Dispute Resolution Alternatives : The Hong Kong Perspective

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The aim of this paper is to provide to those unfamiliar with the jurisdiction of Hong Kong a brief overview of the dispute resolution options available in Hong Kong and to highlight a number of recent developments.

Litigation

In the absence of any agreement to resolve a dispute by other means, parties naturally resort to the Courts when a dispute arises.

The Court system post 30 June 1997 is a continuation of the system established under British rule save that Hong Kong now has its own Court of Final Appeal which hears appeals which were formerly made to the Privy Council in London. Claims are commenced either in the District Court or the High Court according to the size of the claim. From there, an appeal lies in each case to the Court of Appeal and from there to the Court of Final Appeal. These days the procedural rules in the District Court mirror much more closely the rules of procedure which apply in the High Court. These were substantially amended in 1988 based in great part on the Rules of the Supreme Court which then applied in England and Wales, prior to the introduction there of the "Woolf reforms" which were implemented in England and Wales in the form of the Civil Procedure Rules with effect from 26 April 1999.

Substantial amendments to the Rules of the High Court in Hong Kong have recently been enacted to give effect to the final report of the Working Party on Reform of the Civil Rules and Procedures of the High Court. These amendments came into effect on 2 April 2009. Whereas, the English Civil Procedure Rules enacted in 1998 to implement the 'Woolf reforms' formed an entirely new code, in Hong Kong it was decided to adopt a series of selective reforms by amendment to the existing rules rather than by introducing an entirely new code. The amended Rules identify 'underlying objectives' which are applicable to all proceedings in both the High Court and the District Court. They are : -

1. to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;

2. to ensure that a case is dealt with as expeditiously as is reasonably practicable;

3. to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;

4. to ensure fairness between the parties;

5. to facilitate the settlement of disputes; and

6. to ensure that the resources of the court are distributed fairly.

It remains to be seen what impact the amendments to the Rules of the High Court will have in practice and to what extent litigants will benefit from them. There are, however, early signs that the Courts are taking very seriously their new powers of case management to ensure that adjournments and delays are kept to a minimum and that once an action is commenced, it remains on track for an early trial.

In support of the amendments, the Chief Justice has promulgated 23 new Practice Directions relating to the Civil Justice Reforms. The new Practice Directions all took effect on 2 April 2009 save for Practice Direction 31 on "Mediation" which only took effect on 1 January 2010. Practice Direction 31 impacts on virtually all proceedings commenced by Writ and I shall refer below in more detail to its significance.

Arbitration

Arbitration in Hong Kong is governed by the Arbitration Ordinance, as amended. It provides for two separate regimes for arbitrations conducted in Hong Kong, one applicable to domestic arbitrations and the other applicable to international arbitrations. The Arbitration Ordinance provides that the UNCITRAL Model Law on International Commercial Arbitration (Model Law) shall apply to international arbitrations. It also implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

The enforcement in the PRC of arbitral awards made in Hong Kong and the enforcement in Hong Kong of arbitral awards made in the PRC is governed by the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region. The applicant must submit to the relevant court : -

- an application for enforcement;
- the arbitral award;
- the arbitration agreement.

The party against whom the application is filed may oppose enforcement on one of the following grounds :-

(1) incapacity, or invalidity of the arbitration agreement;

(2) improper notice or inability to present a case;

(3) the dispute falls outside the arbitration agreement;

(4) irregularity in the composition of the arbitral tribunal or the arbitral procedure;

(5) the award is not binding or has been set aside or suspended.

As in other jurisdictions, the Arbitration Ordinance in Hong Kong does not provide a complete code for the conduct of arbitrations. Its purpose is to confer basic protection on the parties, vest limited supportive and supervisory jurisdictions in the High Court, supply omissions in arbitration agreements and, together with the procedural rules agreed by the parties, provide a general framework with which arbitrations can take place. A number of matters remain governed by the common law and please note that the laws in force in Hong Kong on 30 June 1997, including the common law, remain in force with effect from 1 July 1997. The object of the Arbitration Ordinance is to facilitate the fair and speedy resolution of disputes without unnecessary expense and is based on the principles that the parties to a dispute should be free to agree how the dispute should be resolved, and that the court should interfere in the arbitration of a dispute only as expressly provided by the Arbitration Ordinance. The Court maintains a strong policy against intervention in arbitrations.

Arbitration Bill

On 31 December 2007, the Department of Justice published a draft Arbitration Bill and implemented a period of consultation. In its present form, the Bill comprises some 265 pages and proposes substantial reform. The intention is to make the law of arbitration more user-friendly to both domestic and international arbitration users. The draft Bill follows the Model Law both as to framework and content with few deviations and a number of additions inherited from the current Arbitration Ordinance. It creates a unitary regime which applies to both domestic and international arbitrations but special "opt-in" provisions are included to address concerns of the construction industry which permit the continued use of certain provisions that only apply to domestic arbitrations.

