

## Wing Bo Ruling Bolsters Hong Kong's Arbitration Prestige

By **Caroline Simson**

*Law360, New York (April 1, 2016, 8:20 PM ET)* -- A recent decision affirming the constitutionality of a provision in Hong Kong's Arbitration Ordinance that precludes parties from appealing a court's arbitration order underscores the city-state's dedication to its pro-arbitration stance and adds to its reputation as one of the world's most-preferred arbitral seats.

In dismissing Wing Bo Building Construction Co. Ltd.'s bid to appeal a decision staying its fee dispute with a property company called Discreet Ltd. in favor of arbitration, Deputy High Court Judge Marlene Ng said that the provision of the ordinance in question is an important component of Hong Kong's policy to ensure that parties to an arbitration know they will be able to resolve disputes as quickly and inexpensively as possible.

The decision continues to solidify Hong Kong's pro-arbitration approach, particularly in light of a similar decision in *China International Fund v. Dennis Lau* that was issued by Hong Kong's Court of Appeal in August. There, the court affirmed the constitutionality of a section of the Arbitration Ordinance requiring that parties first obtain permission from Hong Kong's Court of First Instance before they can appeal a court decision refusing to set aside an arbitral award.

"The court decision once again confirmed Hong Kong as a great place for arbitration," Gareth Hughes and Donovan Ferguson — a partner and senior associate, respectively, at Ashurst LLP in Hong Kong — said in a joint email. "Not only does the Arbitration Ordinance ... create an excellent regime for parties to resolve their disputes, but the recent decision in *Wing Bo v. Discreet* once again shows the commitment that the Hong Kong courts have to the implementation of the objectives of the Arbitration Ordinance."

With the ruling, the judge has fortified Hong Kong's reputation as the third most preferred arbitral seat in the world, behind only London and Paris, according a 2015 survey released by Queen Mary University of London in partnership with White & Case LLP that polled 763 respondents, including private practitioners, general counsel, arbitrators and counsel, academics, and others.

Arbitrations that are seated in Hong Kong are governed by the Arbitration Ordinance, which was enacted in 2011 and is based on the United Nations Commission on International Trade Law. The new Arbitration Ordinance supplements the UNCITRAL model law by including provisions that certain challenges brought to the Court of First Instance, which is one body within the Hong Kong High Court, may not be subject to appeal, or may only be the subject of a further appeal with the leave of the CFI.

That's a departure from the Basic Law of the Hong Kong Special Administrative Region, the city-state's constitution, which provides a number of fundamental guarantees, including the right of final adjudication by an appeals court. According to the Hong Kong judiciary, the right of appeal is an important aspect of the city-state's legal system.

The point was raised by Wing Bo in its appeal when it argued that the provision disproportionately restricts the power of final adjudication conferred upon the Court of Final Appeal under Hong Kong law.

Nevertheless, applying the same principles relied upon in the China International case in the Wing Bo case, Judge Ng determined that even though the challenged provision curtails the right to appeal, the restriction satisfied the "proportionality" test in that it's wholly connected to the aims of the Arbitration Ordinance and should be viewed as part of its overall scheme.

Importantly in this case, the judge noted that her decision is not final. Wing Bo could still try to persuade the eventual arbitral tribunal that it has no jurisdiction to deal with the matter. Even if that tribunal decides that it does have jurisdiction, Wing Bo could still apply to the court to challenge the arbitral tribunal's jurisdiction.

Alternatively, if the arbitral tribunal sides with Wing Bo, the property company involved in the dispute, Discreet Ltd., would be precluded from raising any appeal against that decision, according to the order.

"The Wing Bo decision unequivocally recognizes that excluding rights of appeal from a decision to stay court proceedings for arbitration is proportionate and reasonable, and in no way infringes parties' rights under the Basic Law," Herbert Smith Freehills LLP partner Simon Chapman said.

According to Hogan Lovells partner James Kwan, the approach adopted in drafting the 2011 Arbitration Ordinance was to limit the ability of a party to appeal a court's decision relating to arbitration as part of the larger pro-arbitration scheme.

"Appeals slow down the arbitral process and add to costs. A major benefit of an arbitration seated in Hong Kong is its predictability — supervision by an arbitration-friendly court and minimal court interference," he said. "The court in Wing Bo ... recognized that judicial intervention permitted by the Arbitration Ordinance is predominantly in relation to matters that support the arbitral process, such as enforcement and the collection of evidence."

In fact, the decision in the Wing Bo case is just the latest in a series of decisions that Hong Kong courts have issued confirming a strong pro-arbitration approach since the new arbitration ordinance came into effect in 2011, according to Mayer Brown LLP partner Menachem Hasofer.

Those decisions have highlighted the principles of party autonomy and minimal judicial interference that are embraced in the new Arbitration Ordinance, and they made it clear that challenges to arbitration procedures and awards in Hong Kong will only be considered in exceptional circumstances where fundamental error or injustice can be clearly demonstrated, he said.

That track record has a new breed of challenges to arbitral awards and orders seen in the Wing Bo and China International Fund cases, he said, but such challenges seem unlikely to make any headway in the current legal environment.

The Wing Bo decision "adds to the recent and developing law concerning the nexus between the

guarantee of final adjudication by the courts and the principles of party autonomy, whereby courts in key arbitration jurisdictions seek to enforce the parties choice of a private dispute resolution forum, with only minimal interference by the courts in exceptional cases where fundamental error or injustice can clearly be demonstrated," he said.

--Editing by Jeremy Barker and Emily Kokoll.

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