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# New year, new views – arbitration highlights in the Year of the Rat

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As the world welcomes in the Year of the Rat, we take a look back at five recent decisions that made big waves in the Year of the Pig in their different ways, across Hong Kong, Singapore, and England.

In the decisions, the courts got to grapple with fundamental issues such as governing law, the arbitral seat, the limitation period for commencement of arbitration, and when it might be appropriate to grant an anti-suit injunction restraining court proceedings in another jurisdiction. Please click on the links highlighted to access full case summaries.

**Silence is not so golden**

In *Kabab-Ji S.A.L (Lebanon) v. Kout Food Group (Kuwait) [2020] EWCA Civ 6*, the English Court of Appeal was invited to determine the governing law of an arbitration clause where the clause itself was silent on this issue. The clause provided for arbitration in Paris, but was contained within a main agreement which was expressly governed by English law.

The appellant Kabab-Ji SAL entered into a franchise development agreement on 16 July 2001 (the FDA) for a period of 10 years with Al Homaizi Foodstuff Company (AHFC), which later became a subsidiary of the respondent Kout Food Group (KFG) after reorganization.

A dispute arose under the FDA which the appellant referred to arbitration before the International Chamber of Commerce (ICC) in Paris. The arbitration was only commenced against KFG, not AHFC. The tribunal therefore had to consider, as a preliminary issue, whether KFG had become an additional party to the arbitration agreement under the FDA and therefore was subject to the tribunal's jurisdiction.

The Court of Appeal ruled that the law governing the main contract also applied to the arbitration agreement. It specifically rejected the argument that the principle of separability could be relied upon to divorce the arbitration agreement from the main contract. Instead, the court clarified that the purpose of the separability principle is to ensure that the arbitration agreement (a dispute resolution mechanism chosen by the parties) can survive the main contract becoming unenforceable (for example, because of fraud or misrepresentation).

***Key takeaways***

- Due to the nature of international arbitration, there may be various applicable laws governing different aspects of the arbitration proceedings, including: the law governing the substantive contract; the law governing the arbitration agreement; the procedural law of the arbitration; and the law of the place where the award will be enforced.
- The governing law of the arbitration agreement is of particular importance and is relevant to matters including the formation, existence, scope, validity, legality, interpretation, and enforceability of the arbitration agreement.
- In the absence of the parties specifying the governing law of the arbitration agreement, the governing law could follow the governing law of the underlying contract[1], or the governing law of the seat.[2]
- Substantive costs may be incurred in determining this preliminary issue.
- We recommend that clients stipulate the governing law of the arbitration agreement in their arbitration clauses where the law of the substantive contract and the law of the seat are different, for example, People's Republic of China substantive governing law of contract and Hong Kong seat of arbitration. The Hong Kong International Arbitration Centre (HKIAC) model arbitration clause provides for the governing law of the arbitration agreement.

## Luck of the draw

Singapore's highest court, the Court of Appeal, prevented the enforcement of a US$200 million arbitral award on the grounds that the arbitrators incorrectly chose Singapore instead of Macau as the arbitral seat. According to the Court of Appeal, the award should not be recognized as it was "*not the result of the arbitration that the parties bargained for*."

The decision of the three-person panel in *ST Group Ltd v. Sanum Investments Limited [2019] SGCA 65* reversed a 2018 High Court decision that had permitted Sanum Investments Ltd., a Macau gambling company, to enforce a 2016 Singapore International Arbitration Centre (SIAC) award against four related Laos-based parties and a Laos citizen who was behind the dealings with Sanum that led to the arbitration.

The Court of Appeal agreed with the judge at first instance that the dispute did indeed arise from a breach under a master agreement (MA) between the parties and that the arbitration agreement contained within it should have been the basis for the arbitral proceedings. The correct seat of the arbitration was Macau.

The Court of Appeal considered the choice of seat as "*one of the most important matters for parties to consider*" as the seat "*carries with it the national law under whose auspices the arbitration shall be conducted*." The choice of seat impacted the external relationship with national courts and was vital in governing issues relating to the validity and finality of the award.

The Court of Appeal confirmed that it was not necessary for a party resisting enforcement to demonstrate actual prejudice. It was sufficient that had the arbitration been correctly seated, a different supervisory court would have been available to the parties.

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1 Such as in Arsanovia v. Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm); [2013] 1 Lloyd's Rep 235 and Sulamerica Cia Nacional De Seguros S.A. and Ors -v- Enesa Engenharia S.A. [2012] 12.EWCA Civ 638.

2 Such as in C v. D. [2007] EWCA Civ 1282; [2008] All ER (Comm) 1001.

***Key takeaways***

- The choice of seat in an arbitration agreement is key – it determines the legal and judicial anchor of the arbitration and brings with it a series of significant legal and practical consequences, such as the supervisory court in support of the arbitral process, the level of intervention by the court, and the court for setting aside.
- Clearly state the seat in your arbitration agreement.[3]
- Have compatible arbitration agreements providing for the same seat, number of arbitrators, and institutional rules in multiple agreements that arise out of the same deal.
- This will allow for a single arbitration arising out of multiple agreements under certain institutional rules[4], and would also aid consolidation and joinder if required, thereby enhancing efficiency and economy.

## There's a limit

In *Wang Peiji v. Wei Zhiyong [2019] HKCFI 2593*, the Hong Kong Court of First Instance set aside an order enforcing an arbitral award on the ground that the application to enforce was time barred under section 4(1) of the *Limitation Ordinance* (Cap. 347).

In particular, the court ruled that the limitation period under the ordinance was not suspended by the applicant's enforcement efforts in mainland China. This was despite the fact that the applicant was not allowed to pursue simultaneous applications for enforcement before the mainland and Hong Kong courts pursuant to the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the mainland and the Hong Kong Special Administrative Region* (the arrangement).

