

Key Developments in Hong Kong Arbitration Law in 2023

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Introduction

Hong Kong's Arbitration Ordinance is aimed at encouraging the use of arbitration as an alternative method of dispute resolution. The stated purpose is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. The Ordinance is aimed at reducing court supervision and intervention in the arbitration process.

Hong Kong courts are only permitted to provide assistance in the manner expressly set out in the Ordinance. Broadly, this is limited to taking steps to protect arbitration agreements (by staying court proceedings commenced in violation of an arbitration agreement), determining challenges to arbitrators, granting interim measures in support of arbitration (albeit in fairly limited circumstances), assisting in the taking of evidence and considering applications for setting aside, recognising or enforcing arbitral awards. The Construction and Arbitration List is a specialist list in the Hong Kong High Court which determines arbitration-related applications under the Arbitration Ordinance.

In 2023, the Hong Kong courts have faced wide-ranging and difficult questions of arbitration law to determine in cases where the parties have approached them for assistance. We discuss 10 such cases below. The decisions illustrate the independence of the Hong Kong courts and their reluctance to intervene in the arbitration process. These cases also highlight the importance for any dispute resolution mechanism to be carefully and precisely drafted.

(1) Limited Grounds for Setting Aside Awards

One of the key advantages of arbitration concerns the finality of arbitral awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which 88% of states worldwide have ratified, contains limited grounds for declining the recognition and enforcement of awards. In most jurisdictions there are

also limited grounds pursuant to which the courts of the seat of arbitration are empowered to set aside an arbitral award on the application of a party. Hong Kong courts have a strong track record of upholding arbitral awards and respecting the limited grounds for set-aside contained in the Hong Kong Arbitration Ordinance.

In [*AI and others v LG II and another* \[2023\] HKCFI 1183](#), the Hong Kong High Court confirmed that a high threshold must be met before an arbitral award may be set aside in Hong Kong. The dispute related to agreements for the sale and purchase of investments in trade finance funds. The plaintiff commenced CIETAC arbitration seated in Hong Kong, claiming that the agreements were void for illegality, common mistake and misrepresentation. The CIETAC tribunal found for the defendant. The plaintiff applied to set aside the award on the basis that the tribunal provided insufficient or inadequate reasoning for its findings, misapplied the law and violated its due process rights.

The court dismissed the application and ordered indemnity costs against the plaintiff. The court observed that an arbitral tribunal is not obliged to elaborate on its reasoning for each and every argument raised by the parties so long as “*the essential building blocks*” of the tribunal’s reasoning are made out, and the plaintiff is afforded a reasonable opportunity to present its case. In so doing, the court emphasised that Hong Kong courts are not permitted to review the merits of an award, as this would undermine the independence and integrity of the arbitral process.

(2) Endorsing Virtual Hearings

Virtual hearings became increasingly prominent during the course of the Covid-19 pandemic. These were already a feature of international arbitration before the pandemic, particularly for procedural hearings. Typically, substantive hearings at which witnesses were examined were held in person. The pandemic changed this practice, as these too increasingly started to be held virtually. On occasion, parties may object to virtual hearings and raise due process complaints if tribunals nevertheless proceed to conduct matters virtually.

That is what occurred in [*Sky Power Construction Engineering Limited v Iraero Airlines* JSC \[2023\] HKCFI 1558](#). The award creditor had obtained leave to enforce in Hong Kong an LCIA award issued in a London-seated arbitration. The Hong Kong High Court refused an extension of time for an application to set aside the enforcement order based on the ground that the arbitral tribunal held a virtual hearing in violation of the parties’ arbitration agreement and the tribunal’s own procedural orders.

Initially, the parties had agreed that hearings could be held on a “semi-virtual” basis. The tribunal recorded this agreement in a procedural order. When the defendant’s only

factual witness was unable to travel to Moscow, the tribunal decided to hold a fully virtual hearing, despite objections from the plaintiff, who instead requested a further postponement. The tribunal subsequently ruled in favour of the defendant.

