Commencing Arbitration

The commencement of an arbitration is an important procedural step, since the way in which it is commenced must comply with the requirements of law and contract. One of the first issues to be determined is the seat of the arbitration, as the seat will usually determine the procedural law governing the arbitration itself. Our client's international sales contract has a brief arbitration clause that refers "All disputes to arbitration in Hong Kong SAR, and PRC law shall govern". "The seat of the arbitration is often specified in the arbitration agreement by the selection of a particular place or country in which the arbitration is to be held."[1] "Arbitration in Hong Kong" designates Hong Kong as the juridical seat.

The next issue to be determined is the procedural law of the arbitration. "Under English law the procedural law of an arbitration is generally the law of the country in which the arbitration has its seat."[2] In our client's case, Hong King is the seat, so the Hong Kong Arbitration Ordinance (Cap. 341) shall apply. Our client should know that although the place of arbitration need not be the same as the seat of arbitration, having the seat and location in the same place presents certain advantages. For example, if we need court support to remove the arbitrator for misconduct, obtain an interim measure of protection, or subpoena a witness, it is faster and easier to go to the High Court in Hong Kong, rather than travelling to another country's court for assistance.

The principle of party autonomy means that parties are free to choose the law applicable to the substance of their dispute, as well as the procedural law that governs the arbitration.[3] "PRC law shall govern" denotes that the substantive law governing the sales contract and for deciding the merits of the case shall be PRC law.

The next question is whether the arbitration is domestic or international under the Ordinance. Since the subject matter of the case is an "international sales contract", it is almost certain that it fulfills one of the requirements stipulated in Article 1(3)(a) or 1(3)(b)(ii) of the Model Law,[4] in which case the Fifth Schedule of the Ordinance (UNCITRAL Model Law) would

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[1] *Redfern and Hunter on International Arbitration*. London: Sweet & Maxwell (2207), [2-100].
[2] *Ibid.* [2-101].
[3] Articles 28 and 20 of the Model Law.
[4] An arbitration is international if: (a) the parties have their places of bus iness in different States

apply to the arbitration. Our client should know that if the parties cannot agree on the number or appointment of arbitrators, HKIAC, not the High Court, is vested with the statutory duties to make default appointments.[5]

In the absence of conditions preliminary to commencement (e.g., mediation before arbitration), our client could commence arbitration by one of the following ways, depending on what was stipulated in the arbitration agreement (e.g., *ac hoc* or institutional arbitration):

- serving the other party notice in writing requiring them to agree to the appointment of an arbitrator; or
- giving notice in writing to HKIAC requesting it to make the appointment.[6]

Time bar

The time-bar issue should be made a preliminary issue in order to save costs. The starting date of the dispute is important in terms of the time limits applicable to claims, whether in arbitration or litigation. According to veteran arbitrator and law professor, Philip Yang, there are four types of time bar, and arbitrators have no power to extend statutory time bars, only contractual ones. First, Hong Kong's Limitation Ordinance (Cap. 347) contains limits applicable to different kinds of claims, e.g., six years from the start of a cause of action based in contracts and tort.

Second, foreign limitation provided by international conventions and foreign countries, e.g., one year for carriage of goods under the Hague-Visby Rules; four years for parties to the Limitation Convention. Our client should note that limitations provided by PRC law may apply since the contract is governed by PRC law. Article 43 provides that "The term for application for arbitration of disputes over an economic contract shall be two years, which

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at the time of the conclusion of the arbitration agreement; or (b)(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispu te is most closely connected.

[5] Section 34C of the Hong Kong Arbitration Ordinance (Cap. 341); Articles 11(3) and (4) of the Model Law.

