Green light for Third Party Funding for International Arbitration in Asia

Apology legislation passed in Hong Kong – what does it mean for you?

HONG KONG HIGH COURT APPOINTS RECEIVERS AS INTERIM MEASURE IN SUPPORT OF ARBITRATION PROCEEDINGS IN MAINLAND CHINA
FROM THE EDITOR

Welcome to the 14th issue of ReSolution® in which we draw on the experience and knowledge of leading experts in the field to bring you commentary, articles and reviews on topical matters relating to domestic and international dispute resolution.

In this issue we feature dispute resolution in Asia including articles on third party funding for international arbitration, new apology legislation in Hong Kong, and the appointment of receivers by the Hong Court High Court as an interim measure in support of arbitration in mainland China. We also look at parties being held to their dispute resolution process choices by the Queensland Supreme Court, abuse of process in relation to litigating matters decided in an arbitration, waiver of right to arbitrate by election, the costs consequences of failing/refusing to mediate in the UK (see in ReSolution in Brief for further commentary on the recent UK Court of Appeal decision in Gore v Naheed and Ahmed), and more.

In Case in Brief, Sarah Redding discusses two recent cases in which the New Zealand High Court confirmed its support for arbitration and its reluctance to interfere in the arbitration process. In Forest Holdings Ltd v Mangatu Blocks Incorporation, the court made it clear that there are limited grounds for appeal from arbitral awards, which do not include challenges based on factual findings, and in Savvy Vineyards 4334 Ltd v Weta Estate Ltd, the court confirmed that arbitration agreements are independent of the other terms of a contract and will survive termination of the primary contract unless it can be established that the arbitration agreement has been rendered inoperable.

I wish to take this opportunity to thank all our contributors. We are most grateful for the support we receive from dispute resolution professionals, law firms, and publishers, locally and overseas, that allows us to share with you papers and articles of a world-class standard, and to bring you a broad perspective on the law and evolving trends in the delivery and practice of domestic and international dispute resolution.

Contributions of articles, papers and commentary for future issues of ReSolution® are always welcome. I do hope you find this issue interesting and useful. Please feel free to distribute ReSolution® to your friends and colleagues – they are most welcome to contact us if they wish to receive our publications directly.

Warmest regards,

John Green
EXPERT DETERMINATION FOR ACCOUNTING AND FINANCIAL SERVICES

Model Clause: In the event of any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, the parties must refer that dispute in the first instance to Expert Determination in accordance with the Expert Determination Rules of the New Zealand Dispute Resolution Centre.

To secure the appointment of an expert determiner contact NZDRC at registrar@nzdrc.co.nz nzdrc.co.nz
Failure to advance arbitration fees waives right to arbitrate
In Roach v. BM Motoring, LLC, 155 A.3d 985 (N.J. 2017) (No. 077125) the New Jersey Supreme Court ruled that a party's failure to advance arbitration fees in a contract dispute automatically waives that party's right to enforce an arbitration clause.
In a unanimous ruling, and its first on this question, the court said the failure to abide by contractual language mandating the advancement of arbitration fees amounts to a "material breach" of the contract, and therefore invalidates the arbitration clause. "A failure to advance required fees that results in the dismissal of an arbitration claim deprives a party of the benefit of the agreement," said Justice Lee Solomon writing for the court, "Therefore, the failure to advance fees 'goes to the essence' of the [dispute resolution agreement] and amounts to a material breach."
To permit a party to fail to advance arbitration fees would result in allowing that party to delay dispute resolution without fear of reprisal, Justice Solomon said.

Consumer protection from arbitration in the US
Mandatory arbitration clauses are found in the fine print of tens of millions of financial products, from credit cards to checking accounts in the US.
Republicans are targeting a rule that would let consumers band together to sue their banks or credit card companies in class-action lawsuits rather than having to use an arbitrator to resolve a dispute.
The Consumer Financial Protection Bureau finalised the rule last month. The rule bans most types of mandatory arbitration clauses. The agency said people who otherwise have to go it alone in resolving a financial dispute

Judge may vacate previous judgment enforcing foreign arbitral award
A federal judge in New York had discretion to vacate a previously approved confirmation of a$57 million arbitration award against the government of Laos after the award was set aside by a foreign court at the arbitral seat, an appeals court ruled in Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic, 10-CV-5256.
The case, which involves a dispute between the government of Laos and a Thailand-based company (TLL) over mining contracts, presented a novel issue for the U.S. Court of Appeals for the Second Circuit, namely how a court should approach a motion to vacate its own confirmation of an arbitration award after foreign courts with jurisdiction over the arbitration panel later sets aside the award. In the early 1990s, TLL entered into agreements with the Laotian government to mine lignite in the Hongsa region of northern Laos near the Thai border. In 1994, TLL and Laos entered into an additional contract under which Laos granted TLL the right to build at its own expense and to manage a plant to be located near the mines, that would use the mine's coal production to generate electrical power to be sold to Thailand. However, during the Asian Financial Crisis (1997 - 2000), funding negotiations and resources for the project dried up and negotiations concerning the project fell apart. In 2006, when TLL's attempts to obtain additional funding for the project failed, Laos terminated the project development agreement that it had previously brokered with the company regarding the power plant, as well as the mining contracts. Efforts to settle the matter failed and in June 2007, TLL initiated arbitral proceedings in Malaysia. In late 2009, the arbitral panel found Laos in breach for failing to properly terminate the contracts and awarded TLL approximately $57 million as compensation for losses, interest and costs. After the period for challenging the Award in Malaysia expired, TLL began enforcement actions against Laos in the United States, the United Kingdom, and France under New York Convention. TLL's enforcement efforts succeeded in the United States and the United Kingdom, resulting first in an August 2011 judgment in the United States District Court for the Southern District of New York and later, a November 2012 judgment in the High Court of Justice of England and Wales. In October 2010, almost one year after the Award was issued and nine months after a challenge was due, Laos moved in Malaysia for an extension of time within which to file its application to set aside the award. The Malaysian courts eventually granted Laos' motion and then, in 2012, set aside the award. Returning to the United States with the Malaysian judgment in hand, Laos moved under Federal Rule of Civil Procedure 60(b)(5) to vacate the District Court's August 2011 judgment enforcing the Award. In 2011, Southern District Judge Kimba Wood confirmed the award and the Second Circuit affirmed that decision. The District Court concluded that the New York Convention left it with exceedingly limited discretion. In essence, the Court held that it was bound to give effect to the Malaysian annulment unless doing so would offend basic standards of justice in the United States. Finding that neither Laos' conduct nor anything in the Malaysian court's reasoning so tainted the Malaysian order such that *vacatur* would offend fundamental standards of justice, the District Court granted Laos' motion. In related rulings, the District Court also denied TLL's later application to enforce the English judgment, on grounds that the English judgment conflicted with the presumptively dominant Malaysian judgment, and it rejected TLL's request for security from Laos to protect its interest in the Award during the proceedings and any subsequent appeals. doing so would offend basic standards of justice in the United States. Finding that neither Laos' conduct nor anything in the Malaysian court's reasoning so tainted the Malaysian order such that *vacatur* would offend fundamental standards of justice, the District Court granted Laos' motion. In related rulings, the District Court also denied TLL's later application to enforce the English judgment, on grounds that the English judgment conflicted with the presumptively dominant Malaysian judgment, and it rejected TLL's request for security from Laos to protect its interest in the Award during the proceedings and any subsequent appeals. doing so would offend basic standards of justice in the United States. Finding that neither Laos' conduct nor anything in the Malaysian court's reasoning so tainted the Malaysian order such that *vacatur* would offend fundamental standards of justice, the District Court granted Laos' motion. In related rulings, the District Court also denied TLL's later application to enforce the English judgment, on grounds that the English judgment conflicted.
Laos to protect its interest in the Award during the proceedings and any subsequent appeals. On appeal, the Court observed that the New York Convention adopts an approach that does not require a party seeking enforcement of an award in what is known as a “secondary jurisdiction” (here, the United States) to await the conclusion of all appeals of the award that may be pursued in the “primary jurisdiction” (here, Malaysia). While uniquely empowering courts in the primary jurisdiction to set aside or annul an arbitral award, the Convention also anticipates that an arbitral party that has prevailed may sue elsewhere to enforce an award before the award has been reviewed by courts in the arbitral seat.

