ARTICLE

MARCO POLO'S ARBITRATION ODYSSEY

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Marco Polo's arbitration odyssey

→ Two recent decisions with a very similar fact pattern have been treated differently in Singapore and Hong Kong.

When can the courts play the guessing game?

Two similar cases. Two different jurisdictions. Two different outcomes. How did two courts in Hong Kong and Singapore reach such opposing conclusions on whether a mystery Chinese arbitration centre can be read into an agreement?

The cases, while held in different common-law jurisdictions, saw arbitration clauses put under the microscope due to errors at the drafting stage. In both, the parties had attempted, and failed, to name an arbitration centre in China. Despite the commonalities, the courts treated the mistake in different ways. The clear unpredictability of these decisions shows why care and precision are needed when drafting arbitration agreements, and why periodically reviewing your nominated centre(s) might not be such a bad idea.

Singapore

Background

Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd [2022] SGHC 58 concerned a pair of construction contracts between the Singaporean company Great Wall and the Chinese company Shanghai Xinan. Both contracts contained the following clause:

Any dispute arising from or in relation to the contract shall be settled through negotiation. If negotiation fails, the dispute shall be submitted to China International Arbitration Center for arbitration in accordance with its arbitration rules in force at the time of submission.

This meant that the choice of law for the arbitration was that of the People's Republic of China (**PRC**). The clause, however, contained a crucial mistake. There is no arbitration centre called the *China International Arbitration Center*.

When a dispute arose, Shanghai Xinan commenced arbitral proceedings against Great Wall. The China International Economic and Trade Arbitration Commission (**CIETAC**) operated as the forum of the dispute and found in favour of Shanghai Xinan. Great Wall did not attend the arbitration. Ruling on its own jurisdiction, the award stated that CIETAC did have jurisdiction over the matter.

Proceedings

Shanghai Xinan was granted leave by the Singaporean Court under section 19 of the International Arbitration Act to enforce the award as if a judgment of the Court. In response, an application was filed under section 31 by Great Wall for Shanhai Xinan's leave to be set aside.

Central to Great Wall's argument in favour of setting aside leave was that the arbitration was invalid under PRC law. Article 16 of the Arbitration Law of the People's Republic of China states that an arbitral institution must be selected. The agreement is void where neither the agreement nor a supplementary agreement state where it will be heard. Consequently, as a non-existent arbitration institution was selected, the agreement should not be enforced.

Decision

Justice Philip Jeyaretnam of the High Court rejected the argument submitted by Great Wall. In his determination, the Court's job was to identify the intention of the parties and see if there had been a common intention to select a real arbitration institution. This conclusion was aided by the fact that Justice Jeyaretnam found it very unlikely that the parties would have intentionally selected a non-existent institution.

Part of the exercise then involved matching the incorrect name with potential real institutions. Crucially, the purpose was not to select a workable alternative but rather piece together what was meant by the incorrect name. Accordingly, Justice Jeyaretnam compared the incorrect name with that of the institution which was in fact used by the parties. It was immediately clear that the names had notable similarities. Noting that *China International* was the beginning of both names, and that the word *Arbitration* was included in both, Justice Jeyaretnam began making comparisons to other major institutions from a list. Three of the remaining four institutions in this list contained city names while the fourth contained the word *Maritime*. Consequently, Justice Jeyaretnam found that the most likely option was that the institution used by the parties happened to be the one they intended.

Hong Kong

In complete contrast to *Shanghai Xinan* was the recent Hong Kong decision of *Grand Ocean & Williams Co Limited v. Huaxicun Offshore Engineering Co Ltd* (江苏华西村海洋工程服务有限公司) [2023] HKCFI 86.

Background

In early 2020, Grand Ocean and Huaxicun Offshore Engineering Co Ltd, the latter a company incorporated in the PRC, entered into a construction contract which would be governed under PRC law. These agreements contained arbitration clauses which nominated a *Jiangsu Arbitration Commission* as the forum.This arbitration centre was either incorrectly named or completely non-existent.

