HKIAC’s new Administered Arbitration Rules to come into effect 1 November 2018

Justin Yuen

A new version of the HKIAC’s Administered Arbitration Rules (2018 Rules) will come into effect on 1 November 2018 together with a Practice Note on the Appointment of Arbitrators. The revisions to the current Rules are usefully summarised on the HKIAC’s website, as follows:

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| Online Delivery of Documents (Articles 3.1(e), 3.3 and 3.4) | Parties may agree to deliver documents through the use of a secured online repository – a new method of delivery recognised by the 2018 Rules. Where a document is uploaded onto an online repository, the date of receipt shall be determined according to the time at the place of receiving a notice of the upload.  
Parties may agree to use their own repositories or a dedicated repository provided by HKIAC. |
| Use of Technology for Determination of Procedures (Article 13.1) | The effective use of technology has been identified as a factor to be considered by an arbitral tribunal when determining suitable procedures for the conduct of an arbitration. |
| Disclosure, Costs and Confidentiality of Third Party Funding (Articles 34.4, 44 and 45.3(e)) | A funded party is required to disclose promptly the existence of a funding agreement, the identity of the funder and any subsequent changes to such information. A funded party is permitted to disclose arbitration-related information to its existing and potential funder. These provisions are broadly in line with the relevant amendments to the Hong Kong Arbitration Ordinance (“Ordinance”). |
The 2018 Rules also expressly allow an arbitral tribunal to take into account any third-party funding arrangement in fixing and apportioning the costs of arbitration.

## Expanded Provisions for Single Arbitration under Multiple Contracts (Article 29)

The scope of the provisions on single arbitration under multiple contracts has been broadened by allowing a party to commence a single arbitration under several arbitration agreements even if the parties to the arbitration are not bound by each of the arbitration agreements.

Any question as to whether a single arbitration has been properly commenced under Article 29 shall be decided by the arbitral tribunal once constituted under Article 19.4 or, where the tribunal is not yet constituted, by HKIAC when deciding whether to proceed under Article 19.5.

## Concurrent Proceedings (Article 30)

The 2018 Rules provide an express basis for an arbitral tribunal to conduct multiple arbitrations at the same time, one immediately after another, or suspend any of the arbitrations until the determination of any other of them. The tribunal may do so if the same tribunal is constituted in each arbitration and a common question of law or fact arises in all the arbitrations, after consulting the parties. The test for concurrent proceedings is broader than that for consolidation. As a result, concurrent proceedings may be conducted in situations where consolidation is not possible or desirable.

## Early Determination Procedure (Article 43)

The Early Determination Procedure empowers an arbitral tribunal to determine a point of law or fact that is manifestly without merit or manifestly outside of the tribunal’s jurisdiction, or a point of law or fact that, assuming it is correct, would not result in an award being rendered in favour of the party that submitted such point.

The tribunal must decide whether to proceed with a request for early determination within 30 days from the date of the request. If the request is allowed to proceed, the tribunal must issue an order or award, which may be in summary form, on the relevant point within 60 days from the date of its decision to proceed. These time limits may be extended by HKIAC or party agreement. Pending the determination of the request, the tribunal may decide how to proceed with the underlying arbitration.

## Use of alternative means of dispute settlement (e.g. arbit-med-arb) (Article 13.8)

After the commencement of an arbitration, where the parties agree to pursue alternative means of settling their dispute (e.g. mediation, conciliation or negotiation) a party may request HKIAC, the arbitral tribunal or emergency arbitrator to suspend the arbitration or emergency arbitrator procedure, as applicable. A party may request that the arbitration or emergency arbitrator procedure be resumed at any time during or after the alternative process. Upon such request, the arbitration or emergency arbitrator procedure shall proceed.

## Emergency Arbitrator Procedure (Article 23.1 and Schedule 4)

A party may file an application for the appointment of an emergency arbitrator before the commencement of an arbitration, provided that a Notice of Arbitration is submitted to HKIAC within seven days unless the emergency arbitrator extends this time limit.

An emergency arbitrator, once appointed, will apply the same test for interim measures under Article 23 when considering an application for emergency relief.

