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Insights

HK COURT CONFIRMED HIGH THRESHOLD FOR CHALLENGING ARBITRAL AWARDS ON QUESTIONS OF LAW

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SUMMARY

Dissatisfied with an arbitral award? Think twice before you seek to mount a court challenge against an arbitrator's award in Hong Kong. Hong Kong prides itself as being a pro-arbitration and pro-enforcement jurisdiction. In a recent case, the Hong Kong Court confirmed this approach by refusing to interfere with an arbitrator's findings. The case confirms the pro-arbitration approach of Hong Kong courts, although the judgment is particular application only where the parties have expressly opted into Schedule 2 to the Arbitration Ordinance, which allows challenges to be made on questions of law.

Introduction

The case P v C [2019] HKCFI 2625 (HCCT 27/2019) concerned an arbitration in Hong Kong relating to the renovation and conversion of a building in Wanchai into a serviced apartment (the "**Arbitration**").

There was no dispute that Schedule 2 to the Arbitration Ordinance applied, because the contract (one which was entered into before 1 June 2017) provided expressly that the Arbitration was to be domestic.

The respondent in the Arbitration sought leave to appeal against the interim award published by the arbitrator based on three questions of law.

Under section 6(4) of Schedule 2 to the Arbitration Ordinance, leave to appeal is to be granted only if the Court is satisfied that:
(i) the decision of the question will substantially affect the rights of one or more of the parties;
(ii) the question is one which the arbitral tribunal was asked to decide; and
(iii) the arbitral tribunal's decision was "at least open to serious doubt" if the question of law relates to a question of general importance, or in other cases was "obviously wrong".

Elements (i) and (ii) were not matters of concern in this case. Mimmie Chan J considered how element (iii) was to be applied. She held that none of the grounds of appeal advanced by the plaintiff warranted the grant of leave to appeal.

The dispute

The plaintiff and the defendant in this case entered into a contract under which the plaintiff engaged the defendant as main contractor to carry out certain renovation works. The works were significantly delayed. The defendant vacated the site 78 weeks after the contractual date of completion. The Arbitration revolved around the defendant's claims for payment and extra time, as well as the plaintiff's counterclaims for liquidated damages, defective works and various contra-charges.

The three questions for which leave to appeal was sought can be summarised as follows:-
(1) whether the defendant was entitled to any extension of time ("**EOT Question**");
(2) whether the defendant's claim for loss and expense complied with the notice provision which was the condition precedent set out in the contract ("**Time Bar Question**"); and
(3) whether on the true construction of the contract, the responsibility for certain works was to be borne by the defendant or by the plaintiff ("**Risk Allocation Question**").

Approach taken by the Hong Kong Court

Mimmie Chan J took the view that all three of the questions before her were one-off events dependent on the particular facts and the bespoke terms of the contract. As such, none of the three questions were questions of general importance. Therefore, the "obviously wrong" test was to be applied.

The EOT Question

The Court dealt first with the EOT Question. The relevant finding by the arbitrator, in very simplistic terms, was that as a matter of fact the delay experienced by the defendant was the liability of the plaintiff. While the plaintiff emphasised that it was not challenging the arbitrator's findings of fact, it claimed that there was no evidence to support the findings of the arbitrator.

The Court upheld the trite principle that the arbitrator is the master of the facts. The tribunal's findings of fact are conclusive. While an appeal on points of law may, in some circumstances, involve the Court intervening in areas of law buried beneath conclusions of fact, the principle is clear that it is a point of law which has to be "obviously wrong", not a finding of fact.

Mimmie Chan J also pointed out that a complaint that the arbitrator based his finding on an allegedly wrong understanding of the evidence is in essence an allegation of a mistake of fact made by the arbitrator. A party simply cannot circumvent the rule that a finding of fact is conclusive

and not subject to challenge, by alleging that there was insufficient evidential basis to supporting the finding.

The Time Bar Question

Similarly, Mimmie Chan J also refused to interfere with the arbitrator's factual findings in the context of the Time Bar Question. The arbitrator was entitled to rule, on the facts, about the adequacy of the notices of claims given by the defendant. In fact, the arbitrator was in the best position to do so.

The Risk Allocation Question

The determination of the Risk Allocation Question involved question of contractual interpretation. However, these were contractual provisions that were unique to the particular contract in this case. After considering the arbitrator's analysis in the award, Mimmie Chan J refused to find the arbitrator's interpretation "obviously wrong". The Court recognised that contractual interpretation can be rather subjective, and that the Court dealing with the application for leave to appeal may well have a different view as to the meaning of the contractual provision. It does not follow from that, that the view taken by the arbitrator was either "open to serious doubt" or "obviously wrong". In this regard, the "obviously wrong" threshold is high.

BCLP commentary

The Hong Kong legal atmosphere is very much pro-arbitration. The Courts recognise that when the arbitrator already has done the detailed work of ascertaining the underlying facts, examining the evidence and analysing the parties' respective cases, the arbitrator is in the best position finally to determine the parties' disputes. The interests of finality are placed ahead of the desire to ensure the arbitrator's decision is strictly correct.

For the above reasons, the Hong Kong Courts apply – and should apply - a rather stringent filtering process to limit the number and scope of challenges that reach the Court by way of appeals on questions of law. The "obviously wrong" and "at least open to serious doubt" tests inherently contain an element of subjectivity which allows the Court to refuse to interfere with an arbitrator's conclusions. Also, as seen in this case, a challenge to a finding of fact dressed up as a point of law is unlikely to succeed under the scrutiny of the eagle-eyed judges.

The purpose of this blog post is not to discourage any aggrieved party to an arbitration from pursuing appeals. Rather, the aggrieved party is encouraged to seek legal advice in order to think carefully through the merits of any intended points to pursue so as not to incur unnecessary costs in court proceedings.

It is worth pointing out as a concluding remark that the above discussion regarding appeals on questions of law arising out of an arbitral award only applies if the parties have opted into Schedule

2 of the Arbitration Ordinance. Schedule 2 automatically applies to an arbitration agreement entered into before 1 June 2017 which provides that the arbitration is to be a domestic arbitration. After 1 June 2017, the mere reference to “domestic arbitration” in an arbitration agreement no longer attracts the benefit of the Schedule 2 provisions. Parties to a contract need expressly to opt in for the Schedule 2 provisions to apply.

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