THE INTERNATIONAL ARBITRATION REVIEW

NINTH EDITION

Editor
James H Carter

THE LAWREVIEWS

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2018

Chapter 11

CHINA

Keith M Brandt and Michael K H Kan[1]

I INTRODUCTION

2018 marks two important developments for the arbitration community in China. First, the Supreme People's Court of China (SPC) has published two new provisions regarding the enforcement of arbitral awards in mainland China that came into effect in the first quarter of the year. Secondly, the China International Economic and Trade Arbitration Commission (CIETAC) has also published new procedural rules for investor–state dispute arbitrations, and established a new public-private partnership arbitration centre. These developments demonstrate a firm resolution by the Chinese judiciary to improve certainty and transparency on enforcement of arbitral awards locally and by China to take on a wider spread of arbitrations internationally.

No doubt, the One Belt One Road Initiative (OBOR) has been highly influential in propelling the development of dispute resolution mechanisms and resources in China, ever since the release of the blue book on Dispute Resolution Mechanism for Belt and Road Initiatives by International Academy of the Belt and Road in October 2016; prospectively, China is planning the establishment of an international commercial court for OBOR disputes.

In Hong Kong, the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance 2017 (Third-Party Funding Amendment Ordinance) that permits third-party funding of arbitrations has finally been passed and is anticipated to come into effect later this year. In addition, the arbitrability of intellectual property rights (IPR) disputes is also provided with clarification with the enactment of the Arbitration (Amendment) Ordinance 2017 (Arbitration Amendment Ordinance). CIETAC has also developed rules regarding appointment of arbitrators by the CIETAC Hong Kong Arbitration Centre (CIETAC HK) acting as appointing authority in *ad hoc* arbitrations. Lastly, in recent cases, the Hong Kong courts have continued to demonstrate their pro-arbitration stance where parties have explicit arbitration agreements.

II THE YEAR IN REVIEW

i Enforcement of arbitral awards in mainland China

On 23 February 2018, the SPC issued the SPC Provisions on Issues related to Enforcement of Arbitral Awards by the People's Court (SPC Enforcement Provisions), which became effective on 1 March 2018.

1 Keith M Brandt is the managing partner and Michael K H Kan is a counsel at Dentons Hong Kong LLP.

The SPC Enforcement Provisions apply to enforcement of domestic and foreign-related arbitral awards only, that is, those made in arbitrations administered by Chinese arbitral institutions in mainland China pursuant to the Arbitration Law of the People's Republic of China (PRC Arbitration Law). Hence, it does not apply to awards made in foreign arbitrations, that is, those seated outside mainland China. This is, presumably, because recognition and enforcement of foreign arbitrations is and should continue to be governed by the time-tested New York Convention regime to which China has been a signatory state since 1986.

The SPC Enforcement Provisions contain the following main provisions.

a The right of the third party to challenge enforcement of the arbitral award: the SPC Enforcement Provisions clarify that a non-party who is the legitimate holder of legal and valid rights of interests has standing to challenge the enforcement of an arbitral award that would affect such rights or interest. In order to raise such a challenge (1) the third party must be able to provide evidence that demonstrates that the arbitration is a sham or maliciously applied for, which violates the non-party's legitimate interest, (2) the enforcement affecting such rights has not yet complete, and (3) application must be made within 30 days upon the date when the non-party knows about or ought to have known of the enforcement. The non-party needs to establish that he or she is legitimate holder of the right or interest, which is legal and valid, the parties to the arbitration have fabricated the facts or their legal relationship, and conclusions of the arbitral award dealing with the parties' rights and obligations are wholly or partly incorrect, which affected the non-party's legitimate interest.

b The grounds for non-enforcement of certain arbitral awards: Article 237 of the Civil Procedure Law of the People's Republic of China (PRC Civil Procedure Law) provides that a ground for non-enforcement of a domestic award is where 'the matter arbitrated falls outside the scope of the arbitration agreement or which the arbitral institution has no jurisdiction to arbitrate'. There has hitherto been some uncertainty and debate from time to time whether a particular situation falls within this ground. The SPC Enforcement Provisions now provide the necessary clarification: (1) the matter arbitrated falls outside the scope agreed in the arbitration agreement; (2) the matter arbitrated is non-arbitrable according to law or the arbitration rules agreed by the parties; (3) the arbitral award falls beyond what has been requested by the parties; and (4) the arbitral institution making the arbitral award is not the arbitral institution agreed by the parties. It would appear that the clarification would also apply to the similar ground for non-enforcement of foreign-related arbitral awards under Article 274 of the PRC Civil Procedure Law.

