Arbitration in Hong Kong: The Year of the Monkey in Hindsight

Kluwer Arbitration Blog
February 25, 2017

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Please refer tot his post as: Matthew Townsend, 'Arbitration in Hong Kong: The Year of the Monkey in Hindsight', Kluwer Arbitration Blog, February 25 2017, http://kluwerarbitrationblog.com/2017/02/25/arbitration-in-hong-kong-the-year-of-the-monkey-in-hindsight/

As Hong Kong enters the year of the Rooster, its arbitration community can look back on a year of the Monkey in which the territory's institutions and authorities implemented a number of initiatives aimed to promote arbitration, and its courts rendered several pro-arbitration decisions.

Third party funding for arbitration in Hong Kong

In November 2016, the Hong Kong Law Reform Commission ("LRC") released a report in which it recommended that third party funding of arbitration ("TPF") should be expressly permitted for arbitrations seated in Hong Kong.

The report, which also recommends TPF be permitted for services provided in Hong Kong in aid of arbitrations with a foreign seat, comes in the wake of an extensive public consultation (covered in last year's update on the year of the Sheep).

Hong Kong law does not permit TPF for litigation, except in limited circumstances, but some Hong Kong practitioners consider it an open question as to whether TPF is permissible for arbitrations in Hong Kong. In its report, the LRC recommends amendment to the Arbitration Ordinance (Cap. 609) (the "Ordinance") to resolve this issue.

The report also makes a number of other recommendations, including that clear standards be developed to apply to TPF funders operating in Hong Kong. These should in turn address issues such as capital adequacy, confidentiality, disclosure, privilege, conflicts of interest, control of the arbitration by the funder and the grounds for termination of TPF arrangements.

As for the implementation of these standards, and other regulations, the LRC recommends that for an initial period of three years a "light touch" approach should be adopted in line with international practice and in accordance with Hong Kong's needs and regulatory culture. A body authorized under the Ordinance should issue a code for TPF Funders ("Code"), and upon the conclusion of the initial period should issue a report reviewing the Code's operation and making further recommendations.

The LRC further recommends that a funded party be required to give written notice, to the other party and relevant institution, of its funding agreement, and the identity of the funder.

The report also considers the, much debated, question of whether a tribunal should be empowered to make orders for costs and security for costs orders against a TPF funder. It recommends that there is

no need to give a tribunal the power to order security for costs against a TPF funder, as the powers of a tribunal under the Ordinance to order a party to give security for costs afford adequate protection. As for the question of whether tribunals should be entitled to make costs orders against a TPF funder, the report makes no immediate proposals but suggests that the issue be considered during the initial three-year period of the Code's operation.

Hong Kong confirms arbitrability of IP rights

In recognition of the increasing volume of disputes relating to intellectual property rights ("IPR"), Hong Kong has introduced new amendments to the Ordinance, confirming that IPR disputes may be resolved by arbitration, and that it is not contrary to Hong Kong public policy to enforce arbitral awards involving IPR.

At present, there is no specific legislative provision addressing the arbitrability, or otherwise, of IPR in Hong Kong. The Arbitration (Amendment) Bill 2016 (the "Bill"), introduced into the Legislative Council on 14 December 2016, would insert such provisions by way of a new Part 11A containing new Sections 103A-J.

The new sections variously: define terms relating to IPR disputes (Sections 103A-C); confirm that such disputes may be arbitrated (Section 103D); clarify the status of licensees who are not party to the arbitration (Section 103E); and provide that an arbitral award may not be set aside, or refused enforcement, only because the award involves an IPR. (Section 103F-G). Sections 103I-J concern patents, and provide inter alia that the validity of a patent may be put at in issue in arbitral proceedings.

The Bill also coincides with a recent initiative of the Hong Kong International Arbitration Center (HKIAC) to create a panel of arbitrators for IPR disputes. HKIAC's new panel comprises more than thirty experts with expertise related to IP.

HKIAC

The year of the Monkey saw the HKIAC implement a number of initiatives, including, on 15 December 2016, releasing data on the costs and duration of a HKIAC arbitration.

The statistics also coincide with similar recent releases by other leading arbitration institutions including the Singapore International Arbitration Centre ("SIAC"), the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), and the London Court of International Arbitration ("LCIA"). They therefore offer a basis for comparison.

Although the standard caveats apply regarding differences in sampling and collation methodology, it would appear that:

• The median duration of an HKIAC arbitration of 11.6 months, is broadly comparable to that of the SIAC, but compares favourably to the figures of the LCIA and the SCC.

