The International Arbitration Review

Editor
James H Carter

Law Business Research

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Second Edition

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The International Arbitration Review

Second Edition

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

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New York
July 2011

Chapter 16

HONG KONG

Joseph Kwan and Kwok Kit Cheung[*]

I INTRODUCTION

Until recently, arbitrations in Hong Kong have been governed by the Arbitration Ordinance, Chapter 341 of the Laws of Hong Kong. After over 10 years of consultation and preparation, Hong Kong's new Arbitration Ordinance came into force on 1 June 2011. The new Arbitration Ordinance has been given the title 'Chapter 609 of the Laws of Hong Kong' ('the new Arbitration Ordinance').

Under the old Arbitration Ordinance, there were two distinct arbitration regimes: the domestic regime and the international regime. The Hong Kong Court has greater control over domestic arbitrations in that domestic arbitral awards might be subject to judicial review and appeal to the Hong Kong Court on a question of law in certain circumstances. However, no right of appeal lies to the Hong Kong Court in respect of international arbitral awards, save in very limited and special circumstances, whereby an award can be set aside by the Court. In 1990, Hong Kong adopted the Model Law promulgated by the United Nations Commission on International Trade Law ('UNCITRAL'), which applied to international arbitrations. The Model Law was reproduced at Schedule 5 of the old Arbitration Ordinance.

Under the New Arbitration Ordinance, the distinction between domestic and international arbitration is abolished. There is now a unitary regime of arbitration based on the Model Law. The structure of the New Arbitration Ordinance is divided into 14 parts, which generally follow the sequence of events in an arbitration. Each article of the Model Law is adopted and put in the body of the new Arbitration Ordinance subject to modifications and supplements expressly provided for therein. In fact, only 11 articles out of the 36 articles in the Model Law have been modified or supplemented in the new Arbitration Ordinance. The Court of First Instance of the High Court of Hong

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Kong remains the court with the jurisdiction to hear matters in relation to arbitration proceedings under the New Arbitration Ordinance.

Hong Kong is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the NY Convention') by virtue of China's accession to the NY Convention in 1987. Therefore, an arbitral award obtained in Hong Kong is enforceable in other states that are signatories to the NY Convention. Section 84 of the new Arbitration Ordinance provides, *inter alia*, that an arbitral award may be enforced in the same manner as a judgment of the Court of First Instance. Under Section 87of the new Arbitration Ordinance, a Convention award is enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of Section 84 of the new Arbitration Ordinance.

An application for enforcement under Section 84 of the new Arbitration Ordinance should be made by issuing an *ex parte* originating summons with the court, together with a supporting affidavit setting out the factual background of the award and confirming the outstanding liability. These applications are simple and straightforward and mostly dealt with by the Court of First Instance on paper without a hearing. In our experience, these *ex parte* applications would usually be approved very quickly. After obtaining the approval of the court, the applicant should serve the court order on the respondent who can apply to the court for setting aside the order within 14 days of the service of the order.

After the resumption of China's sovereignty over Hong Kong on 1 July 1997, Hong Kong ceased to be a member of the NY Convention through membership of the United Kingdom. Although China extended its membership of the NY Convention to Hong Kong soon after the handover, the summary enforcement of arbitral awards between Hong Kong and mainland China ('the mainland') can no longer be done through the Convention which only applies between two different contracting countries. To deal with this issue, the authorities in China and Hong Kong signed the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region on 21 June 1999 ('the Arrangement'). The Arrangement was enacted in Hong Kong by way of Division 3 of Part 10 of the new Arbitration Ordinance. The Arrangement mirrors the provisions in the NY Convention, thereby restoring the enforcement procedures that were in place prior to the handover.

According to the Arrangement, a party with a Hong Kong arbitral award may apply to the intermediate people's court of the place where the party against whom the application is filed is domiciled or in the place where the property of the said party is situated to enforce the award. If the place where the losing party is domiciled or where it has property falls within the jurisdiction of different intermediate people's courts, the applicant may apply to any intermediate people's court but not more than one. On the other hand, a party with a mainland arbitral award may apply to the Court of First Instance of Hong Kong for enforcement of the award. Hong Kong recognises awards issued by many arbitral authorities in the mainland, including the China International Economic and Trade Arbitration Commission ('CIETAC') and the local arbitration authorities in the major cities.