Citing Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción (Pemex), the Court observed that although the permissive language used in Article V(1)(e) of the New York Convention could be read to suggest that a district court has “unfettered discretion” as to whether to enforce such an award, the court’s exercise of that discretion should rather be treated as “constrained by the prudential concern of international comity” and that Pemex also carved out a “public policy” exception to the comity principle for occasions when enforcing an arbitral award annulled in the primary jurisdiction is needed “to vindicate ‘fundamental notions of what is decent and just’ in the United States.”

The Court held that when conducting a Rule 60(b)(5) analysis as to whether or not to relieve a party from a final judgment (for certain specified reasons, including that the judgment is based on an earlier judgment that has been reversed or vacated) district courts should analyse the full range of Rule 60(b) considerations, including timeliness and the equities and to assign significant weight to considerations of international comity in the absence of a need to vindicate “fundamental notions of what is decent and just’ in the United States.”

Writing for the Court, Judge Susan Carney said Laos’ conduct was not “sufficiently dilatory” to justify continued enforcement of a vacated arbitration award. To find otherwise, Judge Carney wrote, would be akin to levying a $57 million fine on Laos for misconduct. “A steep fine indeed, and one that the record gives no reason to think the district court would have imposed,” the Judge said.

The Appeals Court affirmed the District Court’s order vacating the judgment. The Court concluded that the District Court did not exceed the permissible bounds of its discretion in refusing to order Laos to post security during the pendency of its Rule 60(b) motion and any subsequent appeals, nor did it err by refusing to enforce the English judgment.

Boundary disputes can also affect relationships, frustrate the use and optimisation of the utility of land and buildings, and impede property transactions. In order to prevent boundary disputes going through the courts, the House of Lords has been considering a private members’ bill which proposes that expert determination of such disputes should be mandatory. The Bill is modelled on the Party Wall Act 1996 in that it takes the dispute out of the hands of the squabbling neighbours (and arguably lawyers) to be dealt with by appointed surveyors.
In order to prevent boundary disputes going through the courts, the House of Lords has been considering a private members’ bill which proposes that expert determination of such disputes should be mandatory. The Bill is modelled on the Party Wall Act 1996 in that it takes the dispute out of the hands of the squabbling neighbours (and arguably lawyers) to be dealt with by appointed surveyors.

In sum, the Bill would require that where an owner of land wishes to establish the position of a boundary or private right of way the land owner should serve notice, accompanied by a plan, on the owner of the adjoining land (or user of a private right of way) establishing the proposed line of the property boundary or private right of way. If the adjoining land owner does not specifically consent to what is contained in the notice then a ‘dispute’ is deemed to have arisen.

Where a ‘dispute’ arises, then both parties must either select one “agreed surveyor”, or each party shall select one surveyor who will then jointly select a third surveyor. One or more of the surveyors selected (depending on the scenario) would then serve on the parties an award setting out their conclusions as to the dispute, and also setting out the costs of the matter and who should pay them.

The surveyors’ findings would be considered conclusive, and could only be challenged if an appeal was made within 28 days to the High Court. Within 28 days after expiry of the appeal period, the owner of the land would be required to submit the award to the Land Registry.

The bill seemed to be making good progress through the House of Lords, surviving a second reading in December 2016 with a date for the Committee stage expected in mid-2017. However, the general election then intervened. On 13 July 2017, the bill was reintroduced in the House of Lords. The main amendment to the bill is the introduction of a set procedure for the Royal Institution of Chartered Surveyors (RICS) to issue a Code of Practice which specifies best practice in the preparation of plans and documents under the bill. The draft Code must be approved by the Secretary of State and Parliament before coming into force.

Global Pound Conference

The Global Pound Conference series concluded on 6 July 2017, with the final conference held at the Guildhall in London. This landmark project which included a very successful one day conference in Auckland on 31 May 2017 has seen more than 3,000 corporate and disputes professionals come together in conferences spanning 29 cities across the globe throughout 2016-17, with many more following and discussing the series online and at other events.

Through interactive electronic voting at the individual conferences on a set of core questions, the series has gathered data aimed at improving systems for the resolution of commercial disputes in the 21st century - spanning court processes, arbitration and ADR. Amongst other things, the data that has been collected will provide a unique insight into what organisations are currently doing to avoid conflict and save money through innovative uses of the key dispute resolution processes.
Refusal to mediate will not always preclude costs recovery in the UK

The UK courts have increasingly encouraged parties to mediate specifically (although not exclusively) by applying costs sanctions to those parties that unreasonably refuse to mediate.

The “usual rule” in litigation is that the winning party will have a proportion of its costs paid by the losing party. However, the Civil Procedure Rules give the court a wide discretion when it comes to determining both who should pay the costs of litigation, and how much. One factor that has recently influenced the judicial exercise of discretion is whether or not a party has unreasonably refused to take part in a mediation. The decision in the 2013 case of PGF II SA v OMFS Company 1 marked a high point for judicial encouragement of mediation - the winning party was prevented from recovering any of its costs as it had failed to respond to an invitation to mediate.

Emphasising the need for the courts to encourage parties to participate in ADR, Briggs LJ said in that case that silence in the face of an invitation to mediate should, as a general rule, be treated as unreasonable. This is regardless of whether a refusal to mediate might in the circumstances have been justified.

Instead, Patten LJ noted that a failure to engage in mediation will not always be unreasonable and will not automatically result in a costs penalty. He emphasised that conduct as regards participation in ADR is simply one factor, usually of many, to be taken into account when a judge exercises his or her discretion on costs. Here the case was complex, and the claimant’s solicitor suggested that the dispute was unlikely to be capable of settlement at mediation; both factors influenced the decision of the first instance judge, with whom Patten LJ agreed.

... a refusal to mediate will not always be seen as unreasonable and will not always preclude a successful party from recovering its costs...

However, the recent Court of Appeal decision in Gore v Naheed and Ahmed [2017] EWCA Civ 369 marks a shift away from the black letter approach taken in PGF and serves as a timely reminder that a refusal to mediate will not always be seen as unreasonable and will not always preclude a successful party from recovering its costs, particularly where complex issues of fact and/or law are involved. In Gore, the court held that a refusal to mediate may be considered reasonable. Putting the point succinctly, Patten LJ said:

“I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated.”

However, the recent Court of Appeal decision in Gore v Naheed and Ahmed [2017] EWCA Civ 369 marks a shift away from the black letter approach taken in PGF and serves as a timely reminder that a refusal to mediate will not always be seen as unreasonable and will not always preclude a successful party from recovering its costs, particularly where complex issues of fact and/or law are involved.
## COURSES AND WORKSHOPS

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*Photo by Mikael Kristenson*
ANOTHER INSTANCE IN WHICH PARTIES ARE HELD TO PRE AGREED DISPUTE RESOLUTION

By Jennifer McVeigh and Hazal Gacka

Hooks Enterprises Pty Ltd v Sonnenberg Pty Ltd

Significance
The Supreme Court held that parties must comply with the dispute resolution provision and processes in a contract even if compliance is not a condition precedent to commencing litigation.

Facts
In 2012, the plaintiff, Hooks Enterprises Pty Ltd (Hooks Enterprises), and the defendant, Sonnenberg Pty Ltd (Sonnenberg), entered into a Development Management Agreement. By mid2016 Sonnenberg had not fulfilled its obligations and Hooks Enterprises terminated the contract.

