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A. Legislation and rules

A.1 Legislation

A.1.1 Arbitrability of disputes relating to intellectual property rights (“IPRs”)

Can disputes relating to IPRs be finally resolved by arbitration? This question is often encountered because IPRs are meant to be enforceable against the world at large, whereas arbitral awards only operate to bind the parties to the arbitration. In many jurisdictions, therefore, disputes concerning the validity of IPRs for example, are deemed non-arbitrable (ie, not susceptible to being finally resolved by arbitration).

In a significant step taken by the Hong Kong Legislative Council in 2017, with effect from 1 January 2018, amendments to the Hong Kong Arbitration Ordinance, Cap. 609 confirm that under Hong Kong law, all disputes relating to IPRs would be deemed arbitrable between the parties to a dispute and any arbitral award touching upon IPRs will not be contrary to public policy only because it concerns a dispute relating to IPRs. These reforms are part of the government’s continuing efforts to enhance Hong Kong’s attractiveness as an arbitration hub.

These amendments apply to any type of dispute relating to any IPRs, irrespective of whether they are protectable by registration or whether

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they are registered or subsist in Hong Kong. Accordingly, parties to an arbitration relating to IPRs can now be assured that the Hong Kong courts will not set aside or refuse the recognition and enforcement of awards only because they involve disputes over IPRs. These include (without limitation) disputes involving: (i) the enforceability, infringement, validity, ownership, scope or duration of IPRs; (ii) a transaction in respect of IPRs; or (iii) any compensation payable for IPRs.

A.1.2 Third-party funding (“TPF”) for arbitrations in Hong Kong

In another significant development, on 23 June 2017, the AO was amended to permit and set out the legal framework for employing TPF for arbitration (and related court and mediation) proceedings in Hong Kong. Further amendments are expected to come into effect by mid-2018 that would permit TPF for arbitrations in Hong Kong subject to appropriate measures and safeguards. We discuss this topic in detail in Section C below.

A.2 Institutions, rules and infrastructure

A.2.1 HKIAC

HKIAC is currently in the process of revising its 2013 Administered Arbitration Rules. The revised rules are expected to come into effect on 1 May 2018. The proposed revisions are intended to enhance the current regimes on multiparty and multicontract arbitrations (eg, by broadening the grounds for permitting joinder) and introduce, among other things: (i) provisions relating to the disclosure of TPF; (ii) provisions expressly allowing parties to pursue other means of dispute settlement after commencement of the arbitration (eg, arb-med-arb); and (iii) default procedures for the conduct of multilingual proceedings. HKIAC is still considering whether to adopt express provisions for the early dismissal of manifestly unmeritorious claims and defenses. Such provisions were recently introduced under the latest rules of SIAC (in 2016) and the SCC (in 2017).



The proposed revisions seek to incorporate HKIAC's experiences in administering the rules and some of the more relevant arbitration developments taking place in Hong Kong and globally. The revisions are intended to further enhance the efficiency and effectiveness of arbitrations administered under the HKIAC Rules.

A.2.2 CIETAC Hong Kong Arbitration Center

On 1 September 2017, CIETAC Hong Kong published its Guidelines to Third-Party Funding in Arbitration. These Guidelines set out various principles of practice and conduct that CIETAC Hong Kong expects parties and arbitrators to observe in respect of CIETAC Hong Kong-administered arbitration proceedings where there is or may be an element of TPF. The Guidelines are useful, as they identify and deal with some of the key issues that can arise. For example, the Guidelines recommend that a party seeking funding should carefully consider the nature and extent of any prospective funder's control over the proceedings, and that a party should take independent legal advice when the prospective funding agreement calls for significant funder consultation in relation to case strategy and settlement.

