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ARBITRATION

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

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It is widely recognised that the pro-arbitration and pro-enforcement approach of Hong Kong courts is the key attribute that underpins Hong Kong's position as an attractive venue for commercial dispute resolution.

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 and pro-enforcement. Hong Kong has been successful in recognising these demands both in principle and in practice.

This article considers:

- The pro-arbitration approach of courts in Hong Kong in the context of a recent judgment in Arjowiggins.
- Other important developments in the arbitration regime in Hong Kong.

THE ARJOWIGGINS CASE

Arjowiggins HKK2 Ltd v Shandong Chenming Paper Holdings Ltd [*HCCT 53/2015*] was decided by the Honourable Madam Justice Mimmie Chan on 19 January 2018

In this case, the Court of First Instance granted an anti-suit injunction restraining an award debtor from commencing parallel proceedings against the award creditor and its agent in mainland China.

Background. Arjowiggins HKK2 Ltd (claimant) and Shandong Chenming Paper Holdings Ltd (respondent) entered into a joint venture contract on 27 October 2005 (JV contract), pursuant to which a joint venture company was established in mainland China for the purpose of manufacturing paper products (JV company). The governing law of the JV Contract was PRC law. The dispute resolution clause provided for arbitration in Hong Kong in accordance with the Hong Kong International Arbitration Centre (HKIAC) Rules.

Disputes arose subsequently between the claimant and the respondent and various proceedings ensued in the mainland as a result, including proceedings for the dissolution of the JV company which was eventually ordered to be dissolved.

The Award. In October 2012, the claimant commenced an arbitration in Hong Kong under the JV contract claiming that the respondent was in breach of the provisions of the JV contract, including, among others, by seeking the dissolution of the JV company without the necessary unanimous vote of all the directors of the JV company. The respondent counterclaimed for damages from the claimant alleging breach of the JV contract and breach of PRC law.

On 20 November 2015, an award was made in favour of the claimant and the respondent's counterclaims were dismissed in their entirety. Damages in the sum of RMB167.86 million were awarded to the claimant with interest and costs.

Enforcement of the Award. On 7 December 2015, the claimant obtained leave of the court to enforce the award in Hong Kong. In February 2016, the respondent applied to set aside the order on the grounds that the:

- Arbitration agreement between the parties was invalid under PRC law.
- Arbitral tribunal had no jurisdiction to determine the claim.
- Composition of the tribunal was not in accordance with the agreement between the parties.

On 12 October 2016, the respondent's application to set aside the order was dismissed as being 'totally without merit' by the Honourable Madam Justice Mimmie Chan. The respondent was directed to pay costs to the claimant on an indemnity basis.

Further proceedings were instituted in Hong Kong and on the mainland.

Winding up proceedings by the claimant in Hong Kong. As the respondent failed to honour the award, the claimant served a statutory demand on the respondent demanding payment of the sums owed under the award and other judgments and orders made in the PRC.

In November 2016, the respondent sought to restrain the claimant from petitioning for the winding up of the respondent. The injunction application was dismissed, and Justice Harris remarked that the conduct of the respondent was unethical and its refusal to honour the award showed disregard for the integrity of the legal system of Hong Kong and contempt for the Hong Kong courts.

Proceedings by the respondent in the PRC. In July 2017, the respondent commenced proceedings before the Weifang Court in the Shandong Province in China (foreign proceedings). The claims made, and the parties named in the foreign proceedings were identical to proceedings brought by the respondent earlier in 2013 in the Weifang Court, which had been withdrawn by the respondent in December 2016. The foreign proceedings were instituted by the respondent against the claimant and one Mr Tong Chong (a director of the JV company nominated by the claimant) (Tong), with the JV company named as the third defendant. In the foreign proceedings, it was claimed that the claimant and Tong dealt with the JV company's property without the approval of the board of directors, and that Tong had misappropriated all the assets of the JV company and had caused the JV company to sustain losses. It was also pleaded that the claimant and Tong effectively controlled the JV company and refused to disclose any financial information to the respondent.

Anti-suit injunction application by the claimant in Hong Kong. On 10 October 2017, the claimant issued an anti-suit injunction application to restrain the respondent from proceeding with the foreign proceedings on the grounds that the:

- Foreign proceedings were instituted in breach of the parties' arbitration agreement.
- Respondent's conduct was vexatious and oppressive, as the claims in the foreign proceedings had been decided in the award and in the proceedings by which the respondent had attempted to unsuccessfully set aside the award.

Issues. In response, the respondent argued that the:

- Foreign proceedings were instituted by the respondent in its own name, but in fact, they constituted a derivative action.
- Arbitration agreement and the award did not bind the JV company, or Tong, and as such, the matter would be best tried by the Weifang Court.

