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Newsletter

International Arbitration

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Major changes in the 2024 CIETAC Arbitration Rules

Joseph Chung and Vivien Wong

The 2024 CIETAC Arbitration Rules came into force on 1 January 2024.

CIETAC, one of the leading PRC arbitral institutions, has incorporated a wide range of revisions in the 2024 Rules, to reflect recent developments and trends in international arbitration. The aim of the revisions is to enhance parties' flexibility, autonomy and efficiency in CIETAC arbitrations and ensure that CIETAC arbitrations are up to international standards and expectations.

This article gives an overview of the key updates and changes made in the 2024 Rules.

Expansion of Tribunal Powers

- **Determining jurisdiction (Articles 6, 14, 18):** Under the 2024 Rules, once the tribunal is constituted, it is automatically empowered to determine its own jurisdiction (including resolving disputes over jurisdiction with respect to joinder proceedings). This contrasts with the position under the previous 2015 Rules, where the power to determine jurisdiction primarily laided with CIETAC and the tribunal

only had power to determine jurisdiction where CIETAC considered it necessary to delegate such power to the tribunal.

- **Interim Award (Article 49):** The 2024 Rules makes it clear that the tribunal is able to render an interim award on its own initiative where it deems necessary or upon a party's request.

- **Early Dismissal (Article 50):** Another new feature under the 2024 Rules is that a party may now request and the tribunal is empowered to grant an early dismissal of a claim or counterclaim in whole or in part on the ground that the claim or counterclaim is manifestly without legal merit, or is beyond the jurisdiction of the tribunal. To avoid undue delay of the proceedings, a request for early dismissal must be made as early as possible and no later than the submission of the Statement of Defence or the Reply to the Counterclaim.

Embracing digital tools and electronic means of communication

The 2024 Rules have been modified to meet the demands of the digital era.

- **Mode of Submission of Request for Arbitration (Article 11):** It is expressly provided that a Request for Arbitration can be submitted in writing and/or via CIETAC's online case filing system.

- **Service of documents (Article 8):** In addition to traditional means of delivery, all documents, notices and materials in relation to the arbitration may now be validly served by electronic means. This includes sending by email or other electronic means agreed by the parties or via the digitalized information exchange system of CIETAC or other information system easily accessible to parties.

- **Hard copies (Article 21):** Submission of hard copies are no longer compulsory unless required by the Arbitration Court or the tribunal.

- **Oral hearing (Article 37):** After consulting the parties and taking into consideration the circumstances of the case, the tribunal now has the option to decide whether to conduct an oral hearing by virtual conference or other appropriate means of electronic communication. The Arbitration Court will provide administrative and logistical support for virtual hearings.

- **Signing of awards (Article 52):** Arbitrators are now permitted to sign arbitral awards electronically and the awards may be delivered to the parties in electronic form, where the parties agree or where CIETAC deems it necessary. (Article 52)

Consolidation of Arbitration involving multiple contracts

Modifications have also been made to enhance efficiency and flexibility in resolving complex international disputes.

- **Addition of contracts (Article 14):** Under the previous 2015 Rules, a claimant may initiate a single arbitration concerning disputes arising out of or in connection with multiple contracts. Under the 2024 Rules, the claimant may also apply to add contracts to an arbitration after the arbitration has commenced. The tribunal is empowered to decide applications to add contracts in the arbitral proceedings if such application is made after the constitution of the tribunal. However, an application to add contracts during the proceedings may be denied if it is made too late and may delay the proceedings.

- **Contracts involving related subject matters (Articles 14 and 19):** Under the 2024 Rules, arbitrations can now be commenced under multiple contracts and arbitrations can be consolidated where the relevant contracts have "related subject matters" provided the other requirements for a single arbitration under multiple contracts or consolidation are met.

Measures to enhance users' experience of CIETAC arbitration

CIETAC has also included changes which ensures that practices and procedures in CIETAC arbitrations are aligned with international standards and recent judicial decisions on arbitration-related issues in other jurisdictions.

- **Non-compliance with escalation dispute resolution clause (Article 12):** Failure to negotiate or mediate as agreed in the arbitration agreement shall neither prevent the claimant from applying for arbitration nor prevent the arbitration court from accepting the case, unless the applicable law of the arbitration proceedings or the arbitration agreement provides otherwise. This is in line with the recent decision of the Hong Kong Court of Final Appeal in C v D [2023] HKCFA 16.

- **Conservatory Measures (Article 23):** In alignment with international standards and to better serve parties from multiple jurisdictions, CIETAC may now forward a party's application for conservatory measures to any courts outside of Mainland China, even before a notice of arbitration has been issued. This new provision provides for pre-arbitration conservatory measures to be ordered by a competent court in urgent situations.

- **Appointment of Arbitrators (Articles 22, 26, 27):** The 2024 Rules expressly provide for the Chairman of CIETAC to interfere in the appointment of arbitrators, if the procedures for forming the tribunal agreed by the parties are manifestly unfair or unjust, or if a party abuses its rights in a way that results in undue delay of the arbitral proceedings. The President of the Arbitration Court may interfere where there is an issue of conflict of interest regarding the appointment of arbitrators and the parties' representatives. This aims to protect the due process of the arbitration.

The parties may now agree that the presiding arbitrator in a three-arbitrator tribunal be jointly nominated by the party-nominated arbitrators. The parties enjoy greater flexibility in the appointment of arbitrators. Meanwhile, the Chairman of CIETAC retains the residual power to appoint arbitrators where the parties and/or the party-nominated arbitrators fail to appoint arbitrators within the time limit stipulated under the Rules, to avoid undue delay in the proceedings.

Third Party Funding (Article 48)

New provisions on third party funding reflect the marked increase in the use of third party funding in arbitration globally and the trend for an increasing number of jurisdictions, including Hong Kong, to allow third party funding in arbitration. Under the new provisions, the funded party has the obligation to inform the Arbitration Court about such funding arrangement without delay, and the tribunal may take into account the existence of third party funding in deciding the costs of the arbitration.

Provision for Ad Hoc Arbitration (Article 2)

Article 2 of the 2024 CIETAC Rules enables CIETAC to provide an extensive range of administration and supporting services for *ad hoc* arbitration, including but not limited to (1) offering guidance and consultation on the application of the arbitration rules, (2) appointing arbitrators and deciding on challenges to arbitrators, (3) providing oral hearing services, (4) scrutinizing draft awards, (5) managing arbitrators' remuneration etc. Such provision of services is subject to the parties' agreement or request and to such agreement not being inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings. The inclusion of this new provision prepares for the anticipated removal of the prohibition of ad hoc arbitration in cases where Mainland China is the seat under PRC arbitration law.

Limitation of Liability (Article 86)

The 2024 CIETAC Rules now include a provision that expressly excludes civil liability for acts and omissions in connection with the arbitration under the Rules, and any obligation to testify in relation to the arbitration, on the part of CIETAC, its staff members, arbitrators, emergency arbitrators and relevant persons engaged by the tribunal, unless otherwise provided in the law applicable to the arbitration.

Comments

Compared with the previous 2015 Rules, the 2024 Rules have expanded a number of provisions and incorporated the latest developments and trends in international arbitrations. The changes will be welcomed by parties as the 2024 Rules will cater for the increase in complexity and cross-border nature of disputes nowadays. The expansion of the tribunals' powers to grant an early dismissal of claims or counterclaims upon a party's request promotes the costs effectiveness in CIETAC arbitrations and provisions relating to third party funding. All in all, the modifications show CIETAC's commitment to enhancing efficiency and flexibility required in resolving complex international disputes and respecting due process and party autonomy in arbitrations.