The plaintiff's complaint before the Hong Kong Court was that the "fully virtual" nature of the hearing prevented it from presenting its case adequately and that this also violated its due process rights. The Court held that the tribunal had considered all the appropriate factors in reaching its decision to hold the hearing virtually. This included the difficulties of the pandemic and the need for a speedy resolution of the proceedings. Ultimately, the Court held that it is not within the ambit of its case management powers to interfere with a tribunal's direction for a virtual hearing where it is empowered to conduct proceedings in such a manner. Most arbitration rules expressly confer tribunals with the power to hold virtual hearings by bestowing them with wide discretionary case-management powers. The Court noted that virtual hearings are commonplace in both court and arbitral proceedings and that the tribunal had been best placed to decide which hearing format was most appropriate. The Court ordered that the plaintiff pay the defendant's costs, unusually on the higher, indemnity basis, which once again serves as a warning to parties considering enlisting the Hong Kong courts' assistance to interfere with decisions properly made by tribunals.

(3) Law Governing Dispute Resolution Clauses

Commercial contracts typically contain governing law and dispute resolution clauses. These provisions are important when disputes arise. They determine the law(s) by which claims are determined and the forum in which that is done, be it before a court or an arbitral tribunal. It is rare for the dispute resolution clause itself to contain a separate governing law provision.

In [*China Railway \(Hong Kong\) Holdings Limited v Chung Kin Holdings Company Limited* \[2023\] HKCFI 132](#), a dispute had arisen under multiple agreements concerning a loan. The governing law clause in the initial loan agreement provided: "*In implementing this contract, if any economic disputes arise between the two parties, they shall be resolved through amicable negotiation. If the negotiation fails, they shall be resolved in accordance with local laws.*"

The plaintiff commenced proceedings in the Hong Kong courts to recover monies under the initial loan agreement. The defendant sought a stay of proceedings, arguing that the parties were bound by a jurisdiction clause in a subsequent debt repayment agreement. This provided for disputes to be resolved in Wuhan, either before an arbitration committee or the local courts.

The Hong Kong High Court held that the debt repayment agreement was an amendment to but did not supersede the initial loan agreement. The Court applied the principles in the landmark UK Supreme Court decision in *Enka v Chubb* (see further our update [here](#)) to determine the governing law of the jurisdiction clause. In that decision, the UK Supreme Court confirmed that an express choice of law clause in the wider contract will generally apply to the dispute resolution clause where the parties do not include an express choice of another law. Applying those principles, the Court held that Hong Kong law was the governing law of the wider contract, as the initial loan agreement provided for the disputes to be resolved in accordance with “local laws”. The Court then applied Hong Kong law to determine whether the jurisdiction clause in the subsequent agreement was exclusive in nature, which ordinarily would lead the court to stay the proceedings in favour of the specified forum. The Court held that it was non-exclusive and that the burden was on the defendant to demonstrate that it was more appropriate for the dispute to proceed in the foreign forum.

This decision highlights the importance of a well-drafted dispute resolution clause reflecting the will of the parties as to the governing law. It also highlights the Hong Kong courts’ continued consideration and application of common law precedent from other jurisdictions where this is relevant and appropriate.

(4) Compliance with Escalation Clauses

Arbitration agreements often form part of a tiered dispute resolution clause. These provisions, also known as escalation clauses, may require arbitration to be preceded by efforts to negotiate a mutually satisfactory result or to participate in a conciliation or mediation. If these processes are unsuccessful, the matter may then be escalated to the next dispute-resolution mechanism specified in the clause, typically with arbitration as a last resort.

Escalation clauses must be drafted and followed with care so that parties do not become embroiled in a collateral dispute over whether a party has complied with the requirements of the escalation clause and whether it is entitled to proceed to arbitration. In recent years, the courts of a number of jurisdictions have had to consider the effect of these clauses and, in particular, whether disputes about compliance are solely to be determined by the arbitral tribunal or whether they go to the tribunal’s jurisdiction and are therefore a matter of shared competence between the tribunal and the courts.