All time limits under the Emergency Arbitrator Procedure have been shortened. The total fees of an emergency arbitrator are subject to a maximum amount which will be notified on HKIAC’s website.

## Time of Delivering Awards (Article 31.2)

After the arbitral proceedings are declared closed, the arbitral tribunal is required to notify the parties and HKIAC of the anticipated date of delivering an arbitral award. The date of delivering the award shall be within three months from the closure of the proceedings or relevant phase of the proceedings. This time limit may be extended by HKIAC or party agreement.
The Practice Note on the Appointment of Arbitrators sets out the HKIAC’s general practice of appointing arbitrators in:

- arbitrations administered by HKIAC under its Administered Arbitration Rules;
- arbitrations administered by HKIAC under the UNCITRAL Arbitration Rules;
- ad hoc arbitrations under the Arbitration Ordinance (Cap 609), the UNCITRAL Arbitration Rules and any other arbitration rules issued by HKIAC; and
- any other arbitration in which the parties agree that the Practice Note shall apply.

The Practice Note also applies to HKIAC’s appointment of emergency arbitrators.

The Practice Notes covers:

- the appointment process (including factors considered by HKIAC when making an appointment e.g. qualifications, availability, fees, nature and complexity of dispute);
- nationality of sole and presiding arbitrators (e.g. where the parties are of different nationalities, HKIAC will not generally appoint a sole/presiding arbitrator of the same nationality as any of the parties, unless the parties agree otherwise);
- diversity of qualified arbitrators (HKIAC will include, wherever possible, qualified female candidates and qualified candidates of any age, ethnic group, legal or cultural background among those it considers for arbitrator appointments).

The new provisions should be welcomed by parties to arbitration proceedings, in particular, the 3-month time limit for the arbitrator to deliver the award, as in our experience it is often much longer than this.

Draft Code of Practice for Third Party Funding of Arbitration and Mediation

Joseph Chung

In our previous article of 19 September 2017, we mentioned that a Code of Practice may be issued by an “authorised body” appointed by the Secretary for Justice to set out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration. On 30 August 2018, the Department of Justice launched a two-month public consultation to seek views on the draft Code of Practice for Third Party Funding of Arbitration and Mediation (Draft Code).

The Code will apply to any funding agreement commenced or entered into on or after the date of commencement of the Code between a third party funder and a funded party (including a potential funded party) for third party funding of arbitration and/or mediation.

A “third party funder” is a person (a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b) who does not have an interest recognized by law in the arbitration other than under the funding agreement. A “third party funder” includes each of the third party funder’s subsidiaries and associated entities and investment advisors acting as its agents.

We set out below some of the key provisions contained in the Draft Code.

1. **The Funding Agreement**

   The third party funder must take reasonable steps to ensure that the funded party has received independent legal advice on the funding agreement. A reasonable step includes a written confirmation from the funded party that independent legal advice has been taken on the funding agreement before it was entered into: see paragraphs 2.3 and 2.4 of the Code.

   Other terms which must be included: Hong Kong address for service, all key features, risks and terms of the proposed funding, name and contact details of the advisory body responsible for monitoring and reviewing the operation of third party funding: see paragraph 2.3 of the Code.
2. **Capital Adequacy Requirements**

A third party funder has a continuous obligation to ensure that it maintains the capacity to pay all debts when they become due and payable and cover all of its aggregate funding liabilities under all of its funding agreements for a minimum of 36 months. It must also maintain access to a minimum of HK$20 million capital, and provide proof of such in the form of an auditor’s opinion or evidence from a qualified third party: see paragraph 2.5 of the Code.

3. **Conflicts of interest**

The third party funder must maintain effective procedures for managing any conflict of interest that may arise, and follow the written procedure in paragraph 2.7 of the Draft Code for managing any conflict of interest that may arise. It must also not take any steps that cause or may cause the funded party’s legal representative to act in breach of its professional duties: see paragraph 2.6 of the Code.