[6] Section 34C(3) of the Hong Kong Arbitration Ordinance (Cap. 341) gives HKIAC the authority to make default appointments under the Model Law regime.

shall be counted from the date the party knows or should have known of the infringement of its rights."[7]

Third, time limits for commencing arbitration. Section 34(3) of the Limitation Ordinance (Cap. 347) applies to all arbitrations. It is vital to ascertain the date on which a claim "is brought", in the words of the Ordinance.[8] For domestic arbitration, the service of a notice to the other party shall commence arbitration,[9] but for international arbitration under the Model Law, "receipt" of notice is required.[10]

The last is contractual time limits subjecting agreements to shorter time limits than the ones prescribed by statute, such as the clause in our client's contract stating that "all claims shall be barred unless arbitration is commenced within two years after the cause of action has arisen". Since "the starting date of the dispute is uncertain" and the cause of action may have arisen for more than two years, the most important first step our client should take is to appoint an arbitrator and serve the potential debtor a notice of arbitration.

The appointment of an arbitrator and the serving of an arbitration notice should protect the time bar in the contract. If the contractual time bar operates to bar a claim, the tribunal would still have jurisdiction over the question of whether the claim was time-barred, unless the parties agree to take the issue to court.[11] The Model Law does not deal with time bar and its extension, but according to Section 2GD of the Hong Kong Arbitration Ordinance (Cap. 341), our client may apply to a tribunal for an order extending the period.[12] However, the tribunal may do so only in limited circumstances.[13] Our client should know that extensions

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7 PRC Contract law

8 Section 4(1) of the Limitation Ordinance (Cap. 347).

9 Section 31 of the Hong Kong Arbitration Ordinance (Cap. 341).

10 Article 21 of the Model Law provides: "Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent." See also Article 3 regarding receipt of written communication.

11 Following "The Sk[illegible]", the absence of agreement between the parties means that the arbitrator(s) would decide the time-bar issue, and court proceedings would be stayed. G[illegible] C[illegible] v The [illegible] S.p.A. v Se[illegible] Lines [illegible] [1998] 2 Lloyd's Law Report 638.

12 But only after a claim has arisen and after exhausting any available arbitral procedure for obtaining an extension of time.

13 The tribunal may grant an extension only if it is satisfied that (a) the circumstances were such as to be outside the reasonable contemplation of the parties when they entered into the arbitration agreement, and that it would be just to extend the period; or (b) the

are rare nowadays and time bars are strictly enforced, as illustrated by *"The "Catherine Helen"* and *"The Calypso"*.[14]

In the present case, a lot depends on timing, on when the dispute "arose" or when our client became aware of the dispute or knew/should have known of the infringement of their rights; when a cause of action was taken and what causes of action were taken. Our client should make sure that they list all the claims that are outstanding against the other party, e.g., monetary as well as indemnity claims. When considering time bar, arbitral tribunals and courts would avoid the difficulties and uncertainties of trying to deal with claims long after the event and would take the view that parties should know what claims are outstanding against each other at an early stage.

Arbitration Notice

The notice of arbitration serves to outline the scope of the dispute and thus the jurisdiction of the tribunal. It should include all possible issues being raised in sufficient detail, since it will play an important role in influencing the appointment of arbitrators by an institution in the event that the parties cannot agree the appointment of arbitrators. As mentioned in the section on Time Bar, limitations indirectly require the service of a notice of arbitration,[15] which may be served in one of four ways, e.g., by delivering it to the person on whom it is to be served.[16] In our client's case, it should be noted that if the parties choose institutional arbitration administered by the HKIAC, its rules specify how a valid notice is to be given.

Jusitce Moore-Bick held in *"The Baltic Universal"* that an arbitration notice is sufficient to commence arbitration if it makes clear by whatever language that the sender is invoking the arbitration agreement and is requiring the respondent to take steps so that the arbitral tribunal

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conduct of one party makes it unjust to hold the other parties to strict terms of the agreement.

[14] *Co[illegible] S.A. v A[illegible]"* [1998] 2 Lloyd's Law Reports 511; *[illegible]sse[illegible]c. v Co[illegible]so S[illegible] Co[illegible] S.A.* [2000] 2 Lloyd's Law Reports 243.

