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This special issue of *Arbitration Law Monthly* features analysis of notable recent arbitration-related court decisions handed down in Hong Kong in the first six months of 2024

2024 mid-year arbitration round-up

Upholding the integrity of arbitration in Hong Kong

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Introduction

In the rapidly evolving landscape of international commercial arbitration, the Hong Kong courts have played a pivotal role in upholding the integrity and finality of arbitral awards. This comprehensive half-year review examines a series of recent decisions that showcase the Hong Kong judiciary's nuanced approach to balancing the autonomy of the arbitral process with the need to address substantive issues of public policy and procedural irregularities.

The cases discussed in this article highlight the Hong Kong courts' commitment to reinforcing the city's reputation as a leading global hub for international commercial arbitration. By carefully navigating the complex interplay between arbitration and related legal frameworks, such as insolvency proceedings and multi-contract disputes, the courts have demonstrated a steadfast dedication to preserving the sanctity of the arbitral process while ensuring alignment with evolving legal standards and public policy considerations.

This review underscores the Hong Kong courts' unwavering support for the arbitral process, their reluctance to interfere with the arbitrators' expertise and decisions, and their recognition of the importance of party autonomy. The decisions analysed herein provide valuable insights for practitioners and commercial parties alike, as they navigate the ever-changing landscape of international arbitration.

Navigating the complexities of re-arbitration: upholding the integrity of arbitral awards

In the dynamic landscape of commercial dispute resolution, the concept of re-arbitration has become increasingly significant, presenting both challenges

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and opportunities for parties seeking to address perceived defects or mistakes in the original arbitral award. A series of recent cases in Hong Kong – for example *G v X and Others* and *G v N* – showcase the Hong Kong courts' nuanced approach to balancing the finality of arbitration with the need to ensure procedural integrity and alignment with public policy.

The case of *G v X and Others* [2023] HKCFI 3316 involved a complex arbitration dispute between G, a Hong Kong-based investment firm, and X, a Chinese technology company, over the sale of interests in a Chinese online music company. The initial 2021 arbitration award had favoured G, finding X liable to pay substantial damages for breaching the sale agreement. However, shortly after the award was rendered, X sought to set aside the award in the Mainland Chinese courts, alleging various procedural irregularities in the arbitration proceedings.

While the Mainland setting aside application was pending, G initiated enforcement proceedings in Hong Kong, which were initially adjourned by the Hong Kong court to await the outcome of the Mainland court proceedings. Subsequently, the Mainland courts ordered a re-arbitration, citing procedural issues with the initial arbitration, but limited the scope of the re-arbitration to focus solely on specific evidential matters. The re-arbitration tribunal ultimately upheld X's liability to pay the same substantial damages as in the original award.

When the enforcement proceedings resumed in Hong Kong, the court upheld G's application and ordered X to pay indemnity costs. The Hong Kong court emphasised its pro-arbitration stance, holding that the original award remained valid under Mainland law, as the setting aside proceedings had been terminated. The court further highlighted that the scope of the re-arbitration was limited to the evidential issue, and the new award did not alter the original findings on damages. By prioritising the finality and efficiency of the arbitration process, the court reaffirmed the integrity of arbitration decisions, signalling a commitment to enforcing awards unless substantial legal grounds dictate otherwise.

The dynamic between illegality defences and public policy considerations in arbitration was further explored in the cases of *G v N* [2023] HKCFI 3366 and the subsequent appeal in *G v N* [2024] HKCFI 655. The dispute arose from a securities purchase agreement (SPA) between G and N, a BVI-registered company, where the validity of the SPA was challenged in the British Virgin Islands courts by one of N's shareholders. The shareholder argued that the share allocation under the SPA was contrary to the company's interests.

Following the BVI judgment, G initiated arbitration in Hong Kong, seeking restitution of the funds paid under the allegedly invalid SPA. N countered with claims of illegality concerning the SPA and raised defences such as unclean hands. The arbitrator initially dismissed G's claims and upheld N's counterclaim for damages.

When G sought to set aside the arbitral awards, the Hong Kong court held that the matter should be remitted to the arbitrator under article 34(4) of the UNCITRAL Model Law. This was to allow the arbitrator to reassess the implications of the recent Hong Kong Court of Appeal decision in *Monat Investment Ltd v All Person(s) In Occupation of Part of The Remaining Portion of Lot No 591 in Mui Wo DD 4 No 16 Ma Po Tsuen, Mui Wo, Lantau Island* [2023] HKCA 479, which had revised the test of illegality in line with the UK Supreme Court's decision in *Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2016] Lloyd's Rep FC 435.

