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RECENT DEVELOPMENTS

SETTING ASIDE AND ENFORCEMENT IN HONG KONG

BY

SAMUEL WONG Barrister-at- Law, Chartered Arbitrator, FCIArb, FHKI Arb,
Former President of Hong Kong Institute of Arbitrators

Hong Kong's Arbitration Ordinance Cap 609

Recourse against an award

- Article 34 of ML adopted as section 81 of Cap 609
 - Application for setting aside as exclusive recourse against arbitral award unless section 4 and/or section 5 Schedule 2 opted into.
 - The Court does not have jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award (Art. 34(3)). (Sec 81 of 609)
 - The supervisory court under Article 6 of ML means the Court of First Instance of Hong Kong (See section 2 of Cap 609)
 - Time for application: not later than 3 months after the award had been received (Art. 34(3) of ML).

- Grounds to set aside – Art 34(2) of ML:
 - Identical to grounds for refusal to recognize and enforce as set out in section 86 of Cap 609 for setting aside generally.
 - Jurisdictional challenge:
 - (i) whether the parties are bound by the arbitration clause – whether permissive or obligatory: *PCCW Global Ltd. V. Interactive Communications Services Ltd* [2007] 1 HKLRD 309;
 - (ii) whether there was an arbitration agreement between the parties: *Dallah Real Estate v the Government of India* [2010] UKSC 46 and [2009] EWCA Civ 755;
 - Due Process challenge
 - (i) whether a party had been denied reasonable opportunity to present its case;
 - (ii) even if there had been valid procedural complaints, whether the result would have been the same.

See the 1st Instance judgment of *Pacific China v. Grand Pacific Holdings Ltd HCCT 15/2010* set aside by the Court of Appeal in *CACV 136/2011*. This case arose from a loan agreement governed by New York law. In *CACV 136/2011*, the Court of Appeal:

- (i) held that Saunders J. should not have questioned the merits of the Tribunal's decision to grant leave to re-amend and the terms on which such leave was granted as the Tribunal took the view GPH had been prejudiced by the lateness of the application (para 52);
- (ii) confirmed Lam J. in *Brunswick Bowling v Shanghai Zhonglu* [2001] 1 HKLRD 707 that "*the tribunal should take steps to conduct the arbitration in such manner that would redress the problem instead of being constrained by an unworkable agreement of the parties*" (para 54);
- (iii) said that Saunders J was not entitled "*to interfere with a case management decision, which was fully within the discretion of the Tribunal to make*" to refuse to receive and consider the additional Taiwan law authorities (para 68);
- (iv) agreed with the observation of Lam J in *Brunswick Bowling* that " *... if the Tribunal gave several reasons for the award, with any single one of those being sufficient for its decision, the court may decline to set aside the award even if the Tribunal had not heard the parties on one of the reasons provided that the*

- court is satisfied the result would have been the same in the light of the other reasons given" (para 81);
- (v) gathered that "the conduct complained of must be serious or egregious, before a court could find that a party "was otherwise unable to present his case"" (para 94) and "that an error would only be sufficiently serious error if it has undermined due process" (para 105);
- (vi) agreed with Saunders J. that "the Court may refuse to set aside an award notwithstanding such violation if the court was satisfied that the outcome could not have been different." (para 101);

Shangdong Textiles Import and Export v Da Hua Non Ferrous Metal HCCT 80/1997 confirmed by Lam J. in *Brunswick Bowling and Billiards Corp* HCCT 66/2007: "... a party must show that it has been prejudiced to a significant degree in not being allowed to present its case such that the proceedings or an important part of them have been conducted unfairly"

- (vii) Whether there had been adjudication in accordance with the agreed procedure: *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 and *Arima v Flextronics* HCCT 32 of 2011.

▪ Public Policy Ground

A narrow ground that only applies where the consequence of enforcing the award would violate the most basic notion of morality and justice of the Hong Kong court: dicta of Reyes J. in *A and R (Arbitration Enforcement)* Construction and Arbitration Proceedings No. 54 of 2008.

- Additional Challenges under Schedule 2 of Cap 609 if opt into
 - Section 4 of Schedule 2: Serious Irregularity
 - Based on nine types of irregularities similar to sections 68(2)(a) to (j) of the English Arbitration Act
 - Sections 5 and 6 of Schedule 2: Appeal against arbitral award on question of law with leave of the Court
 - Leave application to be determined on paper unless the Court decides a hearing is required;
 - Conditions to be satisfied for leave reflect the Nema and Swire Guidelines.
 - On the basis of the finding of facts of the arbitral tribunal
 - The question is one which the tribunal was asked to decide and (a) the decision is obviously wrong or (b) the question is one of general importance.

Recognition and Enforcement

- Article 35 of ML not adopted (section 83 of Cap 609), instead the statutory scheme under section 2GG of the repealed ordinance Cap 341 retained with modification.

- Section 84 for enforcement awards (whether made in or outside of Hong Kong) generally with leave of the Court.
 - Evidence to be produced (section 85) for summary process:
 - authenticated or certified award; and
 - authenticated or certified arbitration agreement.

 - Grounds for refusal to enforce (section 86(1)): similar to the grounds for refusal to recognize and enforce at Article V of the New York Convention;

 - Additional grounds (section 86(2)):
 - Subject matter not arbitrable under the laws of Hong Kong;
 - Contrary to Hong Kong public policy;

- For any other reason the court considers it just to do (section 86(2)(c).

- Section 87- 91 for enforcement of convention awards.
 - Grounds for refusal to enforce similar to those grounds at section 86(1) and (2) save that section 86(2)(c) excluded.

- Sections 92 -98 for enforcement of PRC awards
 - Arrangement on reciprocal enforcement.

 - Grounds for refusal to enforce similar to those grounds at section 86(1) and (2) save that section 86(2)(c) excluded.

 - Case: *Gao Hai Yan and Keeneye Holdings Ltd* HCCT 41/2010 and CACV 79/2011: Enforcement of CIETAC award: whether there was appearance of bias; whether enforcement would be contrary to Hong Kong public policy.

 - Additional restriction:

- (i) No concurrent enforcement in PRC and Hong Kong: see *Kai Long Investment v CEC Electrical Manufacturing* HCMP 1885 of 2000 per J Cheung;
- (ii) Can only enforce to the extent the award has not been satisfied.

A related issue: Interpretation of award

- Section 69 adopts Article 33 of ML in which Article 33(1)(b) to empower an arbitral tribunal which otherwise would be functus after the issuance of an award to give an interpretation of a specific point or part of the award.
- Time limit: within 30 days of the receipt of the award.
- Upon agreement of the parties or by a party with notice to the other party.
- Case: *Shangdong Hongri chemical Joint Stock Company v. Petrochina International (Hong Kong) Ltd* HCCT 45 of 2009 and CACV 31/2011.