The SPC Enforcement Provisions further state that an award debtor should make an application to resist enforcement of an arbitral award within 15 days of receipt of the enforcement notice; a non-party challenging the enforcement should make an application within 30 days from when he or she receives knowledge of or ought to have received knowledge of the enforcement. Failure to make a timely application will result in dismissal of the application.

ii Judicial review and approval of arbitration cases

On 29 December 2017, the SPC promulgated the SPC Provisions on Certain Issues Related to the Conduct of Judicial Review of Arbitration Cases and the SPC Provisions on Issues Concerning Application for Approval of the Arbitration Cases under Judicial Review, which became effective on 1 January 2018 (SPC Judicial Review Provisions).

The key changes brought by the SPC Judicial Review Provisions include:

a extending the reporting procedure to domestic arbitrations: under an established reporting procedure, a mainland Chinese court intending to refuse to recognise or enforce an international arbitration award must report to the higher court and, ultimately, the SPC. In last year's review, we reported of a plan to extend the reporting mechanism to domestic awards. Under the SPC Judicial Review Provisions, a similar reporting procedure now applies to domestic arbitrations – decisions to invalidate an arbitration agreement, set aside an award or refuse to enforce an arbitral award must first be approved by a higher people's court before it can be effective. Nonetheless, there is no need to report to the SPC for approval, save for cases involving parties from difference provinces or if the ground for refusing enforcement or setting aside of the award is infringement of public interest;

b opening the door to party participation in the reporting procedure: prior to the SPC Judicial Review Provisions, the reporting procedure is an internal process within the people's court. The parties are neither informed of the process nor have the opportunity to make submissions to the higher court reviewing the decision. With the implementation of the SPC Judicial Review Provisions, the higher court now has the ability to raise requisitions with the parties or require the lower courts to conduct further fact finding. Parties may therefore have an opportunity to participate in the reporting procedure and address requisitions from the higher court; and

c clarifying the choice of an applicable law to uphold the validity of a foreign-related arbitration agreement: the SPC Judicial Review Provisions also clarify an ambiguity arising from Article 18 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships. Article 18 stipulates that if the parties fail to agree on the applicable law of the arbitral agreement, the law of the locality of the arbitral institution or the law of the arbitral seat shall apply. An issue arises where the legal positions under the two systems of law conflict. It has now been clarified that the system of law that would result in a valid arbitral agreement shall prevail.

While the SPC Judicial Review Provisions do not directly relate to international arbitrations *per se*, they demonstrate steps being taken by the Chinese judiciary to align and harmonise the systems and standards that apply between enforcement of international arbitral awards (including foreign-related awards) and domestic awards. This should be welcome by foreign parties who have agreed or are compelled to adopt domestic arbitration.

iii CIETAC investment arbitration rules for investor–state arbitrations

In last year's review, it was reported that the new Arbitration Rules of the Shenzhen Court of International Arbitration (SCIA Rules) was published and became effective from 1 December 2016. The SCIA Rules sought to expand the coverage of the Shenzhen Court of International Arbitration (SCIA) to the administration of investor–state disputes. The SCIA is the first arbitral commission in mainland China to administer investor–state dispute.

This year, on 19 September 2017, CIETAC published the new Arbitration Rules of the China International Economic and Trade Arbitration Commission for International Investment Disputes (For Trial Implementation) (CIETAC Rules), which became effective from 1 October 2017. The CIETAC Rules are the first set of arbitration rules published

by CIETAC for investor–state international investment disputes. The CIETAC Rules are designated as subject to 'trial implementation', which based on Chinese practice, means that the CIETAC Rules are effective but may be revised for improvement.