There are only limited grounds for refusing to enforce a Hong Kong arbitral award, which mirror the grounds for refusal in the NY Convention. The most controversial

of these might be what constitutes public policy of China as a ground to resist the enforcement of an arbitral award in the mainland.

One major limitation under the Arrangement is that the applicant is not entitled to file applications in both Hong Kong and the mainland at the same time. Only when the result of the enforcement of the award by the court of one place is insufficient to satisfy the award in its entirety may the applicant apply to the court of another place for enforcement of the outstanding liability arising out of the award.

It should be noted that the time limit for applications to enforce an arbitral award is different in the two places. In Hong Kong, it is six years from the date when the other party fails to fulfil its obligation under the award. On the other hand, under Chinese law the time limit is two years.

According to the statistics of the Hong Kong International Arbitration Centre ('the HKIAC'), between 1997 and 2010 there were 291 applications to enforce arbitral awards in Hong Kong and only nine applications were refused. In 2010, there were a total of 25 applications for enforcement of arbitral awards in Hong Kong, out of which six were mainland arbitral awards.

i Local institutions

While the new Arbitration Ordinance provides a basic legal framework for arbitration proceedings conducted in Hong Kong, the detailed procedures of arbitration proceedings are governed by the arbitration rules adopted by the parties or as directed by the arbitrators.

Unlike the mainland or other jurisdictions, there is no legal requirement for the parties to conduct arbitration under any recognised institution. Parties to the arbitration are free to conduct arbitration on an *ad hoc* basis.

The HKIAC was established in 1985 to facilitate and promote the development of different forms of alternative dispute resolution in Hong Kong and the Asia-Pacific region, including in particular, arbitration. The HKIAC provides information on arbitration and other dispute resolution and maintain lists of local and international arbitrators and mediators. Its premises are located in the conveniently accessed Central District and provide purpose-built hearing and conference rooms and full support facilities. Users may rent the facilities for the purpose of arbitration meetings or hearings.

Under thenew Arbitration Ordinance, the HKIAC is authorised to determine the number of arbitrators and to appoint arbitrators when the parties are unable to agree the appointment of the arbitrator in the absence of express provisions to the contrary in their arbitration agreement. Further, if an arbitration agreement provides for the appointment of a mediator by a third party for resolving the dispute and that third party defaults in making an appointment, the HKIAC may appoint a mediator upon application of any party.

The HKIAC also devised various sets of arbitration rules such as the HKIAC-Administered Arbitration Rules, the Short-Form Arbitration Rules, HKIAC Electronic Transaction Arbitration Rules, Small Claims and 'Documents Only' Procedures. As previously mentioned, the parties to an arbitration are free to choose which arbitration rules are to govern their arbitration. If the applicable rules are not stated in the arbitration agreement, the UNCITRAL Arbitration Rules or the HKIAC-Administered Arbitration

Rules are typically applied in international arbitrations conducted in the HKIAC by agreement of the parties or order of the arbitral tribunal.

According to the latest statistics published by the HKIAC, it handled 624 dispute resolution matters in 2010, including 291 arbitrations, 107 domain name disputes and 226 mediation disputes.

In 2008, the International Chamber of Commerce ('ICC') opened a branch of the Secretariat of its International Court of Arbitration in Hong Kong with a case management team to administer cases in the region under the ICC Rules of Arbitration. The ICC in Hong Kong also operates a Standing Committee on Arbitration to handle various issues involving ICC arbitration in Hong Kong. Its primary functions are to provide training and education, to promote ICC arbitration, to consider and comment on issues in ICC arbitration and to advise on the selection of ICC arbitrators.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The New Arbitration Ordinance

As previously stated, the domestic and international regimes of arbitrations under the old Arbitration Ordinance was abolished in the new Arbitration Ordinance. The purpose of the reform is to simplify the law on arbitration and make it more user-friendly. It is also intended to enhance and promote the reputation of Hong Kong as a Model Law jurisdiction. Under the new regime, the arbitration system goes in line with the international arbitration practices, standards and development. Users will no longer be required to go through the process of identifying whether a particular arbitration is domestic or international and ascertaining whether the Model Law is applicable.