Court refuses to enforce arbitral award for arbitrator's failure to give reasons for decision

KK Cheung

In A v B & ORS [2024] HKCFI751, the court refused to enforce an arbitral award. It held that objectively read and in the context of the issues raised and submissions and arguments made in the arbitration, the arbitrator had failed to adequately explain in the Award the reasons for her conclusions made on the key issues raised in the arbitration. The court said that the key is that a party reading the award should understand why a key issue in the arbitration was decided against him. In this case, it could not be said that the Respondents would so understand.

Background

The court had granted the Applicant leave to enforce the arbitral award (Enforcement Order) made in its favour by the sole arbitrator in an arbitration at the International Center for Dispute Resolution, under the Rules for International Commercial Arbitration of the American Arbitration Association. The Respondents applied to set aside the Enforcement Order, on the grounds that the arbitral procedure was not in accordance with the parties' agreement and it would be contrary to the public policy of Hong Kong to enforce the Award. The Award was in A's favour on all the issues, but the Respondents claimed that the arbitrator had failed to give any reasons for her decisions, simply making findings and conclusions, without any analysis.

Failure to give reasons

The court referred to the relevant legal principles, namely that arbitral awards are to be read generously, in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it, and always bearing in mind the policy of minimal curial intervention. Further, any inference that a tribunal has failed to consider an important issue is to be made only if it is clear and virtually inescapable.

The court said that in the present case, however generously the Award was read, the arbitrator had failed to adequately explain in the Award the reasons for her conclusions made on the key issues raised in the arbitration, namely the applicable governing law of the Agreements, effective date of termination of the Agreements, and on the enforceability or reasonableness of the Non-Compete Covenant, all of which were disputed by the parties.

Non-Compete Covenant Issue: governing law

The court noted that the enforceability of the Non-Compete Covenant was a key and central issue in dispute between the parties in the arbitration and turned on which law governed the Agreements in question. However, nowhere in the Award, the court said, was there any analysis by the arbitrator as to how she came to the conclusion that the governing law clause was enforceable and that the law of Maryland applied to the

Agreements. The arbitrator merely recited the governing law clause, without any explanation as to how she dealt with or considered the parties' arguments regarding the applicable law. The court said that although an arbitrator does not have to deal with each and every argument made by the parties, the *lex loci contractus* rule was an essential issue underpinning the decision on enforceability of the Non-Compete Covenant, and arguments on the issue were not dealt with or explained by the arbitrator in the Award. The court noted that there was not even a statement from the arbitrator that she accepted the Applicant's submissions on the issue. Nor did she explain why she considered Maryland law to have the more substantial relationship to the parties or the transaction.

The court referred to the observations made by the English Court in *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), namely: "*It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section 68(2)(d) is to ensure that all those issues the determination of which are crucial to the tribunal's decisions are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been dealt with*." The court said that although those observations were made in the context of an application made under s.68 of the Arbitration Act 1996 to set aside an award on the ground of serious irregularity, they apply with equal force in the context of whether enforcement of an award should be allowed on the ground that the arbitrator failed to deal with a key issue, or failed to give reasons for the decision, to render the arbitral procedure non-compliant with the agreed procedure, or to make enforcement of the award contrary to public policy. The key, the court said, is that a party reading the award should understand why a central issue in the arbitration was decided against him. In this case, it could not be said that the Respondents would so understand.

Non-Compete Covenant Issue: reasonableness of covenant

The court found that there was no reason given, as to why the injunction granted by way of enforcement of the Non-compete Covenant was considered by the arbitrator to be reasonable under Maryland law.

Breach Issue

On the Breach Issue, the parties were in dispute as to the date when the Agreements had been effectively terminated. The arbitrator did not give any reason why she rejected the Respondents' case on termination, which was not mentioned in the Award at all. The court said that the Respondents had legitimate cause for concern as to why their case was not considered, when the effective termination date was important for calculation of the damages and royalties found due, and for the duration of the injunction granted by way of enforcement of the Non-compete Covenant.

What the arbitrator did in the Award, the court said, was to set out the provisions of the Agreements in question and then simply state the orders she made. There was no analysis nor any explanation, however brief, as to why she accepted the effect as held by her, and why the Respondents' contentions - as to the clauses on governing law, on the enforceability and unreasonableness of the Non-Compete Covenant, and as to the effective date of termination of the Agreements - were rejected by her, or were considered by her to be irrelevant to her conclusions.

Court's conclusion

The court held that the failings of the arbitrator were sufficiently serious to affect the structural integrity of the arbitral process, and to have undermined due process. The Respondents were entitled to expect key issues which affected their rights and liabilities to be dealt with and explained with sufficient reasons in the Award.

Under the Agreements, the arbitration was to be conducted under the International Arbitration Rules (Rules) and Supplementary Procedures for International Commercial Arbitration of the American Arbitration Association (Procedures). Under Article 33 of the Rules, the tribunal "*shall*" state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given. Paragraph 5 of the Procedures contains an identical provision. There was no suggestion, the court said, that the parties had waived the need for reasons. Accordingly. the Award did not comply with Article 33 of the Rules and

paragraph 5 of the Procedures, as no reasons were given, and it could not be said to have been made in accordance with the procedure of the arbitration to which the parties had agreed.

The court added that it is fundamental to concepts of fairness, due process and justice, as recognized in Hong Kong, that key and material issues raised for determination, either by a court or arbitral tribunal, should be considered and dealt with fairly. An award should be reasoned, to the extent of being reasonably sufficient and understandable by the parties. Readers of the award, namely the parties themselves, should understand how and why the tribunal reached its conclusion on a particular issue, in the context of how the relevant issues had been argued before the tribunal. Having carefully considered the Award, the court said, the Respondents were entitled to query whether the Non-Compete Issue, the governing law, and effective date of termination issues had been considered at all by the arbitrator, and if considered, why the issues were determined against them.

The court concluded that it would be contrary to public policy to enforce and recognize the Award when those important issues, which the parties were entitled to expect to be addressed in the Award, were not in fact addressed or explained. Accordingly, the court set aside the Enforcement Order and refused to enforce the Award.

Comments

The parties may agree that no reasons upon which the award is based are to be given, pursuant to Article 31(2) of the UNCITRAL Model Law (given effect by Section 67 of the Arbitration Ordinance). In practice, it is seldom so agreed. This judgment highlights the importance of giving reasons in an arbitral award. The award will be read generously. Even a statement from the tribunal that it accepted one of the parties' submissions on the issue may suffice as the reason for making an award in its favour. However, judicial plagiarism i.e. copying the submission of one party without proper attribution and presenting it as its own in the award is not allowed, as can be seen from the Hong Kong Court of Appeal's decision in *Wong To Yick Wood Lock Ointment Ltd v Singapore Medicine Company Ltd* [2023] HKCA 740.