The court's approach in *G v N* [2024] HKCFI 655 further clarified the delicate balance between supporting arbitral awards and minimising court intervention on public policy grounds. The Court of Appeal emphasised the importance of maintaining the integrity of arbitral awards while also considering public policy implications, cautioning against the use of public policy as a basis for a substantive review of awards, especially where the tribunal's assessment of illegality is contested.

The Hong Kong courts' commitment to respecting the arbitral process and reducing judicial intervention is further exemplified in *G v N* [2024] HKCFI 721. In this case, the court upheld the enforcement of an interim order issued by the arbitral tribunal, directing the claimant (G) to take steps to dismiss parallel court proceedings in Mainland China. The court's analysis clearly distinguished the interim order from a final award, recognising the tribunal's discretion in granting such measures to safeguard the ongoing arbitration, and underscoring the courts' deference to the arbitrators' procedural decisions.

Collectively, these cases underscore the Hong Kong courts' unwavering support for the arbitral process, striking a careful balance between upholding the finality and integrity of awards and allowing for limited intervention to address substantive issues of public policy or clear procedural irregularities.

This approach reinforces Hong Kong's position as a premier hub for international commercial arbitration, where the autonomy of the arbitral process is guarded while ensuring alignment with evolving legal frameworks and public policy considerations. The courts have demonstrated a willingness to remit matters back to the arbitrators for further assessment, rather than immediately overturning awards, showcasing their reluctance to interfere with the arbitrators' expertise and decisions.

Furthermore, the courts have distinguished between final awards and interim orders, granting the arbitral tribunal significant discretion in issuing procedural measures to safeguard the ongoing arbitration. The stringent framework for enforcing interim orders, with limited grounds for refusal and no avenue for appeal, underscores the courts' deference to the arbitrators' procedural decisions.

This careful balance struck by the Hong Kong courts is crucial in upholding the integrity and finality of the arbitral process, while also ensuring that public policy considerations and evolving legal standards are properly addressed. By adopting this nuanced approach, Hong Kong solidifies its reputation as a leading jurisdiction for international commercial arbitration, where the courts play a supportive role in facilitating fair and efficient dispute resolution.

Navigating the complexity of multi-contract disputes: determining the proper forum

The Hong Kong Court of First Instance's decision in *AAA and Others v DDD* [2024] HKCFI 513 highlights the intricate challenges that can arise when parties to a commercial transaction have executed multiple related agreements, each with its own dispute resolution clause. This case underscores the importance of carefully navigating the jurisdictional landscape when claims span across different contractual instruments.

The dispute involved a loan arrangement between the borrower (AAA) and the lender (DDD), with BBB and CCC acting as guarantors. The parties had executed various documents, including a loan agreement, an amended loan agreement, share charge agreements, a pledge, and a promissory note. While the majority of these documents did not contain any dispute resolution clause, the loan agreement and the promissory note each had their own arbitration or dispute resolution provisions.

When a default occurred under the promissory note, the tribunal appointed by the Hong Kong International Arbitration Centre (HKIAC) determined that it had jurisdiction over the claims. However, the Hong Kong court disagreed, identifying three distinct paradigms of conflicting dispute resolution clauses in related agreements:

- (1) The basic paradigm: a single contract with two or more dispute resolution clauses.
- (2) The intermediate paradigm: multiple related contracts with only one dispute resolution clause in one of the contracts.
- (3) The generalised paradigm: multiple related contracts with two or more dispute resolution clauses.

The court noted that in the basic paradigm, the presumption is that the parties intended to resolve all disputes in a single forum, absent a clear contrary intention. In the intermediate paradigm, the presumption is that the parties intended for all disputes arising out of the package of contracts to be resolved under the dispute resolution clause in the one contract that contains it.

However, in the generalised paradigm, which was the case at hand, the court emphasised the need to apply the “centre of gravity” approach, as outlined in the English case of *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437;

[2015] 2 Lloyd's Rep 154. This approach requires a careful mapping of each dispute resolution clause to determine which one is more closely connected to the specific issue at hand, rather than assuming a single forum for all disputes.

The Hong Kong court ultimately concluded that the dispute arising from the promissory note fell outside the scope of the tribunal's jurisdiction, as it should be resolved under the dispute resolution clause within the promissory note itself.

