

Insights

## ENFORCING AN ARBITRATION AWARD: DON'T MISLEAD THE COURT!!

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### SUMMARY

In 1955 Capital Fund I GP LLC & another v Global Industrial Investment Limited [2020] HKCFI 956, the court set aside an *ex parte* order for the enforcement of an arbitral award on the grounds of material non-disclosure by the applicants.

This decision is a reminder to parties that they should ensure compliance with the enforcement procedures under the Arbitration Ordinance, and make full and frank disclosure of all material facts where the enforcement application is made on an *ex parte* basis.

### KEY FACTS

The case concerns an arbitral award (the “Award”) made in California for over US\$9 million in favour of the Applicants. The arbitration clause in the underlying contract provided as follows:

*“... Absent the filing of an application to correct or vacate the arbitration award under applicable law, each party shall fully perform and satisfy the arbitration award within 15 days of the service of the award.”* (emphasis by the Court)

The Award referred to and reproduced the clause as follows:

*“... Absent the filing of an application to correct or vacate the arbitration award under applicable law, and unless the parties agree otherwise, in accordance with the Arbitration Agreements each party shall fully perform and satisfy the arbitration award within 15 days of the service of the award.”* (emphasis by the Court)

Subsequently, the Respondent filed a petition in a California court to challenge the Award. Two days after the Respondent’s petition, the Applicants made an *ex parte* application in Hong Kong for leave to enforce the Award. In support of the *ex parte* application, the Applicants’ attorney (the “Attorney”) swore an affidavit and described the status of the Award as follows:

*“The Final Award (as corrected) provides that each party shall fully perform and satisfy the award within 15 days of the service of the award.”*

Critical words (in bold above) were omitted from the affidavit.

Shortly afterwards, an enforcement order was granted by Madam Justice Mimmie Chan (the “Judge”) on an *ex parte* basis (the “Enforcement Order”). The Respondent applied to set aside the Enforcement Order on the grounds of material non-disclosure by the Applicants. The application was heard by Deputy High Court Judge Whitehead SC (the “Court”) .

## **THE DECISION TO SET ASIDE THE ENFORCEMENT ORDER**

The Respondent submitted that the omission was deliberate. In particular, given the Attorney’s detailed involvement in the contractual relations between the parties and in the arbitration, he would have known that the omitted words existed in both the arbitration clause and the Award, and that the Respondent had petitioned in California to challenge the Award. Noting that the Attorney failed to give any direct explanation for omitting the critical words, the Court concluded that the omission was deliberate.

Next, the Court found that the omission was material. *Section 89(2)(f) of the Arbitration Ordinance* provides that the enforcement of a Convention award may be refused if the award has not become binding on the parties or has been set aside or suspended by a competent authority in the country of origin. The Respondent submitted that, by omitting the critical words, the Applicants created a false impression that the Award was immediately enforceable. The Court accepted the Respondent’s further submission that if the Judge had been made aware of the omitted words, the Judge may have refused to grant the Enforcement Order. Hence, the omission deprived the Judge of the opportunity properly and fully to consider the Applicants’ *ex parte* application for the Enforcement Order.

The Court explained that the duty to make full and frank disclosure is imposed to ensure that an *ex parte* application is made in the highest good faith. Therefore, the Applicants could not shift this duty to the Judge by exhibiting the Award and hoping or expecting that the Judge would pick up the pertinent points. In the Court’s view, the Applicants deliberately had attempted to hide the critical words, which were relevant to the weighing exercise necessary in determining whether an Enforcement Order should be made.

Therefore, in light of the Applicants’ material non-disclosure, the Court had “*no hesitation*” in setting aside the Enforcement Order.

## **BCLP PERSPECTIVE**

Parties seeking to enforce an arbitral award in Hong Kong should follow the stipulated procedures in the *Arbitration Ordinance*. This case highlights that, while Hong Kong is a pro-arbitration and pro-

enforcement jurisdiction, the Hong Kong courts will not hesitate to discharge an enforcement order where the relevant requirements are not met or the procedures for enforcement applications are not followed.

In Hong Kong, pursuant to *Rules of High Court O 73 r 10(1)*, enforcement applications generally are commenced on an *ex parte* basis. Therefore, it is incumbent on an applicant to make an enforcement application in the highest good faith and proactively give full and frank disclosure of all material facts in the body of the application or the supporting affidavit or affirmation.

## **RELATED CAPABILITIES**

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- Construction Disputes
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## MEET THE TEAM



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