Court emphasizes exceptional nature of challenging arbitral awards

Justin Yuen

In CNG v G [2024] HKCFI 575, CNG sought to set aside an arbitral award made in G's favour, on the grounds that the tribunal had failed to consider key issues and to give reasons for its decisions in relation to certain of CNG's defences. Complaints were also directed against how the tribunal handled certain matters procedurally, which CNG said resulted in it being unable to present its case. The court dismissed CNG's application. It said that this case was a typical example of a party which had agreed to submit its contractual disputes to the final and binding determination of an arbitral tribunal, but being aggrieved with the award against it, makes all attempts to find loopholes and problems in the award. The court reminded parties that arbitration is a consensual process of final dispute resolution to which they voluntarily agree, with whatever inherent defects and risks there may be, and there are only limited avenues of appeal and challenge to the award. The limited recourse parties have under the Arbitration Ordinance (AO), the court said, is not intended to afford them with an opportunity to ask the court after the event to go through the award with a fine-tooth comb, to look for defects and imperfections under the guise that the tribunal had failed to act in accordance with its remit or the agreed procedure. Nor was any party entitled to rehearse once again before the court, arguments already made before the tribunal, or to have different counsel reargue its case with a different focus, in the hope that the court may be persuaded to come to a different conclusion.

The court in dismissing CNG's application, emphasized the exceptional nature of challenging arbitral awards, as follows:

- The court does not sit on appeal against the tribunal's findings of fact or law and it must not only respect the autonomy of the tribunal, but also leave the tribunal free to decide the dispute with the proper exercise of its case-management powers, when the tribunal is clearly in the best position to manage its own proceedings and procedure in the light of the issues put before it, the complexities of the case, and time-table which best suits the tribunal, the parties and their legal representatives, with the aim of achieving a speedy resolution without unnecessary legal expense. Matters which should have been raised with the tribunal, on procedure, pleadings, and timing, but were not so raised or objected to, should not be brought before the court as a matter of complaint at the time of resistance to enforcement or by way of setting aside of the award.

- Reminders from the courts have somehow not been effective in discouraging parties from embarking on expensive and time-consuming proceedings by way of unwarranted challenges to an award. Costs have routinely been awarded on an indemnity basis for unsuccessful challenges to arbitral awards, but in cases where awards are for very substantial sums, or where the parties are particularly obstinate or unreasonable, these costs orders have not been effective as deterrence, as hoped. The court can only look to and trust legal professionals to carry out their duties to the court and to act responsibly when advising their clients on whether an award can be properly challenged, bearing in mind that public resources are involved when judicial time is taken up by lengthy, but at the root, unmeritorious applications. Unfortunately, it appears that arbitration and litigation have become a game of buying time and competing in resources.

- The aims, objectives and principles of the AO are clearly set out in s.3, and Hong Kong has long been striving to establish and uphold a policy of being supportive of arbitration agreements and awards. It is high time that legal professionals play a much more vigilant role in this regard, at the same time being cognizant of their duties under RHC Order 1A to assist the court in furthering the underlying objectives of the rules of the court. Legal professionals should be aware of the exceptional nature of challenges made under s.81 of the AO. They should only prepare papers for such applications to the court and raise issues in them which have merit, instead of irresponsibly "massaging" a case to fall within the limbs of s.81.

In the present case, as regards the tribunal's alleged failure to deal with key issues, the court held that objectively reading the Award, in the context of the claims made in the arbitration and all matters disputed between the parties, it could not be said that the tribunal had failed to deal with the key issues arising in the arbitration or that it had failed to give reasons for its decision on the matter. It said:

- The tribunal had clearly set out its findings on the key issues for determination, and adequately explained the decisions reached. As regard's CNG's emphasis on the fact that "only" 24 paragraphs of the total 163 paragraphs of the Award were devoted to the tribunal's reasoning for its decision on the Share Transfer Claim, a long, prolix judgment or award does not mean that it must contain sound reasoning or analysis of an issue or the decision made and a short document likewise cannot indicate that there is no good reasoning or answer to the issues raised for decision.

- An agreed list of issues submitted by the parties helpfully frames issues which they agree to be relevant to the tribunal's consideration for the determination of the dispute submitted to arbitration. However, the list cannot dictate how the tribunal deals with the issues raised in the award, or how it is to structure the award when deciding on the dispute.

- The tribunal does not have to set out each step by which it reaches its conclusion, and a failure to deal with an argument or a submission made on or relating to an issue is not equivalent to a failure to deal with an issue. The tribunal is not required to deal with each issue seriatim, as it can deal with a number of issues in the composite disposal of them.

- A tribunal does not fail to deal with an issue if it does not answer every question that qualifies as an issue. It can deal with an issue where that issue does not arise in view of the tribunal's decision on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute, it will have dealt

with all the issues. So long as a decision on one argument suffices to resolve an essential issue, the tribunal does not have to consider all arguments canvassed upon the issue. Although awards often respond to parties' submissions, such submissions do not dictate how the tribunal is to structure the disposal of the dispute referred to it. A list of issues is not an exam paper with compulsory questions for the tribunal to answer them all.

- It is essential to bear in mind the policy of minimal curial intervention, and the court's approach to read an award generously, remedying only meaningful and readily apparent breaches of the rules of natural justice which can cause actual prejudice, rather than to comb an award in order to assign blame or to find fault in the process. Any inference, that an arbitrator had missed one or more important pleaded issues, can only be drawn if it is shown that the inference is "clear and virtually inescapable".

- It has to be borne in mind that the court is not concerned with whether the tribunal had come to the right decision, for the correct reasons, or whether there was evidence to support its findings in the decision. The grounds for setting aside and refusal of enforcement of an award are to be construed narrowly, and the applicant has to show that the error complained of is egregious to warrant the setting aside of the award.

- It is clear from the authorities, that in considering the important question of whether a tribunal has dealt with an issue, the approach is to read the award in a "reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it". It has to be borne in mind that the parties to the arbitration to whom the award was issued were aware of and understood how the issues had been presented to and argued before the tribunal. The tribunal is not bound to structure the Award in the same way as the List of Issues is framed. The Award is to be read and understood in the context of how the case was argued before the tribunal.

As regards CNG's procedural complaints of an "unfairly compressed timetable", inequality of time afforded to it to put forward its evidence, and last-minute ambushes made by G, all of which according to CNG, constituted serious or egregious conduct on the tribunal's part or in the conduct of the arbitration, which effectively deprived CNG of the ability to present its case, the court held that there was no substance in such as:

- The tribunal is the master of its procedures and has the full discretion to decide on the timetable for and on management of the arbitration. A tribunal's case management decision is not a decision which the court should highly interfere with, in the absence of what the court can find to be a serious denial of justice. Nor is it the court's function on an application to set aside the award to descend to a level of reviewing the minutiae of the procedure, in order to examine the correctness or otherwise of case management decisions and orders made by the tribunal. The tribunal is obviously in the best position to decide on the most appropriate and fair manner of proceeding with the arbitration in accordance with the principles of the AO and the time available to the parties, their legal representatives and members of the tribunal.

- No party can claim the right to have all the time it needs to prepare for the hearing. Article 34(2)(a)(ii) of the Model Law permits the court to set aside an award if a party was "unable to present" its case. What the courts seek to enforce and protect is a standard of due process which can satisfy basic minimum requirements and are generally accepted as essential to a fair hearing. In this context, it is relevant to note that s.46 of the AO requires the arbitral tribunal to give the parties "a reasonable opportunity" to present their cases and to deal with the cases of their opponents and reflects that a party's right is to have a reasonable opportunity, as opposed to a "full opportunity" to present its case, and that such a right is not unlimited in scope and breadth, to entitle a party to make unreasonable demands and to ignore other relevant principles and aims of efficiency and speedy resolution of the dispute.

- Despite CNG's complaints in the course of the arbitration, CNG was able to comply with all procedural deadlines and it never sought to apply for an adjournment of the evidentiary hearing. Both sides had a large and sophisticated team of lawyers working on disclosure, evidence preparation and submissions, and the case took 1.5 years to come to the evidential hearing. There were no unusual

features for an international arbitration of this scale, and there was nothing to which the court had been referred which could constitute serious and egregious errors.