This decision highlights the nuanced and contextual approach that courts must take when dealing with multi-contract disputes and conflicting dispute resolution clauses. It underscores the importance for parties to carefully consider the implications of including different dispute resolution mechanisms in their suite of related agreements, and the potential challenges that may arise in determining the proper forum for resolving their disputes.

By providing clear guidance on the various paradigms and the application of the “centre of gravity” principle, the Hong Kong court has offered valuable insights to commercial parties and legal practitioners navigating the complexities of multi-contract dispute resolution. This approach reinforces Hong Kong's position as a leading jurisdiction for the effective resolution of international commercial disputes, where the courts are attuned to the unique challenges presented by modern, complex commercial arrangements.

Maintaining integrity in arbitration: Hong Kong courts carefully balance deference and due process

Recent decisions of the Hong Kong courts demonstrate a nuanced approach to reviewing arbitral awards, underscoring the delicate balance between respecting the autonomy of the arbitral process and ensuring adherence to the principles of due process.

In the case of *CNG v G and Another* [2024] HKCFI 575, the dispute arose from a shares subscription and purchase agreement (SHA). The respondents claimed that CNG had breached the SHA, and the arbitral tribunal issued a first partial award in favour of the respondents. CNG sought to set aside the award on the grounds of its inability to present its case, the arbitral procedure not being in accordance with the parties' agreement, the award dealing with disputes beyond the scope of submission, and the award being in conflict with public policy.

The Hong Kong court firmly rejected CNG's attempts, emphasising the principle of minimal intervention in reviewing arbitral decisions. The court reiterated that it does not sit as an appellate body to review the arbitrators' findings of fact or law, and will only intervene when there is an apparent breach of natural justice or a clear indication that the tribunal failed to address key issues. The court

found that CNG had been given a “reasonable opportunity” to present its case and that the tribunal’s reasoning was coherent and adequately explained.

Similarly, in *X and Another v Z Co* [2024] HKCFI 695, the dispute concerned the alleged failure of X and Y to complete the purchase of shares after Z had exercised an exit right pursuant to a share subscription and purchase agreement (SPA). The respondents (X and Y) sought to set aside the final arbitral award in favour of Z, claiming their inability to present their case and alleging that the arbitral procedure was not conducted in accordance with the parties’ agreement.

The Hong Kong court again firmly rejected the respondents’ attempts, emphasising the well-established legal principles regarding the review of arbitral decisions. The court reiterated the narrow grounds for refusing the enforcement of an award, stating that only conduct that is sufficiently serious or egregious to amount to a denial of due process would warrant an order to set aside or refuse enforcement. The court also stressed the importance of a generous interpretation of arbitral awards, expecting no substantial faults that can be found with them.

The Hong Kong courts have also demonstrated a willingness to balance deference to the tribunal’s decision-making with the need to ensure adherence to the principles of due process. In *AAB v BBA and Another* [2024] HKCFI 699 the underlying dispute concerned a share transfer claim against AAB. AAB sought to set aside the tribunal’s second partial final award on three grounds: (i) lack of reasoning; (ii) lack of due process in the conduct of the arbitration; and (iii) failure to address an issue.

The Hong Kong court carefully considered each of AAB’s grounds. Regarding the lack of reasoning, the court emphasised that a well-reasoned award does not need to be overly detailed, as long as it allows the parties to understand the basis for the arbitrator’s material findings. The court also reiterated that the mere presence of terse or succinct reasoning is not a ground for criticism, as it reflects the diversity of arbitrators’ styles.

On the issue of due process, the court reminded that parties must be given a “reasonable opportunity” to present their case, not a “full opportunity”, and found that AAB’s

passive attitude during the proceedings amounted to a waiver of its right to object to the procedural timetable. As for the failure to address an issue, the court acknowledged the oversight but emphasised that a tribunal is allowed to deal with issues compositely and is not required to address every argument raised by the parties.

Ultimately, the court remitted the outstanding issue back to the tribunal for determination, suspending the set-aside proceedings for three months, rather than setting aside the award at the first instance.

Similarly, in *A v B and Others* [2024] HKCFI 751 the dispute arose from license agreements between the applicant A and a licensee B, with the respondents acting as guarantors C and D. A sought damages and an injunction against C and D, and the arbitral award was issued in favour of A.