The Bill gives legal effect to those provisions of the Model Law that are to apply in Hong Kong. They are arranged in the same order as the Model Law and address such issues as the arbitration agreement, confidentiality, the composition of the arbitral tribunal, jurisdiction, interim and preliminary orders, the conduct of proceedings, enforcement etc etc.

As the current Arbitration Ordinance is to be repealed after the enactment of the Bill, there are transitional arrangements that govern the application of the relevant laws to arbitral proceedings commenced before and after the enactment of the Bill.

The Secretary of Justice has said that one of the objectives of the proposed reform is to attract more parties to choose Hong Kong as the place to conduct arbitral proceedings and help to promote Hong Kong as a regional centre for international arbitration. In his view, the new law will "reinforce the advantages of arbitration, including respect for the parties' autonomy as well as the savings in time and cost for the parties."

The Administered Arbitration Rules

The Hong Kong International Arbitration Centre (HKIAC) is a non-profit, independent dispute resolution service provider. The HKIAC is vested with statutory powers to appoint arbitrators under the Arbitration Ordinance. It also administers arbitration cases, operates a domain name dispute resolution joint venture with the China International Economic and

trade Arbitration Commission (CIETAC) and provides hearing rooms and other facilities at its Exchange Square headquarters. The HKIAC is also the supervisory authority for the Hong Kong Mediation Council.

The Administered Arbitration Rules (AAR) were formally launched by HKIAC on 1 September 2008. The AAR are the latest addition to the HKIAC's dispute resolution service and replace the previous HKIAC's Procedures for the Administration of International Arbitration 2005. The AAR were inspired by the 'light administration' approach of the Swiss Rules of International Arbitration (2006 Edn) which were, in turn, based upon the UNCITRAL Arbitration Rules (1976 Edn). They are designed for use by parties who seek the formality and convenience of administered arbitration and may be used for both domestic and international arbitrations, but do not apply to any arbitration agreement made prior to 1 September 2008.

Prior to the introduction of the AAR, international arbitrations at the HKIAC had commonly been described as 'ad hoc' as opposed to 'institutional', because HKIAC did not have its own set of arbitration rules for administered arbitrations. It was sometimes suggested that this was seen as a disadvantage in the PRC and led to a reluctance to agree to arbitrate at the HKIAC even though the Supreme People's Court of the PRC had issued a clarification that ad hoc arbitration awards obtained outside the PRC were recognisable and enforceable in the PRC (see clarification letter of 25 October 2007 (Ref [2007] 082) to an enquiry from the Hong Kong Department of Justice).

The AAR adopt some of the better practices found elsewhere and include the following provisions :-

Interpretation

The AAR provide that arbitral tribunals shall interpret the Rules insofar as they relate to the latter's powers and duties. The HKIAC Council shall interpret all other provisions.

Appointment of arbitrators

All designations made by the parties of a sole arbitrator or of arbitrators comprising a three-member tribunal are subject to confirmation by the HKIAC Council. The HKIAC Council has no obligation to give reasons when it does not confirm an arbitrator.

Where the parties are of different nationalities, a sole arbitrator and the chairman of the three-member tribunal shall not have the same nationality as any party, unless specifically agreed otherwise by all parties in writing.

Seat of the arbitration

The AAR make express provision as to the juridical seat of the arbitration. The seat of the arbitration shall be the Hong Kong Special Administrative Region, unless the parties agree otherwise. The arbitral tribunal may hold meetings, hearings and inspections at any place it

deems appropriate, without prejudice to the determination of the seat of the arbitration. The award shall be deemed to have been made at the seat of the arbitration.

Challenges to jurisdiction

The AAR encourage respondents to raise any challenge to jurisdiction as early as possible. They expressly require that the respondent shall, if possible, include in the Answer to the Notice of Arbitration any plea that the arbitral tribunal does not have jurisdiction. They go on to provide that such a plea shall in no event be raised later than the Statement of Defence.

Amendments to pleadings

Amendments to pleadings are a fact of many international arbitrations. The AAR provide that either party may amend or supplement its claim or defence during the course of the proceedings, unless the tribunal considers it inappropriate to allow such amendment having regard to the delay in making it, or prejudice to the other party, or any other circumstances.

Awards

As certain jurisdictions have strict requirements about the sealing of legal documents, the AAR provide that awards shall bear the seal of the HKIAC.

Either party may request the arbitral tribunal to give an interpretation of the award, or to correct any errors in computation, any clerical or typographical errors or any errors of similar nature, or to make an additional award, within 30 days after the receipt of the award.