Comments

This judgment is helpful in providing parties, especially the losing party to arbitration, with a better understanding of the difficulties in challenging an arbitral award. Arbitration is often chosen by the parties not for saving legal costs but for its finality and enforceability internationally.

When can an arbitral award be set aside for a tribunal's failure to deal with an issue?

Joseph Chung

In X & Anor v ZCo [2024] HKCFI 695, the court dismissed an application to set aside an arbitral award on the basis that the tribunal had failed to deal with certain issues. The court said that this was another case of a losing party in an arbitration coming to court to launch a challenge to an award by "repackaging" arguments which had not been made the focus of submissions to the tribunal, and presenting them to the court as key issues which had not been dealt with by the tribunal.

Arbitral award

Disputes arose under a Share Subscription and Purchase Agreement (SPA) and ZCo, as Claimant, commenced arbitration against X and YCo,as Respondents, for their alleged failure to complete the purchase of shares following ZCo's exercise of an exit right conferred on it under the SPA (Exit Right). X and YCo denied their liability to purchase the Exit Shares, and the arbitration concerned whether ZCo was entitled to exercise the Exit Right, and if so, whether ZCo was entitled to specific performance and/or damages in lieu. The tribunal issued an award in ZCo's favour.

Application to Court to set aside arbitral award

X and YCo applied to court to set aside the award, on the grounds of their inability to present their case, and/or that the arbitral procedure was not conducted in accordance with the parties' agreement, in that:

(i) X and YCo's obligation to repurchase ZCo's shares under the SPA was only triggered upon the satisfaction of a condition precedent as set out in the SPA (Condition Precedent), and as the Condition Procedent was not satisfied, they had no obligation to repurchase the Exit Shares at all (Condition Precedent Defence); and

(ii) Even if they were liable for specific performance, on the proper interpretation of the SPA or by reason of an implied term, tax liabilities arising from completion of the transfer of the Exit Shares should be borne by ZCo and should thus be deducted from the Exit Price payable (Tax Defence).

The court noted that the real complaint of X and YCo and basis of their setting aside application was that the tribunal had failed to deal with issues, as a result of which, they had been unable to present their case.

Court's decision

The court dismissed the application to set aside the award. It emphasized that the grounds for refusal of enforcement of an award are to be construed narrowly, such that only conduct "sufficiently serious or egregious" amounting to a denial of due process suffices to warrant an order to either set aside or refuse enforcement of an award. As regards, the ground of a tribunal's failure to deal with an issue, the court referred to its summary of the relevant principles in the recent case of *CNG v G* [2024] HKCFI 575 (please

see our article above). As stated in *CNG v G*, the proper approach in reviewing an award is by reading it generously, in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it, and always bearing in mind the policy of minimal curial intervention. Any inference that a tribunal has failed to consider an important issue is to be made only if it is clear and virtually inescapable.

Condition Precedent Defence

The court said that a more unusual feature of this case, which was different to the usual instance of a party claiming that an issue included in an Agreed List of Issues for the tribunal (List) was not dealt with by the tribunal in the award, was that the Condition Precedent was not even mentioned in the List submitted to the tribunal, even though the List set out the other defences raised by X and YCo.

The court noted from the various case authorities, that although the List is a useful document to frame the issues which the parties consider and agree to be relevant to the tribunal's consideration, it cannot dictate the manner in which the tribunal deals with the issues raised in the award and how it answers the key issues. The mere fact that an issue which had been included in the List was not expressly dealt with in the award cannot necessarily mean that the tribunal had failed to consider and deal with it, but the fact that an issue was not included in the List is a strong indication that the issue was not regarded by either the parties or the tribunal as being a relevant or key issue for consideration and determination in the arbitration. As observed by the court in *CNG v G*, an agreed list of issues is not an exam paper with compulsory questions for the tribunal to answer in the award. In the present case, it was clear, the court said, that the Condition Precedent was not even a question put to the tribunal to answer at all.

It should not be left to the tribunal, the court said, to extensively comb through all the documents, materials and notes of the proceedings to ascertain and understand the issues expressly or by implication put by a party to the tribunal for determination. The arbitral process is intended to be more cost-effective than litigation in the courts, and the object of the Arbitration Ordinance is to facilitate "the fair and speedy resolution of disputes without unnecessary expense". It is not consistent with such object, the court said, if the tribunal is expected to find out for itself what the issues put to it are, or to look for unequivocal abandonment of any claim or issue on which the parties or their counsel had not focused or made submissions on in the course of the hearing.

The court added that it would be more ludicrous to suggest that the court, at a hearing for setting aside an award, should go through the voluminous documents filed in the arbitration and transcript of the entire hearing, in order to ascertain whether any issue raised in any document had been unequivocally abandoned, before accepting that all issues, however minor, and irrespective of whether submissions had been made on them, had actually been dealt with, and decided upon in the award. Hence, the prime duty and the onus, the court said, must be on the parties and their representatives in the arbitration to clearly identify and refer the tribunal to the salient issues in dispute, the issues to be decided by the tribunal, and key issues in particular and the List is the useful starting point. The pleadings may have to be reviewed, but the tribunal, and ultimately the court, can reasonably expect that the key issues put to the tribunal for determination would be identified in counsel's opening and closing submissions in the hearing. If they were not, and were not addressed at the hearing, the court and tribunal could reasonably infer and accept that such issues did not arise from the evidence adduced for decision in the tribunal's award, either because they were not disputed or no longer disputed by the parties, or because the evidence available did not support the issue(s) which had been raised in the pleadings, and that in any event, they were not important issues at all.

The court said that each case must be considered on its own particular facts and the particular grounds relied upon, either to set aside or resist enforcement of the award. On the particular facts of this case, and against the background of the pre-hearing memorials and opening and closing submissions made in the arbitration, the court was not satisfied on the materials that the Condition Precedent Defence was a matter which remained to be an issue, or any key issue which was put to the tribunal for determination Even if it could somehow be shown that the Condition Precedent Defence had been put to the tribunal as an issue for determination in the arbitration, the issue could not have made any difference to the outcome of the arbitration. There was nothing in the evidence of X or YCo in the arbitration, the court said, which could support the tribunal finding that the Condition Precedent Defence could be established.

The Tax Defence

The court concluded that the alleged Tax Defence as argued before the court, was clearly an instance of a losing party seeking to reargue the claims made in the arbitration with a totally different focus. The court found that even if the Tax Defence was an issue which had been put to the tribunal, in the light of the parties' submissions on the calculation of the Exit Price, the tribunal obviously considered that it was no longer necessary to deal with the issue. Accordingly, the court rejected the claim that the Tax Defence was an issue put to the tribunal for decision, and that the tribunal had failed to deal with it.

Comments

This is another example which demonstrates how difficult it is to challenge an arbitral award.

When can the court intervene in a tribunal's decision on public policy?

Justin Yuen

G v N [2023] HKCFI 3366, involved the question of the application of public policy in a case where illegality is raised as a defence to a claim and the extent to which the court can intervene in a tribunal's decision on public policy under Article 34 of the Model law (s.81 of the Hong Kong Arbitration Ordinance (AO)). G applied to the court to set aside two HKIAC partial awards, or alternatively, to remit them back to the arbitrator to reconsider questions of illegality under Hong Kong law. One of the grounds of G's application was that the awards were in conflict with the public policy of Hong Kong on the question of illegality. In the arbitration, the arbitrator, in denying G's claim due to illegality of the underlying transaction, had relied on an English authority (*Tinsley v Milligan* [1994] 1 AC 340) which had ceased to be good law in Hong Kong shortly before the arbitrator's ruling (as a result of the Hong Kong Court of Appeal's decision in *Monat Investment* [2023] HKCA 479, which followed the UK Supreme Court decision in *Patel v Mirza* [2016] UKSC 42). The court suspended G's setting aside application and remitted the matter back to the arbitrator (Decision). N has been granted leave to appeal the Decision.