The respondents sought to set aside the award, claiming that the arbitrator failed to provide any reasons for her decisions. The Hong Kong court carefully examined the arbitrator’s reasoning and found that the arbitrator had clearly failed to provide sufficient reasons on key issues, such as the choice of governing law for the non-compete covenant and the rejection of the respondents’ proposed date of termination for the damages calculation. Accordingly, the court proceeded to set aside the enforcement order.

The Hong Kong courts have also demonstrated their willingness to manage set-aside applications in a manner that preserves the integrity of the arbitral process. In *SA and Others v BH and Another* [2024] HKCFI 1357, the dispute arose from a joint venture between the plaintiffs (a Dutch company and two US residents) and the first defendant (a BVI company) regarding the development of a communication satellite. The plaintiffs applied to set aside an interim award in favour of the first defendant, raising three grounds, including national security concerns.

In response, the first defendant applied for security for costs against the plaintiffs in the set-aside application. The Hong Kong court carefully considered the plaintiffs’ arguments against the court’s jurisdiction to grant the security for costs order, ultimately rejecting their claims. The court found that the plaintiffs’ shares in the second defendant company were not readily realisable assets

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in Hong Kong and that the plaintiffs' conduct during the arbitration proceedings, including their failure to comply with prior costs orders in other jurisdictions, justified the order for security for costs.

The Hong Kong courts' emphasis on preserving party autonomy is further exemplified in the case of *SYL and Another v GIF* [2024] HKCFI 1324. The dispute arose from a loan agreement and two security deeds entered into between the plaintiffs and the defendant. The defendant commenced a single arbitration under the HKIAC Administered Arbitration Rules 2018, seeking to consolidate the disputes under the various agreements.

The plaintiffs challenged the tribunal's jurisdiction, arguing that the arbitration agreements were incompatible and that the composition of the tribunal was defective, as it did not align with the parties' agreed appointment mechanism. The Hong Kong court carefully examined the various arbitration agreements and the challenges raised by the plaintiffs.

The court acknowledged the potential for multiple interpretations of the phrase "mutatis mutandis" in the arbitration agreements of the security deeds but placed greater emphasis on the parties' fundamental right to determine the constitution of the tribunal, as enshrined in the arbitration agreements. The court held that forcing the parties to accept a unilateral decision on the appointment mechanism would be against their autonomy. Ultimately, the Hong Kong court disagreed with the tribunal, finding that it lacked jurisdiction.

The recent decisions of the Hong Kong courts demonstrate a robust and nuanced approach to the review of arbitral awards. The courts have consistently upheld the finality of arbitral awards, while providing guidance on the limited grounds for intervention and the importance of party autonomy.

By carefully balancing deference to the tribunal's decision-making with the need to ensure adherence to the principles of due process, the Hong Kong courts have reinforced the city's reputation as a leading jurisdiction for international commercial arbitration. The courts' willingness to remit outstanding issues back to the tribunal, their emphasis on the quality of the tribunal's reasoning, and their proactive measures to manage set-aside applications all contribute to the overall integrity and credibility of the arbitral process in Hong Kong.

These judgments send a strong message to arbitration users and practitioners that the Hong Kong courts are committed to preserving the autonomy and finality of the arbitral process, while ensuring that fundamental principles of due process are upheld. This delicate balance, struck by the Hong Kong courts, solidifies the city's position as a premier destination for international commercial arbitration.

Preserving access to justice: Hong Kong courts reject security for costs in anti-recognition applications

In the face of growing efforts to challenge the enforcement of arbitral awards, the Hong Kong court has taken a firm stance in safeguarding the fundamental right of access to justice for award debtors. In a recent decision of *AAD and Another v BBF* [2024] HKCFI 698, the court has rejected the imposition of onerous conditions, such as security for costs and Hadkinson Orders, in anti-recognition applications, striking a careful balance between the interests of award creditors and debtors.

The dispute arose from a commercial relationship between the claimants, which included a Mainland Chinese and a Hong Kong company, and the respondent, a Mainland Chinese company. After the claimants supplied machines to the respondent, the respondent decided to manufacture its own machines instead of continuing to purchase them. This led to an arbitration administered by the HKIAC, in which the tribunal found in favour of the claimants on liability.

Following the unsuccessful attempt by the respondent to set aside the award, the tribunal issued a quantum award in favour of the claimants. The claimants then sought a recognition order of the quantum award, prompting the respondent to file an application against the recognition and enforcement of the award (the "Anti-Recognition Application") and seek a stay of execution of the recognition order.