Article 2 of the CIETAC Rules provides that the CIETAC Rules may apply in 'cases involving international investment disputes arising out of contracts, treaties, laws and regulations, or other instruments between an investor and a state, an intergovernmental organisation, any other organ, agency or entity authorised by the government or any other organ, agency or entity of which conducts are attributable to a State'. Article 3 of the CIETAC Rules also provides that the CIETAC Rules apply where the parties have agreed to refer an international investment dispute to CIETAC for arbitration. The CIETAC Investment Dispute Settlement Centre (CIETAC IDSC) in Beijing and CIETAC HK are responsible for administration of international investment dispute arbitration cases. According to Article 4 of the CIETAC Rules, CIETAC IDSC is the default centre where the parties have agreed to refer an international investment dispute to CIETAC for arbitration, save where the parties have expressly agreed to designate Hong Kong as the place of arbitration or to refer the dispute to CIETAC HK, in which case CIETAC HK shall administer the case. The CIETAC Rules also provide that the default place of arbitration shall be the domicile of CIETAC IDSC or CIETAC HK (as the case may be) that administers the case. The arbitral tribunal may also determine the place of arbitration to be another location that is within the territory of a New York Convention state. The CIETAC Rules expressly permit third-party funding of arbitrations, albeit this ought to be subject to constraint of local laws.

Given the long-standing reputation of CIETAC as a leading arbitral institution in China, the extension of the CIETAC Rules to investor–state disputes offers a serious alternative choice of a dispute resolution forum to the increasing number of investors dealing with the Chinese government or otherwise investing in China. The CIETAC Rules further offer an option for Chinese companies seeking to resolve disputes with government bodies of host countries under OBOR. The attractiveness is augmented by the flexibility vested in the parties to choose either China or Hong Kong as the seat of arbitration under the CIETAC Rules.

iv First public-private partnership arbitration centre in China

On 16 May 2017, CIETAC launched the CIETAC Public-Private Partnership (PPP) Arbitration Centre (PPP Arbitration Centre) in Beijing. The PPP Arbitration Centre applies the CIETAC Rules, but maintains a distinct panel of arbitrators consisting of Chinese and international experts in PPP. With the rising prominence of PPP construction projects, coinciding also with the anticipated increase in number of such projects under OBOR, the set-up of the PPP Arbitration Centre is no doubt a conscious and fitting move to meet the consequential rising demand for arbitration in these projects.

CIETAC is not the first, however, in its initiative. In October 2016, the Wuhan Arbitration Commission established the OBOR Arbitration Centre. Since then, the OBOR Arbitration Centre has administered five construction contract-related cases involving foreign parties from Libya, Kuwait and Vietnam. On 6 December 2017, the Wuhan Arbitration Commission declared the establishment of the OBOR PPP Arbitration Centre (OBOR PPP Arbitration Centre) for international PPP project disputes under OBOR.

Further, in January 2018, China announced SPC's plan to establish an international commercial court dedicated to OBOR, which would consist of three courts in Beijing, Xi'an and Shenzhen, and headquartered in Beijing. The court in Xi'an would settle commercial

disputes on the continental silk road while the court in Shenzhen would settle disputes on the maritime silk road. As Shenzhen is located near Hong Kong, Hong Kong may provide expertise for the Shenzhen court. This is also consistent with Hong Kong's positioning in the Great Bay Area Initiative for the Pearl River Delta region that Hong Kong may help to develop the legal system in the region with its well-established common law system and regulatory system as well as sound rule of law. However, international players still have concerns over the independence and impartiality of the court established by the Chinese judiciary. It remains to be seen how successful the international commercial court in China will be.

vi Hong Kong legal developments

Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017

In last year's review, it was reported that, the Law Reform Commission of Hong Kong published the Report on Third-Party Funding for Arbitration,[2] which recommends the legalisation of third-party funding in arbitration and related proceedings. On 14 June 2017, the Legislative Council of Hong Kong finally passed the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2016 and the Third-Party Funding Amendment Ordinance. The legislation is expected to come into effect later this year.

The Third-Party Funding Amendment Ordinance amends the Arbitration Ordinance[3] (Arbitration Ordinance) to provide to the effect that third-party funding of arbitrations, whether seated in Hong Kong or elsewhere, does not contravene the traditional doctrines of maintenance and champerty. Similar amendments are also made to the Mediation Ordinance.[4]

By way of background, the common law rules against maintenance and champerty have survived to the present day, as confirmed by the Hong Kong Court of Final Appeal.[5] Although the issue of whether those rules apply to arbitrations was expressly left open by the Court, in practice, no legal practitioner in Hong Kong would run the risk of conducting any arbitration under an arrangement that may fall foul of such rules. The Third-Party Funding Amendment Ordinance, thus, provides certainty and an appropriate framework for legal practitioners to conduct arbitration with a third-party funding arrangement.