B. Cases

B.1 Court of first instance dismisses claim of Crown immunity by Chinese SOE

At common law, the Crown enjoys immunity from being sued in its own courts. Unlike sovereign immunity, which is based on the notional equality of states, Crown immunity originates from the concept of the inequality of the ruler and the ruled. In Hong Kong, sovereign and Crown immunity are absolute, with no exception for purely commercial transactions or assets. However, immunity does not operate as a bar to arbitrations seated in Hong Kong. In *TNB Fuel Services Sdn Bhd v. China National Coal Group Corporation*,³ the court of first instance dismissed a Crown immunity claim by China

³ [2017] HKEC 1184.

National, a Chinese state-owned enterprise, and enforced an arbitral award by applying a charge over its shares in a Hong Kong subsidiary.

TNB had obtained an award against China National for approximately USD 5.2 million and obtained leave from the court to enforce the award in Hong Kong in the same manner as a court judgment. TNB subsequently obtained an interim order for charging China National's shares in a Hong Kong company. China National then opposed TNB's application to make the charging order final, alleging that it was entitled to Crown immunity against execution. There was no dispute that China National's sole shareholder or investor was the State Council of the PRC Central People's government which is the sovereign Crown of Hong Kong. The issue before The Honorable Justice Mimmie Chan was whether China National was able to assert Crown immunity from execution, by virtue of its claim that it was part of the CPG.

The principles of Crown immunity as applicable in Hong Kong after its handover to the PRC as the new sovereign power in 1997 were set out in *The Hua Tian Long (No 2)*.⁴ After the handover, Crown immunity continued to exist at common law. The meaning of "Crown" extends to a body corporate established by the executive arm of the Crown. When assessing whether a corporation can be said to be part of the Crown at common law, the material consideration is the control that the Crown has over that corporation, albeit the corporation's objects and function are also relevant. In terms of "control," the salient question is whether the corporation is able to exercise independent powers of its own.

To assert Crown immunity, China National had to show that it: (i) had authority to assert Crown immunity on behalf of the CPG; and (ii) cannot exercise independent powers of its own. As these were questions of PRC law, the court considered expert evidence on PRC law. The court also took into account a letter from the Hong Kong and Macao Affairs Office of the State Council, stating that a Chinese SOE

⁴ [2010] 3 HKLRD 611.



was an independent legal entity which was not deemed as a part of the CPG or a body performing functions on behalf of the CPG.

On the authority point, Chan J found that China National was not a part of the CPG, but a separate corporate entity. China National enjoyed the rights to possess, use, profit from, and dispose of its property, had operational autonomy, and was able to exercise independent powers of its own. These rights were expressly protected by PRC law, with their emphasis on the separation of government bodies and enterprises, separation of the state's administrative and contributor's functions, and the separation of ownership and management.

Chan J also considered the control test at common law, in case she was wrong that China National had failed to show it had authority from the CPG. Chan J noted that the fact that an entity enjoyed independent discretion in its operation had consistently been held by the courts to be a powerful indicator that the entity was not an agent or instrumentality of the Crown. Chan J concluded that China National was able to exercise independent powers of its own, bearing in mind the nature and degree of the control which the CPG could exercise over China National, China National's ability to exercise independent powers of its own, and because its business and operational autonomy were in fact guaranteed under PRC law.

Crown immunity is a potential defense for Chinese SOEs in enforcement proceedings in Hong Kong. However, this case provides important guidance on the application of the control test at common law and illustrates that it is only in narrow and exceptional circumstances that a Chinese SOE may be able to invoke Crown immunity in Hong Kong.

B.2 Court of first instance provides useful guidance on obtaining urgent interim measures in aid of foreign arbitral proceedings yet to be commenced

Section 45 of the AO empowers a Hong Kong court to grant an interim measure in relation to any arbitral proceedings which have been or are to be commenced in or outside Hong Kong. In *Ve Global UK Limited v. Charles Allard Jr and Intelita Limited*,⁵ the court decided to maintain an injunction that had been granted in aid of foreign arbitral proceedings at the pre-commencement stage, despite delay by the applicant in commencing the arbitral proceedings.