Court's decision

The court held as follows:

- The Privy Council (PC) decision in *Betamax v State Trading Corp* [2021] UKPC 14, was highly persuasive. The PC had held that the question of illegality involves two stages:
    - the tribunal making findings of facts, and applying the law to the facts to ascertain if there is any illegality; and
    - ascertaining the consequences of the illegality found, and while the 1st stage is not open to review by the court, at the 2nd stage, the court must assume jurisdiction to determine whether the award is in conflict with public policy of the jurisdiction of the supervisory court.
- Where a party makes an application under s.81 of the AO to set aside an award, or under either s.86(2)(b), 89(3)(b) or 95(3)(b) of the AO to resist enforcement of an award, it is open to (and incumbent on) the party to show the court that the award or enforcement of it is contrary to the public policy of Hong Kong.
- The court is then bound to consider and decide the claim, applying the authorities which define the narrow scope of such claim and it is not against the spirit or principles of the New York Convention or AO to do so.

- In this case, the arbitrator had considered matters which in his view were relevant to whether or not relief should be granted to G and had analysed the cases on the illegality defence, including *Tinsley* and then *Patel*, and concluded that as the Hong Kong Court of Final Appeal had not yet considered whether *Patel* should be followed in Hong Kong, he was required to apply the law of illegality in *Tinsley*.

- When the court was now asked, on an application to set aside the awards, to consider the award in the context of public policy, it was bound to consider whether the awards or enforcement of them would be contrary to the public policy of Hong Kong, as recognized by the Hong Kong Courts at the current date.

- If, now adopting the approach in *Patel* as acknowledged by *Monat*, the court considers that it would be manifestly unjust and against the public policy of Hong Kong to enforce the awards, the court may be compelled to set aside the awards notwithstanding that the arbitrator had decided on matters engaging public interest when he made his award.

- This may be because the arbitrator had not considered all matters highlighted to be important in the approach advocated in *Patel* and *Monat*, before determining whether relief should be denied to G.

- It was not necessary for a party seeking setting aside or remission of the award to show that the outcome would have been different, only that it could or might have been different.

- Here, instead of pronouncing the court's view on whether the awards were contrary to the public policy of Hong Kong as it should now be considered, it was more appropriate to suspend the setting aside proceedings and remit the matter to the arbitrator, so that he had the opportunity to resume the arbitral proceedings and take such action as in his opinion would eliminate the grounds for setting aside. The arbitrator could then consider *Monat* and decide whether his decision, as reflected in the awards, would be affected in any way.

N's appeal

N applied for leave to appeal the above Decision (G v N [2024] HKCFI 655).

The court granted leave to appeal, as it said the Decision raised an important and novel issue on the proper scope of the court's permissible intervention on the ground of public policy, and the interplay between, on the one hand, the public policy underpinning the denial of remedies on the ground of illegality and, on the other hand, the policy of the court's support of arbitral awards and minimal curial intervention in arbitrations. It would be in the interests of justice, the court said, to allow the appeal to be made, and to obtain a decision from the Court of Appeal, with guidance on the extent of permissible review by the supervisory court of a tribunal's consideration of public policy, when illegality is raised by way of defence to a claim made.

The court added that parties should not be encouraged to use public policy as a ground to seek substantive review of an arbitral award, on the basis simply that the tribunal had misapplied the "range of factors" test in *Patel,* or had failed to consider a particular factor before dismissing a claim on the basis of illegality. A decision by the Court of Appeal and clear guidance on the issues disputed in this case would, the court said, benefit the development of arbitration law in Hong Kong and in the Model Law jurisdiction. The court concluded that it could not be said that N's grounds of appeal had no reasonable prospect of success.

The court rejected G's submission that the Decision amounted to a case management direction to reserve the application for determination, and did not amount to any "decision" from which an appeal would lie. The Decision to suspend the setting aside proceedings and remit the matter to the tribunal under s.81 of the Ordinance was, the court said, a substantive decision to firstly stay the setting aside proceedings and secondly, to remit the matter to the tribunal for it to decide the matters referred to in s.81. It is a decision which affects the substantive rights of the parties to the arbitration, and not just one for the management of the procedural aspects of the setting aside proceedings. A decision under s.81 is one from which an appeal may lie with leave of the court, as provided for in s.81 (4), the court said

The parties informed the court that the hearing of the arbitration would still be resumed for the arbitrator to consider the matter remitted, and to that extent, the arbitration would not be affected by any leave granted on N's present application. Please stay alert for the outcome of the substantive appeal on this important and novel issue on the proper scope of the court's permissible intervention on the ground of public policy.

HKIAC Statistics 2023

Carmen Ng

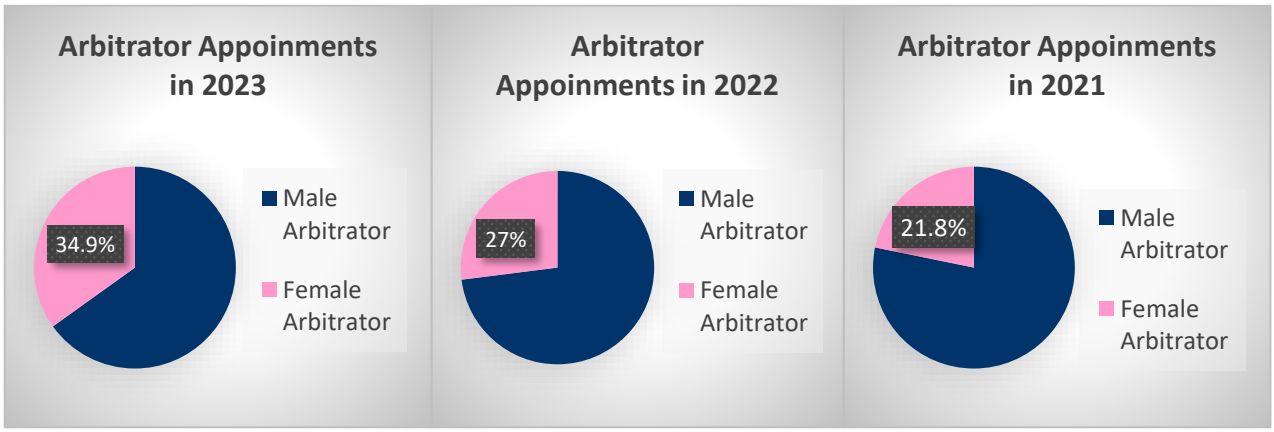
The HKIAC has published its statistics for 2023, with the amounts in dispute and gender diversity in arbitral appointments setting a new high.