The contract contained a dispute resolution provision (Clause 12), which outlined several processes for dispute resolution:
- commencing with giving a notice of dispute;
- the recipient providing a notice of response;
- both parties taking reasonable steps to resolve the dispute within 7 days of the notice of response; and
- either party referring the remaining dispute for expert determination.

Contrary to this provision, Hooks Enterprises commenced proceedings seeking damages for breach of contract, or alternatively, damages pursuant to section 236 of the Australian Consumer Law for misleading and deceptive conduct. Sonnenberg issued a notice of dispute under Clause 12. Hooks Enterprises argued that Clause 12 was not mandatory and therefore not bar to it commencing litigation. Hooks Enterprises also argued that the dispute was not amenable to expert determination because the process operated without safeguards or the supervision of the court and the claims raised mixed questions of fact and law.

Decision
The court ordered that the proceeding be stayed pending the completion of the expert determination procedure under Clause 12. Daubney J found that Clause 12 did not expressly bar the commencement of proceedings. However, his Honour found that once a party provided a notice under Clause 12, the procedure to resolve the dispute by expert determination became compulsory. Although there was no express provision preventing a party from commencing proceedings pending the outcome of expert determination, his Honour found that parties should be held to their bargain to resolve their dispute in the agreed manner, and that a party opposing a stay must persuade the court that there is good reason to allow the action to proceed.

His Honour held that Hooks Enterprises did not discharge its heavy onus to persuade the court that the stay application should be refused. Daubney J noted that the clause expressly provided that the President of the Queensland Law Society would appoint a suitably qualified expert in the event of disagreement, and that the expert was required to comply with procedural fairness and natural justice and provide written reasons for their determination. His Honour observed that a
Jennifer McVeigh, Consultant

Jennifer’s expertise is in strategic thinking – applied to resolution of construction disputes, infrastructure and mining sector procurement contracts and project delivery. A qualified mediator and arbitrator, Jennifer has 30 years’ experience in the construction industry including four years as the full time member of the Queensland Building Tribunal. Across her disputes, contract, tender and project practice, she has a well-earned reputation for her holistic strategic thinking and risk identification expertise, developing tailored legal and commercial solutions to create value and reduce risk.

“The Supreme Court held that parties must comply with the dispute resolution provision and processes in a contract even if compliance is not a condition precedent to commencing litigation.”

MinterEllison
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- NEW ZEALAND DISPUTE RESOLUTION CENTRE
- BUILDING DISPUTES TRIBUNAL
- FAMILY DISPUTE RESOLUTION CENTRE
- NEW ZEALAND INTERNATIONAL ARBITRATION CENTRE
APOLOGY LEGISLATION PASSED IN HONG KONG – WHAT DOES IT MEAN FOR

by J. Copeman, G. Thomas, D. Geiser & A. Phillips

On 13 July, Hong Kong’s Legislative Council passed a law (the Apology Law) intended to facilitate the resolution of civil disputes in the territory. The Apology Law, which is expected to be gazetted and come into force shortly, reforms the legal consequences of making any sort of apology (written, oral or by conduct). An apology will not constitute an admission of fault or liability (even if it includes such an admission), nor may it be admissible in evidence to the detriment of the apology maker. This is the case unless the maker of the apology wishes it to be admitted or it falls to be admitted in the usual way through discovery, oral evidence or an equivalent tribunal process.

Hong Kong is the first jurisdiction in Asia to enact apology legislation and its Apology Law is the broadest enacted to date worldwide. The driver behind it is that apologies may in some circumstances ‘unlock’ disputes and lead to settlement without recourse to formal legal action. Since parties (and their lawyers and insurers) may be reluctant to do anything that may be construed as an admission of liability, apologies have to date been sparse. The Apology Law seeks to incentivise disputing parties to make apologies, whether in the direct aftermath of an accident or dispute, or further down the line, should the dispute escalate.

The law has far-reaching consequences for anyone involved in contentious civil disputes, whether before the courts or tribunals in Hong Kong. The Apology Law has the scope substantially to change the way insurance, evidence and settlement are approached in civil proceedings and regulatory and disciplinary matters. The scope for ‘tactical’ apologies by counterparties should be borne in mind as set out below.

Background
The law was formulated on the basis of recommendations by the Steering Committee on Mediation, and was subject to two rounds of consultation in 2015 and 2016. Hong Kong follows in the footsteps of over 50 common law jurisdictions, including the UK, US, Canada and Australia in enacting apology legislation. Like those jurisdictions, the Apology Law is short and focuses on defining an “apology” and the inadmissibility of it, the proceedings to which the legislation applies, and the effect of apologies on insurance contracts and limitation periods.

Key aspects of the Apology Law and their implications are set out below.

“Apology”
The definition of apology (clause 4) is broad and includes so called ‘partial’ apologies (those saying sorry or expressing regret) and ‘full’ apologies (those admitting fault as part of the apology). This widens significantly the ambit of inadmissible evidence under the Apology Law. Many jurisdictions, including the UK and the majority of US states, have enacted apology legislation to cover ‘partial’ apologies only. Hong Kong’s legislature felt it vital for the definition to be broad and to include admissions of fault. Whether this prejudices a potential claimant, who is left to adduce
Evidence of liability in other ways, is open to debate. However, the policy driver, namely to encourage settlement of disputes, was regarded as the more pressing priority, and the protection of partial apologies, too limited to have any tangible and positive effect.

**Statements of fact also inadmissible in evidence**

The Apology Law goes further than all other jurisdictions with apology legislation, in that statements of fact included in an apology will also be inadmissible in evidence against the apology maker (clause 8). The intention behind this is to encourage full and burden-free apologies to prompt amicable settlement. LegCo was keen to avoid situations where parts of an apology (e.g., the surrounding statements of fact) were admissible, but the accompanying apology/admission was not. Of course, a claimant may still separately obtain evidence related to a statement of liability or fact by other independent means, for example, during discovery or during cross-examination. But this may impose on a claimant an additional evidential burden. In response to this concern, a late amendment to the bill was introduced such that, in exceptional cases (the only example cited is where there is no other evidence available for determining an issue), a statement of fact contained in an apology may be admitted as evidence at the discretion of the decision maker. It may be admitted only if he/she is satisfied that it is “just and equitable” to do so, having regard to “the public interest or interests of administration of justice”.

Whilst these are well-defined legal terms, the decision maker burdened with this call may not have a legal background in the case of certain tribunals/disciplinary boards. The scope for satellite litigation on this point is possible, which would counter the intention of the law to reduce, not increase, recourse to the courts.

**Jurisdiction**

Clause 6 states that the Apology Law applies to all civil (not criminal) disputes subject to litigation, arbitration, and almost all disciplinary and regulatory proceedings. Only proceedings under the Commissions of Inquiry Ordinance (Cap 86), the Control of Obscene and Indecent Articles Ordinance (Cap 390) and the Coroners Ordinance (Cap 504) are specifically exempted further to consultation requests by interested parties. There is scope for the Chief Executive to exempt other proceedings over time and it will be interesting to see whether this happens. Given the wide number of authorities and industry organisations, including the Hong Kong Monetary Authority and the Hong Kong Federation of Insurers, who participated in the consultation process, it is unlikely that a significant number of proceedings will be added to the exemption list.

The Apology Law expressly applies to proceedings involving the government (clause 13).