Ruling. The court agreed with the claimant that it would be vexatious and oppressive on the part of the respondent to reopen the issues determined in the arbitration on the basis that the:

- Claims made by the respondent in the foreign proceedings could not be said to be unrelated to the JV contract, and the foreign proceedings fell well within the scope of the arbitration clause in the JV contract.
- Respondent's claims had been already determined in the award, by which the respondent was bound.
- As for the claim against Tong, the respondent's counterclaim in the arbitration proceedings related to Tong and his alleged acts and omissions as a director of the JV company, which were now being repeated in the foreign proceedings.
- New claims (if any) by the respondent would have to be brought in separate arbitration proceedings pursuant to the JV contract.

The court, accordingly, granted the injunction and extended it to restrain the further conduct of the foreign proceedings against Tong.

In exercising her discretion in favour of the claimant, Justice Chan shared the sentiments expressed by Justice Harris and held that the conduct of the respondent was unethical, reproachable and unacceptable, as the respondent displayed complete disrespect for the arbitration agreement and the arbitral process to which it had voluntarily agreed under the JV contract.

As is the norm in most such cases, the respondent was directed to pay the costs of the claimant on an indemnity basis.

Conclusion. The decision reinforces the Hong Kong courts' continuing pro-arbitration stance and their willingness to support the arbitral process, even after the arbitral proceedings have concluded, to guard against the use of parallel proceedings in foreign jurisdictions as a forum-shopping tactic, particularly where the award debtor displays a deliberate disregard for the justice system.

OTHER SIGNIFICANT INITIATIVES AND DEVELOPMENTS IN THE ARBITRATION REGIME

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

- **Arbitration of disputes involving IPR**. The Arbitration (Amendment) Ordinance 2017 introduces a new Part 11A to the Arbitration Ordinance (Cap. 609) with the objective of clarifying that disputes over intellectual property rights (IPR) can be resolved by arbitration and it will not be contrary to the public policy of Hong Kong to enforce awards involving IPR.
- The effect is that the enforcement of an award would not be refused in Hong Kong under either the arbitrability ground or the public policy ground merely because the award involves IPR.
- The new provisions apply to arbitral proceedings commenced on or after 1 January 2018.
- **Third Party funding of arbitration and mediation proceedings**. On 23 June 2017, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 came into force, legalising third party funding of arbitration and mediation proceedings commenced in Hong Kong and abolishing the offences of champerty and maintenance in this context. For the purposes of this legislation, mediation proceedings mean mediation proceedings referred to in the arbitration agreement or commenced during the arbitral process.
- The Ordinance represents a significant and essential development for Hong Kong as an international dispute resolution centre, brining it in line with most other jurisdictions such as England and Wales, Australia, France, Germany, Netherlands, Switzerland, Korea, the PRC, the EU and the US.
- In summary, a third-party funder will now be permitted to provide funding to a party pursuant to a funding arrangement (which would have to be in writing and made after the amended law takes effect), in return for a financial benefit if the arbitration/mediation is successful within the meaning of the funding agreement.
- The law also contains disclosure requirements regarding informing the other parties and the relevant court or tribunal about the:
  - Fact of a funding agreement;
  - Name of the funder;
  - Termination of the funding agreement (other than because the arbitration/mediation has ended).
- A code of practice was issued on 7 December 2018 for monitoring the activities in connection with third-party funding, including provisions for capital requirements, disclosure, privilege, conflicts of interest, and so on.
- **HKIAC announces Belt and Road Initiative resource centre**. In April 2018, the HKIAC appointed a panel of industry experts to a Belt and Road Advisory Committee and launched an online Belt and Road Initiative (BRI) resource centre to be updated regularly with news and practical resources related to the project.
- The Advisory Committee is a body of independent experts that is meant to bring together legal and commercial expertise across the infrastructure, finance, construction and maritime sectors. Meanwhile, the resources available on the online BRI platform include news, publications and reports relevant to the BRI, a list of past and future HKIAC BRI events and information on dispute resolution options for BRI projects.

- These two initiatives align with Hong Kong's role as a hub for BRI activities and professional services and reinforce HKIAC's role as an independent and internationally-recognised dispute resolution centre for resolving Belt and Road disputes.
- **HKIAC launches panel of arbitrators for financial services disputes**. In May 2018, HKIAC launched a panel of Arbitrators for Financial Services Disputes comprising 30 leading experts on financial arbitrations from 17 different jurisdictions. The establishment of this panel is said to be an important step for HKIAC to tap into the financial services market and will appeal to parties involved in financial services disputes as it will provide them with a convenient source of arbitrators with relevant technical expertise and experience.

CONCLUSION

Forward-looking reforms such as those mentioned above, the unobtrusive support of the judiciary and its pro-arbitration approach continue to reinforce Hong Kong's position as one of the most preferred and comforting forums for international commercial dispute resolution.

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