In [C v D \[2023\] HKCFA 16](#), the Hong Kong Court of Final Appeal determined that compliance with a pre-arbitration condition is a matter concerning the admissibility of claims and not the jurisdiction of the arbitral tribunal to determine them. On this basis, the parties’ dispute as to whether pre-arbitration conditions had been fulfilled was viewed as a matter that the parties had intended to submit to arbitration. It followed

that the courts were not empowered to review the arbitral tribunal's decision that the claimant had complied with conditions precedent to arbitration. Our detailed analysis of the case is available [here](#).

This decision highlights that a carefully worded escalation clause should promote the speedy resolution of disputes over compliance. The escalation clause should make clear that it is open to either party to commence arbitration either at any time or after a short, specific time period for negotiation, conciliation or mediation. Including such a provision will mitigate the risk of a protracted dispute over whether a party failed to meet a condition precedent to arbitration. In addition, the clause should specify that any disputes about compliance with an escalation clause are themselves subject to arbitration so that a delaying party does not attempt to litigate the question in the courts.

(5) Determining the Proper Parties to an Arbitration Agreement

The Hong Kong Arbitration Ordinance aims to set out clear boundaries between matters that are to be solely decided by the arbitral tribunal in accordance with the will of the parties and matters which may be reviewed by the Hong Kong High Court in its supervisory capacity. As demonstrated by the decision in *C v D*, questions of admissibility are to be decided by the arbitral tribunal alone, whereas questions of jurisdiction may be reviewed by the Court.

In [R v A, B and C \[2023\] HKCFI 2034](#), the Hong Kong High Court set aside an HKIAC award and in so doing affirmed that the identity of the proper parties to an arbitration agreement is a question of jurisdiction and within the Court's powers to review.

R had entered into an agreement with A to provide investment funding. As a result of A's failure to comply with its distribution obligation under the agreement, R commenced HKIAC arbitration proceedings against A and B (a special purpose fund of which A was the general partner). C made a joinder request to intervene in the arbitral proceedings, claiming that R entered into the investment agreement as her agent having invested her money. The HKIAC granted the joinder on a preliminary basis. Once the tribunal was constituted, R challenged its jurisdiction over C, arguing that the money used for the investment was unrelated to the amount received from C. Following a five-day preliminary hearing, the tribunal issued a partial award, finding that C was the principal and, thus, a party to the arbitration agreement.

R subsequently applied to the Hong Kong High Court to set aside the partial award on the ground of lack of jurisdiction. C argued that the partial award did not address the question of jurisdiction but only decided who was the true party to the arbitration agreement. The Court rejected this argument, clarifying that a determination of the

proper parties to an arbitration agreement will in essence determine the scope of the tribunal's jurisdiction and is within the remit of the Court's decision-making powers.

The Court held that C had a "heavy" burden to establish that R, a known and identified party to the agreement, should be excluded. Ultimately, after considering additional arguments and evidence which had not been adduced before the tribunal and which showed that the money R received from C was part of a share manipulation scheme, the Court held that C had not discharged the burden of proving that she was the beneficial owner and, thus, was not a party to the agreement. The Court allowed the application to set aside the partial award.

This decision brings further clarification as to what constitutes a question of jurisdiction under the Arbitration Ordinance and thus falls within the remit of the court's review powers. The case also confirms that courts may consider fresh evidence and arguments and provides clarity on the high threshold that a party must meet to be joined to arbitral proceedings where it is not expressly named as a party to the underlying arbitration agreement.

(6) Immunity of Arbitrators

Judicial immunity is an established common law principle that safeguards judicial independence and protects judges from being compelled as witnesses in relation to the exercise of their judicial functions. To protect the autonomy of the arbitral process, Hong Kong law confers arbitrators with a similar level of immunity available to judges in respect of their decision-making.

