Latest Developments regarding Arbitration in Hong Kong and Mainland China

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Overview

Hong Kong

- New Era for Third Party Funding of Arbitrations in Hong Kong
- Decision of the Court of Final Appeal in Astro v First Media (which is within the Lippo Group)

Mainland China

- Enforcement of CIETAC arbitral awards
- Enforcement of arbitration awards vs court judgments
Hong Kong – New Era for Third Party Funding of Arbitrations in Hong Kong
New Era for Third Party Funding of Arbitrations in Hong Kong

1 February 2019

- Relevant Amendments of the Hong Kong Arbitration Ordinance came into effect
  - Abolishment of the common law doctrines of maintenance and champerty
  - Opens the door for third party funding of arbitration
  - Does not include third party funding of mediation
New Era for Third Party Funding of Arbitrations in Hong Kong

Meanwhile,

• 7 December 2018
• Code of practice on third party arbitration funding was issued
• setting out the practices and standards third party funders

• clear and non-misleading promotional materials
• reasonable steps ensuring that the funded party is aware of the right for independent legal advice
• requirements for capital adequacy
• effective management of conflicts of interest
• annual returns to be submitted to the advisory body

• failure to comply will not result in judicial or other proceedings
New Era for Third Party Funding of Arbitrations in Hong Kong

- Funders’ activities in Hong Kong
- Funding on a “non-recourse basis”
- Financial risk of parties potentially being funded
- Increased number of funded arbitrations
Hong Kong –
Decision of the
Court of Final Appeal in
Astro v First Media
Astro v First Media

2005
Astro and Lippo entered into a Subscription and Shareholders’ Agreement (SSA)
Joint venture to provide multimedia and television services in Indonesia
SIAC arbitration
Singapore Law as governing law

2008
Astro commenced arbitration against Lippo seeking monetary damages for breach of the SSA
Astro applied to include three additional Astro entities (the “Additional Parties”) that were not parties to the SSA as co-claimants
* SSA contained condition precedents
* Prior to fulfilment of these conditions precedent, the Additional Parties would supply funds and services to the joint venture

2010
The tribunal decided that the Additional Parties were entitled to bring claims and awarded in favor of Astro in a sum exceeding US$130 million
Astro sought to enforce the award in Singapore and Hong Kong
Astro v First Media

Singapore

- Astro was initially granted leave to enforce the awards
- October 2013
- Singapore Court of Appeal
  - Lippo succeeded on its appeal
  - Held that the arbitral tribunal lacked the jurisdiction to make the awards in favor of the Additional Parties
  - The Singapore enforcement orders in favor of these Additional Parties should be set aside
  - Found that Lippo was entitled to choose between the “active” remedy of set aside, and the “passive” remedy of resisting enforcement
Astro v First Media

Hong Kong

September 2010
• Judgment enforcing the award was entered
• Lippo took no steps to set aside the judgment within 14 days as prescribed under the Arbitration Ordinance
• mistakenly believed that it did not have any assets in Hong Kong

July 2011
• Astro located assets in Hong Kong and obtained a garnishee order to attach a debt of US$ 44 million
• One of the Lippo companies (First Media) then, after a delay of 14 months, applied for an extension of time to set aside the judgment enforcing the award as well as the garnishee order
Astro v First Media

Court of First Instance

- Refused First Media’s application on the following grounds
- First Media in breach of a duty of good faith

“The delay was substantial

"to defend the claim on the merits in the hope that it would succeed before the Tribunal, and keep the jurisdictional point in reserve to be deployed in the enforcement court only when it suited its interests to do so"
Astro v First Media

Court of Appeal

• Overturned the above good faith ground
  • fundamental defect - the SIAC award against the Additional Parties were made without jurisdiction

• But still rejected First Media’s application for the following reasons:
  • the length of the delay was substantial
  • the fact that a deliberate decision was taken not to apply to set aside within the time prescribed
  • the fact that the awards had not been set aside at the seat of the arbitration
Astro v First Media

Court of Final Appeal

• The Court of Final Appeal granted extension applied by First Media
• Preferred a broader approach to discretionary extensions of time
  • “look at all relevant matters and consider the overall justice of the case”
  • “rigid mechanistic approach is not appropriate”
• The Courts below had erred in principle, leading them to “downgrade the fundamentally important absence of a valid arbitration agreement between First Media and the Additional Parties”
Astro v First Media

Court of Final Appeal (cont’d)

• Found that Lippo was entitled to choose between the “active” remedy of set aside, and the “passive” remedy of resisting enforcement
  • Consistent with the approach of the Singapore Courts

• The lower courts “treat the fact that the awards have not been set aside in Singapore as a major factor in refusing a time extension come into conflict with the choice of remedies principle”

• While accepting that the delay was substantial, the CFA held that Astro had not suffered substantial prejudice as a result, other than costs which can be compensated
Astro v First Media

Court of Final Appeal (cont’d)

• The CFA considered that there must be balanced against the 14 month delay the “fundamentally important” absence of a valid arbitration agreement, which “clearly” gives rise to a defence to enforcement.

