

Hong Kong - The Gold Standard of International Arbitration in Asia

by Steven C. Nelson

According to the 2015 International Arbitration Survey conducted by Queen Mary University of London¹, Hong Kong is the third most preferred seat of international commercial arbitration in the world, behind only Paris and London.

For international arbitration practitioners active in the Asia-Pacific region, this will come as no surprise. Hong Kong's pre-eminence in international arbitration is owed in large measure to its modern arbitration law, codified in the Arbitration Ordinance (Cap 609 of the laws of Hong Kong),² which conforms closely to the UNCITRAL Model Law on International Commercial Arbitration;³ the aggressively "pro-arbitration" stance of Hong Kong's first-rate judiciary, building on similar trends in other jurisdictions with legal systems based on English common law; and the Hong Kong International Arbitration Centre, known for its innovation, internationalism and world-class secretariat, which saw some 271 new arbitration cases filed in 2015 continuing several years of impressive growth.

The Model Law is the single most important statutory instrument in international arbitration. It was designed to be enacted into domestic law by national legislatures, with the object of harmonizing the treatment of international commercial arbitration in different countries. Under the Model Law, written international arbitration agreements are presumptively valid and enforceable, subject to limited, specified exceptions. The Model Law emphasizes the primacy of the arbitral tribunal's authority, vests essential powers in it and concomitantly limits the role of the courts to one of general supervision and support of the arbitral process.

In interpreting and applying the Arbitration Ordinance, Hong Kong courts have shown great deference to party autonomy in determining whether a valid arbitration agreement exists, with a strong inclination toward overcoming defects in such agreements where the parties clearly intended to arbitrate their disputes. For example, the Hong Kong courts have recognized arbitration agreements referring to non-existent arbitral institutions and rules and have taken a narrow view of public policy grounds for invalidating awards,

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generally limiting such relief to instances of fraud, criminal, oppressive or otherwise unconscionable behavior.

The Model Law has served Hong Kong well in practice, both internationally and domestically. In international terms, it has contributed towards substantially raising the territory's profile as an international arbitration center. Hong Kong case law has been at the cutting edge of the Model Law's development and interpretation and is widely cited in other common law jurisdictions. And there is no better indicator of the respect for arbitral awards in Hong Kong courts than their enforcement rate. This reliability also helps explain why Hong Kong is the third most popular seat for international arbitration.

The high enforcement rate is directly related to the application of Section 86 of the Arbitration Ordinance, which provides an exhaustive list of the limited grounds on which enforcement of an award can be challenged. These grounds are generally narrowly construed by the Hong Kong courts, upholding the pro-enforcement bias found in both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ and the Model Law.

This article briefly examines a few recent Hong Kong arbitration cases that have reinforced Hong Kong's position as the gold standard of international arbitration through the Hong Kong courts' continued application of the principles of the Model Law, including in respect of issues such as those relating to:

- interim interlocutory and equitable relief;
- staying litigation in favor of arbitration; and
- setting aside arbitral awards.

1. Interim Interlocutory and Equitable Relief

*CASE EXAMPLE: Classroom Investments Inc. v. HK Wanshitaiping Investment and Management Ltd. et al*⁵

The issue before the court was whether a temporary injunction order should be continued until the determination of a concurrent arbitration. The court ordered that the injunction order be continued on the basis that there was at least a serious issue to be determined by the arbitral tribunal and that the funds (subject to the temporary injunction order) were part of the claimant's proprietary claim against the respondent companies in the concurrent arbitration.

This decision reflects the Hong Kong courts' willingness to act in aid of arbitration and support arbitral tribunals by granting interim interlocutory and equitable relief under the authority of Section 45 of the Arbitration Ordinance.

2. Staying of Litigation in Favor of Arbitration

CASE EXAMPLE (1): Chok Yick Interior Design & Engineering Co Ltd v Fortune World

Although this case dates back to 2010, it is one that exemplifies the resolutely “pro-arbitration” approach of the Hong Kong courts. The case involved an application by the plaintiff to stay litigation in favor of arbitration. The application for stay was unusual in that it was brought by a plaintiff who had already commenced judicial proceedings. A stay pending arbitration would usually be sought when a defendant had been served with a writ in relation to a contract containing an arbitration provision. Then, in reliance upon Section 20 of the Arbitration Ordinance, which gives effect to Article 8 of the Model Law, and not later than when submitting its first statement on the substance of the dispute, the defendant would seek a stay pending arbitration.

