

# Cordells Rompotis

Case Note - April 2015

## Could Arbitrations Be Held Where Agreements Nominated China As The Seat And Chinese Law As Governing Law?

---

In *Z v A*, the Court of First Instance considered whether arbitrations could be held in Hong Kong, with Hong Kong as the applicable *lex fori*, where the agreements containing the arbitration clauses nominated China as the seat of arbitration and Chinese law as the governing law of the agreement.

The parties entered into two agreements which contained the following clauses:

*"In case of breach of any of the Articles of this agreement by either of the parties...those Parties agree to arbitration as per the International Chamber of Commerce [(ICC)] and held in CHINA..."*

*"Any disputes, controversy or difference ...shall be finally settled in CHINA by arbitration pursuant to the Rules of the International Chamber of Commerce..."*

The governing law of the agreements (*lex causae*) was the law of the PRC. The applicable procedural law of the arbitration (*lex fori*) was a central issue in this case.

A dispute between the parties was referred to arbitration in accordance with the agreements. Pursuant to Art 9(3) of ICC Rules, a sole arbitrator was appointed by the ICC. Hong Kong was fixed as the place of arbitration by the International Court of Arbitration (**ICC Court**) in accordance with Art 14 of ICC Rules. The arbitrator ruled that the applicable arbitration law to be applied in determining whether or not the tribunal had jurisdiction to hear the matter was Hong Kong law. Z appealed the award, seeking a declaration that the arbitration had no jurisdiction to hear and deal with the issues in dispute and, on that basis, to set aside the award.

On appeal, the Court considered (i) whether the tribunal erred in confirming the ICC Court's determination of Hong Kong as the place of arbitration; and (ii) whether "Chinese Law" referred to the law of the Mainland or

Hong Kong Law, and whether "China" meant Mainland China or Hong Kong.

The Court had regard to settled principles of construction, namely, that the judge should put himself as a reasonable man, or rational businessman. The Court noted that the test is not a subjective one, but an objective one taking into account the intention of ordinary, reasonable and sensible businessmen in the position of the actual parties, the language used and the surrounding circumstances. As to the background to be taken into account, this includes anything which a reasonable person would have regarded as relevant, including the state of the law or proved common assumptions which were in fact quite mistaken (*BCCI v ALI* [2001] 1 AC 251). Having regard to these principles of construction and the facts, the Court observed that parties to a contract were unlikely to have intended to agree to do something legally ineffective, and where the construction of a contract or a clause is in issue, the Courts lean in favour of and prefer a construction which renders the contract enforceable and legal. Rational and reasonable businessmen would not have intended by their agreement to refer their dispute to arbitration by an institution, or in a place, which would render the arbitral award unenforceable, or otherwise than binding and effective.

At the time of the agreements, China had resumed sovereignty over Hong Kong. Accordingly, it would be artificial to find that the parties had intended China to exclude Hong Kong when they had chosen China and Chinese law. The Court had regard to expert evidence which demonstrated that there was a risk that an ICC award made in Mainland China might not be enforceable in Mainland China.

The Court concluded that it was unlikely for rational and reasonable businessmen to have intended to agree to refer their dispute to a place which would potentially render the arbitral award unenforceable and, accordingly,

found that the tribunal was properly constituted and that the arbitrator had jurisdiction over the dispute submitted by the parties.

**Legal Notices**

*International arbitration forms one of the core elements of Cordells Rompotis's practice. For full details of these services please see our website: [www.cordells.com.hk](http://www.cordells.com.hk)*

*This Note does not constitute legal advice and you should not take, or refrain from taking, any action as a result of it. No responsibility can be taken for losses arising out of any such action or inaction. Always seek advice from a solicitor in respect of any legal issue which you may have.*

**Copyright**

*All rights reserved Copyright ©2017 Cordells Rompotis. No part of these notes may be reproduced in any form by any means without the written permission of Cordells Rompotis.*