On 28 July 2017, Global obtained an urgent *ex parte* injunction restraining the defendants from operating various companies so as to prevent flow of confidential information from Intelita (a Hong Kong company) to Mr. Allard's alleged rival business in Hong Kong. Global obtained the injunction in aid of an ICC arbitration "to be commenced" against Intelita in London as provided in the arbitration clause under the relevant license agreement. However, Global only served its request for arbitration on Intelita on 21 September 2017. At the *inter partes* hearing before Chan J on 25 September 2017, the defendants argued that the court's jurisdiction to support arbitral proceedings was exceptional and the court should be cautious in providing assistance. As such, the court should discharge the injunction on the ground that Global's delay in commencing the arbitration amounted to an abuse of process of the court.

Chan J agreed that there had been delay in commencing the arbitration. She reminded the parties that when seeking urgent relief in contemplation of proceedings to be commenced, it was imperative for an applicant to act with diligence and speed in the service of the request for arbitration. Normally, the undertakings on which the order is granted should provide that the applicant will issue and serve the request "as soon as practicable." Global's explanation for the delay

⁵ HCMP 1678/2017.



was that Mr. Allard had intimated that he would conduct himself in a manner that might make commencement of arbitration unnecessary.

Chan J pointed out that in deciding whether to discharge the injunction on the ground of delay, the court would consider all the circumstances of the case, including the length of the delay, any explanation offered, the degree of prejudice caused to the defendant, the prejudice liable to be caused to the applicant if the injunction was to be discharged, and whether the defendant had in any way caused or contributed to the delay.

Chan J referred to the balance struck between the court's powers to grant an interim measure and its discretion to decline the measure where it was currently the subject of arbitral proceedings. The court considered it more appropriate for the tribunal to deal with the measure. Chan J added that in exercising its power in relation to foreign proceedings, the court had to consider that the power was ancillary to the proceedings and for the purposes of facilitating the process of a tribunal that had primary jurisdiction over the proceedings. However, Chan J noted that so long as the court gave regard to those matters, there was no reason why the court should not order interim measures where it was appropriate, to facilitate the process of the tribunal.

Chan J was not persuaded that Global's application amounted to an abuse of process. Although Global's delay was frowned upon by the court, Chan J was not satisfied that the defendants had suffered any prejudice as a result. She noted that granting an injunction depended on whether, in all the circumstances of the case, it was more appropriate for the orders be dealt with by the tribunal, and the balance of the risks of injustice that might be caused by the grant or refusal of the relief sought. Chan J found that there was ground for Global to apply for the injunction on an *ex parte* basis, instead of awaiting the appointment of the tribunal and seeking *inter partes* relief from the tribunal. Since Global had also shown that there was a serious question to be tried in the arbitration and that it would suffer

irreparable harm if the interim measure was not granted, which would outweigh any harm suffered by the defendants if the measure was not granted, Chan J ordered that the injunction be maintained.

This case shows that where an applicant can meet the general requirements for granting interim measures, the Hong Kong courts will not hesitate to grant an interim measure in aid of foreign arbitral proceedings provided that it facilitates the process of the tribunal and the court does not consider it more appropriate for the applicant to seek the measure from the tribunal (or an emergency arbitrator). Resorting to foreign courts for interim measures in aid of arbitrations may be critical in cases where no suitable measure can be obtained from the courts of the place where the arbitration is seated or where the applicant cannot await the formation of the tribunal or needs to seek relief on an *ex parte* basis. The case is also a reminder for parties seeking urgent *ex parte* relief in aid of future proceedings not to delay commencement of the proceedings, because delay is a factor the court will subsequently take into account in deciding whether to maintain or discharge the interim measure.