4. **Control**

The control or conduct of the arbitration or mediation should remain with the funded party or the funded party’s legal representative, and the funding agreement shall make clear that the third party funder will not influence that or cause the funded party’s legal representative to act in breach of professional duties: see paragraph 2.9 of the Code.

5. **Liability for adverse costs**

The funding agreement must state whether (and if so to what extent) the third party funder is liable to the funded party to: (1) meet any liability for adverse costs; (2) pay any premium (including insurance premium tax) to obtain costs insurance; (3) provide security for costs; and (4) meet any other financial liability: see paragraph 2.12 of the Code.

6. **Grounds for termination**

The funding agreement must state whether (and if so how) the third party funder may terminate the funding agreement in the event that the third party funder: (1) reasonably ceases to be satisfied about the merits of the arbitration or mediation; (2) reasonably believes that there has been a material adverse change of prospects to the funded party’s success in the arbitration; (3) reasonably believes that there has been a material adverse change of prospects to the funded party’s being able to reach any agreement with the other party(ies) to the mediation to resolve in whole or in part the dispute; or (4) reasonably believes that the funded party has committed a material breach of the funding agreement. The funding agreement must provide that if the third party funder terminates the funding agreement, the third party funder is to remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach by the funded party: see paragraphs 2.13-2.16 of the Code.

In addition to the above, the Draft Code also includes provisions on the responsibility for subsidiaries and associated entities, promotional materials, confidentiality and legal professional privilege, disclosure, disputes regarding the funding agreement, complaints procedure and annual returns.

Similar to in England and Wales, third party funding is not regulated in Hong Kong. Non-compliance with the Code of Practice does not render any person liable to any judicial or other proceedings, but it is admissible as evidence in other proceedings (section 98S of Cap. 609).

**England’s Technology and Construction Court holds that collateral warranty signed after practical completion had retrospective effect**

**KK Cheung**

In Swansea Stadium Management Company Ltd v City and County of Swansea [2018] EWHC 2192 (TCC), England’s Technology and Construction Court held that a collateral warranty signed after practical completion had retrospective
effect and related back to the date of practical completion, resulting in the Claimant’s claim for breach of the Collateral Warranty being statute barred. The Court also held that the cause of action accrued on the date of practical completion for breach of the construction contract if there were defects or outstanding works, although there may be a further cause of action under the defects liability provisions in the contract.

Background

The 1st Defendant engaged the 2nd Defendant to carry out design and construction works by an amended JCT standard form contract dated 17 June 2004 (Building Contract), executed as a deed. On 1 April 2005, a letter sent by the Employer’s agent to the 2nd Defendant (Letter), stated that the works reached practical completion on 31 March 2005, but there were outstanding works and defects to make good. In or about April 2005, the parties entered into an undated collateral warranty (Collateral Warranty), executed as a deed, under which the Claimant was the beneficiary, in respect of works carried out by the 2nd Defendant under the Building Contract.

On 4 April 2017, because of flooring and paintwork defects, the Claimant sued the 1st and 2nd Defendants, claiming that (1) the design and construction of the concourse flooring and supply, construction and painting of the steelwork were defective, and (2) contrary to clause 16 of the Building Contract, the 2nd Defendant failed to identify and rectify defects, which arose from breaches of the Building Contract and the Collateral Warranty.

The 2nd Defendant argued that (1) the works under the Building Contract reached practical completion on 31 March 2005, and the Collateral Warranty was retrospective, relating back to the date of practical completion; and (2) the claims were time barred because the action was commenced more than 12 years from the date of practical completion on 31 March 2005.

Issues in dispute

The issues before the Court were:

- Did the Collateral Warranty have retrospective effect?
- Were the Claimant’s claims under the Building Contract time-barred and when does practical completion occur if there are still defects to be made good?

Court’s Decision

Effect of the Collateral Warranty

The Court referred to the general principle that a contract or a deed can take effect retrospectively. It said that whether or not a contractual clause is capable of having retrospective effect depends on the express or implied intention of the parties.