In response, the claimants applied for security for costs against the Anti-Recognition Application, including a Hadkinson Order that would dismiss the Anti-Recognition Application if the respondent failed to comply with the security for costs order.

The Hong Kong court firmly rejected the claimants' application, emphasising the fundamental right of access to justice for award debtors. The court stated that it is generally against the position of the Hong Kong court to impose security as a condition for a party opposing the enforcement of an award, as this right is entitled to the award debtor and should not be deprived easily, unless in special circumstances.

The court also found that the claimants failed to demonstrate that a Hadkinson Order should be issued in the current circumstances, as the respondent's previous non-compliance with a costs order did not constitute the type of contempt of court or contumelious conduct typically required for such an order.

Furthermore, the court noted that even if a Hadkinson Order were issued, the respondent could still choose to disobey it, which would only cause the Anti-Recognition Application to remain in limbo and delay the enforcement of the quantum award. The court emphasised that the correct approach for the claimants was to seek a quick resolution of the Anti-Recognition Application, rather than pursuing the security for costs and Hadkinson Order.

The Hong Kong court's decision in this matter underscores its commitment to preserving the fundamental right of access to justice for award debtors, even in the face of enforcement challenges. By rejecting the claimants' application for security for costs and a Hadkinson Order, the court has sent a clear message that it will not easily deprive award debtors of their right to oppose the recognition and enforcement of arbitral awards, unless there are exceptional circumstances.

This judgment highlights the Hong Kong court's nuanced approach to balancing the interests of award creditors and debtors. The court recognised that the imposition of onerous conditions, such as security for costs and Hadkinson Orders, could ultimately hinder the swift resolution of the dispute and the enforcement of the award, which is contrary to the fundamental principles of international commercial arbitration.

The court's emphasis on the claimants' need to seek a quick resolution of the Anti-Recognition Application, rather than pursuing aggressive tactics, demonstrates the its pragmatic approach to arbitration-related disputes. This judgment reinforces Hong Kong's reputation as a jurisdiction that values party autonomy, due process, and the overall integrity of the arbitral process.

By preserving the award debtor's right to access justice, the Hong Kong court has struck a delicate balance, ensuring that the enforcement of arbitral awards remains effective, while safeguarding the fundamental principles that underpin the arbitration framework in the city.

Navigating the intersection of arbitration and insolvency: Hong Kong courts clarify the way forward

Recent decisions of the Hong Kong Court of Appeal have shed light on the intricate interplay between arbitration and insolvency proceedings, offering guidance to practitioners on how the courts will approach cases where these two realms converge.

In *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299, the dispute arose from a bond instrument dated 27 November 2017 between the petitioner and the company. The bond instrument contained an arbitration clause.

The company failed to redeem the convertible bond after the listing of the company failed. The petitioner then served a statutory demand and presented a winding-up petition to the Hong Kong Court of First Instance ("CFI").

In opposing the petition, the company argued that the CFI should dismiss the petition and the parties should resolve their dispute in arbitration, following the principles in *Re Lam Kwok Hung Guy, ex parte Tor Asia Credit Master Fund LP* (2023) 26 HKCFAR 119. However, the CFI refused to adjourn the hearing of the petition, finding that the company had failed to demonstrate a bona fide dispute on the debt, and granted the winding-up order against the company.

Crucially, the CFI distinguished the present case from *Re Guy*, stating that the principles in *Re Guy* were confined to the context of exclusive jurisdiction clauses, and did not extend to contracts containing arbitration clauses.

The company appealed to the Hong Kong Court of Appeal ("CA"), contending that the reasoning in *Re Guy* should be extended to the contract containing an arbitration clause and the CFI was wrong in refusing to adjourn the petition.

The CA noted that the parties had affirmatively agreed to submit their dispute for resolution by the agreed mechanism, in this case, the arbitration clause in the bond instrument. The CA held that the Hong Kong courts should conduct a multi-factorial analysis when deciding whether to exercise its discretion to allow the petition, balancing the strong policy reason to abide by the arbitration agreement and the public policy underpinning the legislative scheme of the court's winding-up jurisdiction.

The CA ultimately dismissed the company's appeal, finding that the company had not provided sufficient evidence as to its intended actions following the requested adjournment, nor had it submitted any evidence to dispute the debt or indicate its intention to arbitrate.

