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THE HONG KONG COURT DISMISSES CHALLENGE TO REMOVE ARBITRATORS ON GROUND OF APPARENT BIAS

Jun 26, 2024

SUMMARY

In P v D [2024] HKCFI 1123 (judgment date: 30 April 2024), the Hong Kong Court of First Instance dismissed an application, pursuant to section 26 of the Arbitration Ordinance, by the challenging party ("**P**") to remove two arbitrators ("**Impugned Arbitrators**") in an HKIAC administered arbitration governed by the UNCITRAL Arbitration Rules, pursuant to section 26 of the Arbitration Ordinance (Cap. 609).

BACKGROUND

This current application was subsequent to an earlier unsuccessful challenge that had been issued to the HKIAC against all three members of the Arbitral Tribunal. The third arbitrator had resigned shortly after the issuance of the Notice of Challenge for the earlier challenge, in order to avoid further disputes. The earlier challenge had been dismissed by the Proceedings Committee of HKIAC on 4 May 2023 on the basis that the grounds relied on by P did not give rise to justifiable doubts as to the impartiality or independence of the Arbitral Tribunal.

P maintained that the Impugned Arbitrators should be removed on the basis of apparent bias on account of several procedural decisions and comments made by the Tribunal, relying on five grounds: (i) failing to keep an open mind in handling procedural matters by refusing to hold an oral hearing on a procedural application as requested by P; (ii) making decisions which were not contested or went beyond parties' contentions; (iii) unequal treatment depriving P from the opportunity of presenting its case on procedural matters; (iv) unjust and argumentative language; and (v) attacking P's lawyers "by insinuation".

The court relied on the test of a "fictitious bystander" (*Jung Science Information Technology Co Ltd v ZTE Corporation* [2008] 4 HKLRD 776) in determining the presence of "*apparent bias*" that warrants the removal of an arbitrator, under which the court must ask whether an objective fair-

minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the arbitrator was biased.

Based on this, without going into further detail, the court dismissed the application of P against each of the grounds advanced, holding that: (i) there were "*respectable arguments*" to the contrary that would allow a fair-minded and informed observer to conclude that the Impugned Arbitrator's refusal to hold a hearing as requested by P was not due to bias; (ii) none of the six circumstances referred before the court that P alleged were questionable came close to being a case of "*extreme conduct*" that warranted the removal of the Impugned Arbitrators; (iii) the relevant decisions made on orders against P were within the Impugned Arbitrators' discretion, and based on the circumstances of the case, the Impugned Arbitrators were entitled to make them; (iv) that the Impugned Arbitrator's criticisms of P's conduct were fairly made and based on facts; and (v) the words that allegedly amounted to "*insinuation*" were made merely in the hope that the parties might reach agreement on procedural matters.

ANALYSIS

In applying the standard of "*an objective fair-minded and informed observer*", the court employs a commonplace approach and takes into account such a bystander would be taken to consider that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers; and would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Further, such a bystander should not be complacent nor unduly sensitive or suspicious when assessing arbitrators' conduct.

One feature that should be noted in this case is P's advancement of two additional grounds that had not been included in the notice of challenge and which were raised out of time. P's arguments on this front were that based on Article 13(2) UNCITRAL Model Law, applied in the Hong Kong context by virtue of section 26 of the Arbitration Ordinance (Cap. 609), the challenging party only had to send a written statement of the "*reasons for the challenge to the arbitral tribunal*" and did not have to provide the evidence justifying the challenge, and therefore P submitted that those additional grounds should be treated as '*evidentiary circumstances of the* "*umbrella reason*"' in the earlier challenge. This argument was rejected by the court. The court considered that Article 13(2) was inapplicable to the present case, as the earlier challenge was decided before the Proceedings Committee of the HKIAC, and not by the arbitral tribunal. Notably, the court considered that Article 13(3) UNCITRAL Model Law requires the court to decide afresh on an unsuccessful challenge previously determined, thus if P were permitted to rely on the additional grounds, the challenge before the court no longer would be the unsuccessful challenge previously determined under the procedures that were agreed between the parties.

BCLP PERSPECTIVE

The relevant procedure for advancing a challenge against an arbitrator is stipulated within the UNCITRAL Arbitration Rules under Article 13, the 2015 HKIAC Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules / 2024 Administered Arbitration Rules as well as the Practice Note on the Challenge of an Arbitrator issued by the HKIAC. Under these provisions, parties are free to agree on a procedure for challenging an arbitrator. If there is no such agreed procedure, the arbitral tribunal shall be entitled to decide on the challenge based on the relevant rules. If such a challenge was not successful, the challenging party may then, within 30 days of receiving the notice of the rejected application, apply to the court to decide on the challenge.

It thus follows that any challenges contemplated against arbitrators must necessarily be brought with prudence, since many institutional rules provide for the challenge to be first decided by the relevant institution, and such institutions are not obliged to provide any reasons behind their decisions (paragraph 3.3 in the Practice Note on Challenges to Arbitrators issued by the HKIAC). In the immediate case, for example, the Proceedings Committee of the HKIAC only gave their decision following Recommendations given by the appointed panel, which were not binding on the Proceedings Committee (paragraph 3.1 in the Practice Note on Challenges to Arbitrators issued by the HKIAC). Any party who is contemplating bringing a challenge thus would not necessarily benefit from a reasoned decision when assessing the merits behind whether to escalate such a challenge to be considered before the court.

Should parties intend to advance additional grounds that were not included within the original notice of challenge, the proper course for the challenging party should be to raise these additional grounds by issuing a further notice of challenge and for such grounds to be processed under the procedure agreed between the parties. This case also demonstrates that the court will not permit additional grounds that were raised out of time and without consulting the other party and the challenged arbitrators to be raised under, for example, the guise of "*evidentiary circumstances*" of an umbrella reason.

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