**Effect of apologies on insurance cover**

Insurance policies often contain clauses prohibiting the admission of fault by an insured without the insurer’s consent. In practice, to
Effect of apologies on insurance cover

Insurance policies often contain clauses prohibiting the admission of fault by an insured without the insurer’s consent. In practice, to date, insurers in Hong Kong tend to agree apologies only in limited circumstances (for example where there has been a clear breach). In complex claims in particular, insurers are likely to counsel against (early) “without prejudice” apologies. The fear that making an apology would adversely affect the apology maker’s insurance cover was identified by the Steering Committee as a real and significant barrier to apologies in Hong Kong. Clause 10 of the Apology Law removes this barrier by providing that an apology will not void or affect insurance cover, compensation or other benefit for any person in connection with the insurance. It matters not if the policy in question is governed by another law: if Hong Kong is the place of the litigation, tribunal or regulatory proceedings, the apology will be protected and insurance cover will not be affected. This again highlights the desire of the legislature to make Hong Kong a popular venue for dispute resolution. Insurance companies, regardless of the substantive law covering their contracts of insurance/indemnity, should take clause 10 on board.

Effect of apologies on limitation periods

Under the Limitation Ordinance (Cap 347), certain rights of action relating to land, personal property, and debts are deemed to accrue on the date of acknowledgment. Clause 9 of the Apology Law states that apologies will not constitute acknowledgements of rights of action for tolling purposes under the Limitation Ordinance (Cap 347).

Again, parties and lawyers should be cognisant of this development. In keeping with other provisions, it focuses on reducing perceived disincentives to offering apologies, by extending time for limitation purposes. In Canada, detailed legislation was required to address tolling for the purposes of its apology laws and it will be interesting to see whether this light touch amendment causes any issues in practice or results in satellite litigation.

Interplay with mediation and without prejudice negotiation

The Apology Law forms part of the government’s policy to encourage the wider use of mediation to resolve disputes. The law does not directly impact mediation, where apologies, admissions and all other statements are already protected from admissibility in other proceedings by confidentiality provisions under the Mediation Ordinance (Cap 620). This is reinforced by the common law doctrine of without prejudice privilege, which protects mediation and without prejudice negotiations. The Apology Law is really of most relevance outside of the mediation/without prejudice negotiation context in that it makes otherwise open and admissible statements automatically inadmissible. It is possible that, in making such an apology, the parties proceed on a more conciliatory footing rendering them amenable to mediation. It will certainly be interesting to see whether there is an uptick in mediation in light of the Apology Law.

Conclusion

In becoming the first jurisdiction in Asia to enact apology legislation, the law may help to further enhance Hong Kong’s position as a centre for international dispute resolution in the Asia Pacific region. Apologies certainly can enhance the chances of settlement, when made in the right circumstances and at an appropriate time.

Research showing the efficacy of apologies in reducing subsequent legal suits is most prevalent in healthcare and personal injury disputes. The challenge for Hong Kong will be to ensure that this potentially powerful law (particularly for defendants) is adequately promoted and understood by all stakeholders to the dispute resolution community. The government is planning certain education activities in this regard.

At worst, the legislation could lead to ‘hollow’ or tactical apologies that seek to pressurise complainants to settle on less advantageous terms. A (potential) defendant is safe in the knowledge that there will be no legal downsides in admitting fault. A complainant/
At worst, the legislation could lead to ‘hollow’ or tactical apologies that seek to pressurise complainants to settle on less advantageous terms. A (potential) defendant is safe in the knowledge that there will be no legal downsides in admitting fault. A complainant/plaintiff, on the other hand, armed with an open admission of fault by his or her counterparty, cannot use this to their advantage should the dispute not settle. This issue highlights the complexities of apology legislation and the potential scope for misuse.

It is hoped that the drafting of the Apology Law, which has been subject to thorough scrutiny and careful drafting, strikes the right balance and prompts genuine apologies and attempts to settle.

If you would like to discuss the implications of the Apology Law to your organisation and its disputes portfolio, please contact the authors.

**ABOUT THE AUTHORS**

**Julian Copeman**  
Greater China managing partner  
Hong Kong

**Gareth Thomas**  
Partner, Head of commercial litigation  
Hong Kong

**Anita Phillips**  
Professional support consultant  
Hong Kong

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Green light for Third-Party Funding for International Arbitration in Asia

J. Harrison, A. Chung & S. Cheung

On 14 June 2017 hot on the heels of Singapore, Hong Kong became the second jurisdiction in Asia to provide an express framework for third party funding in international arbitration.

In bringing these changes Singapore and Hong Kong have ensured that they can continue to compete with other leading arbitration jurisdictions such as the US and UK where third-party funding arrangements were already allowed.

Singapore
The Civil Law (Amendment) Act 2017 (the Act) and Civil Law (Third Party Funding) Regulations 2017 (the Regulations) came into force on 1 March 2017, together with the insertion of new rules into Singapore's Legal Profession Act (the LPA) and Legal Profession (Professional Conduct) Rules 2015 (the LPCR). These developments follow the Civil Law (Amendment) Bill which was passed on 10 January 2017.

Summary of legislative amendments
In summary, the Act provides that third party funding agreements with qualifying third-party funders will no longer be illegal and unenforceable under Singapore law as long as they relate to one of the specified categories of dispute resolution proceedings.

The Regulations set out detailed provisions regarding:
- The classes of "Prescribed dispute resolution proceedings" for which third party funding is permitted. At present, only third-party funding contracts in relation to international arbitration and related court or mediation proceedings are enforceable. This would include applications for stay of court proceedings in respect of matters which are the subject of arbitration agreements, as well as the enforcement of arbitration awards.
- It is clear from the Regulations that only professional funders are permitted to enter into third-party funding arrangements in Singapore. Regulation 4 provides that a "qualifying Third-Party Funder" must (a) carry on the "principal business" of funding dispute resolution proceedings in Singapore or elsewhere, and (b) have a paid-up share capital of not less than SGD 5 million (or the equivalent amount in foreign currency).

Lawyers and Third-Party Funding
New rules applicable to third-party funding have also been inserted into the LPA and LPCR:
- Section 107(3A) of the LPA provides that lawyers may introduce or refer a third-party funder to their clients, as long as the lawyer does not receive a direct financial benefit from the introduction or referral. Lawyers may also advise on or draft a third-party funding contract for their clients and act for their clients in any dispute arising out of the third-party funding agreement.
- The amendments to the LPCR concern two key areas:

Disclosure: Rule 49A imposes a duty on lawyers to disclose to the tribunal or court and every other party the existence of any third party funding their client is receiving, including the identity and address of the
- **Disclosure**: Rule 49A imposes a duty on lawyers to disclose to the tribunal or court and every other party the existence of any third party funding their client is receiving, including the identity and address of the third-party funder. This disclosure must be made at the date of commencement of dispute resolution proceedings (where the third-party funding contract was entered into before commencement of those proceedings) or as soon as practicable after the third-party funding contract is entered into (where the third-party funding contract is entered into on or after the commencement of proceedings).

- **Prohibition against financial interests**: Rule 49B prohibits lawyers and law firms from holding directly or indirectly any shares or other interest in the Third-Party Funder (i) which the lawyer or law firm has introduced or referred to their clients; or (ii) which has a third-party funding contract with a client of the lawyer or law firm.

**Hong Kong**

On 14 June 2017, the long awaited Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (the 2016 Bill) was finally passed in Hong Kong. Whist a Code of Practice for funders is being drawn up, it is expected that the 2016 Bill will take effect later this year.

**Summary of Legislative Amendments**

The 2016 Bill will amend the Arbitration Ordinance (Cap. 609, The Laws of Hong Kong) and the Mediation Ordinance (Cap. 620, The Laws of Hong Kong).

Under the new law:

- The doctrines of maintenance and champerty are expressly stated not to apply to third-party funding in arbitration proceedings and mediation, including proceedings before emergency arbitrators and ancillary court proceedings.
- The funded party must give notice in writing to each other party to the arbitration and the relevant arbitration body in relation to (i) the fact there is a funding agreement in place; (ii) the name of the third-party funder; and (iii) a stipulated end point of the funding agreement.
- The term 'third-party funder' has a broad meaning and unlike in Singapore it is not solely limited to professional funders. Anyone who does not have an interest in the arbitration proceedings can potentially be a third-party funder. As such, law firms and lawyers providing legal services in Hong Kong or elsewhere are allowed to provide third party funding provided that they are not involved in the same arbitration.
- Third-party funders will need to comply with a Code of Practice. An advisory body appointed by the Hong Kong Secretary for Justice will draw up such a code. The code is expected to cover provisions in areas such as confidentiality, conflicts of interest and internal procedures of third-party funders etc. and funders will be required to report annually on their compliance with the code.