The Court found that the words used in the Collateral Warranty and the factual matrix indicated that the parties intended the warranty to have retrospective effect:

1. The purpose of the Collateral Warranty was to provide a direct right of action by the Claimant against the 2nd Defendant in respect of its obligations under the Building Contract to which the Claimant was not a party. Such purpose was served by a warranty giving the Claimant the same rights against the 2nd Defendant that it would have had if there had been privity of contract.

2. The recitals to the Collateral Warranty explained that the Claimant’s interest was to ensure that the 2nd Defendant performed its obligations in the Building Contract.

3. Clause 1 of the Collateral Warranty specifically referred to the past and future performance by the 2nd Defendant of its obligations under the Building Contract. When read together with Article 10 of the Building Contract, which did not contain any time limitation on a written request which would trigger the 2nd Defendant’s obligation to execute a collateral warranty in favour of a first tenant, this indicated that the Collateral Warranty was intended to cover the full scope of the contractual works regardless of when it was executed.

4. The proviso to clause 1 of the Collateral Warranty expressly limited the 2nd Defendant’s liability to that it would have had if the Claimant had been named as joint employer under the Building Contract. The provision gave the parties clarity and certainty as to the extent of any liability in respect of the works, including the period of limitation. The reference in the proviso to the Claimant’s position being as if it “had been named as joint employer” was a clear indication that the parties intended the Claimant to stand in the employer’s shoes. The 2nd Defendant’s liability to the Claimant was intended to be coterminous with its liability to the employer under the Building Contract. The Court concluded that any breach of contract created by the Collateral Warranty would be regarded
as actionable from the original date on which the breach occurred even though the relevant facts occurred prior to the effective date of the Collateral Warranty.

**When did practical completion occur?**

The Court referred to the well-established law that the cause of action for breach of a construction contract accrues when the contractor is in breach of its express or implied obligations under the contract. Where, as in this case, there is an obligation to carry out and complete works, the Court said, the cause of action for failure to complete the works in accordance with the contract accrues at the date of practical completion. The Claimant’s argument was that practical completion had not been achieved by 31 March 2005, since at that time, the 2nd Defendant was still working on site and there were patent defects in the works.

The Court held that the Letter sent by the Employer’s agent to the 2nd Defendant was strong evidence that practical completion occurred on 31 March 2005 because it contained a clear statement that the works had reached practical completion in accordance with clause 16.1 of the Building Contract on 31 March 2005. The Court said that although that alone would not be sufficient to conclusively establish that practical completion was achieved by 31 March 2005 (at least for a summary judgment application), clause 16 of the Building Contract provided that the date of practical completion was based on the reasonable opinion of the employer that the works had reached practical completion and merely required the employer to give the contractor a written statement to that effect. Where such statement is given, the clause deems practical completion to have taken place on the day named in such statement, even if there are outstanding or defective works and regardless of the physical state of the works as at the practical completion date.

The Court concluded that any breach of the Collateral Warranty in respect of the Building Contract must have occurred by 31 March 2005, and the proceedings commenced on 4 April 2017 were therefore time-barred.

**Comments**

Where it is plain from express provisions and the factual matrix of a building contract that the collateral warranty was intended to cover the full scope of the contractual works, it is more likely than not that a collateral warranty will be given retrospective effect. Hence, regardless of the date of execution of a collateral warranty, one must be aware of the date of practical completion under the building contract when commencing proceedings under the collateral warranty, to avoid being time barred.

For example, in a JCT standard form contract, the date of practical completion is determined according to an express term of the building contract, and such contract specifically contemplates works outstanding to be made good after practical completion. In such a case, a cause of action will accrue right up to practical completion if the contractor fails to complete the works properly, rather than when all works are actually complete / all patent defects are remedied. There may then be a further cause of action after practical completion under the defects liability provisions of the contract.

**England’s Supreme Court clarifies law in respect of No Oral Modification Clauses**

**KK Cheung**

In Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24, England’s Supreme Court had to consider a fundamental issue of contract law, namely whether a “No Oral Modification Clause” (NOM clause) i.e. a contractual term stating that an agreement may not be amended unless it is in writing and signed by parties, is legally effective. The Supreme Court held that it is.