The second case, *Re Shandong Chenming Paper Holdings Ltd* [2024] HKCA 352, dealt with the issue of cross-claims in the context of company winding-up procedures.

The petitioner and the company entered into an agreement to establish a joint venture company ("JVC"). Disputes subsequently arose between the parties, leading to the petitioner commencing an arbitration against the company pursuant to the arbitration clause in the joint venture agreement.

After the petitioner obtained a favourable arbitral award and leave from the CFI to enforce it, the company attempted to seek an injunction against the petitioner to present a winding-up petition. This application was dismissed by the CFI.

During the appeal process, the petitioner presented a winding-up petition against the company. In the meantime, the company believed that the petitioner had withheld the books and records of the JVC and commenced a second arbitration against the petitioner. The second award was subsequently set aside by the court on the ground that the tribunal lacked jurisdiction.

Undeterred, the company commenced a third arbitration against the petitioner, seeking an award to uphold the findings in the second award and for damages for the Petitioner's breach of the joint venture agreement). The company asserted that the third arbitration amounted to a cross-claim against the petitioner and applied to the Hong Kong court to stay the winding-up petition.

The CA observed that the lower court's approach to cross-claims is distinct from the treatment of disputed debts. While a cross-claim does not affect the petitioner's standing to present a winding-up petition, the court held

that the presence of a cross-claim is a matter for the court's discretion in deciding whether to stay or dismiss the petition.

Importantly, the CA held that where the cross-claim is subject to an arbitration clause, it would be contrary to the parties' agreement for the court to determine the presence of a genuine and serious cross-claim. Echoing the principles in *Re Guy*, the CA emphasised the need to uphold the parties' agreement to resolve disputes in the agreed forum, which in this case was arbitration.

The decisions in these two cases highlight the Hong Kong courts' nuanced approach to balancing the sanctity of arbitration agreements and the public policy objectives of insolvency proceedings.

In *Re Simplicity & Vogue Retailing (HK) Co Ltd* the court's distinction between exclusive jurisdiction clauses and arbitration clauses is particularly notable. By refusing to automatically extend the principles in *Re Guy* to the latter, the court has demonstrated its willingness to safeguard the parties' agreed dispute resolution mechanism, even in the face of insolvency proceedings.

This decision is significant as it reinforces Hong Kong's pro-arbitration stance. Arbitration has become increasingly common in modern commercial contracts, as it offers the benefits of confidentiality and efficiency in dispute resolution. The court's refusal to deprive the award debtor of its right to oppose the recognition and enforcement of the award, unless in exceptional circumstances, underscores its commitment to preserving the fundamental principles of arbitration.

The court's approach in *Re Shandong Chenming Paper Holdings Ltd* further highlights the delicate balance the courts must strike when dealing with cross-claims in the context of winding-up proceedings. By recognising that the presence of a cross-claim is a matter for the court's discretion, the court has avoided a rigid application of the principles concerning disputed debts.

Crucially, the court's emphasis on upholding the parties' agreement to resolve disputes through arbitration, even in the face of cross-claims, demonstrates the courts' unwavering dedication to respecting the autonomy of the parties and the integrity of the arbitral process.

These twin rulings serve as a valuable resource for practitioners, as they navigate the complex interplay between arbitration and insolvency. The decisions provide clarity on the courts' approach and underscore the importance of carefully considering the unique circumstances of each case when seeking to enforce arbitral awards or resist winding-up petitions.

As the global business landscape continues to evolve, the Hong Kong courts' ability to adapt and provide consistent guidance in this area will be crucial in maintaining the city's status as a leading international arbitration hub and a preferred jurisdiction for commercial disputes.

Damages for breach of implied promise: upholding the sanctity of arbitral awards

In the ever-evolving world of commercial disputes, the interplay between arbitration and the enforcement of arbitral awards can often present complex legal challenges. A recent decision by the Hong Kong court has shed light on the appropriate assessment of damages for the breach of an implied promise arising from an arbitration agreement, underscoring the importance of upholding the finality and integrity of arbitral awards.

The case, 廈門新景地集團有限公司 *formerly known as* 廈門市鑫新景地房地產有限公司 (*Xiamen Xinjingdi Group v Eton Properties Ltd and Another* [2024] HKCFI 1291, presented a long-running legal saga spanning over 17 years. The court was tasked with determining the damages owed to the plaintiff as a result of the defendants' failure to comply with an arbitration award, in breach of their implied promise under the arbitration agreement.