In [Song Lihua v Lee Chee Hon \[2023\] HKCFI 1954](#), the Hong Kong High Court confirmed that an arbitrator cannot be compelled to give evidence in proceedings to challenge an award issued by them. The Court had granted the plaintiff leave to enforce an arbitral award issued by the Chengdu Arbitration Commission in Mainland China. The defendant applied to set aside the enforcement order on various grounds, including that it had been unable to present its case in the arbitration. The defendant alleged that a video recording of a hearing supported its position in this respect.

The Mainland Chinese courts had already refused the defendant's application for this and related evidence. The defendant asked the Hong Kong High Court to issue a letter of request to the Mainland Chinese judicial authorities to obtain statements from the arbitrator and the tribunal secretary. In certain circumstances, letters of request can be obtained under the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between Mainland China and Hong Kong. The Arrangement enables parties in both jurisdictions to request court assistance to obtain evidence.

The Court dismissed the application and ordered costs against the defendant. The Court held that the competence of an arbitrator to give evidence does not mean that they can be compelled to give evidence. The Court's decision affirms the strong protection afforded to arbitrators under Hong Kong law to maintain their independence and confer them with immunity similar to that enjoyed by judges.

(7) Declining Enforcement of Mainland Chinese Arbitral Award Due to Serious Irregularities

Hong Kong has a legal system distinct and separate from Mainland China. An arbitral award which has been enforced in Mainland China will not automatically be enforced in Hong Kong. Different decisions on enforcement may be reached.

In a subsequent judgment in the case described above, [Song Lihua v Lee Chee Hon \[2023\] HKCFI 2540](#), the Hong Kong High Court ultimately refused to enforce the award issued by the Chengdu Arbitration Commission on grounds of public policy. This was due to the Court's finding that the conduct of one of the arbitrators was seriously irregular and violated due process rights. This was also despite the award having already been enforced in Mainland China, where similar complaints had been raised.

During the arbitration, video evidence demonstrated that one of the arbitrators was not physically present at one of the hearings. In the record, the arbitrator was seen in public watching the hearing remotely on his mobile telephone without any earphones, periodically disconnecting from the hearing and even travelling in a vehicle. In declining enforcement of the award, the Court emphasised that "*not only must justice be done, but it must also be seen to be done*". A member of the decision-making tribunal not appearing focused or present during the hearing shows a lack of apparent justice and fairness. The arbitrator's conduct during the hearing was not in line with his duty to show appropriate care, skill and professional integrity.

(8) Anti-Suit Injunctions and the Impact of Sanctions

One of the main challenges to arbitration as a result of sanctions concerns the enforcement of awards. On occasion, the existence of sanctions may lead courts to decline to enforce awards based on public policy grounds. Parties may also seek to rely on the existence of sanctions to escape arbitration agreements and seek the resolution of disputes in their preferred forum, which is not the forum agreed by their contractual counterparty.

In [Linde v RusChemAlliance \[2023\] HKCFI 2409](#), the Hong Kong High Court issued an anti-suit injunction aimed at staying Russian court proceedings in favour of HKIAC arbitration.

As a result of EU sanctions, the plaintiff, a German company, suspended performance of a contract with the defendant, a Russian company, which subsequently terminated the agreement. The contract contained an HKIAC arbitration clause. Despite this, the defendant obtained a freezing injunction from a Russian court over the plaintiff's assets in Russia.

The plaintiff obtained an anti-suit injunction from the Hong Kong High Court to restrain the defendant's breach of the HKIAC arbitration agreement. The defendant sought discharge of the anti-suit injunction on several grounds. These included that they would not receive a fair trial in an HKIAC arbitration and that the HKIAC award would be unenforceable outside of Russia as a result of EU sanctions.