**Comments**

These new third-party funding regimes are significant steps forward for Singapore and Hong Kong as leading international arbitration hubs, and the change is welcome news for the arbitration community.

Since the new third-party funding legislation does not generally apply to court litigation in Hong Kong or Singapore, some people believe that it will encourage parties with a Hong Kong or Singapore connection to opt for arbitration over litigation.

However Singapore's Senior Minister of State for Law has said that the current legislative amendments "...will serve as a testbed for third party funding. The categories may be broaded after a period of assessment". No time frame has been set for such further reform it is possible that third party funding may be extended to Singapore's International Commercial Court in the not so distant future. This would be another step towards cementing Singapore's position not just as a leading international arbitration hub, but also as a prime destination for international commercial dispute resolution.

In Hong Kong the new Bill is also timely given that Hong Kong is the "super conductor" in the PRC's rapidly developing Belt and Road Resolution Aug 2017 18
GREEN LIGHT FOR THIRD-PARTY FUNDING FOR INTERNATIONAL ARBITRATION IN ASIA - CONT...

extended to Singapore's International Commercial Court in the not so distant future. This would be another step towards cementing Singapore's position not just as a leading international arbitration hub, but also as a prime destination for international commercial dispute resolution.

In Hong Kong the new Bill is also timely given that Hong Kong is the "super conductor" in the PRC's rapidly developing Belt and Road initiative, which many are anticipating will generate more investments and trade which in turn is likely to lead to an increase in activity in the dispute resolution market in Hong Kong.

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ABOUT THE AUTHORS

Adeline Chung
Managing Associate, Dispute Resolution Singapore

Jamie Harrison
Head of Singapore Office, International Arbitration Singapore

Secy Cheung
Associate, Dispute Resolution Hong Kong

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A recent judgment from the Hong Kong High Court (Chen Hongqing v Mi Jingtian) illustrates the manner in which parties may seek interim relief in Hong Kong to support arbitral proceedings being conducted elsewhere – in this case, the appointment of receivers in connection with a CIETAC arbitration in Mainland China. The decision illustrates the wide-ranging power of the Hong Kong courts to grant measures to preserve assets or evidence (or simply to preserve the status quo between parties) in support of foreign arbitral proceedings, which will be of particular interest to parties arbitrating in Mainland China given the relatively limited powers of the PRC Courts to grant equivalent interim relief.

Background
The dispute concerned shares held in China Shanshui Investment Company Limited ("CSI") by an individual named Mr Zhang. Proceedings had been commenced against Mr Zhang in the Hong Kong courts by certain individuals who claimed that his shares were merely held on trust and that he had sought to deprive them of an alleged beneficial interest. That litigation resulted in the appointment of receivers over 45.63% of the shares in CSI. CIETAC arbitration proceedings were commenced in respect of a remaining portion of the shares held by the Defendants. The CIETAC arbitration had been filed under a share pledge and guarantee agreement that had been signed in 2015. In support of those proceedings, the Claimant filed an application to the Hong Kong Court requesting the appointment of receivers in respect of the Defendants' shares in CSI; and an order restraining the Defendants from taking any steps to cause or procure the transfer, charge or assignment of their shares, or from otherwise encumbering or dealing with the shares, save for complying with the requests of the receivers to be appointed.

In response, the Defendants argued (amongst other things) that receivership was a drastic and draconian form of interim relief which should not be granted lightly, and that in any event the Hong Kong court was not the proper forum for the Claimant to seek such relief, which should instead have been sought from the CIETAC tribunal or from a PRC court.
Hong Kong High Court Appoints Receivers As Interim Measure In Support Of Arbitration Proceedings In Mainland China - Cont.

Decision

On 27 June 2017, Justice Mimmie Chan ruled that, "[h]aving considered the entire circumstances of this case, I am satisfied that the appointment of receivers to exercise the voting and other rights in the [pledged] Shares is an interim order that may be granted by the court in Hong Kong in relation to arbitral proceedings. Bearing in mind that the [pledged] Shares are of a company in Hong Kong, the interim appointment of receivers of such [pledged] Shares will facilitate the process of the arbitral tribunal or the Mainland court that has primary jurisdiction over the Arbitration, and it is just for the court to grant such an interim order to maintain and preserve the status quo."

In relation to the argument that the relief should have been sought from the arbitral tribunal or the PRC Court, Justice Mimmie Chan cited s.45 of the Arbitration Ordinance, which she said made clear that the Hong Kong courts had both the jurisdiction and the power to grant interim measures in relation to "any arbitral proceedings which have been, or are to be, commenced outside Hong Kong". She specifically addressed the Defendants' argument that the Hong Kong court might "[usurp] the jurisdiction of the Mainland court" by recognising that the CIETAC tribunal had primary jurisdiction over the substantive dispute (and that the Mainland court had supervisory jurisdiction over those proceedings), but that the powers of the Hong Kong court existed "ancillary to the arbitral proceedings outside Hong Kong, and... for the purpose of facilitating the process". In the present case, the fact that CSI was a Hong Kong company made Hong Kong the appropriate forum in which to seek the intended interim relief.

With regard to the argument that receivership is a drastic and draconian form of relief, the court concluded that putting the shares in the hands of receivers would be the best manner of preserving the value of the shares and, as such, would be in the interests of the beneficial owners. Amongst other things, Justice Mimmie Chan considered that CSI was an investment holding company, whose sole function was to hold shares in other entities, such that any adverse impact would be far less than in the case of a company with active business interests.

Under the circumstances, the court trusted that the receivers, acting independently and under the supervision of the court, would be in the best position to preserve the value of the shares. In making this order, Justice Mimmie Chan also nullified documents executed by the Defendants which purported to transfer the shares to a third party. In doing so, she relied upon article 17 of the Model Law (incorporated as s.35 of the Arbitration Ordinance) which empowers the court to grant an order to "maintain or restore the status quo pending determination of the dispute." In the circumstance of the present case, Justice Mimmie Chan concluded that the position existing immediately before the commencement of the arbitration reflected the status quo, such that any share transfer documents signed after that date would cease to have effect pending the resolution of the dispute.

Comment

The power of the Hong Kong court to grant interim relief in support of foreign arbitral proceedings is well established. As the present case illustrates, this can be a powerful tool for parties seeking to preserve assets, evidence or the status quo pending the outcome of arbitral proceedings. It is particularly noteworthy in the context of China-related disputes, given the relatively limited preservation measures available from the Mainland courts.

Read about the authors on next page.

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The appellant company, Michael Wilson & Partners Ltd (MWP), sought to recover assets, which, it said, a former partner (Mr Emmott) acquired in breach of his contractual and fiduciary obligations in the names of the respondents (Sinclair). There had been an arbitration hearing between MWP and Mr Emmott, which MWP had lost.

In the High Court, the Judge noted that Sinclair, who was seeking to take a benefit of the arbitration award by claiming abuse of process, had not been a party to the earlier arbitration, and so would not have been bound by any detriment had the arbitration been decided differently. Nonetheless, the High Court found that it was an abuse of process for MWP to pursue Sinclair now, due to a number of 'special circumstances', which included:

- The intent for the arbitration to have effect between the parties involved, including Sinclair
- MWP being estopped from being able to make out its central allegation and necessary pre-condition of the claim (that Mr Emmott had received the shares in breach of his fiduciary duty)
- The "unusual unfairness" in permitting MWP to have a second opportunity to make the same allegations against Mr Emmott, who had successfully defended himself in the arbitration.