However, funding by legal practitioners or persons providing legal services would remain impermissible, whether such funding is provided directly or indirectly, in Hong Kong or elsewhere. As a result, conditional and contingency fee arrangements would still be illegal, and any agreement for contingency fee arrangements would be invalid.[6]

A code of practice may be issued to guide the practices and standards with which third-party funders are ordinarily expected to comply. Parties would need to pay more attention to funding terms in arbitration agreements. Following the trend of third-party funding of arbitrations worldwide, the Third-Party Funding Amendment Ordinance definitely helps promote Hong Kong as a jurisdiction for arbitration practice.

2 www.hkreform.gov.hk/en/publications/rtpf.htm.

3 Cap. 609 of the Laws of Hong Kong.

4 Cap. 620 of the Laws of Hong Kong.

5 *Unruh v. Seeberger* (2007) 10 HKCFAR 31. Justice Riberio PJ: 'I leave open the question whether maintenance and champerty apply to agreements concerning arbitrations taking place in Hong Kong since it does not arise in the present case.'

6 Section 64 of the Legal Practitioners Ordinance (Cap. 159 of the Laws of Hong Kong).

Arbitration of intellectual property rights (IPR) disputes in Hong Kong

In last year's review, it was reported that the Hong Kong Arbitration (Amendment) Bill 2016 (Bill) was introduced on 2 December 2016 which sought to clarify that IPR disputes are capable of arbitration under Hong Kong law.

On 14 June 2017, the Bill was passed, and the Arbitration Amendment Ordinance came into effect on 1 January 2018. The Arbitration Amendment Ordinance confirms that all IPR disputes, whether the IPR is registered or subsists in Hong Kong or not, may be arbitrated. Further, it is not contrary to the public policy of Hong Kong to enforce arbitral awards concerning IPR.

Nonetheless, certain important constraints remain:

a Arbitral awards are only binding on the parties to the arbitral proceedings, which extend to any person or entity claiming through or under a party to the arbitral proceedings. As such, an award may not be binding on a person or entity that is a third-party licensee of the IPR, unless the third-party licensee has agreed to be so bound.

b Although IPR disputes may be arbitrated in Hong Kong, the enforceability of the award in another jurisdiction would still depend on the arbitrability of the IPR disputes in such jurisdiction and also be subject to the local laws and requirements of that jurisdiction. For instance, there remains uncertainty about whether an award would be enforceable in mainland China, where IPR disputes are not arbitrable under the PRC Arbitration Law, and therefore, it would be unlikely for mainland Chinese courts to enforce an arbitration award concerning IPR.

vii CIETAC HK's appointing authority rules for ad hoc arbitrations

On 1 July 2017, the CIETAC Hong Kong Arbitration Centre Rules as Appointing Authority in Ad Hoc Arbitration (Appointing Authority Rules) came into effect.

While the default appointing authority of arbitrators under the Hong Kong Arbitration Ordinance in Hong Kong is the Hong Kong International Arbitration Centre, the parties are free to designate an appointing authority as they wish. Article 1 of the Appointing Authority Rules provides that the rules apply in cases where CIETAC HK is designated as appointing authority of arbitrators or provides services in circumstances (1) where the parties have agreed to refer their disputes to arbitration under the UNCITRAL Arbitration Rules, (2) where the parties have agreed to refer their disputes to arbitration under other *ad hoc* arbitration rules; or (3) in other non-institutional arbitration cases conducted in accordance with provisions of law or agreement of the parties. When acting as the appointing authority, the functions of CIETAC HK include various matters set out in Article 2 of the Appointing Authority Rules, such as appointing an arbitrator at the request of a party, deciding on the number of arbitrators to be appointed at the request of a party and deciding on challenges to arbitrators at the request of a party.

viii Hong Kong court decisions

Striking out a winding-up petition in favour of arbitration

On 22 January 2018, in the case *Lasmos Ltd v. Southwest Pacific Bauxite (HK) Ltd*,[7] the court of first instance struck out a winding-up petition sought by Lasmos Limited (Lasmos) against Southwest Pacific Bauxite (HK) Ltd (Bauxite) in favour of arbitration.