**Background**

By a written agreement, MWB granted Rock Advertising a contractual licence to occupy office space for a licence fee. Clause 7.6 of the agreement provided:

“This Licence sets out all of the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this Licence. All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.”
Rock Advertising accumulated arrears of licence fees and its director proposed a revised schedule of payments to MWB’s credit controller. A dispute arose concerning whether MWB’s credit controller had orally accepted Rock Advertising’s proposal.

Decisions of the Courts below

At first instance, the trial judge held that an oral agreement was made to vary the licence in accordance with the revised schedule, but it was ineffective because it was not recorded in writing in accordance with clause 7.6. The Court of Appeal allowed Rock Advertising’s appeal, finding that the oral agreement to revise the schedule amounted to an agreement to dispense with the requirements of clause 7.6, so that MWB was bound by the variation. MWB appealed to the Supreme Court.

Supreme Court’s Decision

The Supreme Court unanimously allowed the appeal, holding that the NOM clause deprived the alleged oral agreement asserted by Rock Advertising of any binding force as a contractual variation. The oral variation was invalid because it was not in writing and not signed by the parties, as prescribed by clause 7.6 of the licence agreement.

Lord Sumption (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed) said as follows:

- The law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation. There is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation.
- The Court of Appeal’s approach was to override the parties’ intentions to bind themselves as to the manner in which future changes in their legal relations were to be achieved. There are many cases in which a particular form of agreement is prescribed by statute (e.g. contracts for the sale of land and consumer contracts) and there was no principled reason why the parties should not adopt the same principle by agreement.
- The law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy. There is no mischief in NOM clauses and they do not frustrate or contravene any policy of the law.
- There are at least 3 reasons for including NOM clauses in contracts, which were all legitimate commercial reasons for agreeing a clause like 7.6:
  o they prevent attempts to undermine written agreements by informal means;
  o they avoid disputes not just about whether a variation was intended, but also about its exact terms;
  o a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them.
- It did not follow that parties who agreed an oral variation despite there being a NOM clause must have intended to dispense with the clause. Parties to such a clause, agreed not that oral variations were forbidden, but that they were invalid. The mere fact of agreeing to an oral variation was not therefore a contravention of the clause.
- Since it is not difficult to record a variation in writing, the natural inference from the parties’ failure to observe the formal requirements of a NOM clause was not that they intended to dispense with it, but that they overlooked it.
- Although the enforcement of NOM clauses carries with it the risk that a party may act on the contract as varied, and then find itself unable to enforce it, the safeguard against injustice lies in the various doctrines of estoppel.

Lord Briggs came to the same conclusion and agreed that that the appeal should be allowed, but for different reasons. He disagreed with Lord Sumption’s view that to refuse to recognize the effect of a NOM clause is to override the parties’ intentions, so as to make it impossible for them validly to bind themselves as to the manner in which a change in their legal relations is to be achieved in the future. Lord Briggs’ view was that, for as long as either party to a contract containing a NOM clause wishes that clause to remain in force, that party may so insist, and nothing less than a written variation of the substance will suffice to vary the rest of the contract (leaving aside estoppel). The NOM clause will remain in force until they both agree to do away with it. In particular, it will deprive any oral terms for a variation of the substance of their obligations of any immediately binding force, unless and until they are reduced to writing, or the NOM clause is itself removed or suspended by agreement. Any agreed departure must also expressly refer to the NOM clause. That, Lord Briggs said, fully reflected the autonomy of parties to bind themselves as to their future conduct, while preserving their autonomy to agree to release themselves from that inhibition.

Comments

It is common to find NOM clauses in commercial agreements and this Supreme Court decision usefully clarifies the law in relation to such. As noted by the Supreme Court, there are legitimate commercial reasons for including NOM clauses in contracts. The formality of recording variations in writing, provides certainty to the contracting parties and should reduce disputes about whether a contract has been orally varied.
It is common to provide in construction contracts that instructions by the architect/engineer must be issued in writing. The usual argument of the contractor is that strict compliance of such provision has been waived by the conduct of the parties. The above judgment may make such argument more difficult to succeed.