On appeal, the Court considered there was indeed a jurisdiction for a court to take account of an earlier arbitration (as opposed to a court) award, when considering whether proceedings were an abuse.

In particular, the Court noted that under the 'special circumstances' test, the Judge placed too much weight on:

- The intent of arbitration and award, to which Sinclair was not a party
- His view that, because MWP was inviting the Court to come to a different view to the arbitrators in relation to the nature and discharge of Mr Emmott's obligations, MWP was mounting an illegitimate collateral attack on the award
- The position of Mr Emmott in the Court

In Michael Wilson & Partners Ltd v Sinclair and Another [2017] EWCA Civ 3, the Court of Appeal for England and Wales considered whether it was an abuse of process to bring proceedings in relation to issues that had previously been decided in an arbitration involving the plaintiff (but not the defendant).
His view that, because MWP was inviting the Court to come to a different view to the arbitrators in relation to the nature and discharge of Mr Emmott's obligations, MWP was mounting an illegitimate collateral attack on the award.

The position of Mr Emmott in the Court proceedings. It would not be manifestly unfair for Mr Emmott to face MWP's allegations for a second time, as MWP was not seeking any relief against Mr Emmott and he would be treated no more than a potential witness.

The Court also noted that the party making an application of abuse had the burden of proof in establishing that an order should be made. Consequently, the Court of Appeal overturned the decision to strike out the action.

(The same parties are also litigating issues in New Zealand: see *Michael Wilson & Partners Ltd v Thomas Ian Sinclair* [2016] NZCA 376.)

See the Court's decision here: http://www.bailii.org/ew/cases/EWCA/Civ/2017/3.html
If you are a party to a commercial contract where Chartered Accountants ANZ (or ICCA or NZICA) has been named in relation to the nomination of an independent expert, this clause may no longer operate as intended. This may result in this dispute clause being unenforceable and leaving the disputing parties without an agreed approach to appoint an independent expert. It is recommended that you review any contracts to see whether this issue may arise and seek appropriate advice on your options.

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**RECOMMENDED CLAUSE**

**Recommended Clause**

The following clause should be included in contracts where the parties wish to have any future disputes resolved by Expert Determination under NZDRC’s Rules:

In the event of any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, the parties must refer that dispute in the first instance to Expert Determination in accordance with the Expert Determination Rules of the New Zealand Dispute Resolution Centre.
The High Court recently considered an appeal against an arbitral award including the ability to adduce further evidence on appeal. In his decision to dismiss the application for leave to appeal, Heath J confirmed the Court’s reluctance to interfere in the arbitration process where parties have contractually agreed to arbitrate.

Background
Mangatu Blocks Incorporation (Mangatu) owns indigenous forestry land in the Gisborne area. In 2003, Mangatu and Forest Holdings Limited (Forest Holdings) entered into a contract under which Mangatu granted Forest Holdings a registered Forestry Right to manage, protect, harvest and carry away and otherwise utilise trees, timber and logs growing or to be grown on the forest land[1]. The Forestry Right was granted for a maximum duration of 50 years, provided Forest Holdings continued to comply with the agreed terms of contract.

Forest Holdings began operating in accordance with the Forestry Right and continued operations for approximately 10 years. In July 2013, Mangatu sent a letter to Forest Holdings purporting to cancel the Forestry Right “with immediate effect” alleging breaches of contract. Forest Holdings initially opposed the termination questioning its validity, however in August 2013 Forest Holdings accepted the repudiation and elected to cancel the Forestry Right.[2].

Forest Holdings sought relief for cancellation of the Forestry Right, claiming damages in the sum of what they purported the market value of the Forestry Right was at the date of repudiation – some $10.75 million dollars. Mangatu denied its termination was unlawful or in the alternative, that Forest Holdings was only entitled to nominal damages. The parties entered arbitration to resolve the dispute.

The arbitrator concluded that Mangatu had wrongfully terminated the Forestry Right. The arbitrator considered Mangatu’s cancellation was premature and that Forest Holdings should instead have been granted 120 days to remedy the alleged breaches before termination could become effective. However, the arbitrator confirmed that Mangatu’s lack of notice did not affect Forest Holding’s ability to claim minimal damages only. In reaching this conclusion, the arbitrator determined Forest Holdings would not have been able to remedy the breaches within 120 days. The arbitrator’s approach to assessing Forest Holding’s damages claim for capital loss centered on two issues: first, that it would be necessary to determine what was a real possibility to happen at the date of repudiation, and second, quantum.

Forest Holdings appealed against the arbitrator’s damages decision, and was successful in the High Court. The High Court allowed the appeal against the arbitrator’s damages award, holding that the arbitrator was wrong to say that Forest Holdings was unlikely to recover other than nominal damages on its claim for capital loss[3]. Heath J remitted all questions of damages back to the arbitrator.

Mangatu then sought leave to appeal to the Court of Appeal against that judgment, on grounds including that the judgment failed to identify any error of law in the damages award, and wrongfully concluded that the arbitrator had pre-determined damages. Mangatu also sought
Mangatu then sought leave to appeal to the Court of Appeal against that judgment, on grounds including that the judgment failed to identify any error of law in the damages award, and wrongfully concluded that the arbitrator had pre-determined damages. Mangatu also sought permission to adduce further evidence relating to the arbitrator’s actions following the previous damages appeal decision, in support of its application for leave to appeal.

**Decision**

In reaching his decision to dismiss the application for appeal, Heath J considered the legal principles in relation to granting leave to appeal. Given arbitration is a consensual process designed to enable parties to obtain a binding decision on a dispute, Heath J observeded that generally speaking, no challenge may be made to an arbitrator’s factual findings, and that there are limited circumstances in which arbitral awards may be challenged in the High Court. His Honour went on to reiterate that Forest Holdings’ first appeal was heard following the grant of leave to appeal on a question of law under clause 5(1)(c) of the Second Schedule to the Arbitration Act 1996 ([Act](#)). Further, that Clause 5(5) of the Second Schedule of the Act confers jurisdiction on the High Court to determine whether leave should be granted to appeal to the Court of Appeal.

Heath J considered the Court of Appeal’s approach to the application of clause 5(5) in Cooper v Symes (No 2).[5] citing Randerson J’s summary at para [12]:

“(a) The appeal must raise some question of law . . . capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.

(b) Upon a second appeal, the Court of Appeal is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below.

(c) Not every alleged error of law is of such importance either generally or to the parties as to justify further pursuit of litigation that has been twice considered and ruled upon by a Court.”

In determining whether there was any need for him to consider the additional evidence proposed by Mangatu to determine whether there was a qualifying question of law fit for submission to the Court of Appeal for decision,[6] His Honour referred to Wylie J’s discussion of jurisdiction to admit further evidence in Fresh Direct Ltd v JM Batten & Associates in which Wylie J admitted some evidence relevant to the importance of the question arising on the application for leave to appeal, but ruled other evidence inadmissible:

[11] Supporting affidavits should, however, be confined to the application which is before the Court. They may be necessary to explain why leave should be given. They should not, however, seek to introduce fresh evidence which could and should have been before the Associate Judge at the first hearing and this Court on the review.
Supporting affidavits should, however, be confined to the application which is before the Court. They may be necessary to explain why leave should be given. They should not, however, seek to introduce fresh evidence which could and should have been before the Associate Judge at the first hearing and this Court on the review.