The dispute originated in 2005 when the plaintiff commenced arbitration against the first and second defendants for their breach of an agreement for the development of land held by the fifth defendant. Prior to the publication of the arbitration award, the first and second defendants transferred the shares in the fourth defendant, which held 100 per cent of the fifth defendant, to the third defendant, without the plaintiff's or the tribunal's knowledge.

In October 2006 the tribunal issued an award in favour of the plaintiff, ordering the defendants to pay damages and to "continue to perform with the Agreement". The plaintiff subsequently applied to the Hong Kong courts for a judgment in terms of the award and for its enforcement.

However, the first and second defendants applied to set aside the judgment and opposed its enforcement, arguing that it had become impossible to perform due to the transfer of their ownership of the fourth defendant. The matter eventually reached the Hong Kong Court of Final Appeal, which in 2020 dismissed the defendants' appeal and upheld the enforcement of the Judgment.

The crux of the dispute in the present case centred around the assessment of damages. The plaintiff argued that the damages should be based on the value of the shareholding in the fourth defendant, including the entire interests in the land or the sale proceeds received by the fifth defendant as of the date of the award. The defendants, however, contended that such an assessment would amount to rewriting the award, as the tribunal had only ordered them to "continue with" the agreement.

In its decision, the Hong Kong court recognised the distinction between the defendants' performance of the agreement, which was subject to the arbitration, and their performance of the arbitration award itself. Regarding the timing of the damages assessment, the court held that since the plaintiff's cause of action was the breach of an

implied promise, it could only arise upon the publication of the award.

Applying the established compensatory principle for the breach of an implied promise, the court found that the first and second defendants' breach concerned their failure to continue with the agreement in 2006. The plaintiff's damages were the amount that the defendants would have procured the transfer of the shares of the fourth defendant to the plaintiff, to enable the plaintiff to obtain the benefits of the land development.

This decision adds clarity to the assessment of damages for the breach of an arbitration award, affirming the difference between a claim arising from a breach of contract and a breach of an implied promise in the arbitration agreement. The court's adherence to the compensatory principle, even in the face of the defendants' subsequent actions rendering the original contract impossible to perform, underscores the importance of upholding the sanctity of arbitral awards.

By refusing to allow the defendants to escape the consequences of their own wrongdoing, the court has reinforced the integrity of the arbitral process and the finality of its decisions. This case serves as a valuable precedent for practitioners navigating the complex interplay between commercial disputes and the enforcement of arbitral awards, highlighting the Hong Kong courts' commitment to providing clarity and consistency in this area.

As the global business environment continues to evolve, the ability of courts to strike the right balance between respecting the parties' arbitration agreements and upholding the public policy objectives of commercial disputes will be crucial. This decision and another stands as a testament to Hong Kong's reputation as a leading international arbitration hub, where the finality and enforceability of arbitral awards are consistently safeguarded.

Navigating the challenges of arbitrator removal: upholding the integrity of the arbitral process

The recent decision by the HKCFI in *P v D* [2024] HKCFI 1132 has provided valuable insights into the courts' approach to addressing issues surrounding the removal of arbitrators. This case highlights the importance of parties carefully considering and presenting all relevant grounds for challenging an arbitral tribunal, as well as the court's limited supervisory role in this regard.

The case arose from an arbitration initiated by D against P under the UNCITRAL Arbitration Rules. During the proceedings, P made repeated requests for the tribunal to seek an evidence-taking order from the Hong Kong courts, which the tribunal initially refused. After obtaining a court order for taking evidence, P sought further approval from the tribunal, which was eventually dismissed due to P's substantial delay.

Dissatisfied with the tribunal's handling of the proceedings, P issued a notice of challenge to remove the tribunal on various grounds, including that the tribunal did not keep an open mind, made decisions beyond the parties' contentions, and demonstrated apparent bias against P. After DL withdrew from the tribunal, YZ and MC (the "Impugned Arbitrators") refused to do so, and the HKIAC ultimately dismissed P's challenge.

P then applied to the Hong Kong court for the removal of the Impugned Arbitrators under the Arbitration Ordinance, relying on the grounds raised in the notice of challenge as well as two additional grounds.

The court addressed the two additional grounds first, holding that they were not properly presented to the HKIAC and therefore fell outside the scope of the court's supervisory role. The court emphasised that parties must deliberate and present all grounds of challenge at once, or risk waiving those grounds.

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