[15] Section 34(3) of the Limitation Ordinance (Cap. 347) provides that "an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator …"

[16] Section 34(4) of the Limitation Ordinance (Cap. 347).

can be set up.[17] For example, a message to an arbitrator asking him to accept appointment, copied to the respondent with a specific requirement that they indicate if they would accept the arbitrator, or alternatively appoint their own arbitrator, would be regarded as a proper notice.[18] A proper notice must be clear as to its intention to invoke the arbitration agreement, so a conditional request to concur in an arbitrator's appointment would not suffice to commence arbitration.[19] Similarly, a letter was held not to be "objectively clear" in giving notice of arbitration. The letter was written in the context of seeing whether the defendant would insist on arbitration, not in the context of intending to start the process of arbitration. Therefore the letter was not construed as sufficient to commence arbitration and the claimant's subsequent appointment of an arbitrator was invalid.[20] Finally, a notice of arbitration should identify the claim(s) with sufficient particularity and make clear the claimant's intention to refer the claim(s) to arbitration, not just threatening to do so.[21]

Draft Arbitration Notice

Date: November 20, 2008
(Respondent Company Name and Address)
(Respondent Law Firm and Address)

Attention: (Names of Company Director and Counsel)

Re: Notice of Arbitration

1. In view of your refusal to pay US$xxx under the attached international sales contract, we hereby notify you that the matter be referred to arbitration pursuant to the arbitration clause in paragraph xx of our sales contract that refers "All disputes to arbitration in Hong Kong SAR, and PRC law shall govern".

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17 [illegible] Co. [illegible] . [1999] 1 Lloyd's Law Reports 497.
18 Harris et al, [illegible] (4th Ed) (Oxford: Blackwell & The Chartered Institute of Arbitrators, 2007), p. 89.
19 [illegible] (2000) HCA 7693.
20 [illegible] [2008] EWHC 825.
21 [illegible] [2004] 2 Lloyd's Law Reports 109.

2. The particulars of the matter are as follows: (Provide a brief outline of all the issues)

3. We make the following claims and seek the following remedies: (State briefly all claims and remedies sought.)

4. The value of this claim is estimated at US$xxx.

5. We have appointed Mr Philip Yang as its nominee for a sole-arbitrator tribunal. Mr Yang's consent as the nominated arbitrator in this matter and his CV are attached. We would call upon you to agree to the appointment of Mr Yang as sole arbitrator, or alternatively appoint your own arbitrator.[22]

6. The foregoing shall not be construed as a complete account of the facts and events of the above matter, or a waiver of any rights, remedies or claims which we may have.

(Claimant/Counsel Name, Title and Company Name)
(Claimant/Counsel Signature)

Danger of "spending good money after bad"

Our client has expressed doubt about the potential debtor's financial strength. The ability to have the assets of the potential debtor attached, or securities lodged to have the assets released would help our client avoid "spending good money after bad". The benefit of obtaining security for claims is not just to ensure that our client will be paid, if their claim is successful, but also to enhance the possibility of an early amicable settlement. If an amicable settlement is not reached, with security in place the debtor is not likely to employ delaying tactics.

Our client can obtain security for claims by applying for a Mareva injunction, a procedural

[22] By virtue of Article 10 of the Model Law, parties are free to agree to the number of arbitrators. Failing such agreement, however, it is a mandatory requirement that three arbitrators be appointed. This makes it possible to appoint one's own arbitrator and simultaneously call for a counter -appointment within a certain time frame. Default appointment follows after that period.

order nisi,[23] a Rule B Attachment, an order for lien on cargo, arrest of ship (for maritime claims), or an interim protection order. A Mareva injunction is usually made against the bank accounts, property or insurance proceeds of the defendants. It might be the most useful to our client,[24] since it allows the assets of the potential debtor to be "freezed", even before the arbitration is under way, on the ground that the potential debtor would be unable to pay if ordered to do so or would try to dispose of their assets to avoid payment.[25] A procedural *order nisi* is a conditional interim order which is to be confirmed unless something required is done by a specified time. It can be ordered, provided it does not cause delay.[26]

Section 2GB of the Hong Kong Arbitration Ordinance (Cap. 341) empowers arbitral tribunals to make orders or give directions requiring money in dispute to be secured, along with other interim measures of protection.[27] Section 2GC(6) provide for concurrent jurisdiction of the High Court and arbitral tribunal in granting interim measures; it states that the Court may refer the granting of such measures to a tribunal. Section 2GC empowers the High Court to grant interim measures of protection. Section 2GG also provides for the enforcement of tribunal decisions, which can be used for enforcing all kinds of orders and awards.[28]

Further to the powers provided by Hong Kong law, Article 9[29] and the amended Article 17 of the Model Law also vest the tribunal with the power to order interim measures and preliminary orders. Before its amendment, Article 17 did not specify what interim measures

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23 Yang, Philip, "Security for claims in arbitration, Part II " (1996) As[illegible] March 55.