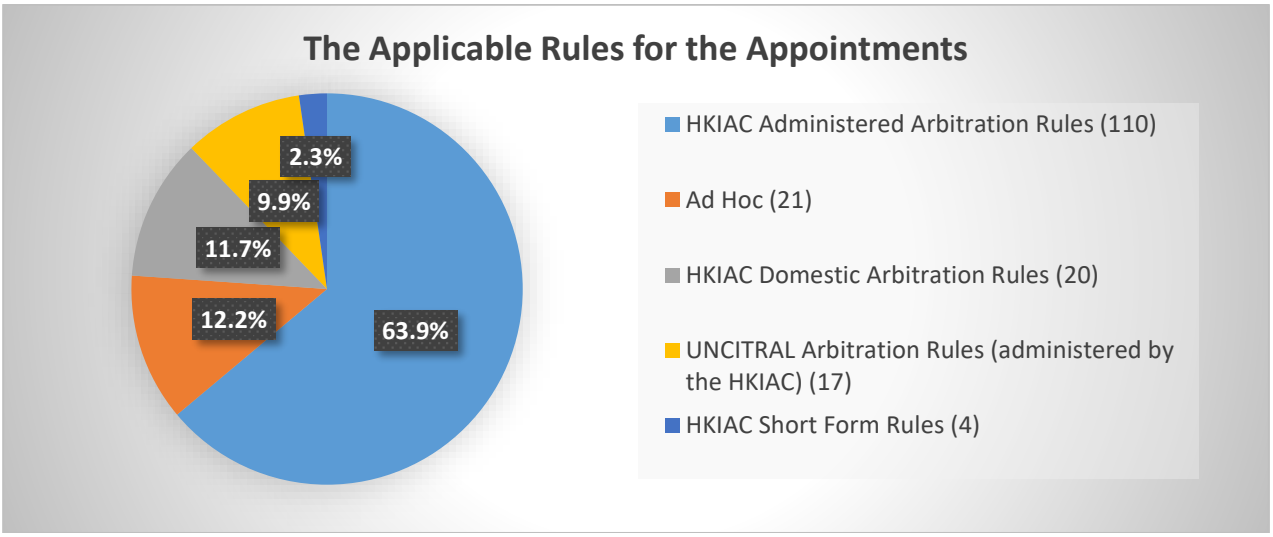
The following are some of the more notable statistics:

- **No. of arbitrations:** 500 matters were submitted to the HKIAC in 2023. Of those cases, 281 were arbitration filings (the 3rd highest number of cases received since 2017). For the remaining cases, 209 were domain name disputes (as compared to 161 in 2023) and 10 were mediations (the same number as in 2022). Of the 281 arbitrations, 184 were administered by the HKIAC.

Year	2023	2022
Total Cases were submitted to HKIAC	500	515
Arbitration filings	281 (184 were administered by the HKIAC)	344 (256 were Administered by the HKIAC)
Domain name disputes	209	161
Mediations	10	10

- **Arbitrator appointments:** In 2023, the HKIAC made a total of 172 arbitrator appointments, 60(34.9%) of which were of female arbitrators (as compared to 21.8% in 2021 and 27% in 2022). As to the role of arbitrators appointed in 2023: Sole Arbitrator - 64.5% (111), Co-Arbitrator - 17.5% (30), Presiding Arbitrator - 16.3% (28) and Emergency Arbitrator - 1.7% (3). The applicable Rules for these appointments were: HKIAC Administered Arbitration Rules - 63.9% (110), Ad Hoc - 12.2% (21), HKIAC Domestic Arbitration Rules - 11.7% (20), UNCITRAL Arbitration Rules (administered by the HKIAC) - 9.9% (17) and HKIAC Short Form Rules - 2.3% (4).





- **International arbitrations:** 75.1% of all arbitrations and 89.7% of all administered arbitrations submitted to the HKIAC in 2023 were international in nature i.e. at least one party was not from Hong Kong. 37.7% of all arbitrations submitted to the HKIAC in 2023 involved no Hong Kong parties and 9.6% involved no Asian parties. Parties from Mainland China featured in 39.5% of all arbitrations submitted to the HKIAC in 2023.

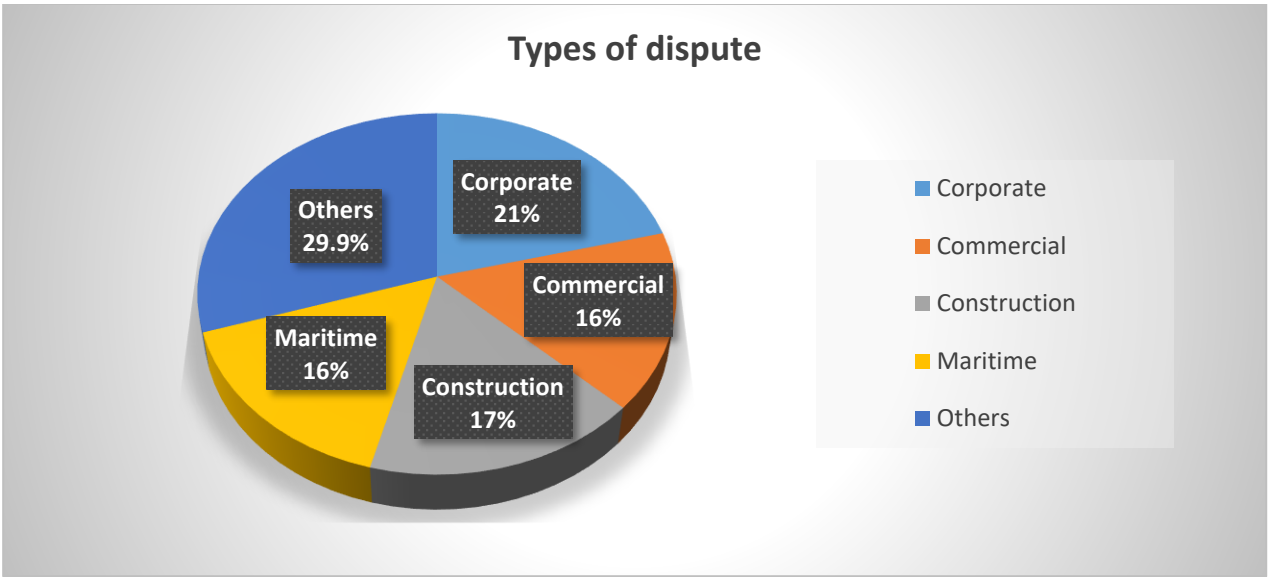
- **Amount in dispute:** The total amount in dispute across all arbitrations was HK$92.8 billion (as compared to HK$43.1 billion in 2022). The total amount in dispute in all administered cases was HK$86 billion (as compared to HK$36.7 billion in 2022). The average amount in dispute in administered arbitrations was HK$467.6 million (as compared to HK$180.6 million in 2022). These figures represent record highs for the HKIAC.

Year	2023	2022
Total amount in dispute across all arbitrations	HK$92.8 billion	HK$43.1 billion
Total amount in dispute in all administered cases	HK$86 billion	HK$36.7 billion
Average amount in dispute in administered arbitrations	HK$467.6 million	HK$180.6 million

- **Seat of arbitration:** The vast majority of arbitrations (96.87%) were seated in Hong Kong. In the remaining arbitrations, the seat was not specified.

- **Governing law:** Disputes referred to the HKIAC in 2023 were subject to 14 different governing laws, with Hong Kong law being the most commonly selected governing law, followed by English law and then Chinese law.

- **Types of dispute:** The top 5 types of dispute were corporate (21%), construction (17.1%), commercial (16%) and maritime (16%).



- **Challenges to arbitrators:** 5 challenges to arbitrators were submitted to the HKIAC in 2023 (down from 11 in 2022). Of those challenges, 3 were pending as at the end of 2023, 1 resulted in resignation of the challenged arbitrator and 1 was withdrawn.