7 [2018] HKCFI 426.

Lasmos and Bauxite are shareholders in a joint venture company, and Lasmos issued the winding-up petition on grounds that Bauxite failed to pay a debt under a statutory demand issued by Lasmos, arising out of a management services agreement (management services agreement). The management services agreement contains an arbitration clause.

The issue in the case was the effect of the arbitration clause in the management services agreement over the court's exercise of discretion to make a winding-up order. The Honourable Mr Justice Harris (Harris J) acknowledged the development of Hong Kong law which now encourages and supports party autonomy in determining the means by which a dispute arising between the parties should be resolved. The debt in question was in dispute, and an agreement was never concluded for how the fees for the services were to be paid. Bauxite required the dispute to be resolved in accordance with the arbitration clause in the management services agreement.

It has always been thought to be the position under Hong Kong law that, as a matter of general legal principle, the fact that the agreement contains an arbitration clause would not prevent the presentation of a winding-up petition pursuant to the Hong Kong compulsory winding up regime. Further, where a winding-up petition was issued, an arbitration clause in an agreement covering the debt in question in the winding-up petition is usually considered to be irrelevant to the court's exercise of discretion to make a winding-up order. Nonetheless, Harris J departed from the approach in earlier Hong Kong court's decisions, and held that: (1) if a company disputes the debt relied on by the petitioner; (2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and (3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation) (and files an affirmation in accordance with Rule 32 of the Companies (Winding-Up) Rules[8] demonstrating this), the petition should generally be dismissed. At the same time, Harris J considered that the court still retains and may exercise its insolvency jurisdiction. As such, a petition may still be presented (and thereafter be stayed) for the purpose of seeking an order for appointment of provisional liquidators or to engage the referral back or avoidance provisions under fraudulent preference rules, pending determination of the arbitration.

In any event, the court found that Bauxite's claim was disputed on *bona fide* and substantial grounds.

Staying litigation in favour of arbitration

On 27 November 2017, the Court of First Instance issued a judgment for *Neo Intelligence Holdings Ltd v. Giant Crown Industries Ltd*,[9] which shows the Hong Kong court's willingness to uphold an arbitral agreement which has been superseded by a supplemental agreement.

In *Neo Intelligence Holdings Ltd v. Giant Crown Industries Ltd*, the parties entered into an agreement dated 19 June 2015 (the June agreement), under which the parties agreed to negotiate for the acquisition by Neo Intelligence Holdings Ltd (Neo Intelligence) an 80 per cent shareholding of and in Giant Crown Industries Ltd (Giant Crown) and another Hong Kong company. The June agreement contained an arbitration clause that states, 'This Letter of Intent shall be governed by the laws of Hong Kong Special Administrative Region. Any dispute arising from this Letter of Intent or in connection therewith shall first be resolved

8 Cap. 32H of the Laws of Hong Kong.

9 HCA 1127/2017.

by consultation and negotiation among the parties, failing with any party may submit the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules then enforce at the Hong Kong International Arbitration Centre in Hong Kong. The award of the arbitration panel shall be final and binding upon the parties.'

On 30 November 2015, the parties entered into a further agreement (the November agreement) which supplemented and varied the June agreement. The November agreement contained a jurisdiction clause that states, 'The conclusion, the validity, interpretation of performance of this Supplemental Letter of Intent and [any] dispute arising therefrom shall be governed by the laws of the Hong Kong Special Administrative Region of the People's Republic of China, and the parties agree to submit to them on exclusive jurisdiction of the Hong Kong Special Administrative Region.'

Giant Crown sought the customary stay under Section 20 of the Arbitration Ordinance that states that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests and not later than when submitting his or her first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed. Neo Intelligence argued that the arbitration agreement in question in the June agreement was amended or superseded by the November agreement.