24 Our client needs to be mindful that once the debtor is Mareva -ed, its normal business will grind to a halt, and we must ascertain that this would not backfire against our client.

25 Our client must show: a) a "good arguable case" with a full and frank disclosure of facts; b) some grounds for believing that the debtor has assets; c) some grounds for our fear of the removal of assets; d) it is just and convenient to grant the injunction.

26 For example, in "[illegible] *Gl[illegible]ce*" (1980) 1 LLR 288, the arbitrator issued an interim award on condition that the claimant put up security for the return of it in case the respondent's counterclaim was successful.

27 Interim measures include: a) ordering an amount in dispute to be secured; b) ordering the inspection, detention and sale of relevant property/goods; c) granting interim injunctions and other measures; d) ordering th e attendance of an unwilling witness; e) ordering the production of documentary and other material evidence.

28 Clause 62(1) of the new draft Arbitration Bill provides that an order or direction by a tribunal in or outside of Hong Kong "is enforceable in th e same way as an order or direction of the court that has the same effect. " Cited in Lorraine De Germiny, "Arbitration Law Reform in Hong Kong: Furthering the UNCITRAL Model La w" (2008) As[illegible] 73. This is presumably why Section 4 (recognition and enforce ment of interim measures) of the amended Article 17 of the Model Law has not been adopted by the new draft Arbitration Bill.

29 Article 9 of the Model Law provides: "It is not incompatible with an arbitration agreement for a party to request, before or duri ng arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

might be. Now it states that interim measures are any temporary measures that preserve assets and evidence, prevent actions prejudicial to the arbitral process, or maintain/restore the status quo pending determination of the dispute. Our client needs to satisfy a tribunal that they would suffer irreparable harm if the measure is not granted, and they have a reasonable chance of success with their claim(s). They may apply for an interim measure ex parte together with an application for a preliminary order directing the debtor not to frustrate the purpose of the measure.

Our client may also need to obtain interim measures against the debtor in jurisdictions outside of Hong Kong, in which the debtor is located or has assets. In Hong Kong, courts may make interim orders in support of foreign arbitral proceedings, although they will exercise caution in doing so. As *"The Lady Muriel"*[30] shows, the Court of Appeal was reluctant to encroach on the procedural powers of arbitrators and refused an application for an order to inspect the vessel (for the preservation of evidence to be used in arbitration) when the arbitrators in London (seat of arbitration) were not asked to approve such an application.[31] The Court also required proof of serious and irreparable damage to the applicant's position; it was not enough that it would be just and convenient to make the order.

Danger for dilatory claimants

Our client, faced with a potentially insolvent debtor, has good reasons to be dilatory, especially if commencing arbitration fails to force payment or bring the respondent to the negotiation table. However, as Philip Yang clearly warns,[32] our client should be aware of the danger of employing delay tactics. Although the House of Lords' decision in *"The Bremer Vulkan"*[33] held that neither the courts nor arbitrators should have the power to dismiss arbitration claims for want of prosecution,[34] changes in the law both in the UK and

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30 *Owners of the Vessel "Lady M" v [illegible] Shipping Co.* (1995) HKCA (Civil) 87.

31 Philip Yang rightly argues that obtaining prior approval from arbitrators could be a logistical problem, since they cannot give approval without hearing the arguments of both parties.

32 Yang, Philip, "Strike out for want of prosecution Part I" (1994) [illegible] January 45.

33 *[illegible] v [illegible] Shipping Corporation* [1981] 1 Lloyd's Law Reports 253.

34 The rationale was that arbitration is not the same as court action in that it is consensual and both parties are bound by the contractual obligation to progress with the reference.