As the plaintiff had commenced proceedings, it was unable to rely on Section 20 of the Arbitration Ordinance. However, the stay was granted. The court relied on its inherent jurisdiction under Section 16(3) of the High Court Ordinance and also on the High Court’s case management powers, which seek to encourage and facilitate alternative dispute resolution. The decision aptly demonstrates the extent to which Hong Kong courts will go to uphold arbitration agreements and the primacy given to arbitration if agreed by the parties.

*CASE EXAMPLE (2): Bluegold Investment Holdings Limited v Kwan Chun Fun Calvin*⁷

This case involved the construction of inconsistent dispute resolution clauses in related contracts and an application by the defendant under Section 20 of the Arbitration Ordinance to stay proceedings and refer the dispute to arbitration.

The court held that the defendant established a *prima facie* and plainly arguable case that the parties are bound by an arbitration clause and that a stay of proceedings was justified. The court thus granted the stay notwithstanding the absence of an arbitration clause in the particular contract under which the claim was brought. The court held that an application to stay proceedings requires a court to consider whether:⁸

- there is an arbitration agreement between the parties;
- the clause in question is capable of being performed;
- there is (in fact) a dispute or difference between the parties; and
- the dispute or difference between the parties is within the ambit of the arbitration agreement.

The court reaffirmed the mandatory requirement that a court order a stay of proceedings pursuant to Section 20 of the Ordinance if it is established that the action is brought in a matter which is the subject of an arbitration agreement, and that unless the point is clear, the court should not decide the matter but instead must refer the parties to arbitration for the tribunal to determine its own jurisdiction.

3. Applications to Set Aside Arbitral Awards

CASE EXAMPLE (1): *KB v. S and Others*⁹

In this anonymized decision of September 2015, the High Court rejected an application from an award debtor based in the British Virgin Islands to set aside an order to enforce two arbitral awards. The decision usefully set out 10 principles that Hong Kong courts should observe when dealing with enforcement of arbitral awards. Those principles provide a checklist for courts to consider when enforcing awards in Hong Kong and summarize Hong Kong's long-standing judicial policy towards arbitration.

CASE EXAMPLE (2): *T v C*¹⁰

This decision dismissed C's application to set aside an order granting T leave to enforce an arbitral award that had been rendered in Malaysia. The application alleged that the award had been procured through the introduction of fraudulent evidence. In reaching its decision, the court emphasized its limited role in reviewing arbitral awards by stating that *"[i]n considering whether or not to refuse enforcement of an award, it is clear that the court does not look into the merits of the case, nor at the underlying transaction. Error of law is not a ground for the setting aside of an award under Article 34. The court's role is confined to determining whether or not grounds exist for refusing to enforce the award because it would be contrary to public policy Enforcement should be 'as mechanistic as possible'."*

The court further stated that it is in the interests of public policy to uphold an agreement made between parties to submit their dispute to arbitration and, as a matter of comity, to enforce an arbitral award which is binding on the parties and enforceable under and in accordance with international convention.¹¹ The court did not entertain C's application because it had not made an arguable case for its claim of fraud, which had been rejected by the arbitral tribunal. This no-nonsense approach to the enforcement of arbitral awards is a clear application of the narrow interpretation of the grounds for the setting aside of arbitral awards as set out in the Model Law and the New York Convention and as reflected in the holding of the Court of Final Appeal in an earlier decision that, for an award to be "contrary to public policy" of the enforcing jurisdiction within the meaning of those Instruments, it must be "so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the convention, it cannot reasonably be expected to overlook the objection".¹²

CASE EXAMPLE (3): *China International Fund Ltd v Dennis Lau & Ng Chun Man Architects & Engineers*¹³

This Court of Appeal case involved an appeal of a decision of the Court of First Instance of the High Court to dismiss an application to set aside an arbitral award. The Court of Appeal held that it did not have the power to entertain an appeal against the Court of First Instance's decision in refusing to set aside the arbitration award when the latter court had refused to grant leave to appeal. This was because Section 81(4) of the Arbitration Ordinance provides that such appeal can only be brought with the leave of the

Court of First Instance.