***Key takeaways***

- The arrangement has made the mutual enforcement of arbitral awards by Hong Kong and mainland China more convenient and efficient. Unlike a foreign arbitral award (and enforcement on the mainland under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* – the New York Convention), an application to enforce a Hong Kong award can be made directly to a mainland court, without going through the recognition procedure.
- Having an enforcement strategy is key. Choose to enforce first in a jurisdiction where not only there are assets, but which is also arbitration friendly – and enforcement can be obtained quickly. Enforcement decisions of other courts may have an impact on enforcement of the award in other jurisdictions.[5]
- Take steps to enforce arbitral awards in Hong Kong promptly as the limitation period in Hong Kong continues to run despite enforcement efforts made in other jurisdictions.
- If the period of enforcement is unduly long before the mainland court, the applicant should consider withdrawing or procuring determination of the enforcement procedure in the mainland, so that it can apply for enforcement in Hong Kong prior to the expiry of the limitation period.

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3 In 2015, the Chartered Institute of Arbitrators developed the "London Principles," which provided for key elements of a "safe seat" for international arbitrations.

4 Most leading arbitral institutions now in their latest rules provide for the possibility of commencing one arbitration in respect of multiple contracts, e.g., HKIAC 2018 Administered Arbitration Rules, Article 29; 2017 ICC Rules of Arbitration, Article 3; 2015 China International Economic and Trade Arbitration Commission Arbitration Rules, Article 14; and 2016 SIAC Arbitration Rules, Article 6.1.

5 For e.g., issue estoppel was applied in *Diag Human v Czech Republic* [2014] EWHC 1639 (Comm).

### Thou must arbitrate

In *GM1 and GM2 v. KC [2019] HKCFI 2793*, the Hong Kong Court of First Instance granted an interim anti-suit injunction in favor of the plaintiffs to restrain the defendant from pursuing mainland court proceedings relating to the disputes arising out of a guarantee entered into between the defendant and the first plaintiff (the guarantee).

Two sets of arbitral proceedings were commenced, one between the first plaintiff and the defendant under the guarantee and the other between the first plaintiff and the defendant's wholly owned subsidiary. The arbitration agreement in the guarantee provided for any disputes arising out of the guarantee to be referred to arbitration administered by the Hong Kong International Arbitration Centre. However, the defendant brought separate proceedings against the plaintiffs before the Suzhou courts, in relation to the same dispute.

An interim injunction was granted to restrain the mainland proceedings.

#### *Key takeaways*

- The Hong Kong courts uphold the parties' arbitration agreement – only "*special circumstances*" or "*strong reasons*" would justify a departure from a party's entitlement to enforce the arbitration agreement.
- This is notwithstanding the fact that the foreign court in question may indeed have jurisdiction over the disputed issues.
- If your counterparty commences parallel foreign court proceedings, an anti-suit injunction is a powerful weapon to restrain them.

### Fashion weak

In *Giorgio Armani SpA v. Elan Clothes Co Ltd (No 2) [2019] HKCFI 2983*, the Hong Kong court granted a permanent anti-suit injunction to restrain court proceedings in mainland China involving third parties, based on a Hong Kong arbitration agreement.

The first plaintiff was part of a group companies which manufactured and supplied luxury fashion products. In December 2014 the first plaintiff and the defendant entered into an MA pursuant to which the defendant was appointed as an authorized retailer with a right to open and operate single brand stores in mainland China. The second to fourth plaintiffs were not signatories to the MA.

The defendant purchased products from the second and third plaintiffs which were authorized distributors of the first plaintiff. The fourth plaintiff was the controller of the first. Disputes arose due to a rebranding exercise announced by the first plaintiff in February 2017. The defendant claimed that it suffered significant losses as a result, and stopped paying royalties and advertising contributions under the MA.

The first plaintiff terminated the MA and commenced arbitration in Hong Kong in respect of the disputes under the MA (the Hong Kong arbitration). The defendant later commenced proceedings in tort in the Higher People's Court of Shandong against the first to fourth plaintiffs (the mainland proceedings).

The first plaintiff subsequently commenced the present proceedings in Hong Kong for an anti-suit injunction restraining the defendant from pursuing the mainland proceedings in breach of the arbitration agreement under the MA.

One of the key questions before the court was whether the second to fourth plaintiffs were bound by the arbitration agreement based upon the overall construction of the MA. The court noted that the MA was made "*by and between*" the first plaintiff "*together with its branch offices and Affiliates*" and the defendant. In light of the contractual terms, the court ruled that the parties to the MA included not only the first plaintiff, but also the second to fourth plaintiffs.

The court further ruled that, even if the second to fourth plaintiffs were not parties to the MA, it was clear that the arbitration agreement under the MA had to extend to claims against, and disputes with, the second to fourth plaintiffs and other entities within the wide definition of "*Affiliates*."

***Key takeaways***

- Arbitration agreements can extend to nonsignatory affiliates of a contracting party and anti-suit injunctions can be granted against a nonsignatory third party.
- The "one-stop arbitration" assumption applies when construing the scope of the arbitration agreement. The parties, as rational business people, are likely to have intended any dispute arising out of the related legal relationships should be decided by the same tribunal.
- An arbitration agreement should be construed in accordance with this assumption unless the language makes it clear that certain questions are intended to be excluded from the arbitrator's jurisdiction. Whether the claims are contractual or tortious – and whether the foreign court says it has jurisdiction – is irrelevant.
- Arbitration agreements involving multiple parties in complex transactions should be carefully drafted so that the parties intended to be bound are clearly identified.

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