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Insights

FAILED APPLICATION FOR SETTING ASIDE AN ARBITRAL AWARD BEFORE HONG KONG COURT ON THE GROUNDS OF THE LACK OF PROPER NOTICE OF THE APPOINTMENT OF ARBITRATOR AND/OR NON-COMPLIANCE OF THE ARBITRAL PROCEDURE

May 23, 2022

K v T ([2022] HKCFI 1194, HCCT 53/2021, 26 April 2022) was a court application made by the Respondent in the arbitration for an extension of time to set aside an arbitral award.

BRIEF FACTS

The sum in dispute was the small sum of HK$356,500, which was part of the sums (a) invested by the Claimant pursuant to a Shareholders Agreement and (b) which the Respondent agreed, but failed, to return to the Claimant by way of installment payments in accordance with a Repayment Agreement.

Both the Shareholders Agreement and the Repayment Agreement contained an arbitration clause, stating that (a) the agreements were governed by Hong Kong law and (b) "*any dispute or difference arising out of, or in connection with the agreements shall (if not mediated) be referred to and determined by arbitration at HKIAC in accordance with its Domestic Arbitration Rules*".

On 23 March 2018, the Claimant commenced an arbitration against the Respondent.

In May 2018, the Claimant's solicitors and the HKIAC exchanged correspondence (with the Respondent copied in) regarding the Claimant's application for HKIAC to appoint a sole arbitrator. See issue (2) below for more detail. By a letter dated 15 June 2018, the HKIAC notified the parties that an Arbitrator had been appointed.

On 3 July 2018, the Arbitrator, by email, informed the parties that he agreed to act as the sole arbitrator and directed the parties to pay a deposit for the Arbitrator's fees (the "**Deposit**"). On 5 September 2018, the Plaintiff replied to the Arbitrator's email.

On 21 September 2018, the Respondent, by email, told the Arbitrator she would neither (a) participate in the arbitration, nor (b) provide any Deposit. Immediately afterwards, the Claimant

asked the Arbitrator to give an award against the Respondent on the basis that the Respondent had no intention to defend the Claimant's claim in the arbitration.

On 3 October 2018, the Arbitrator ordered that unless the Respondent provided her share of the Deposit by 10 October 2018, she would be debarred from adducing evidence for the arbitration.

The Respondent made no payment of the Deposit and did not file any further defence or submissions.

On 4 March 2019, the Arbitrator proceeded with the arbitration hearing as originally scheduled. The Respondent did not attend the hearing.

On 15 August 2019, the Arbitrator handed down the arbitral award. In the arbitral award, the Arbitrator reminded himself of (a) his duty to evaluate the evidence and (b) that the Respondent's non-participation by her failure to file a defence and attend the hearing did not abrogate such duty, and was not to be treated as an admission of the Claimant's case. The Arbitrator found against the Respondent and ordered her to pay the Claimant's claimed sum of HK$356,500, with interest and costs.

In June 2021, the Respondent applied to the Court of First Instance (the "**Court**") for an extension of time to seek to set aside the arbitral award. Her grounds for the purported application for setting aside were:-

1. The Respondent was not given proper notice of the appointment of the arbitrator (Article 34(2)(a)(ii) of the UNCITRAL Model Law as incorporated by section 81(1) of the Arbitration Ordinance (Cap. 609) (the "**Model Law**")); and

2. The composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement (Article 34(2)(a)(iv) of the Model Law).

On 26 April 2022, the Court dismissed the Respondent's application with costs to the paid by the Respondent on the indemnity basis. In this blog, we will look at the Court's reasoning for the dismissal.

BURDEN OF PROOF ON THE APPLICANT

Pursuant to Article 34(2)(a) of the Model Law, it is the applicant in a setting aside application who must furnish proof of the existence of one or more of the grounds for setting aside. If a ground is made out, the Court nonetheless has a residual discretion whether to set aside the award.

ISSUE (1): WHETHER PROPER NOTICE OF THE APPOINTMENT OF THE ARBITRATOR HAD BEEN GIVEN TO THE RESPONDENT

The Respondent contended that (a) she had never approved or confirmed the appointment of the Arbitrator, (b) she disagreed with the Arbitrator's fees because such fees were unreasonably high and disproportionate to the sum in dispute, and (c) she had never indicated her agreement to the appointment of the Arbitrator.

Article 34(2)(a)(ii) of the Model Law provides: "*the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case*".

The Court said that if a party has been given proper notice of the appointment of a particular arbitrator, in the manner agreed under the arbitration agreement, such party has no ground to complain that it was not happy with or did not approve the appointment of the particular arbitrator.

In the present case, neither of the Respondent's (a) disagreement with the Arbitrator's fees and (b) refusal to pay the Deposit, could not mean that the Respondent had not been given notice of the appointment of the Arbitrator. If the Respondent considered the Arbitrator's fees to be unreasonable, there were avenues open to her to challenge them. That was a separate matter to the question of whether the Respondent had been "given proper notice of the appointment of an arbitrator".

