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**Insights**

# INADEQUATELY REASONED ARBITRAL AWARD NOT ENFORCED BY HONG KONG COURT

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SUMMARY

In the case of *A v B & ors* [2024] HKCFI 751 (date of reasons for decision: 13 March 2024) the Hong Kong court set aside an order granted to enforce an arbitral award dated 25 August 2022 made by the sole arbitrator in an arbitration at the International Center for Dispute Resolution, under the Rules for International Commercial Arbitration of the American Arbitration Association ("**Arbitration**"), on the grounds that the Arbitrator had failed to give reasons for her decisions on key issues.


## BACKGROUND

The Arbitration concerned a dispute surrounding three License Agreements ("**Agreements**") entered into by A, as Licensor of educational services, with B, as Licensee. C and D were shareholders of B and operators of education centres ("**Centres**") under the Agreements. A sought payment of royalties under the Agreements from the Respondents, for operating further education centres after closure of the Centres under the Agreements, within the same locations as the Centres, and an injunction against the Respondents to restrain them from operating learning centres for a period of two years in Hong Kong.

It was not disputed that the three issues for the Arbitrator to consider in the Arbitration were as follows:

1. Whether C and D had personally guaranteed the liabilities of the Licensee under the Agreements;

2. The applicability and enforceability of the restrictive covenant under the Agreements; and

3. The liability and quantification of the damages payable by the Respondents.

The Arbitrator granted the award in favour of A in respect of all three issues. The Respondents challenged the arbitral award and sought to set it aside by reason that the Arbitrator had "…failed to

give any reasons for her decisions".

## PRINCIPLES

The principles behind a challenge to set aside an enforcement order of an arbitral award for failure to give adequate reasons are settled. The court cited the following cases for guidance on the factors that need to be considered:

- An arbitral award must be read and understood in its proper context, in particular against the context as to how the relevant issues have been argued before the arbitration tribunal. The reasoning process expressed in an award must be such that the readers of the award (who are mostly if not always the parties themselves only) can understand how and why the conclusion has been reached on a particular issue (*R v F* [2012] 5 HKLRD 278**,** paragraphs 36 & 37)
- The court of enforcement should not review the merits of the award. Nor is any mistake of fact or law made by the tribunal a ground to set aside or refuse enforcement of the award (*Z v Y* [2018] HKCFI 2342)
- An inference will be reached that the arbitrator has failed to consider an important pleaded issue only if such inference is shown to be clear and virtually inescapable. (*LY v HW* [2022] HKCFI 2267 citing from *ASG v ASH* [2016] SGHC 130)

The court further opined that awards "*are to be read generously, in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it*". This shows that the threshold for the applicant is necessarily high to take into account the general policy of minimal curial intervention in the enforcement of arbitral awards.

## BCLP PERSPECTIVES

It is rare for judicial intervention in such a way on the grounds that the decision was not sufficiently substantiated by the arbitrator, to the extent that it would affect the conscience of the court in enforcing the award. Most occasions for judicial intervention to set aside an arbitral award in such a manner involve lengthy and in-depth discussions into whether the arbitrator has dealt with the relevant key issues in the arbitration, and the extent to which they are considered by the arbitrator within the reasoning in the award, as it is common for parties to adopt this avenue to put forth new issues that had not been put forward to the tribunal at the time of the arbitration, in order to make the allegation that those are relevant key issues that the tribunal had failed to consider in granting the arbitral award (see for example *X & YCo v ZCo* [2024] HKCFI 695).

In this present case, the key issues were clear and undisputed. The court cited extracts from the award in question, remarking that there was only a recitation of or reference to the relevant clause, "without any explanation…as to how she dealt with or considered the parties' arguments." A party seeking to set aside a award on the ground of insufficient reasons faces a heavy onus. But the fact

that the Respondents who were seeking to challenge this award succeeded in satisfying the court to this effect demonstrates a serious inadequacy in the arbitrator's analysis behind granting the award, which was picked up by the court in the case.

Hong Kong is a pro-arbitration and pro-enforcement jurisdiction. This case demonstrates that while Hong Kong courts typically are non-interventionist towards arbitrations, they will not shy away from making appropriate directions in cases (which will be exceptional and rare in practice) where it is clear that the arbitrator's reasoning behind the granting of the arbitral award demonstrates a lack of consideration of the relevant key issues. This synergy between the courts and arbitration demonstrates the attractiveness of Hong Kong as a seat for arbitration. In the context of challenges against enforcement of awards, the courts play an unmistakable role of sifting out and granting challenges that, such as in the present case, genuinely contain a lack of reasoning, on the one hand, and on the other hand, unmeritorious challenges which seek to repackage arguments which had not, for whatever reason, been made the focus of submissions, and presenting them to the Court as key issues which had not been dealt with by the tribunal.

## RELATED PRACTICE AREAS

- Business & Commercial Disputes
- Construction Disputes
- International Arbitration
- Investigations
- Litigation & Dispute Resolution

## MEET THE TEAM


### Glenn Haley

Hong Kong SAR

glenn.haley@bclplaw.com
+852 3143 8450



### Hilary Chan

Hong Kong SAR

hilary.chan@bclplaw.com
+852 3143 8410


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