The Court held that it was 'clear that the parties did not intend the November Agreement to replace the June Agreement.' The November agreement was stated in one of its clauses to be an agreement which supplements the June agreement and as from its date the November agreement is to be regarded as part of the June agreement and they shall be viewed as the same document, and govern the rights and duties of all parties under the June agreement. The Court also mentioned that the June agreement explicitly states that the June agreement has full force in accordance with its content. The Court considered that the arbitration clause in the June agreement is a detailed dispute resolution clause specifying the procedures that shall be followed in the event of a dispute arising that includes a stepped process of consultation and negotiation first and only if that fails submission to arbitration, while the jurisdiction clause of the November agreement is only a simple jurisdiction clause that is to make clear that the parties submit to the non-exclusive jurisdiction of the Hong Kong courts, and does not amount to a sufficiently clear and unequivocal indication of waiver of the arbitration clause in the June agreement.

The Court also emphasised the principle that absent overwhelming evidence of an unequivocal waiver of the arbitration clause, an order to stay the proceedings in favour of arbitration shall be granted.

The case shows the Hong Kong courts' willingness to uphold an arbitration agreement in the absence of an unequivocal waiver of the arbitration agreement.

Court of Final Appeal affirming finality of arbitral awards

On 3 November 2017, the Court of Final Appeal dismissed an application for leave to appeal an application for the setting aside of an arbitral award refused by the Court of First Instance in *America International Group Inc v. Huaxia Insurance Co Ltd,*[10] which affirms the constitutionality of finality of arbitral awards under the Basic Law.

10 [2017] HKEC 2365.

There are several Hong Kong law provisions on finality of arbitral awards. Article 82 of the Basic Law provides that the power of final adjudication of Hong Kong shall be vested in the Court of Final Appeal. Section 81(4) of the Arbitration Ordinance and Section 14(3)(ea)(iv) of the High Court Ordinance,[11] on the other hand, combined to provide that no appeal shall lie for judgment or order of the court of first instance to set aside an arbitration award unless the court of first instance granted an appeal for such. American International Group Inc (AIG) argued that the sections are in violation of the principle in Article 82 of the Basic Law. The Court of Final Appeal held that Section 84(1) of the Arbitration Ordinance and Section 14(3)(ea)(iv) of the High Court Ordinance does not violate the Basic Law since there are appropriate limitations on such power of final adjudication exercised by the court of first instance.

Recognition and enforcement of foreign arbitral awards in the absence of arbitration agreements

On 11 April 2018, the Court of Final Appeal (CFA) handed down its decision in *Astro Nusantara International BV and Others v. PT First Media TBK*.[12]

While Hong Kong courts have generally adopted a pro-arbitration stance, it is trite that a ground for refusal to enforce an award under the New York Convention is where there is no valid arbitration agreement (Article V(1)(a)). In 2008, dispute arose out of a joint venture between Astro Nusantara International BV and its group (Astro Group), PT First Media TBK and its Indonesian conglomerate Lippo group (Lippo Group) which led to arbitration in Singapore. The Astro Group successfully applied to join additional parties of the Lippo Group to the arbitration. The Astro Group successfully obtained a substantial award against the Lippo Group, including the additional parties, as well as enforcement orders in Singapore and Hong Kong.

Subsequently, the Singapore Court of Appeal later held that the joinder of the additional parties was erroneous as there was no valid arbitration agreement with them. The enforcement orders against the additional parties were set aside in Singapore.

In Hong Kong, however, the Lippo Group did not make any application to set aside the enforcement orders against the additional parties until 14 months after the statutory deadline. The Court of First Instance refused to extend for making the application, which was upheld by the Court of Appeal.

The CFA disagreed. It held that the lower court failed to accord proper weight to the lack of valid arbitration agreement that wholly undermines the central arguments made by the Astro Group. The CFA adopted a broad approach towards exercising discretion to extend time, having regard to overall justice. Further, the CFA also confirmed the choice of remedies principle, under which a party is free to choose between setting aside the award at the seat of arbitration and resisting enforcement at the seat or elsewhere. The lower courts' heavy reliance on the fact that the arbitral awards have not been set aside in Singapore is inconsistent with the principle. Lastly, the CFA considered that the delay by the Lippo Group did not prejudice the Astro Group. The CFA concluded that refusing a time extension would be wholly disproportionate. The CFA allowed the appeal and extended the time for the Lippo Group to apply to set aside the enforcement orders.

11 Cap. 4 of the Laws of Hong Kong.

12 [2018] HKCFA 12.