While the scheme for enforcement of arbitral awards is basically retained, the following are some key changes in the provisions in the new Arbitration Ordinance:

- *a* There was no provision in the old Arbitration Ordinance as to the limitation period for arbitrations. It is now expressly provided that the Limitation Ordinance and any other ordinances relating to the limitation of actions apply to arbitrations as they apply to the court actions.
- *b* Proceedings under the new Arbitration Ordinance will be held otherwise than in open court subject to the court's right to order the same to be held in open court. To further safeguard the confidentiality of arbitration, it is now expressly provided that the parties are deemed to have agreed not to publish, disclose or communicate any information relating to arbitral proceedings or to an award made in those proceedings, subject to certain limited exceptions.
- *c* The requirement that an arbitration agreement be in writing can be met by an electronic communication, which has a wide definition in the new Arbitration Ordinance.
- *d* Some provisions of the domestic regime in the old Arbitration Ordinance in relation to determination by a sole arbitrator, consolidation of arbitrations, determination of preliminary question of law by the court, challenging arbitration awards on the ground of serious irregularity and appeals against an arbitral award

on questions of law are available for opting in by express agreement of the parties or automatically in prescribed situations.

e If an arbitration agreement provides for the appointment of a mediator by a third party for resolving the dispute and that third party defaults in making an appointment, the HKIAC may appoint a mediator upon application of any party.

f With the consent of the parties in writing, an arbitrator may act as a mediator after the commencement of the arbitration and this cannot be a ground for objection against the arbitrator continuing hearing the case.

ii Arbitration developments in local courts

***FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Others*[1]**

In *FG Hemisphere Associates*, the Court of Appeal went through an extensive analysis and debate on, *inter alia*, the issues of state immunity and waiver of immunity arising out of an application before the Hong Kong Court to enforce NY Convention arbitral awards made in France and Switzerland against the Democratic Republic of the Congo ('the DRC'). The plaintiff obtained leave in Hong Kong to enforce the awards and injunction to prevent third parties from transferring assets allegedly due to the DRC. The DRC claimed immunity from jurisdiction and from the process of execution.

The Court of Appeal held that in the absence of legislation to a broader effect, the submission of a foreign state to arbitration operates solely to remove state immunity from the first stage of the arbitration in which the national courts exercise supervisory powers, and it does not constitute waiver of state immunity from jurisdiction of the Hong Kong courts and from execution.

By majority, it was held that the DRC enjoys restrictive but not absolute immunity from the jurisdiction of Hong Kong courts. The Hon Mr Justice Stock VP found that the doctrine of restrictive immunity (which he held to be the common law of Hong Kong as of 30 June 1997 before China resumed the exercise of sovereignty over Hong Kong on 1 July 1997) continued to apply in Hong Kong. Restrictive immunity means that states are immune in respect of acts of government but not in respect of commercial acts.

Also by a majority, it was held that leave should be given to enforce the arbitral awards and that the DRC is not immune from execution in respect of such of the fees as may be due to the DRC and are not intended to be used for sovereign purposes. On the evidence before the court, the court found that part of the fees payable to the DRC are intended for commercial purposes rather than public purposes and thus they are subject to enforcement. Accordingly, the injunction preventing third parties from transferring assets allegedly due to the DRC was restored.

DRC appealed to the Court of Final Appeal in Hong Kong and requested the Court of Final Appeal to refer the issue of sovereign immunity to the National People's Congress of China for interpretation. The hearing of the appeal took place in March 2011 and the judgment has not been issued. This will be a decision which draws significant

1 CACV 373/2008 & CACV 43/2009; judgment handed down on 10 February 2010. Leave to appeal to the Court of Final Appeal granted on 5 May 2010.

implications not only in the context of arbitration but also on judicial independence and politics in Hong Kong.