• Median tribunal fees for HKIAC arbitrations (US$19,587.63) are approximately US$7,300 lower than those for the SIAC, with median administration fees (US$ 9,281.49) approximately US$3,400 higher. Neither the LCIA nor SCC release exactly comparable data.

The results nonetheless would appear to vindicate HKIAC's claim to be one of the world's most time and cost-efficient arbitration institutions.

In October 2016, the HKIAC also announced that it shall offer its hearing and meeting rooms to parties

free-of-charge in respect of HKIAC-administered dispute resolution proceedings to which one or more of the parties is a State listed on the "Organization for the Economic Cooperation and Development "DAC List of ODA assistance" ("OECD List").

The OECD List, identities a number of countries which, on the basis of World Bank gross national income statistics, and UN "Least Development Country" categorisation, are eligible to receive official development assistance ("ODA"). Such entities will now enjoy free-of-charge use of the HKIAC's world class facilities for qualifying disputes.

The HKIAC's initiative is also a timely one in view of growing attention given to investor state arbitration in Asia, and the fact that many of the countries listed are also part of China's One Belt One Road outward bound investment initiative.

CIETAC HK

In a noteworthy development for CIETAC's Hong Kong Arbitration Centre ("CIETAC HK"), a Chinese court has for the first time enforced a CIETAC HK arbitral award in Mainland China.

While CIETAC is China's busiest arbitration institution, it only established its Hong Kong Arbitration Centre in September 2012. The CIETAC HK's authority to accept and administer cases was only formalised upon the publication of the 2015 edition of CIETAC's rules.

The Decision of *Ennead Architects International LLP v. Fuli Nanjing Dichan Kaifa Youxian Gongsi* (2016) Su 01 RenGang No.1 was rendered on 13 December 2016, by the Nanjing Intermediate People's Court of Jiangsu Province. In this decision, the Nanjing Court allowed the enforcement of the interest portion of the arbitral award, with which the PRC respondent had already substantially complied. In doing so, the court relied upon a 1999 arrangement between Mainland China and Hong Kong for the mutual enforcement of arbitration awards.

This confirmation that the Chinese courts recognise the validity of, and are prepared to enforce, awards administered by CIETAC HK further cements CIETAC HK as a genuine alternative for arbitration users, seeking the "offshore" resolution of China-related disputes.

Case law

The year of the Monkey also saw a number of pro-arbitration decisions of the Hong Kong courts. These included but were not limited to the following cases:

• ***Astro Nusantara International B.V. and others v PT Ayunda Prima Mitra*** [2015] HCCT 45/2010) by which the Hong Kong Court of Appeal refused to overturn a Hong Kong Court of First Instance decision refusing enforcement of awards rendered in Singaporean arbitration proceedings, in doing so clarifying certain issues, including the interrelationship between an award debtor's right, on the one hand, to pursue "passive" remedies against an award, and its duty, on the other hand, to act in good faith in challenging enforcement.

• ***Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd*** [2016] HKEC 2128 by which the Hong Kong court confirmed the circumstances in which it will set aside an arbitral award on the grounds that the arbitral process and enforcement violated notions of natural justice, fairness, due process and public policy.

• ***William Lim & anor v Hung Ka Hai Clement*** [2016] HKCFI 1439; HCA 1282/2016 by which the Hong Kong Court of First Instance stayed litigation proceedings in favour of a reference to arbitration, in so doing rejecting the Plaintiffs' contention that they were entitled to maintain the court

proceedings by virtue of the operation of an “escalation clause”, providing for one or more methods for resolving disputes prior to the commencement of arbitration proceedings.

• ***American International Group and AIG Capital Corporation v X Company*** (HCCT 60/2015) in which the Hong Kong Court of First Instance refused to set aside an arbitral award despite the Plaintiff’s allegation that the Award had been wrongly decided on the basis of principles of fairness and equity, instead of under the strict law of the relevant agreements.

The HKIAC also published statistics covering the enforcement of arbitral awards in Hong Kong in 2016. The statistics provide a useful cross section of the position in Hong Kong when it comes to enforcement. They show that the Hong Kong courts granted a total of 32 applications for enforcement, Further, whereas five applications were brought to set aside an order granting leave to enforce, only one of those resulted in the court setting aside the order.

Summary

The Year of Monkey was perhaps a year of evolution rather than revolution for arbitration in Hong Kong, 2016 being characterised by the steps taken by various institutions and authorities to build upon the innovations of previous years. Nonetheless these steps confirm the continued commitment of Hong Kong’s arbitration community to maintain the territory’s status as a leading international arbitration seat aligned with, and often setting, international best practice.

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