• In the CFA’s view, refusing an extension would deny First Media a hearing where its application has “decisively strong merits” and would penalise it to the extent of permitting enforcement of a US$130 million award.

• The CFA held that that would “self-evidently be wholly disproportionate”
Astro v First Media

Result

- Appeal allowed
- Extended the time for First Media to apply to set aside the orders granting leave to enforce the award and the judgment entered on the awards for three months from the date of the judgment

Lessons

- Beware of Additional Parties to an arbitration agreement
- Active remedy v Passive remedy
Mainland China – Enforcement of CIETAC arbitral awards
CIETAC Family Feud
## Guidance by the Supreme People’s Court (15 July 2015)

<table>
<thead>
<tr>
<th>DESIGNATED ARBITRATION COMMISSION</th>
<th>DATE OF ARBITRATION AGREEMENT</th>
<th>JURISDICTION</th>
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<td>CIETAC Shenzhen/CIETAC South China</td>
<td>On or before October 22, 2012</td>
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<td>October 23, 2012 – July 16, 2015</td>
<td>CIETAC Beijing</td>
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<tr>
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<td>On or after July 17, 2015</td>
<td>CIETAC Shenzhen</td>
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<td>CIETAC Shanghai</td>
<td>On or before April 11, 2013</td>
<td>SHIAC</td>
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<td>April 12, 2013 – July 16, 2015</td>
<td>CIETAC Beijing</td>
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<td>July 17, 2015 - present</td>
<td>CIETAC Shanghai</td>
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</tbody>
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# Relevant Cases

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<tr>
<th>Judgment</th>
<th>Courts</th>
<th>Arbitration clause</th>
<th>Date of arbitration clause</th>
<th>Result</th>
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<tbody>
<tr>
<td>LDK v Hindustan (July 2018)</td>
<td>India High Court</td>
<td>Any and all claims, disputes, controversies or differences arising between the Parties out of or in relation to or in connection with this Bond shall be submitted for arbitration before China International Economic and trade Arbitration Commission (“CIETAC”) in Shanghai by three Arbitrators appointed in accordance with the corresponding rules of arbitration</td>
<td>14 November 2011</td>
<td>CIETAC Beijing</td>
</tr>
<tr>
<td>Wuhan Jiexibo Equipment v Shanghai Jiexibo Construction Machinery (2016)</td>
<td>No.2 Intermediate People’s Court in Beijing</td>
<td>Any dispute arising from or in connection with this agreement, shall be submitted to China International Economic and Trade Arbitration Commission for arbitration in Shanghai in accordance with the arbitration rules applicable when applying for arbitration.</td>
<td>1 January 2014 and 1 January 2015</td>
<td>CIETAC Beijing</td>
</tr>
<tr>
<td>Southwest cement v TAN Guoren (2017)</td>
<td>No. 2 Intermediate People’s Court in Shanghai</td>
<td>Any party may submit dispute to China International Economic and Trade Arbitration Commission for arbitration in Shanghai according to then valid arbitration rules. The arbitration shall be final and binding on both parties.</td>
<td>23 March 2012</td>
<td>SHIAC</td>
</tr>
<tr>
<td>Dalian Baiyi v Dalian Carrefour (2017)</td>
<td>Intermediate People’s Court in Dalian</td>
<td>Any dispute arising from or in connection with this commodity contract shall be submitted to China International Economic and Trade Arbitration Commission for arbitration in Shanghai according to the arbitration rules of the commission applicable when applying for arbitration.</td>
<td>18 September 2013</td>
<td>CIETAC Beijing</td>
</tr>
</tbody>
</table>
Mainland China – Enforcement of arbitration awards vs court judgments
Enforcement of arbitration awards v. court judgments

**Enforcement of arbitration awards**

- New York Convention 1958
- 159 signatories
- All major jurisdictions around the world

**Enforcement of court judgments**

- Arrangement between Mainland China and HK
- Two recent cases on reciprocity regarding US and Singaporean judgments
- Developments in International Treaty
Enforcement of arbitration awards v. court judgments

Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Court of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned

Hong Kong and China may recognize and enforce civil judgment issued by each other

- Implemented in 2006
- Judgment is of payment of money with executive force in a civil or commercial case given by a designated court of either the mainland or Hong Kong
- There is a written jurisdiction agreement between the parties concerned stipulates in writing that a people's courts in the mainland or a Hong Kong court has exclusive jurisdiction
- Judgment is final and conclusive
Enforcement of arbitration awards v. court judgments

Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Court of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned

New version

• Signed on 18 January 2019 (Implementation date – to be determined)
• Requesting Place – Personal Jurisdiction (eg defendant’s residence or place of business, performance of contract or tort, express agreement)
• Requested Place – Not exclusive jurisdiction
• Cover monetary and non-monetary judgments, specific performance, (except punitive damages, administrative, family, bankruptcy, maritime, arbitration, etc)
• Cover IP disputes (trademarks, counterfeiting, passing off, etc) – punitive damages (but not specific performance such as injunctions)
• Cover IP disputes (trade secret) - punitive damages, and specific performance (such as injunctions)
• Grounds to refuse enforcement (eg lack of due process, judgment obtained by fraud, etc)
Enforcement of arbitration awards v. court judgments

Application for recognition and enforcement of civil judgments in foreign courts for disputes between LIU Li and TAO Li etc

The Intermediate People's Court of Wuhan Municipality

• 30 June 2017
• Recognized and enforced a US court judgment
• Based on the principle of reciprocity
• A judgment issued by the Los Angeles Superior Court, which recognized and enforced a PRC court judgment (Hubei Gezhouba Sanlian Industrial Co Ltd and Hubei Pinghu Cruise Co Ltd vs. Robinson Helicopter Company Inc)
Enforcement of arbitration awards v. court judgments

Application for the recognition and enforcement of civil judgments and rulings of special procedures in foreign court between Kolmar Group AG and Jiangsu Textile Industry (Group) Import & Export Co., Ltd.

Kolmar Group AG

The Intermediate People’s Court of Nanjing Municipality

- Recognized and enforced a Singaporean court judgment
- December 2016
- Based on the principle of reciprocity
- A judgement issued by the High Court of Singapore has enforced a PRC judgment issued by the Intermediate People’s Court of Suzhou Municipality in January 2014
Enforcement of arbitration awards v. court judgments

On 12 September 2017, China signed (but not yet ratified) the Hague Convention on Choice-of-Court Agreement

- Promotes recognition and enforcement of foreign judgment
- Convention entered into force in October 2015 and has been signed and ratified by Mexico, Singapore and the European Union (on behalf of 28 member states)
- Convention signed but not yet ratified by the US, Ukraine and Montenegro
- Needs “an exclusive choice of court agreement”

On 8 June 2017, China and ten member states of ASEAN (including Singapore, Indonesia, Malaysia, Thailand, Vietnam etc) announced a joint statement of initiatives promoting judicial assistance

- If there is no precedent in a country refusing enforcement of a judgment in another country based on lack of reciprocity, then it should be presumed that there is mutual reciprocity between the two countries.
Enforcement of arbitration awards v. court judgments

Is enforcement still an important advantage for arbitration awards?

• Average enforcement rate of foreign arbitral awards in China from 1994 to 2015 is 68%
• Significantly improved in recent years (86.4% during the period from 2011 to 2015)
• January 2018, the SPC issued the Relevant Provisions on Issues concerning Applications for Verification of Arbitration Cases under Judicial Review
  • Expansion of the Reporting System
Enforcement of arbitration awards v. court judgments

Is enforcement still an important advantage for arbitration awards?

• Need proper arbitration clause
  • Application for recognition and enforcement of an Singapore International Arbitration Center arbitral award by Bao Resources International Pte. Ltd.
  • August 2017
  • PRC Courts refused to enforce the SIAC arbitral award
  • Award made under expedited procedure which provided that “the case shall be referred to a sole arbitrator, unless the President determines otherwise”
  • Contrary to the parties’ agreement for 3 arbitrators
Thank You
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Terence Wong is a partner at Winston & Strawn who focuses his practice on commercial arbitration. He helps clients resolve disputes via international arbitration as well as other dispute resolution mechanisms (such as mediation, expert determination, and court proceedings). In addition, Terence drafts construction contracts for major projects.

Terence is familiar with the arbitration rules of many arbitral institutions, including the China International Economic and Trade Arbitration Commission (CIETAC), the Shanghai International Court of Arbitration (SHIAC), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) Model Rules, and the Terms of the London Maritime Arbitrators Associations (LMAA).

Terence is a Fellow with the Chartered Institute of Arbitrators, and is listed in the Panel of Arbitrators with CIETAC, SHIAC, HKIAC, and SAC.

Terence has solid experience in dealing with multi-jurisdictional disputes, including China, Hong Kong, Singapore, England, France, Indonesia, the Middle East, Nigeria, Tanzania, and Venezuela. His experience spans a wide range of sectors such as infrastructure (such as rail, roads, and bridges), power and utilities, energy, real estate, international trade, shipping, joint venture, intellectual property etc.
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