***Shandong Hongri Acron Chemical Joint Stock Company Limited v. PetroChina Internatonal (Hong Kong) Corporation Limited*[2]**

Shandong Hongri was a case concerning the enforcement in Hong Kong of a CIETAC arbitral award in favour of Shandong Hongri. Apart from requiring PetroChina to pay $2,953,198 and other consequential payments to Shandong Hongri, the award provided, at the very beginning, that Shandong Hongri should return a certain amount of sulphur to PetroChina. The court was requested to consider whether the obligations arising from the award on the respective parts of Shandong Hongri and PetroChina are concurrent obligations or whether the return of the sulphur is a condition precedent to payment.

The award is silent as to when the sulphur must be delivered to PetroChina but provides that the payment of the money awarded shall be paid within 30 days from the date of the award. PetroChina relied upon Article 49(1) of the CIETAC Arbitration Rules which provides that 'The parties must automatically execute the arbitral award within the time period specified in the award. If no time limit is specified in the award, the parties shall execute the arbitral award immediately'. Counsel for Shandong Hongri relied on the judgment of another similar case in 1992, in which it was held that the award became binding on the parties when it was published.

The court compared the awards in the two cases and found that the case relied upon by Shandong Hongri is distinguishable. The court agreed with the approach of interpretation of the award proffered by PetroChina and held that the obligation on PetroChina to make payment of the awarded sums to Shandong Hongri is not concurrent with the obligation of Shandong Hongri to return the sulphur. Rather it was subsequent to, and condition upon, the due performance of that obligation.

Before the issue came to be resolved by the court, PetroChina secured three letters to be issued by CIETAC to clarify the correct interpretation of the award and the sequence of performance. The court also considered the issue whether the three letters constituted a supplementary/additional award and thus formed an integral part of the award. It is trite law that upon the delivery of an award, the arbitral tribunal becomes *functus officio*. The *functus officio* doctrine in relation to arbitral awards means that once an arbitrator has issued a final award, he may not revise it. Further, it is held that the issuance of the three letters was not in compliance with Article 48 of the CIETAC Arbitration Rules, which is the only provision in the rules in relation to issuing an additional award. In the circumstances, the court decided that the three letters do not form part of the award.

***Gao Haiyan & Another v. Keeneye Holdings Limited & Another*[3]**

The respondents in this case applied to set aside an order for the enforcement of an arbitral award made by the Xian Arbitration Commission on the ground that it would be contrary to public policy. The respondents suggested that the enforcement of the award

2 [2011] 2 HKLRD 124.

3 HCCT 41/2010 , unreported, judgment handed down on 12 April 2011.

would be contrary to public policy because the award was tainted by bias or apparent bias. During the course of the arbitration before the Xian Arbitration Commission, the Secretary General and one of the three arbitrators were appointed to mediate the case with a view to bring about a settlement of the case by the respondents paying 250 million renminbi to the applicants. In this regard, they met with a person who was merely a friend of the respondents at a hotel for dinner and asked that third party to 'work on' the respondents to accept the Arbitral Tribunal's 250 million renminbi proposal. There were disputes as to the details of the meeting but the aforesaid facts were agreed by the parties. The judge considered that the approach and the manner in which the mediation was conducted would cause a fair-minded observer to apprehend a real possibility of bias on the part of the Arbitral Tribunal. The judge also gave some remarks on the risks of mediated arbitration, which is expressly allowed under the new Arbitration Ordinance.

The respondents raised, *inter alia*, the issue of bias in an earlier application for setting aside the award at the Xian court but failed. The judge in the Hong Kong court held that the court supervising the conduct of the arbitration (in the present case the Xian court) refuses to set aside an award as contrary to that court's public policy does not give rise to an estoppel in Hong Kong. He went on to say that the Hong Kong court is to consider the question of bias from the viewpoint of Hong Kong public policy and is not bound by a finding of the Xian court relating to Xian public policy. The judge took into account two competing public policy considerations, namely, finality to litigation and appearance of bias in an award, and decided to refuse enforcement of the award as a matter of public policy.

III OUTLOOK AND CONCLUSIONS

i Reciprocal enforcement of judgments in the mainland and Hong Kong

The 'Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned' was signed on 14 July 2006 and became Hong Kong law with the enactment of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597 of the Laws of Hong Kong) on 1 August 2008. Since then, certain court judgments made in Hong Kong can be registered and enforced in the mainland and *vice versa*. This appears to create an initial impression that Hong Kong judgments may be readily enforceable in the mainland, which may make litigation a more attractive procedure than arbitration in resolving cross-border disputes.