Heath J ultimately dismissed Mangatu’s application to adduce further evidence. His Honour concluded that there was no additional evidence proposed by Mangatu relevant to his decision which fell within the scope of the circumstances envisaged by Wylie J in *Fresh Direct Ltd*. Heath J dismissed the appeal as he was not satisfied it met the required threshold. His Honour acknowledged the preliminary determination by the arbitrator as to methodology used in determining damages, but found there was a factual vacuum which meant important facts remain to be determined, and that the appropriate forum for determination was by the arbitrator. Remaining facts for determination included whether Mangatu would have issued a notice to terminate at the same time, if it had proceeded on the footing that immediate termination was impossible, and what steps might have been taken in the period between any notice being given and its expiry, to determine whether, and if so, to what extent, Forest Holdings has suffered loss.

**Comment**

The outcome of the consequent arbitral decision remains to be seen, and may only become public if either party appeals the arbitrator’s award. However, Heath J’s referral of the damages quantum back to the arbitrator is to be welcomed as it demonstrates the Court’s support for arbitration and its reluctance to interfere in the arbitration process where parties have contractually agreed to pursue arbitration in the event of a dispute arising.

**References**

[1] *Forest Holdings Ltd v Mangatu Blocks Incorporation* [2017] NZHC 448 at [5].
[2] *Forest Holdings Ltd v Mangatu Blocks Incorporation* [2017] NZHC 448 at [10].
CASE IN BRIEF

Savvy Vineyards 4334 Limited v Weta Estate Limited

-by Sarah Redding

Recent High Court decision confirms effect of clause 8(1), of the First Schedule of the Arbitration Act 1996: arbitration agreements will remain operative and binding following cancellation of main contract unless proved otherwise.

Background

Savvy Vineyards 4334 Limited and Savvy Vineyards 3552 Limited (together, the Plaintiffs) had entered into contracts with Weta Estate Limited and Tirosh Estate Limited (together, the Defendants). Litigation between the Plaintiffs and Defendants over the contracts, specifically vineyard management agreements (VMAs) and grape supply agreements (GSAs), has been ongoing for some eight years. Earlier litigation determined that the Defendants had invalidly terminated the VMAs and GSAs and their notices of termination were of no effect. The Defendants were required to continue to perform their obligations pursuant to those agreements. The present proceeding relates to the Plaintiffs’ claims for damages under the GSAs for various harvest years, and claims for management fees and operations charges under the VMAs for breach of agreement and in quantum meruit.

Decision

The Defendants sought an order staying the Plaintiffs’ causes of action relating to the VMAs and referring those claims to arbitration. In particular, the Defendants relied on clause 8(1) of Schedule 1 of the Arbitration Act 1996 (Act) and Article 16(1) of Schedule 1(1) of the Act, which provide as follows:

8 Arbitration agreement and substantive claim before court
(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party’s first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

16 Competence of arbitral tribunal to rule on its jurisdiction
(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure (necessarily) the invalidity of the arbitration clause.

The Defendants argued that clause 8(1) made a stay of Court proceedings and referral to arbitration mandatory and that pursuant to Article 16(1) of Schedule 1(1) of the Act, the arbitration agreement survived the termination of the VMAs. The Plaintiffs agreed that in light of Article 16(1), the arbitration clause in the contract was to be considered as a separate contract which remained operative. However, the Plaintiffs argued that while the arbitration agreement
The Defendants argued that clause 8(1) made a stay of Court proceedings and referral to arbitration mandatory and that pursuant to Article 16(1) of Schedule 1(1) of the Act, the arbitration agreement survived the termination of the VMAs. The Plaintiffs agreed that in light of Article 16(1), the arbitration clause in the contract was to be considered as a separate contract which remained operative. However, the Plaintiffs argued that while the arbitration agreement might have survived, it did not encompass disputes being dealt with after the principal contract had come to an end and was therefore inoperative.\[11\]

The Plaintiff’s relied on clause 25 of the VMAs which related to disputes and dispute resolution. Clause 25 included provision for cancellation specifically under clause 25.5. The Plaintiffs contended that their cancellation letter complied with clause 25.5 and therefore effected valid termination of the VMAs. However, the Defendants argued instead that the prerequisites of clause 25.5 had not occurred, and that the Plaintiffs were mistakenly relying on clause 25.5 when they were in fact relying on an alleged substantial breach under the Contractual Remedies Act 1979, meaning the VMAs remained operative.

In his decision to grant the stay, Associate Judge Osborne held that unless the Plaintiffs could establish the arbitration had in fact become \textit{inoperative}, Article 8(1) of the Act meant that the Defendants were entitled to a stay of the Plaintiffs’ claims and to have the disputes referred to arbitration.\[12\] Pursuant to Article 16(1), Schedule 1 of the Act, the arbitral tribunal has the power to rule on its own jurisdiction, including as to the existence or validity of an arbitration agreement.\[13\] The Plaintiffs failed to shift the burden of the proof. Associate Judge Osborne held that the Defendants had \textit{established prima facie that the arbitration agreement remained operative in this case as the evidence indicates that the event which would have rendered the arbitration agreement inoperative...cancellation...did not occur}.\[14\]

In reaching his decision to grant the stay to allow the arbitral tribunal to determine whether it has jurisdiction in relation to the dispute, Associate Judge Osborne relied on the approach applied in three recent cases,\[15\] as summarised by Simon France J in \textit{Tamihere v Media Works Radio Ltd}.\[16\]

\begin{quote}
\textit{The authorities were recently reviewed in Ursem v Chung. It seems there is support for three approaches, being immediate referral, a prima facie assessment of whether the arbitration agreement is valid or applies, or a full consideration of the issue. Associate Judge Abbott adopted the prima facie test, an approach I am content to follow for the reasons he gives. It seems to best reflect the right of the arbitration tribunal to determine its own jurisdiction. (footnotes omitted).}
\end{quote}

Associate Judge Osborne also ordered security for costs of $12,800 (representing 80 percent of a 2B award) after balancing the respective interests of the parties, on the grounds that there were no considerations strongly weighing against requiring the Plaintiffs to provide security and there was a high degree of likelihood that the Plaintiffs will be without funds at the end of the litigation if it proves to be unsuccessful. He also dismissed the Defendants’ application to strike
Sarah graduated from the University of Otago with a Bachelor of Laws. She then worked as a graduate law clerk at the New Zealand Dispute Resolution Centre, and now is a solicitor at Kensington Swan.
Facts
The Claimants leased a building to the Defendants and it was used as a school. Thieves stole lead from the roof. It rained. The school was unusable from the water damage. The Claimants sought £210,000 for dilapidations and the Defendants sought compensation of £41,875 for rent during the period that the school was unfit for habitation as a result of the water damage. Initially the parties seemed to want to settle. In July 2011, the Defendants offered £30,000 plus costs with a drop hands on the counterclaim which the Claimants did not accept but made a Part 36 offer to accept £86,400 in August 2011. The Defendants then withdrew their offer and the case was stayed to enable alternative dispute resolution.
Both parties expressed a willingness to mediate. The Claimants were proactive and the Defendants were slow to respond to letters and raised difficulties. Nearly a year later no progress had been made on a mediation date and by October 2012, directions were given to progress matters for a trial in October 2013. The Trial was part heard and the Claimants made a Part 36 offer to accept £40,000 in February 2014. The Defendants rejected this and the Trial resumed with a net award (taking account of the counterclaim) of £28,183.52 due from the Defendants together with a subsequent award of interest.

Court of Appeal
The Court of Appeal agreed with the Trial Judge that both parties were in a similar position concerning their knowledge of the Claimants' claim but only the Defendants had knowledge of their counterclaim and were better placed to assess litigation risk. The Court of Appeal affirmed the Claimants were reasonable. The Court of Appeal then addressed mediation and agreed that the Claimants "took proactive steps", whereas the Defendants had "dragged their feet and delayed for so long that the claimants lost confidence in the process". The Court of Appeal gave five reasons why a mediation would have had a real chance of settlement:

1. It was a purely commercial dispute.
2. The monetary gap between the parties' respective positions was not that large.
3. The Claimants had taken proactive steps to settle.
4. The Defendants had dragged their feet and delayed for so long.
5. The Claimants had lost confidence in the process.