- **Multi-party or multi-contract arbitration, joinder and consolidation:** Of the 281 arbitration filings in 2023, 164 involved multiple parties or contracts. Of the 184 arbitrations administered by the HKIAC, a total of 45 were commenced as a single arbitration under multiple contracts, and 24 of those cases were the subject of a determination by HKIAC of the appropriateness of such commencement. The HKIAC received 10 requests for consolidation, 8 of which were granted. Of the 8 requests for the joinder of additional parties submitted to the HKIAC or arbitral tribunals, 3 were granted and 5 rejected.

- **Interim Measures Arrangement:** A steadily growing number of parties made applications under the Hong Kong-Mainland China Arrangement on interim measures. In 2023, the HKIAC processed 19 applications to 13 different Mainland Chinese courts under the Arrangement, seeking to preserve assets or conduct, worth a total of RMB3.5 billion in Mainland China. In respect of those applications, the Mainland courts issued orders to preserve RMB544milion worth of assets. Approximately 19.5% of the applications were made by parties from Mainland China and 80.5% by parties from the BVI, Cayman Islands, Hong Kong, Norway, UAE, St Kitts and Nevis and the US. Approximately 62.4% of the applications concerned assets owned by Mainland Chinese parties and 37.6% concerned assets or evidence owned by non-Mainland parties (from Australia, BVI, Canada, Cayman Islands, Hong Kong, Singapore, Taiwan and the US). Since the Interim Measures Arrangement came into force on 1 October 2019 and as of the end of 2023, the HKIAC has processed 105 applications. 99 applications were made for the preservation of assets, 2 were for the preservation of evidence, and 4 for the preservation of conduct. The total value of assets requested to be preserved amounted to RMB26.4 billion. Up to 2023, the HKIAC is aware of 70 decisions issued by Mainland Courts. Of these 70 decisions, 66 granted the applications for preservation of assets upon the applicant's provision of security and 4 rejected such application. The total value of assets preserved by the 66 decisions amounted to RMB 15.8 billion.

- **Emergency arbitrator applications:** 3 emergency arbitrator applications were submitted to the HKIAC in 2023. The total number of emergency arbitrator applications filed with the HKIAC as at the end of 2023 is 35.

- **Expedited procedure:** 24 applications for the expedited procedure under the HKIAC Administered Arbitration Rules were submitted in 2023, 15 of which were granted and 9 rejected.

- **Early determination procedure:** 5 applications for the early determination procedure were submitted to arbitral tribunals in 2023. 2 applications were rejected, 2 granted and 1 was pending as at the end of 2023. The total number of early determination applications filed with HKIAC up to 2023 is 13.

- **Third party funding:** Parties made disclosures of third party funding in 1 arbitration administered by HKIAC under the 2018 HKIAC Administered Arbitration Rules.

- **Virtual hearings:** In 2023, the HKIAC hosted a total of 101 hearings, of which 44 were fully or partially virtual and 57 in person at the HKIAC's premises in Hong Kong.

Disputes as to proper parties to arbitration agreement may be reviewed by the court

KK Cheung

In R v A, B and C [2023] HKCFI 2034, the court held that an arbitral award finding that C was the true party to an agreement and therefore in effect finding that she was a party to the arbitration clause in the agreement, was a decision on the arbitral tribunal's jurisdiction over C and the parties to the arbitration. The award was therefore amenable to review under s.34 of the Arbitration Ordinance. The court, having reviewed the matter de novo, found that C had failed to discharge the burden of proving that she was the true party to the agreement. Accordingly, the tribunal had no jurisdiction over her claims in the arbitration and the award as between C and R was set aside by the court.

Background

R and A had entered into a limited partnership agreement (2nd Amended LPA). C was never a signatory, nor was she named in the agreement. On C's case, R was her agent and nominee in making investments, so as to mitigate the expense and delays from Mainland foreign exchange controls and overseas direct investment restrictions. According to C, the 2nd Amended LPA was signed by R as agent for and on her behalf, and she was the principal and beneficiary entitled to all rights under and to enforce the 2nd LPA. C claimed that she had reimbursed R for the funding for the investment in question (RMB 300 million).

Arbitration clause

The 2nd Amended LPA contained an arbitration clause. Arbitration was initiated by R against A and B, claiming their breach of the 2nd Amended LPA. When C learned of the arbitration, she made a request to be joined to it and sought declarations that she was R's true principal in relation to the investment and beneficial owner of it. R challenged the right of C to be joined in the arbitration. C was granted the provisional right to intervene in the arbitration, the HKIAC having notified the parties that the decision to grant C's joinder request on a preliminary basis would *not* prejudice R's right, as Claimant, to challenge the tribunal's jurisdiction over C, once the tribunal had been fully constituted.

The tribunal then went on to determine as a Preliminary Question whether R or C was the true principal and/or party to the 2nd Amended LPA and whether the tribunal therefore had jurisdiction over C or R.

Tribunal's partial final award on jurisdiction

The tribunal issued a "Partial Final Award on Jurisdiction" (Award), finding that C, and not R, was the true principal and party to the 2nd Amended LPA, based on its finding that the RMB300 million was a payment in respect of the investment and that C was therefore the beneficial owner of the investment.

Application to set aside award

R applied to court to set aside the Award under s.34 of the Arbitration Ordinance. The first question before the court was whether the tribunal's ruling in the Award was a decision on its jurisdiction. C, A and B contended that no decision had in fact been made by the tribunal on its jurisdiction, so the decision was not open to review by the court under s.34 of the Arbitration Ordinance. According to them, the Award was a decision on the merits, but C was not applying to set the award aside under s.81 of the Ordinance, and the time for doing that had expired.

Was the Tribunal's decision one on jurisdiction?

Having considered the history of the arbitration leading up to the Award, the parties' formulation of the Preliminary Question, and form as well as substance of the Award, the court held that the Award, and ruling made in it, was a decision on the tribunal's jurisdiction over C and the parties to the arbitration.

The court said that in concluding and making the declaration that C was the true principal and party to the 2nd Amended LPA, the tribunal was in effect and substance deciding that she was the party to the arbitration agreement contained in the 2nd Amended LPA, was entitled to enforce the rights and obligations conferred under the 2nd Amended LPA, including the arbitration agreement, and that as C was the true party to the agreement, the tribunal had the jurisdiction to decide the dispute between R and C, which arose out of or in connection with the 2nd Amended LPA, its existence, and breach as alleged.

The court added that, even if the tribunal's ruling and decision as contained in the Award was wider in scope than a decision on jurisdiction only, in that the tribunal had decided on at least part, if not the entirety, of the merits of the claims made by R and C, including questions relating to how payment of the investment was made and reimbursed, that did not by itself mean that there was no award on jurisdiction. The key, the court said, was to ascertain whether the Award had dealt with and decided the question of whether the tribunal had jurisdiction over the claims made by R and C respectively in the arbitration.

The court concluded that there was no basis to characterize the Award and ruling made in it as anything other than one on a true question of jurisdiction. It was a finding on the existence of a valid and binding arbitration agreement as contained in the 2nd Amended LPA, to which C was a true party and principal. The identities of the parties to a contract are fundamental and go to the root of the question of whether a contract exists and in this case whether there was an agreement to arbitrate. A tribunal only has jurisdiction over parties to the arbitration agreement, and it is only with the consent of those parties to the arbitration agreement that the power to join non-parties can be exercised. It could not be disputed, the court said, that a difference or disagreement over the proper parties to an arbitration agreement is a true matter of jurisdiction.