However, the application of the said Ordinance is rather limited. It only covers judgments made by designated courts which order payments of money and those judgments must be final and conclusive. Another factor that restricts its application is that it only applies where the parties concerned in the judgment have previously agreed in writing to submit to the exclusive jurisdiction of the courts in the mainland or Hong Kong for resolving the relevant disputes. As of now, we are not aware of any application for registration of a mainland judgment in Hong Kong to date. On the other hand, we understand that there was at least one application for reciprocal enforcement of a Hong Kong court judgment in Shanghai pursuant to the Arrangement.

ii The new UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules are widely used in arbitrations, especially international arbitrations, in Hong Kong. The 1976 edition of the Rules were not revised until 2010. The new Rules provide that the parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the new Rules, unless the parties have agreed to apply a particular version of the Rules.

The following are new in the Rules:

a It is no longer necessary to agree in writing that the Rules will be the rules of the arbitration and any record of an agreement to arbitrate in accordance with the Rules will suffice.

b There are new provisions that allow for the joinder of other parties to the arbitration agreement and inclusion of these third parties in the arbitration making the Rules more suited for multiparty disputes.

c Arbitrators are under a continuous obligation to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

d The arbitral tribunal has the power to grant a broader range of interim measures of protection.

e There are various provisions that are designed to make it harder for the parties to frustrate or delay the expeditious disposal of the arbitration.

f There is a new system for the establishment of a costs regime for the proceedings and a mechanism for the review and adjustment of the tribunal's costs under an award by the appointing authority or the Secretary General of the Permanent Court of Arbitration at The Hague where the tribunal's determination of costs is either inconsistent with the agreed costs regime or is 'otherwise manifestly excessive'.

iii Hong Kong–China Arbitration Agreement

Along with the phenomenal economic development in China and the increasing economic cooperation between Hong Kong and China over the last decade, the demand for arbitration services also increases. As part of the result of the Closer Economic Partnership Agreement ('CEPA'), the Secretary for Justice of Hong Kong signed a bilateral cooperation agreement on legal services for commercial matters in arbitration with China Council for Promotion of International Trade ('the CCPIT'), which is the overseeing body of CIETAC on 25 October 2010.

The main goals of the agreement are:

a to foster exchanges and cooperation on legal services and arbitration bodies between Hong Kong and China;

b to strengthen information exchanges and organise conferences on legal services and related activities;

c to promote sharing of experiences between the two jurisdictions by assisting the legal services and arbitration sectors in organising activities;

d to promote cooperation and exchanges between legal departments under the CCPIT and related bodies in Hong Kong in areas including arbitration and mediation; and

e to enhance cooperation between arbitration bodies across the border with a view to improve efficiency and standards in resolving commercial disputes.

The signing of the agreement is part of the government's efforts to further its policy objective of developing Hong Kong as the centre for dispute resolution in the Asia-Pacific region.

Appendix 1

ABOUT THE AUTHORS

JOSEPH KWAN

Deacons

Joseph Kwan is a partner in Deacons' commercial litigation practice group. He advises and represents clients on companies matters, shareholders disputes, breach of directors' duties, investment and cross-border disputes, employment, commercial fraud, sale of goods disputes, insolvency and public inquiries. He also advises clients regularly on financial regulatory issues. In the past five years of *ALB 500*, Mr Kwan has been recognised as a leading individual in the regulatory area. He is also a member of the Civil Litigation Committee of the Law Society of Hong Kong.

KWOK KIT CHEUNG

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Kwok Kit Cheung has wide experience in handling cross-border disputes, particularly those between Hong Kong and mainland China. He has acted for both local and overseas clients in arbitrations and litigation in Hong Kong and various parts of mainland China. Mr Cheung is also a fellow of the Hong Kong Institute of Surveyors and Royal Institution of Surveyors. He has acted for developers, contractors and subcontractors in major construction dispute resolution. He is a member of the panel of the arbitrators in the Hong Kong Institute of Surveyors and China International Economic and Trade Commission. He has been appointed as an arbitrator and mediator in occasionally resolving construction disputes.

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