, once leave has been obtained, the Court order is served on the defendant. The defendant will then have 14 days to apply to set aside the leave. If no such application is made, then the Hong Kong Court will issue a judgment in terms of the arbitral award. Thereafter, all methods of enforcement of a judgment, such as garnishing the debtor's bank account, become available to the judgment creditor.

If the application for leave to enforce an arbitral award is contested, then the defendant will have to satisfy a high threshold of proving to the Hong Kong Courts that the case falls within the limited grounds for refusal of enforcement. The defendant will need to prove that:

1) a party to the arbitration was under some incapacity;
2) the arbitration agreement was not valid;
3) it was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present its case;
4) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
5) the composition of the arbitral authority or arbitral procedural was not in accordance with the agreement of the parties or the law of the country where the arbitration took place; or
6) the award has not yet become binding on the parties or has been set side or suspended by a competent authority of the country in which, or under the law of which, it was made.

Overall, the Hong Kong Courts have residual discretion to refuse to enforce a Convention Award if the award is in respect of a matter which is not capable of settlement by arbitration under the laws of Hong Kong or it would be contrary to public policy to enforce the award.

However, even where any of the grounds for refusal of enforcement has been proven, the Hong Kong Courts have a residual discretion to order enforcement.

The grounds for refusal of enforcement of non-Convention awards are mostly identical to the grounds relating to Convention Awards. In addition, the court can also refuse to enforce a non-Convention award for any other reason the court considers it just to do so.

* * *

Endnotes

1. *KB v S* [2015] HKEC 2042, paragraph 1.
2. *Fung Hing Chiu Cyril v Henry Wai & Co* (a firm) [2018] HKCFI 31, paragraph 57.
3. [2018] HKCFI 426.
4. Hong Kong is a signatory to the New York Convention via the PRC's accession.

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James Yeung is a Hong Kong qualified lawyer with over 14 years' post-qualification experience. James specialises in commercial dispute resolution and has handled numerous high-profile litigation, arbitration and mediation cases.

James regularly acts in contentious matters for major banking and financial institutions, listed companies, building managers, casinos and major corporations in Hong Kong and overseas. His experience includes handling shareholders' disputes, unfair prejudice claims, contractual disputes, professional negligence claims and fraud claims. With his construction law background, James also has considerable experience in handling construction disputes for major developers, main contractors and sub-contractors.

James completed his LL.B. and PCLL at the University of Hong Kong. He was admitted as a Solicitor in Hong Kong in 2002. James is fluent in English, Cantonese and Mandarin.

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Felda joined the firm as a trainee solicitor in 2011 and was admitted as a Solicitor in Hong Kong in 2013.

Felda has experience in commercial and civil litigation, with a focus on arbitration, contractual disputes and fraud investigations. Recent arbitration related work includes enforcing foreign arbitration awards in Hong Kong and defending applications to set aside arbitration awards. Recent litigation work includes assisting in large-scale cross-border actions worth in excess of HK$1 billion at both the Court of Appeal and Court of Final Appeal stage and obtaining various injunctions and urgent interim relief both in support of Hong Kong proceedings and in aid of foreign proceedings.

Felda completed her LL.B. and PCLL at the University of Hong Kong. She also completed a LL.M. in Arbitration and Dispute Resolution at the University of Hong Kong and is a member of the Chartered Institute of Arbitrators.

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