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HK COURT RELUCTANT TO GRANT EOT FOR SETTING ASIDE AN ARBITRAL AWARD

Dec 30, 2020

The recent case of *A v D* (HCCT 52/2020) reinforces the pro-arbitration and pro-enforcement approach of Hong Kong courts.

Under Article 34 (3) of the Model Law (adopted by section 81 of the Arbitration Ordinance ("**Ordinance**")), an application for setting aside an arbitral award may not be made three months after the applicant received the award.

In this case the applicants sought to extend the time to set aside an arbitral award. The Court of First Instance ("**Court**") took the view that (even if the court had the jurisdiction to grant an extension) the Applicants had come nowhere near the necessary threshold for the Court to exercise its discretion to extend the time sought.

Brief facts

On 21 May 2020, an arbitral award was made in an arbitration in Hong Kong between the Applicants and the Respondent. The arbitration was administered by the Hong Kong International Arbitration Centre ("**HKIAC**"). On 28 August 2020 (i.e. more than three months after the issuance of the award), the Applicants issued an Originating Summons ("**OS**") to set aside the award, and sought retrospective extension of time to apply to set aside the award. The Respondent sought the immediate dismissal of the OS, the reasons being (a) the statutory deadline for making the application to set aside the award expired on 21 August 2020, (b) the court had no power to extend the three-month period provided for in Article 34 (3) of the Model Law, and (c) even if the court had such power, the Applicants had not given any satisfactory explanation for the delay.

It was undisputed that on 21 May 2020, the arbitral tribunal sent the award by email to the email accounts of the Applicants. These email accounts were the same as those notified by them to the tribunal for communication with the tribunal, the HKIAC and the Respondent in the arbitration. The email accounts for the 1st and 2nd Applicants were that of their lawyers on the Mainland ("**Mainland Lawyers Account**"). The email account for the 3rd Applicant was his own. The Mainland lawyers of the 1st and 2nd Applicants previously had sent an email to the tribunal and the HKIAC to confirm that they had authority to receive and respond to email communications from the tribunal,

the Respondent and their lawyers. During the arbitration, emails had been exchanged between the Mainland lawyers, the tribunal and HKIAC, using the Mainland Lawyers Account.

Court's analysis

As the starting point, the Court stated that pursuant to the deeming provisions under Article 3 of the Model Law, section 10(2) of the Ordinance and Article 2.1 of the 2013 HKIAC Administered Arbitration Rules, the award was deemed to have been received by the Applicants on the date of the email sent to the Mainland Lawyers Account. If the Applicants wish to displace the deeming provisions and to rebut the presumption of receipt, the Court took the view that there should be sufficient and credible evidence adduced to show that the Applicants had not received the award by the email on 21 May 2020.

The 1st and 2nd Applicants sought to rely on the unsigned draft affirmations of their Mainland lawyers. The affirmations were in identical terms and were exhibited to the signed affirmation of the 1st and 2nd Applicants' Hong Kong solicitor (HK Lawyer) made two days before the hearing. The Mainland lawyers stated in the affirmations that they had not received the email on 21 May 2020. The HK Lawyer claimed that the "*finalized drafts*" of the Mainland lawyers affirmations supported the application for extension of time to set aside the award, and that the contents of the draft affirmations had been "*reviewed and confirmed*" by the Mainland lawyers. The HK Lawyer also stated that he had been informed by the Mainland lawyers that "*in the limited time available they were unable to execute*" the affirmations before a Chinese notary.

As to the 1st and 2nd Applicants' reliance on their Mainland lawyers' affirmations, the Court:

a. Was critical of the decision of the Applicants to rely on last minute draft affirmations of the Mainland lawyers (produced just two days before the hearing) when the service of the award should have been appreciated as a critical issue in the application to set aside. The timing and manner of dispatch and receipt of the award were important issues which should have been addressed in detail and in good time before the hearing by the Applicants when they issued the OS on 28 August 2020.
b. Also made reference to the Respondent's submissions that, given that the affirmations were in identical terms, and their brevity, it was dubious whether the Mainland lawyers had themselves prepared their affirmations, to explain in their own words the circumstances of and reasons for their alleged lack of receipt and notice of the email of the award.
c. Pointed that, in any event, no reason has been given by the Mainland lawyers' affirmation as to why the particular email of 21 May 2020 (which enclosed the award) could have been lost and not received, when other emails had been sent from and received in the Mainland Lawyers Account.
d. As a result, the Court accepted that the award was sent to and deemed to have been received by the 1st and 2nd Applicants.

The 3rd Applicant admitted that the email with the award had been received by him on 21 May 2020. But he claimed that because of the oversight of his secretaries, the matter was not reported to him. Despite having been informed by his lawyers that the original award was received on 29 May 2020, the 3rd Applicant took no steps to apply to set aside the award before the expiry of three months on 21 August 2020.

Given that no reason had been given by any of the Applicants for their failure to take any steps to apply to set aside the award between 21 May 2020 and 28 August 2020, the Court refused to grant extension of time to the Applicants.

Takeaway points

Given the importance of upholding the finality of arbitral awards, the court's reluctance to grant an application for an extension of time for setting aside an arbitral award is understandable, and consistent with the pro-arbitration and pro-enforcement stance in Hong Kong. Any applicant seeking to set aside an award or seeking to prevent enforcement must make the application in a timely way, and if there has been any delay must give a fulsome and satisfactory explanation for the delay.

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MEET THE TEAM

George Burn

Partner & Global Co-leader,
International Arbitration, London

george.burn@bclplaw.com
+44 (0) 20 3400 2615