The Court dismissed the application and stated that the defendant's arguments were "*grossly exaggerated, if not totally based on false premises*". The EU sanctions had no legal effect in Hong Kong, and there was no reason why the defendant would face any challenges in gaining access to justice and a fair trial through arbitrating in the jurisdiction. The Court also did not consider that the sanctions would have any negative impact on the ability of the parties to enforce the award, as the plaintiff was part of a global group with assets outside of the European Union. As such, whether or not an award in favour of the defendant would be unenforceable on the ground of public policy will depend on the public policy of each state and its regard for the EU sanctions in place.

(9) Staying a Winding-up Petition in Favour of Arbitration

Under Hong Kong's insolvency regime, winding-up orders ordinarily are only made if the underlying debt relied upon by the petitioner is not subject to a *bona fide* dispute on substantial grounds.

In [Re Shandong Chenming Paper Holdings Ltd \[2023\] HKCFI 2065](#), the Hong Kong High Court held that courts should decline to exercise jurisdiction in a winding-up petition where the underlying dispute is subject to an arbitration clause. This extends the principles in *Re Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9, which held that courts should decline to exercise jurisdiction where the underlying dispute is subject to an exclusive jurisdiction clause.

In the *Shandong Chenming* case, the petitioner applied for the winding-up of the debtor company on the ground of insolvency following non-payment of an arbitration award. The debtor company commenced arbitration against the petitioner under the same arbitration clause which gave rise to the award forming the petitioning debt. The debtor company sought the dismissal or adjournment of the petition on the basis that their

cross-claim in the new arbitration, exceeding the judgment debt owed to the petitioner under the first arbitral award, was yet to be determined.

The Court stayed the winding-up petition, holding that the principles in *Guy Lam* extend to winding-up petitions where the underlying dispute is subject to an arbitration clause. So long as a debtor can demonstrate that the cross-claim falls within the scope of a valid arbitration clause between the parties, and the cross-claim is a *bona fide* dispute on substantial grounds, a winding-up petition should be stayed or dismissed.

On 25 October 2023, the Hong Kong High Court granted the petitioner leave to appeal the decision in *Shandong Chenming*, which will provide the Court of Appeal with an opportunity to opine on the impact of arbitration agreements on winding-up petitions in Hong Kong.

(10) Upholding Success Fee Agreements

In [BB v KO \[2023\] HKCFI 2661](#), the Hong Kong High Court refused to set aside an enforcement order for an arbitral award on the ground of it being contrary to public policy as a result of a contingency fee arrangement (known in Hong Kong as success fee arrangements). These arrangements are prohibited in Hong Kong litigation proceedings by the common law doctrines of champerty and maintenance, even though they are permitted in arbitration and certain arbitration-related court proceedings (see further our discussion of this distinction [here](#)).

The underlying dispute related to an agreement for BB to represent KO in court proceedings in Nevada, USA, which included a provision for a “*success bonus*”. The agreement also contained a term for BB to “*provide strategic advice*”, but crucially not act as lead counsel, in KO’s Hong Kong litigation. After the successful conclusion of the U.S. proceedings, KO refused to pay the success fee, resulting in arbitral proceedings decided in BB’s favour.

BB applied for and was granted leave to enforce the arbitral award against KO’s assets in Hong Kong. However, more than two years after the enforcement order was granted, KO applied to set it aside on the ground that it would be contrary to public policy to enforce an award which gives effect to a contingency fee agreement partially related to litigation in Hong Kong.

The court dismissed the application and awarded indemnity costs in BB’s favour. The court held that there was no good reason justifying KO’s delay in challenging enforcement. KO had also failed to discharge the burden of proving that enforcement of the award would be contrary to public policy. The court was not persuaded that the Hong Kong litigation was sufficiently connected and impacted by the U.S. litigation

which formed the basis of the contingency fee agreement. As such, the court could not determine that a genuine risk to the integrity of the Hong Kong court proceedings arose through enforcement of the award.

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