Continuing the pro-arbitration focus of the Hong Kong courts, the Court of Appeal concluded that multiple rounds of leave application would undermine the legitimate aim of finality and speed and reduction of costs of dispute resolution by arbitration.

CASE EXAMPLE (4): China Property Development (Holdings) Ltd v Mandecly Ltd¹⁴

Notwithstanding the above case examples where Hong Kong courts have refused to set aside arbitral awards and ordered that court proceedings be stayed and referred to arbitration, it does not necessarily follow that a court must dismiss an application in order to be pro-arbitration. The Court of Appeal in this case affirmed the decision of the Court of First Instance, which had given leave for the appeal, in which an arbitral award was partially set aside due to a serious breach of due process. The plaintiff had sought to set aside the relevant part of the award under Article 34(2)(a)(ii) of the Model Law on the ground that it was unable to present its case on a specific claim on which the Tribunal had ultimately rendered that part of its award because that claim had not been pursued by the other parties in the arbitration. The Court of the Appeal, like the Court of First Instance, agreed with that contention.

This case highlights the importance of the parties' right to be heard and is a pro-arbitration case in the sense that it demonstrates the Hong Kong courts' efforts to ensure the integrity of arbitral proceedings by ensuring respect for due process and a party's right to be heard rather than deciding on the substantive merits. While the Hong Kong courts will generally respect the finality of arbitral awards whenever possible, they are ready to intervene in the event of serious breaches of natural justice.

Conclusion

The concept of being "pro-arbitration" does not mean that courts have to absolve themselves of interference in arbitral proceedings. The relationship between the courts and arbitral tribunals and the limits of a court's intervention into the arbitral process has been subject to some debate, but it is without doubt that the arbitral process requires some support and, indeed, supervision from the courts in order to ensure that it serves the interests of justice. Judicial oversight of the arbitral process constitutes a form of risk management. If there has been a lack of due process or procedural fairness, or if a tribunal has exceeded the scope of its jurisdiction as established by the agreement of the parties, then the courts must intervene to correct the process. The Hong Kong judiciary's supportive supervision of the arbitral process in accordance with the principles of the Model Law has indeed enabled Hong Kong to set the gold standard for the operation of international commercial arbitration.

The concept of party autonomy, meaning respect for the parties' choice to submit their disputes to a "final and binding" process, is deeply engrained in the Model Law and the New York Convention, and the Hong Kong courts have continued to uphold that concept by declining to subject arbitral decisions to time-consuming and expensive reviews or appeals on the merits. Indeed, it quickly becomes

apparent from the cases discussed above that Hong Kong has cultivated a robust regulatory framework and a judicial climate that is pro-arbitration in elaborating on the scheme of the Model Law as embodied (and amended) in the Arbitration Ordinance. Hong Kong courts continue to place a strong emphasis on their limited supervisory role in the arbitral process, which is serving well to protect the reputation of Hong Kong as a jurisdiction can be relied upon to protect the integrity of arbitration of international disputes.

¹ 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, School of International Arbitration, Queen Mary University of London. (<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>)

² The Model Law on International Commercial Arbitration was prepared by the United Nations Commission on International Trade Law (“UNCITRAL”) and adopted by the United Nations in 1985 and was amended in 2006. It has now been enacted in one form or another in over 60 countries and territories.

³ The new Arbitration Ordinance came into force on 1 June 2011.

⁴ The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), 330 U.N.T.S. 38. As of May, 2015 there were 156 Contracting States including the People’s Republic of China, which has declared the Convention applicable to Hong Kong.

⁵ HCMP 577/2016.

⁶ [2010] HKEC 146.

⁷ [2016] HKEC 532.

⁸ See *Tommy CP Sze & Co v Li & Fung (Trading) Ltd. & Ors* [2003] 1 HKC 418.

⁹ [2015] HKCFI 1787; HCCT 13/2015.

¹⁰ HCCT 23/2015.

¹¹ See *A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389.

¹² *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 139.

¹³ [2016] 1 HKC 35.

¹⁴ [2016] HKCU 1225.