Accordingly, the court held that the Award was one on the jurisdiction of the tribunal and as to the existence of an arbitration agreement between R and C. As such, it was open to review by the Court under s.34 of the Ordinance and Article 16 of the Model Law.

Was the Tribunal's decision that C was a party to the agreement correct?

The court went on to consider whether the tribunal was correct in its decision that there was an arbitration agreement between R and C who was found to be the principal and true party to the 2nd Amended LPA. The court referred to its approach in this regard, namely that in deciding this question, it could consider afresh the evidence adduced before the court and the tribunal's own view of its jurisdiction had no legal or evidential value to the court, irrespective of how full the evidence was before the tribunal, and no matter how carefully deliberated the tribunal's conclusion. The hearing before the court is *de novo*, and if necessary, witnesses can be called and the parties are entitled to put forward new arguments on the question of

jurisdiction which the court is entitled to consider. The rationale for this is that the court should not be in a worse position to make an assessment on an issue of fact, and is therefore able to examine the evidence and the witnesses in the usual way.

On the court's review, it could receive evidence which is relevant and admissible, regardless of whether it had been adduced, or could have been adduced, before the tribunal. The court is not bound by or limited to either the findings made by the tribunal in the award, or the evidence adduced before the tribunal. The court is to make its own decision on the evidence before the court. It does not simply review the tribunal's decision, but makes its own decision on the evidence before it, but as is often the case, the court said, after considering the award and tribunal's findings, it may agree with the tribunal's conclusions. This is partly due to the fact that whilst the evidence before the court is not confined to what was adduced before the tribunal, it will include such evidence which had been adduced, had been considered by the tribunal and is referred to in the award, including the testimony of the witnesses who had been cross-examined before the tribunal and whose credibility had been assessed by the tribunal.

On the entirety and state of the evidence before the court, it concluded that it could not be satisfied that C had made reimbursement of the payment made by R for the investment and C had not discharged her burden of proving herself to be the beneficial owner of the investment and the true principal and party to the 2nd Amended LPA. Accordingly, as she was not the party to the arbitration agreement contained in the 2nd Amended LPA, the tribunal had no jurisdiction over her claims purportedly made in the arbitration, and therefore the Award had to be set aside as between R and C.

This judgment confirms that disagreements as to who are the parties to an arbitration agreement are matters of jurisdiction and that decisions made about such by an arbitral tribunal are reviewable by the courts, which can consider the matter afresh.

Public Consultation on Proposed Amendments to 2018 HKIAC Administered Arbitration Rules

KK Cheung

The HKIAC Rules Revision Committee has invited comments on its proposed amendments to the HKIAC Administrated Arbitration Rules, which were last revised in 2018. The Committee notes that although the 2018 HKIAC Rules have been working well in practice, in light of arbitration developments in Hong Kong and globally over the last 6 years, it would be useful to make certain amendments. Proposed revisions include the following.

Encouraging diversity in arbitral appointments

A proposed new Article, encourages parties and co-arbitrators to take into account considerations of diversity when designating arbitrators and states that the HKIAC when exercising its authority to appoint arbitrators shall take into account considerations of diversity together with all other relevant considerations.

Enhancements to the mechanism for single arbitration under multiple contracts

The current Article provides for the circumstances in which claims arising out of or in connection with more than one contract may be made in a single arbitration, for example, where a common question of law or fact arises under each arbitration agreement giving rise to the arbitration. It is proposed that the Article be revised to add a provision, stating that where the HKIAC decides that the arbitration has been properly commenced under the Article, the parties shall be deemed to have waived their rights to designate an arbitrator and that the HKIAC shall appoint an arbitral tribunal with or without regard to any party's designation.

Arbitral tribunal's powers to address preliminary issues

A provision is proposed to be added to the Article dealing with General Provisions, stating that the arbitral tribunal may, in its discretion, and in consultation with the parties, determine preliminary issues that the tribunal considers could dispose of all or part of the case, bifurcate the proceedings, conduct the arbitration in sequential stages, and decide the stage of the arbitration at which any issue shall be determined, or otherwise adopt procedures to decide the case efficiently.

Conflicts of Interest

Another provision proposed to be added to the General provisions is one stating that the arbitral tribunal (after consulting with the parties) may take any measures necessary to avoid a conflict of interest arising from a change in party representation, including excluding the proposed new party representative from participating in the arbitral proceedings.

Revoking arbitrator appointment

An addition is proposed to the General Provisions, providing that the HKIAC may, after consultation with the parties and tribunal, take any necessary measure to preserve the efficiency or integrity of the arbitration, including revoking the appointment of any arbitrator, where it considers that the arbitrator is prevented from or has failed to fulfil his/her function in accordance with the Rules or within the prescribed time limits.

Closure of Pleadings

Currently, the relevant Article provides that the arbitral tribunal shall declare the proceedings or relevant phase of the proceedings closed when satisfied that the parties have had a reasonable opportunity to present their case, whether in relation to the entire proceedings or a discrete phase of the proceedings. The revision proposed adds a time limit for this, namely no later than 45 days from the last directed substantive oral or written submission in respect of the discrete phase of the proceedings (excluding submissions on costs).

Information security

A new Article is proposed for the protection of information, stating that the parties may agree on any reasonable measures to protect information shared, stored or processed in relation to the arbitration and that the arbitral tribunal may (after considering the parties' views) give directions on such. It is also proposed that the arbitral tribunal have power to make an order, decision or award in respect of any breach of information security measures agreed or directed.

Fees and expenses payable to arbitrators

A revision is proposed whereby the HKIAC may review an arbitral tribunal's determination of its fees and expenses, following which, the HKIAC may adjust such fees and expenses.

Emergency Arbitrator Powers

Revisions are proposed to Schedule 4 (Emergency Arbitrator Procedure) to clarify emergency arbitrator powers, including a provision that the emergency arbitrator have power to make any order within 14 days from the date on which the HKIAC transmitted the case file to the emergency arbitrator (or within such time as may be extended by party agreement or, in appropriate circumstances by the HKIAC) pending the Emergency Decision. Also, that the emergency arbitrator may proceed with the Emergency Relief proceedings and an Emergency Decision may be made within that period, even if in the meantime the case file has been transmitted to the arbitral tribunal.

It is clear that the proposed revisions are aimed at clarifying certain existing provisions, increasing efficiency in the arbitral proceedings and, as the HKIAC says, enhancing the HKIAC's role in relation to matters affecting the integrity of the arbitral process.

New CRCICA Arbitration Rules 2024

Joseph Chung

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) Arbitration Rules 2024, came into effect on 15 January 2024. The 2024 Rules, last updated in 2011, introduce provisions on:

- Consolidation of arbitrations
- Early dismissal of claims
- Emergency Arbitrator Rules
- Expedited Arbitration Rules
- Online arbitration filing
- Multiple contracts
- Third party funding
- Remote hearings
- Law applicable to arbitration agreements

The tables of the administrative and arbitral tribunal fees have also been revised.

Consultant Stanley Lo admitted to the Government's List of Dispute Resolution Advisors

The Government's Joint Management Committee (JMC) has included Construction Consultant, Stanley Lo, in its list of Dispute Resolution Advisors (DRAd).

The DRAd system aims at minimizing claims, disputes and disruption to Public Works Contracts with contract values exceeding HK$700M and to ensure the expeditious resolution of disputes, if they arise. It is also adopted in contracts where the nature of work is complicated and disputes are likely to arise.

The DRAd system is administered by the JMC which consists of representatives from the Architectural Services Department, various government works departments and Hong Kong Construction Association.

Want to know more?

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