How is project insurance coverage affected by a subcontractor having its own insurance coverage?

KK Cheung

In Haberdashers’ Aske’s Federation Trust Ltd v Lakehouse Contracts Ltd [2018] EWHC 558 (TCC), England’s Technology and Construction Court had to decide on the extent of coverage (or inclusion) of a project insurance policy for a construction project and how that coverage was affected by a sub-contractor having its own insurance cover. The Court held that to the extent that the sub-contractor had its own insurance cover, it was not entitled to the protection of the project insurance, meaning that the project insurers who had paid out on a claim, could recover the full amount of the insurance cover which the sub-contractor had in place under its own insurance. The Court said that this was the first case in which the court had to decide on how subcontractors in the construction industry come to participate in project insurance policies.

Background

The London Borough of Lewisham (Lewisham) owns buildings, in which Haberdashers’ operates a school. Lewisham entered into a Design and Build Contract with a Local Education Partnership (LEP). LEP entered into a Design and Build Subcontract with Lakehouse. Although Lakehouse contracted with the LEP, it also entered into a Duty of Care Deed with Haberdashers’, under which Lakehouse owed certain duties directly to Haberdashers’.

In the Design and Build Contract, the LEP was obliged to take out “Required Insurances”. Clause 25.3 stated that Lewisham and Haberdashers shall, where indicated in Schedule 12, be named “as co-insured with any other party maintaining this insurance”. In Schedule 12, the insureds included the LEP, Lewisham, Haberdashers, Lakehouse, and sub-contractors either of LEP, and/or of Lakehouse “of any tier”, each of their respective rights and interests in the project. Also in Schedule 12, Endorsement 2 stated that for the purpose of the policy the insureds must be considered to be separately insured and the insurers waived all rights of subrogation against any insured party. Endorsement 5 stated that the policy was to provide primary cover for the insured parties, as if any other policy held by an insured party covering the loss, damage or liability were not in force.

Lakehouse issued a subcontract order to Cambridge Polymer Roofing Ltd (CPR) in respect of roofing works. It was an express term of this subcontract that CPR obtain its own third party liability insurance.

Due to hot works carried out by CPR, a fire occurred and caused extensive damage to the buildings. Haberdashers’ and Lewisham issued proceedings seeking damages from Lakehouse and CPR, alleging breaches of the Duty of Care Deed, the Design and Build Subcontract and common law duties of care.

Lakehouse issued an additional claim against its co-defendant CPR, seeking a contribution, alternatively an indemnity, in respect of Lakehouse’s liability to Haberdashers’ and Lewisham. CPR issued additional claims against the three Project Insurers, seeking declarations that CPR was entitled to the benefit of the Project Insurance in place, and that this provided CPR with a defence to the additional claim brought by Lakehouse.

Lakehouse entered into a settlement with Haberdashers’ and Lewisham with funds that came from the Project Insurers. This left as a live issue in the proceedings the extent to which (if any), CPR was entitled to the benefit of the Project Insurance.

Standing Offer Approach

The Court said that to determine the issue, an analysis was required of the legal mechanics by which insurance cover would be available to a subcontractor under a Project Insurance policy. The Court looked at different ways of analyzing the situation and decided that the “standing offer” analysis was the correct approach. Under this approach, the offer is “made by the insurer to insure persons who are subsequently ascertained as members of the defined grouping. The offer would be accepted by a sub-contractor joining, upon execution of the subcontract…. The acceptance of that offer leads to the implication of a term in the contract between (here) Lakehouse and CPR.”
A question before the court was whether the express term in the subcontract between Lakehouse and CPR that CPR would take out its own insurance negated the implied term that CPR should take the benefit of the Project Insurance. The Court decided that it did.

The Court said that it was also necessary to consider the intention of the parties. Here, CPR’s intention, objectively assessed on the express terms of the roofing subcontract between Lakehouse and CPR, was to obtain its own insurance, and not to rely upon the Project Insurance.