When a contractual matter arose between the parties, the existence of the mistake became central to the decision in the Hong Kong Court of First Instance. The Court had to decide where the dispute would be resolved. Grand Ocean submitted that the clause was invalid due to the arbitration institution not being real, therefore not meeting the test in Article 16 of China's Arbitration Law. If that were the case, proceedings would have to occur in Hong Kong.

Decision

Due to the non-existence of the

nominated arbitration institution, the Judge held that the arbitration clause could not be effective. This was partially reached by considering the previous case of *Klockner*[1] wherein a clause which failed to identify an institution was similarly deemed invalid. The clause could not be enforced under PRC law and therefore any attempts to use an arbitration centre in the PRC would not be valid.

How non-existent is too non-existent?

The decisions seem to contradict each other so heavily that it would be worth understanding why one court held that a constructive approach should be taken while another, albeit in a different jurisdiction, did not.

Unfortunately, the *Grand Ocean* decision does not seem to consider the approach taken in *Shanghai Xinan*. It seemingly notes that the *Jiangsu Arbitration Commission* does not exist and leaves it at that. The reliance on *Klockner* also seems misguided. The facts can be distinguished by the fact that in *Klockner*, the arbitration clause used between the parties did not even attempt to nominate an institution. The clause had simply only referred to the rules which would govern the arbitration, missing a crucial element as outlined by Article 4 of the PRC's Arbitration Law.

The question then is whether it would have been better had the Hong Kong Court opted to construe a common understanding of the agreement. That this was not done seems especially strange considering that the courts in Hong Kong have long looked for a common intention. In fact, when citing a 1993 case,[2] Justice Mimmie Chan called it *clear authority* that *where the parties have clearly expressed an intention to arbitrate, the agreement is not nullified even if they chose the rules of a non-existent organisation.*[3] This approach was again endorsed in the recent ***李明實*** *v ACE Lead Profits Ltd.*[4]

It is worth noting however, that in all three of these cases, the names of the non-existent centres referenced locations that have existing centres. In other words, the clauses referenced centres in Hong Kong and Hong Kong is a location with arbitration centres. Distinction on the facts could then occur if Jiangsu, a large province within China, did not have an arbitration centre. In that event, Huaxicin may have selected a centre with such imprecision that it would be beyond a court's powers to name an alternative. This would suggest limits to how much a court can read in a common intention by the parties to arbitrate a dispute.

Without the Court having deliberated on the matter, the idea that there could be limits in this case remains a hypothetical. Beyond that, the Court of First Instance may have missed the crucial reality that there are in fact two active arbitration centres in Jiangsu. One is the Jiangsu Arbitration Centre, a branch established in Nanjing by CIETAC (the same centre inserted by Justice Jeyaretnam in *Shanghai Xinan*), and the other the Nanjing Arbitration Commission. The two centres clearly differ in name to the *Jiangsu Arbitration Commission* nominated in the agreement. However, an application of the approach taken in *Shanghai Xinan* may have revealed merit in inserting one of those two centres into the agreement. Like *Shanghai Xinan*, there are clear similarities between the non-existent centre, and the real ones.

Conclusion: Getting it right

Giving the benefit of the doubt to all the parties mentioned, there are other reasons for why a non-existent centre may be named. Like any organisation, arbitration centres do not last forever, and when they sit in a foreign jurisdiction, they can be hard to keep track of. This is all complicated by the fact that in a country as enormous as China, with numerous arbitration centres, mistakes can occur. For this reason, it may be worth conducting an annual verification to see whether the centre still exists, what name it may have taken on, or whether it still functions as it used to. Notwithstanding this, great care should clearly be given to make sure that the venue named is correct at the time of drafting the contract.

1 *Klöckner Pentaplast GmbH & Co KG v. Advance Technology (HK) Co Ltd* [2011] 4 HKLRD 262.

2 *Lucky Gold-Star International (HK) Ltd v Ng Moo Kee Engineering Ltd* [1993] 1 HKC 404

3 *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKLRD 582 at [22]

4 ***李明實*** *v ACE Lead Profits Ltd* [2022] HKCFI 3342