III OUTLOOK AND CONCLUSIONS

With the promulgation and implementation of new SPC provisions, in particular by aligning the enforcement regimes between domestic and international arbitration awards, it is hoped that investors' confidence in the Chinese judicial system, and in turn doing business with Chinese businesses, would continue to build. This is of importance, in light of OBOR that would bring immense business opportunities for the Chinese. Coupled with the CIETAC's initiatives of establishing rules and a centre to deal with, respectively, investor–state disputes and PPP project disputes, China is doing as much as possible to not only build investors' confidence and align local systems with international best practices and expectations, but also keeping as many arbitrations within its boundaries as possible.

In Hong Kong, the implementation of third-party funding of arbitrations that has been prevalent in many other jurisdictions should ensure that Hong Kong stays 'competitive' in its endeavours to continue leverage upon its well-established, excellent and quality international arbitration regime.

Appendix 1

ABOUT THE AUTHORS

KEITH M BRANDT

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Keith M Brandt is the managing partner of the Dentons Hong Kong LLP office. He is a commercial dispute resolution partner specialising in heavyweight dispute resolution, including high court and commercial court litigation, domestic and international arbitration, expert determinations, ADR and mediations, with particular experience in the energy, construction and financial services sector.

Keith was educated at the University of Warwick (BA ((hons) law and sociology).

He qualified as a solicitor in England and Wales in 1985, in Hong Kong in 1985 and in Australia in 1990, and as a solicitor and barrister at the Supreme Court of the Australian Capital Territory in 1990.

He is a member of the Law Society of England and Wales and the Law Society of Hong Kong, and has various professional memberships including the International Bar Association and ICC Hong Kong.

Keith has been widely recognised for his expertise. *Chambers Asia-Pacific* 2016 states that he is known for his work on significant commercial litigation in the High Court. He specialises in finance, construction and energy issues, in which he is ranked in band 5. *Chambers Global* Asia-Wide Rankings places Keith Brandt of Dentons Hong Kong LLP as being known for his broad experience representing clients in the finance, energy and construction sectors on a range of commercial litigation. He is also skilled at advising on a variety of ADR procedures. *Chambers Asia-Pacific* 2015 identifies him as 'effective and experienced' and *Chambers Global* 2015, ranking him in band 4, remarks that he is known for his broad disputes practice, encompassing ADR, litigation and international arbitration. *Chambers Asia-Pacific* 2014 stated that Keith 'is tenacious and always available to provide urgent advice', adding that he is 'very responsive and a good guide to the differences between Hong Kong and US procedure'. Fellow lawyers greatly respect his extensive experience in the Hong Kong market. Both *Chambers Global* and *Chambers Asia-Pacific* 2012 and 2013, in the category of dispute resolution China international firm, states that Keith 'earns praise for his calm and considered approach'. Placed in 'The Experts' category, Keith appears in the 2011 *Asian Legal Business* 'Hot 100' list of Asia's 'leaders, movers and shakers'. Additionally, the 2011, 2012, 2013 and 2014 editions of the *Chambers Global Clients' Guide* place Keith in band 3 for Asia-Pacific and China (international firms) dispute resolution. *Chambers and Partners* also certified Keith as a leading lawyer in dispute resolution (international firms) in 2011. His experience has led him to advising clients in locations as diverse as Malaysia, Thailand and the Middle East. Clients are quick to underline Brandt's 'upbeat approach

and effective interpersonal skills'. In *Chambers Asia-Pacific – a Client's Guide to Asia-Pacific's Leading Lawyers for Business* 2011, Keith is named in tier 3 of dispute resolution leading individuals: 'Having been in Asia for over 20 years, Keith Brandt of Brandt Chan & Partners affiliated with SNR Denton is well versed in a range of commercial disputes', notes the guide.

MICHAEL K H KAN

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Michael K H Kan is a counsel at Dentons Hong Kong LLP. Michael has led a diversified practice on both the contentious and non-contentious sides, in private practice and as in-house legal counsel at the Hong Kong Hospital Authority. Michael has particular experience in commercial disputes, contractual disputes, shareholders disputes, SFC investigations, fraud, corruption, and bankruptcy and insolvency matters. He also has experience defending judicial review applications and advising on product liability and recall issues.

Michael formerly served as a solicitor in the Hong Kong offices of Hammonds, Kennedys and as in-house legal counsel at the Hospital Authority (Hong Kong).

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