The Court said that with deemed or actual knowledge of the Project Insurance, CPR expressly agreed a term that governed its relationship with Lakehouse (and hence its involvement in the project) that it would have its own insurance. That was directly contrary to there being an intention that there would be an insurance fund under the main contract which would be the sole avenue for making good the relevant loss and damage. It was an express agreement to create a second insurance fund.

**Conclusion**

The Court held that CPR did not achieve the status of co-insured and was not entitled to the benefit of the Project Insurance. The Project Insurers could therefore bring a subrogated claim in the name of Lakehouse against CPR for the losses suffered as a result of the settlement with the two claimants.

To conclude, to the extent that CPR and Lakehouse expressly agreed in the roofing subcontract that CPR was required to have its own individual insurance cover, CPR was not entitled to the protection of the Project Insurance. The Project Insurers could therefore recover (alternatively, Lakehouse was not prevented from recovering on their behalf) the full amount of the insurance cover which CPR had in place by reason of its separate policy at the time of the fire.

**Comment**

The Design and Build Contract and the Project Insurance documentation listed sub-contractors either of LEP and/or of Lakehouse “of any tier” (which would encompass CPR) as co-insured. Following from that express term, one would expect that any sub-contractor should be able to accept a standing offer made by the Project Insurers. However, the court interpreted the standing offer made by the Project Insurers in this case as being to insure sub-contractors which have not agreed to take out their own insurance. Hence where sub-contractors had agreed to take out their own insurance in a sub-contract, the sub-contractor could not be a co-insured under the Project Insurance. The Court did, however, make it clear that the answer in any particular case is one of construction and it therefore critically depends upon the provisions of the particular contract in each case. The question in each case, the Court said, was whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss and damage. In the present case, the court said that the fact that CPR and Lakehouse had expressly agreed (in the roofing subcontract) that CPR would take out its own separate insurance, was directly contrary to there being an intention that there would be such insurance fund.

*Note: This case is currently under appeal, with the appeal due to be heard in January 2019.*

**When will the court give leave to appeal an arbitration award on a question of law?**

**Christy Yu**

It is the policy of the Hong Kong Courts to give finality to arbitral awards. Parties may opt into Schedule 2 (Schedule 2) of the Arbitration Ordinance if they want to retain their right to appeal against an arbitral award on a question of law. An applicant has to overcome a high hurdle before it can obtain leave to appeal against an arbitral award from the Court and there are very few successful applications. Please refer to our previous article regarding challenging arbitral awards under Schedule 2.

In the recent case of Maeda Kensetsu Kogyo Kabushiki Kaisha v Bauer Hong Kong Ltd, HCCT 4/2018, an application was made for leave to appeal against the arbitrator’s 2nd Interim Award on a question of law, pursuant to s.6(1)(b) of Schedule 2. Leave to appeal was granted for two questions out of the four of the questions of law raised by the Plaintiffs.
Under s.6(4) of Schedule 2, leave to appeal against an arbitration award on a question of law is to be granted only if the Court is satisfied that:

(a) the decision of the question will substantially affect the rights of one or more of the parties;
(b) the question is one which the arbitral tribunal was asked to decide; and
(c) on the basis of the findings of fact in the award, the decision of the tribunal on the question is "obviously wrong"; or the question is one of general importance and the decision of the tribunal is "at least open to serious doubt".

In applying the third limb of the test above, Mimmie Chan J took the following approach:

- Where there was no claim or assertion that the question of law for which leave to appeal was sought was a matter of general importance, the judge would apply the higher threshold of "obviously wrong" for granting leave to appeal.
- However, if the plaintiff claimed and the judge accepted that the question was a matter of general importance, the lower threshold of "at least open to serious doubt" would be applicable under s.6(4)(c) of the Schedule.

For example, in deciding whether there was compliance with the notification of claim provision and whether the expression “fair valuation” must mean one based on actual costs, the Plaintiff claimed and the judge accepted that the construction of the clauses was of general importance to the construction industry in Hong Kong, as the provisions are commonly used in the construction industry, and there are identical or similar provisions contained in the standard form conditions of contract used by the Government, MTR Corporation, the Hong Kong Airport Authority and Institute of Surveyors/ Architects. Such somewhat liberal approach followed the decision of Fok JA (as he then was) in Maeda-Hitachi-Yokogawa-Hsin Chong JV v HKSAR (2012) [para. 12] that the “value” loading in that case necessarily turned on its own facts, it was a commercial exercise of sufficient general prevalence which justified applying "at least a serious doubt" test. On the facts, it was held that the arbitrator’s decisions were at least open to serious doubt, and leave was granted for appeal on these two questions.