HK have empowered arbitrators to do so. In *TAG Wealth Management v West* [2008],[35] the arbitrator's dismissal of the claim on the ground of inordinate and inexcusable delay was upheld under Section 41(3) of the Arbitration Act 1996.

Dilatory claimants are somewhat dealt with in Article 25[36] and 23(1)[37] of the Model Law: where there is delay in submitting a claim, the arbitration proceedings may continue and an award may be made on the evidence before it. Philip Yang rightly points out that these provisions do not adequately address delays, which can occur at any time during the proceedings.[38] The Model Law does not provide strict time periods for the exchange of submissions or pleadings, and the parties have to rely on the arbitrator's discretion; neither does it provide arbitrators with the power to dismiss a claim for want of prosecution and prohibit further proceedings in respect of the same claim(s).

The inadequacies of the Model Law are remedied in Section 2GE of the Hong Kong Arbitration Ordinance (Cap. 341). It states that a claimant has a duty to prosecute the claim without delay, implying that the respondent is under no obligation to press ahead with the arbitration. In other words, contrary to Lord Diplock's ruling in *"The Bremer Vulkan"*, the respondent can "let sleeping dogs lie", even if the claimant does not progress the reference. Section 2GE(2) provides an arbitrator with the power to make an order to dismiss a claim without applying to the court, if satisfied that the claimant or their advisor has unreasonably delayed in prosecuting the claim. "Prosecuting" a claim must, by implication, refer to maintaining the momentum of proceedings once brought.[39] Section 2GE(4) defines what

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35 TAG Wealth Management v West [2008] EWHC 1466 (Comm). Before the enactment of the 1996 Arbitration Act, the House of Lords' decision in [illegible] S.A. v [illegible] Co. [illegible] [1994] 1 Lloyd's Law Reports 251.

36 Article 25 provides: "Unless otherwise agreed by the parties, if, without showing sufficient cause, (a) the claimant fails to communicate his st atement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings; … (c) any party fails to appear at a hearing or produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."

37 Article 23(1) provides: "Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim ".

38 Yang, Philip, "Strike out for want of prosecution, Part II" (1994) [illegible] February 32. The Model Law provides for defaults regarding statements of claim and defense, non-appearance and non-production of evidence but not other procedural defaults.

39 Paul Starr, "Interlocutory Applications" in The Hon. Mr Justice Ma (Editor-in-Chief) and Kaplan, Neil (Ed.) [illegible], Volume 1 (Hong Kong: Sweet & Maxwell, 2003), 13-247, p. 409.

amounts to unreasonable delay.[40]

Serious prejudice is likely to be caused by dilatory claimants when, e.g., key witnesses/ documents disappear, or companies go bust. Under these circumstances, arbitrators would be inclined to dismiss a claim, since it is their overriding duty to avoid unnecessary delay and expense (Section 2GA). Another situation where serious prejudice is likely would be when the claimant succeeds in obtaining security for the claim, such as a Mareva injunction, the arrest of a ship or forms of attachment in foreign jurisdictions, but delays and uses the security as a "ransom" to force settlement. Our client should know that case law has placed a special duty on a claimant who obtains a Mareva injunction to proceed diligently.[41] Philip Yang argues that the arbitrator should dismiss a dilatory claim with a Mareva injunction earlier than other dilatory claims. Therefore, we and our client must take care not to delay, especially when we succeed in obtaining security for the claim(s). Furthermore, our client needs to know that if their claim(s) has been dismissed, they would not be able to start a fresh reference of the same dispute, nor would they be able to go to court to prosecute their claim.[42]

(2,810 words)

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[40] Delay is unreasonable if (a) it gives rise, or is likely to give rise, to a substantial risk that the issues in the claim will not be resolved fairly; or (b) it has caused, or is likely to cause, serious prejudice to the other parties to the arbitration proceedings.

[41] Boyes v Bowmaker (Commercial) Proprietary [illegible] (1988) 1 WLR 1337.

[42] But see Starr, n 34 above, 13-235, p. 406. Paul Starr discusses the problems in Section 39C of the Hong Kong Arbitration Ordinance (Cap. 341), regarding the arbitrator's power to deal with parties in default.