In Thakkar v Patel (2017), the Claimants failed to beat the Defendants' settlement offer, yet recovered 75% of their costs. Is this fair? The Defendants thought not and appealed. The Court of Appeal confirmed this ruling.
1. It was a purely commercial dispute.
2. The monetary gap between the parties' respective positions was not that large.
3. The costs were greater than the sum in dispute.
4. Bilateral negotiations had been unsuccessful.
5. Any mediator would have let the parties have their say and point out the gap was narrow whilst costs would escalate.

The Court of Appeal found that the vast majority of the litigation costs would have been saved if there had been a settlement in August 2012.

The Court of Appeal then went on to consider the case of *PGF II SA, v OMES Company 1 Limited* (2013). In PGF II the Court of Appeal held that silence in the face of an offer to mediate was unreasonable conduct meriting a costs sanction. The Court of Appeal in Thakkar went further and explained its reasoning as follows:

“The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene.”

**Summary**

The clear message is that prevarication will lead to cost sanctions. Parties should be slow to reject attempts at mediation, particularly where the cost to the parties of pursuing a matter to trial is high when compared against the sums at stake, and even if the parties might otherwise be more reluctant to mediate because of the recent case of *Savings Advice Limited v EDF Energy Customers PLC* (2016) in relation to costs. Whilst not directly relevant to the decision in Thakkar, it raises an interesting question in relation to the extent to which statements made in mediation can be disclosed.

We often think of mediation and the documentation produced during the mediation
the decision in Thakkar, it raises an interesting question in relation to the extent to which statements made in mediation can be disclosed. We often think of mediation and the documentation produced during the mediation process as entirely cloaked by "without prejudice privilege" which must remain confidential absent an agreement by the parties to waive that privilege. This principle (as well as the fact that all discussions must remain confidential) is usually expressly stated in the mediation agreement itself. In Savings Advice, the defendant had made statements of the costs that would be incurred in pursuing a case to trial in mediation correspondence. The claimant subsequently accepted an offer of settlement but there was a dispute over the costs that it could claim, including the premium for After the Event insurance, which was calculated by reference to the defendant's costs. The insurer had used that estimate in calculating its premium. However, the defendant subsequently stated that its costs would have been at a level lower than it had indicated in the mediation. In assessing the defendant's liability for the insurance premiums, the Court held that "without prejudice privilege" protects a party from the disclosure of admissions or concessions made in negotiations – but not the costs information contained in correspondence as that was purely factual information relating to After the Event insurance. The court held that the confidentiality clause in question allowed disclosure of the costs information and the use of the term "w.p. save as to costs" on the defendant's correspondence only served to highlight the intention of the parties. The rationale for unravelling the "cloak of mediation" was set out as follows: "In my judgment it is imperative that when parties enter into a formal mediation or informal negotiations for settlement of a claim that they do so in the full knowledge of their opponent's costs. The amount of the costs of litigation condition any subsequent negotiations or mediation that may follow."

Whilst this decision very much turned on its particular facts, the circumstances in which a party to a mediation may seek to challenge the scope of the privilege and confidentiality of the communications may be increase and give rise to greater uncertainties when advising clients.

Nevertheless, mediation remains a useful and efficient mechanism for dispute resolution and functions when each party accepts they are facing risk, but do bear in mind the following:

1. Confidentiality of the mediation – in the post Savings Advice Limited world, it is preferable to carefully limit the exceptions to the duty of confidentiality and avoid writing correspondence that is "without prejudice save as to costs".

2. If there is a genuine reason not to mediate, then that can be defensible. Otherwise be cautious about refusing to engage in the process.

3. Silence in the face of an invitation to participate in ADR is unreasonable and can attract a costs penalty (PGF II SA v OMFS CO 1 Ltd (2013))

4. Time sensitivity: an early mediation can be successful before the parties become entrenched in their positions.
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THE AUTHORS

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Stephen Turner
Legal Director

Ilana Gilbert
Associate

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HELPING FAMILIES
WHEN DOES STARTING A COURT ACTION END THE RIGHT TO ARBITRATE

Lukas Lim

Parties are sometimes advised that the choice between arbitration and litigation is final, and that taking one path permanently excludes the other. In BMO v BMP [2017] SGHC 127 ("BMO"), however, the Singapore High Court ("Court") clarified that this is not always the case. The defendant in BMO had initially filed court proceedings against the plaintiff in breach of an arbitration agreement ("Agreement"), but later abandoned them in favour of arbitration. At the arbitration and subsequently in Court, the plaintiff argued unsuccessfully that the tribunal did not have the jurisdiction to hear the matter, as the defendant's prior pursuit of litigation now barred it from arbitrating the dispute.

Waiver by election
The plaintiff's first contention was that the defendant, by electing to litigate rather than arbitrate, had taken a position inconsistent with its right to arbitrate. This constituted a "waiver by election" of its right to arbitrate and rendered the Agreement inoperative. As the Court explained, however, a waiver by election could only arise as a response by one party to the conduct of the other – typically when an innocent party elected between two inconsistent rights in response to a counterparty's wrongful conduct. In the present case, the party breaching the arbitration agreement by initiating litigation was the same party re-asserting the right to arbitrate. There was therefore no conduct by the plaintiff that the defendant was responding to, and no election that could give rise to a waiver.

Contractual repudiation
The plaintiff's second contention was that the defendant's commencement of litigation amounted to a repudiatory breach of the Agreement, which the plaintiff had accepted by participating in the litigation proceedings, thus bringing the arbitration agreement to an end. The Court noted that there were two requirements for repudiation to be established, neither of which was satisfied:
First, it had to be shown that the defendant no longer intended to be bound by the Agreement. However, the Court accepted that the defendant's actions in filing the court proceedings did not point to such an intention, as the defendant was not aware of the Agreement when litigation commenced.
Second, even if the defendant intended to repudiate the Agreement, it had to be demonstrated that the plaintiff accepted the repudiation. On this point, the Court found that the actions taken by the plaintiff in the litigation were not "steps in the proceedings" (i.e. acts that advance the hearing of the matter in court), and therefore did not constitute unequivocal acceptance of a repudiatory breach.
Promissory estoppel

The plaintiff’s final contention was that the defendant was precluded by promissory estoppel (i.e. a promise not to enforce a legal right) from pursuing arbitration, as its actions in litigating the matter constituted a representation that it would not enforce its right to arbitrate the dispute. This argument was also unsuccessful, as the Court did not agree that the defendant’s commencement of litigation could be characterised as a forbearance of any legal right. Further – as with waiver by election – promissory estoppel could only be raised against a party seeking to enforce its rights in response to another party’s breach. In this case, it was being raised by the party seeking to enforce its rights.

Comments

As illustrated in the BMO decision, a party’s commencement of litigation may not, in itself, bar a subsequent switch to arbitration, provided the following is satisfied:

- First, the party seeking to switch to arbitration must not have previously elected litigation over arbitration in response to the wrongful conduct of the other party.
- Second, the arbitration agreement must give both parties the right to arbitrate, as the initiation of litigation may otherwise constitute a unilateral waiver of that right.
- Third, the prior commencement of litigation must not have been done with the intention of rejecting or repudiating the arbitration agreement.
- Fourth, if the party had in fact initiated litigation with repudiatory intent, the repudiation must not have been accepted; i.e. the other party must not have taken any steps in the proceedings.

Even if this change of forum is possible, as a lot of time and money will likely have to be spent in front of the tribunal and the courts before it can be effected. It is therefore crucial that the decision to litigate or arbitrate a dispute is only made after a careful review of the documents and a thorough review of the available options.

* This article first appeared in CMS Law Now.

ABOUT THE AUTHOR

Lukas Lim is an associate solicitor at CMS Cameron McKenna Singapore, and is specialised in International Arbitration.

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John Green