C. Funding in international arbitration

In Hong Kong, the centuries-old common law doctrines of maintenance and champerty still operate. These principles have been held by the courts to prohibit TPF for litigation, both as a tort and criminal offense, save in certain exceptional areas. However, it was less certain as to whether they also applied to TPF for arbitrations. The Hong Kong Law Reform Commission was asked to review the position. In October 2016, the LRC recommended that the AO be amended to expressly permit TPF for arbitrations in Hong Kong, subject to the adoption of ethical and financial standards for funders.

Following the adoption of the recommendation for TPF for arbitrations passed by the LRC, Hong Kong is now putting in place the necessary legislative reform for TPF in a two-stage process: (i) the AO was amended on 23 June 2017 to set out the framework for permitting TPF; and (ii) further amendments will come into effect,



likely by around mid-2018, to confirm that TPF of arbitration is not prohibited by the common law doctrines and offenses, and implementing a Code of Practice and other measures and safeguards. The key features of Hong Kong's regime on TPF for arbitrations are as follows:

- (a) TPF will be permitted for any Hong Kong-seated arbitrations and arbitration-related proceedings falling under the AO, such as emergency arbitrator proceedings or arbitration-related court proceedings. TPF will also be permitted for services provided in Hong Kong in relation to arbitrations seated outside of Hong Kong.
- (b) TPF can be in the form of money or any other financial assistance in relation to any costs of the arbitration. Anyone who is a party to a funding agreement for the provision of arbitration funding and who does not have an interest recognized by law in the arbitration other than under the funding agreement will be considered a third-party funder. Unlike Singapore, where a similar regime has also just been introduced, lawyers will be permitted to act as funders, provided they do not act for a party in relation to the arbitration. Conversely, lawyers and their firms acting for any party in relation to an arbitration continue to be prohibited under Hong Kong law from providing funding to a party in that arbitration, whether by entering into conditional or contingency fee arrangements, or in any other manner.
- (c) The funding agreement between a funded party and a funder must be in writing. The funded party will have to disclose in writing to the other parties and the arbitral tribunal (or emergency arbitrator or court) that a funding agreement has been made. Disclosure must be made at commencement of the arbitration or, if the funding agreement is made thereafter, within 15 days of the agreement being made. The funded party will also have to disclose that a funding agreement has ended and the date it ended.

- (d) The AO provides for express confidentiality obligations for parties in arbitrations, subject to certain exceptions (eg, disclosure to a professional adviser). Parties in arbitrations will be allowed to communicate confidential information to potential or existing funders who will then also become subject to such confidentiality obligations. Notably, since no provisions on privilege will be introduced, issues of privilege will have to be resolved in accordance with the doctrines of litigation privilege, common interest privilege, and waiver.
- (e) Tribunals will not be given express powers to order security for costs against funders. This is because the existing provisions and powers under the AO are considered sufficient to allow a party to seek security for costs and other relief from a tribunal.
- (f) The Code will set out standards and practices that funders are ordinarily expected to comply with in carrying out activities in connection with TPF for arbitration. For example, the Code will likely require funders to: (i) set out in the funding agreements their key features, risks, and terms (eg, grounds for termination or withholding of funding); (ii) ensure that funded parties obtain independent legal advice; (iii) ensure they have sufficient minimum capital; and (iv) have effective procedures for addressing conflicts of interest and complaints. The Hong Kong secretary for justice will monitor compliance by funders with the Code and review the position after an initial period of three years.

While TPF for arbitrations does not come without challenges, it has been recognized that TPF may benefit parties wishing to arbitrate in Hong Kong in various ways and the benefits outweigh the risks. For example, TPF may provide parties with an alternative form of financing for the efficient allocation and management of their financial resources, and allow funded parties to mitigate the risks of non-recovery of costs by passing it to the funder. Moreover, TPF for arbitrations will allow Hong Kong to maintain its position as a leading



international arbitration center regionally and globally. This is important given Hong Kong's role as financial and dispute resolution hub, including for initiatives such as China's Belt and Road Initiative (a multi-decade initiative to strengthen connectivity between Asia, the Middle East, Africa and Europe).