Expedited Procedure

The AAR provide that, where the amount in dispute representing the aggregate of the claim and the counterclaim does not exceed US$250,000.00, the expedited Procedure shall apply. Under this procedure, inter alia, arbitrations will be conducted on a documents-only basis, unless the arbitral tribunal decides that a hearing is necessary, and awards shall be rendered within six months of the case file being sent to the tribunal by the HKIAC Secretariat.

Defaults

The AAR provide that if, within the deadline set by the tribunal, the claimant has failed to communicate its Statement of Claim without showing sufficient cause for such failure, the arbitral tribunal shall (not may) issue an order for the termination of the arbitral proceedings, unless the respondent has brought a counterclaim and wishes the arbitration to continue. Where a respondent fails to submit a defence, the AAR provide that the tribunal may proceed with the arbitration.

Miscellaneous

The AAR attempt to provide more certainty and minimise unnecessary argument in their interpretation and application. For example :-

- they expressly provide how holidays or non-business days are to be treated in calculating time periods.

- they provide that, where there is no agreement on language, the Notice of Arbitration shall be submitted in either English or Chinese.

- they suggest that if the Notice of Arbitration is "incomplete", it may be deemed to have been invalidly filed, whereupon the HKIAC Secretariat may request the claimant to remedy any defect(s) within an appropriate period of time – alleged invalidity of notices is a frequent area of dispute, particularly where there is a time limit for the commencement of arbitration in the contract.

- if an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his functions, unless the arbitral tribunal decides otherwise.

Mediation

I have referred above to the civil justice reforms and to Practice Direction 31 on Mediation promulgated by the Chief Justice on 2 April 2009 but which only became effective on 1 January 2010. I have also referred above to the underlying objectives behind the amended Rules of the High Court. These include facilitating the settlement of disputes and actively managing cases by encouraging the use of an alternative dispute resolution procedures (ADR) if appropriate to help the parties to settle in whole or in part. The parties and their lawyers have a duty to assist the Court to further these objectives.

The Practice Direction comprises four parts and four appendices. Part A makes it clear that it applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ except for certain categories of proceedings, such as for personal injuries, which have their own specific mediation provisions. It defines ADR as a process whereby the parties agree to appoint a third party to assist them to settle or resolve their dispute and that a common form of ADR is mediation. It states that the Court, in exercising its discretion on costs, will take into account "all relevant circumstances". These include any unreasonable failure of a party to engage in mediation where this can be established by admissible materials. Paragraph 4 specifically states :-

> "Legal representatives should advise their clients of the possibility of the Court making an adverse costs order where a party unreasonably fails to engage in mediation."

It should, however, be noted that no adverse costs order will be made where there has been a "minimum level" of participation, or a party has a reasonable explanation for not engaging in mediation. Assurance is given that in exercising its discretion on costs the court cannot compel disclosure of or admit materials so long as they are protected by privilege. This includes legal professional privilege and the privilege protecting without prejudice negotiations. Paragraph 6 contains the following statement :-

> "What happens during the mediation process, being without prejudice communications, is protected by privilege. It must be emphasised that there is no question of the court undermining the protection afforded by privilege."

Part B of the Practice Direction sets out the procedure to be followed in proceedings in which all of the parties are legally represented. The party who wishes to mediate (applicant) files a mediation certificate with the Court and serves a mediation notice on the other party (respondent) who is required to file a response. The forms require that both the lawyers and their clients confirm that they have properly considered mediation to resolve the dispute and to explain in some detail if they are unwilling to engage in mediation. The specimen mediation notice in Appendix C provides an example of a specified level of participation :-

> "Agreement between the Parties as to the identity of the Mediator and the terms of his or her appointment, agreement as to the rules applicable to the mediation (if any), and participation by the parties in the mediation up to and including at least one substantive mediation session (of a duration determined by the mediator) with the mediator."

The applicant is required to propose when the mediation should commence, whether the applicant requests or opposes an interim stay of the proceedings for a specified period pending the mediation process and whether the applicant's willingness to pursue mediation is or is not conditional upon an interim stay of legal proceedings being granted. The respondent has 14 days in which to respond to the notice.

Any agreement reached by the parties should be reduced into writing in a minute called a Mediation Minute. If the parties are unable to reach agreement they can have their differences resolved by a direction of the Court if they make a joint application. In the absence of a joint application, the Court's powers are limited and it is specifically provided that :-

> "The Court may not, for instance, be asked to direct a party to engage in mediation or to appoint a particular mediator over the opposition of the other party, unless both parties are willing to have their differences resolved by the Court."

The Practice Direction contains provisions for the Court, either on the application of one or more parties, or on its own motion, to stay the proceedings in whole or in part for the purpose of mediation. It is unlikely, however, that the Court will be willing to disrupt milestone dates or adjourn a trial date. Where the Court stays proceedings, the Plaintiff is required to inform the Court about the outcome of the mediation.

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