In the present case, the court gave little explanation of the phrases "obviously wrong" and "at least open to serious doubt". Previously, in A & Others v Housing Authority [2018] HKCFI 147, Mimmie Chan J referred to the Hong Kong Court of Final Appeal decision in Swire Properties Ltd & Others v Secretary for Justice (2003) 6 HKCFAR 236 and explained the applicable principles as follows:-

“Leave should not normally be given in 'one-off' disputes unless the arbitral tribunal’s construction is 'obviously wrong'; but leave can sometimes be given in 'standard clause' disputes as long as there is at least 'a strong prima facie case that the arbitral tribunal's construction is wrong.'

For the meaning of the phrase "obviously wrong", Mimmie Chan J applied the dicta in Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724 as approved by Swire:

“Where, as in the instant case, a question of law involved is the construction of a 'one-off' clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the Tribunal that they had chosen to decide the matter in the first instance.”

However, subsequent to the Nema decision, the English Court of Appeal in CMA CGM SA v Beteiligungs-KG MS "Northern Pioneer" Schiffahrtsgesellschaft mbH & Co [2003] 1 WLR 1015 modified the “strong prima facie case” requirement to a “broader” test and imposed a “less severe restraint” threshold after the amendment to section 69(3)(c)(ii) of the Arbitration Act 1996 in England. The Northern Pioneer case was also referred to in the obiter dicta of Swire, considering it relevant to the construction of the statutory regime in Hong Kong, even if Hong Kong at the time had amended the Arbitration Ordinance to incorporate section 69(3)(c)(ii).

There is little authority in Hong Kong as to the meaning of "obviously wrong" expressed in the Nema-Antaios Guidelines. In Nema, Lord Diplock had identified two situations which would justify the court’s interference: (1) the tribunal misdirected itself in law; (2) the decision was such that no reasonable tribunal could reach it. More recently, the English Court of Appeal added “a false leap in logic” in the tribunal’s conclusion (HMV UK v Propinvest Friar Limited Partnership [2011] EWCA Civ 1708).

These observations do not help one to decide readily in a given case what the appellant has to show before the court can be satisfied that the arbitral decision’s is “plainly wrong”. By way of example, Lord Donaldson MR said that undoubtedly the arbitrator was not “allowed to cavort about the market carrying a small palm tree and doing whatever
he thinks appropriate by way of settling the dispute” (Seaworld Ocean Line Co SA v Catseye Maritime Co Ltd (“The Kelaniya”) [1989] 1 Lloyds Rep 30.

In the present case, Mimmie Chan J did not explain the meaning of “obviously wrong” or make reference to the Nema-Antaios Guidelines of requiring “a strong prima facie case” as the threshold test of “open to serious doubt” as in A & Others v Housing Authority [2018] HKCFI 147. Nor was there reference to the “less severe restraint’ threshold, which ‘opens the door a little more widely’ than the Nema-Antaios Guidelines, as applied in Swire.

Schedule 2 of the Arbitration Ordinance is commonly adopted by the parties to construction contracts. More guidance as to the meaning of “obviously wrong” and “at least open to serious doubt” is required, particularly the former, since in the majority of cases, the dispute is either a “one off” or the provision to be construed is non-standard. How obviously wrong does the tribunal’s decision have to be shown to be? The late Justice Coleman spoke ex-judicially of the obviousness in these terms, which is thought-provoking:

“What is obviously wrong? Is the obviousness something which one arrives at … on first reading over a good bottle of Chablis and some pleasant smoked salmon, or is ‘obviously wrong’ the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter.”

More authoritative and specific guidelines from the appeal courts on these two thresholds would be welcomed by arbitration practitioners.

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