Based on the following, the Court rejected the Respondent's contention and found that the Respondent had been given proper notice of the appointment of the Arbitrator:-

1. The Respondent never claimed non-receipt of the HKIAC's letter dated 15 June 2018 by which the HKIAC notified the parties that the Arbitrator had been appointed.

2. The Respondent replied to the Arbitrator's email dated 3 July 2018, in which the Arbitrator informed the parties that he agreed to act as the sole arbitrator in the arbitration.

3. Clearly, the Respondent was notified by both the HKIAC and the Arbitrator of the appointment of the Arbitrator.

4. Such notice was properly given (a) pursuant to and under HKIAC Domestic Arbitration Rules and (b) in accordance with the parties' agreement in the arbitration clause.

ISSUE (2): WHETHER THE COMPOSITION OF THE TRIBUNAL OR THE ARBITRAL PROCEDURE WAS IN ACCORDANCE WITH THE PARTIES' AGREEMENT

The Respondent relied upon the same contentions from issue (1) above to allege the appointment of the arbitrator was not in compliance with the agreement of the parties, and hence the arbitral award should be set aside pursuant to Article 34(2)(a)(iv) of the Model Law.

Article 34(2)(a)(iv) of the Model Law provides: "*the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement*

was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law".

In the present case, the arbitration clause did not contain any procedure for the appointment of arbitrators, nor did it specify the number of arbitrators. There was no requirement for both the Claimant and the Respondent to approve or consent to the arbitrator appointed by the HKIAC.

Steps taken by the parties and the HKIAC on the appointment of the Arbitrator were as follows:-

1. By the Notice of Arbitration dated 23 March 2018, the Claimant proposed that a sole arbitrator should be appointed by HKIAC. This was in compliance with Article 1 of the HKIAC Domestic Arbitration Rules, which requires the claimant to send to the respondent a Notice of Arbitration, which shall include a proposal that either HKIAC appoints the arbitrator or a list of up to three names from which the respondent may choose an arbitrator.

2. On 7 May 2018, the Claimant's solicitors applied to the HKIAC for an arbitrator to be appointed.

3. On 16 May 2018, the Claimant's solicitors wrote to the HKIAC and proposed the appointment of a "less senior arbitrator".

4. On 21 May 2018, the HKIAC invited the Respondent to submit her comments on the Claimant's proposal to appoint a "less senior arbitrator".

5. On 15 June 2018, in the absence of Respondent's response, the HKIAC proceeded to appoint the Arbitrator.

The Court held that the appointment of the Arbitrator was in accordance with the HKIAC Domestic Arbitration Rules and section 23 of the Arbitration Ordinance.

Even if there was any default in compliance with the HKIAC Domestic Arbitration Rules with regard to appointment of the Arbitrator, the Respondent did not argue and the Court did not find any prejudice that might have been suffered by the Respondent.

ISSUE (3): WHETHER THE APPLICATION WAS OUT OF TIME AND WHETHER EXTENSION OF TIME SHOULD BE GRANTED

By issues (1) and (2), the Court dealt with the Respondent's application for setting aside on the merits. Therefore, the Judge considered that it not necessary to decide further whether (a) the Respondent's application was made in or out of time and (b) whether an extension of time should be granted.

Nevertheless, the Court said that in this case no extension of time should be granted to the Respondent:-

1. The arbitral award was issued on 15 August 2019. The Respondent applied for an extension of time to set aside the arbitral award in June 2021.

2. Under Article 34(3) of the Model Law, an application for setting aside "*may not be made after 3 months have elapsed from the date on which the party making that application had received the award*".

3. The Respondent's only explanation for the almost-two-year delay was that she had "overlooked" the Arbitrator's email enclosing the arbitral ward, because she had not expected it.

4. The Court said "if the Court has the power to grant an extension of time to the [Respondent] to make the application, it can only do so in exceptional circumstances".

5. In the present case, the Court found no good reason to exercise the discretion in the Respondent's favour, in light of the Respondent's (a) undue delay and (b) absence of any good defence to the claims against her in the arbitration.

BCLP COMMENTS

Hong Kong courts maintain a robust approach not to lightly interfere with an arbitral award, so as to safeguard the finality of the arbitration process. Applications for setting aside an arbitral award should be regarded as exceptional, and granted only if a statutory ground for setting aside is clearly demonstrated.

Where the Court dismisses an application for setting aside, and as a default rule, indemnity costs will be granted against the challenging party unless special circumstances can be demonstrated. The imposition of adverse costs consequences aims to deter unmeritorious and spurious challenges to arbitral awards.

In the present case, the Respondent was ordered to pay the costs of the application for setting aside on an indemnity basis, on the basis that there was no merit whatsoever in the Respondent's application.

This judgment serves as a useful reminder that a party intending to apply to set aside an arbitral award should carefully assess the merits of the purported application, and be mindful of potential heavy costs consequences in case of an unsuccessful challenge.

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