

Insights

CONFLICTING AWARDS IN PARALLEL ARBITRAL PROCEEDINGS

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SUMMARY

In *W v AW* [2021] HKCFI 1707 (date of decision: 17 June 2021), a case described by the court as “highly unusual”, an arbitral award was held to be manifestly invalid.

The award in question contained findings that were inconsistent with the findings made in an earlier award, on the same issues, and in a parallel arbitration proceeding between the same parties. Material to the court’s decision was that there was a common arbitrator in the two sets of arbitral proceedings, and who had made contradictory findings, failed to deal with or explain the inconsistency, and failed to give the parties an opportunity to be heard before making the inconsistent findings against them.

THE UNDERLYING CONTRACTS AND THE CONFLICTING AWARDS

W and AW were parties to two related agreements (a framework agreement and a share redemption agreement) that formed part of a series of transactions designed to pave way for an acquisition. The acquisition was not completed.

After a series of disputes arose between the parties, two arbitrations were commenced. The earlier arbitration was commenced by W and PY (W’s sole shareholder and director) under the framework agreement against AW and other parties to that agreement (“**Arbitration 1**”). Subsequently, AW commenced an arbitration under the share redemption agreement against W (“**Arbitration 2**”). Different tribunals of three arbitrators were constituted in Arbitration 1 and Arbitration 2 (“**Tribunal 1**” and “**Tribunal 2**” respectively), but there was one common arbitrator and that common arbitrator was nominated by AW.

Tribunal 1 and Tribunal 2 handed down their respective awards in March and July 2020 (“**Award 1**” and “**Award 2**” respectively). Both awards turned on misrepresentation claims made by AW against W and (in Arbitration 1) PY, based on identical representations made by PY through W. While

Tribunal 1 (in Award 1) dismissed AW's misrepresentation claims, Tribunal 2 (in Award 2) found in favour of AW's misrepresentation claims. Both Award 1 and Award 2 were unanimous decisions.

W AND AW'S RESPECTIVE APPLICATIONS TO THE COURT

W applied to the court to set aside Award 2 on, among other grounds¹, the ground that Award 2 was contrary to the public policy of Hong Kong. Invoking the doctrine of issue estoppel, W argued that Tribunal 2 was bound by the findings on the common issues already determined in Award 1, and that it was contrary to principles of fairness, due process and justice for Tribunal 2 deliberately to ignore Tribunal 1's findings and make inconsistent findings on the same issues between the same parties.

Subsequently, AW applied for, among others, security for the sums payable under Award 2 (under *Rules of High Court Order 73 rule 10A*) and security for the costs of the proceedings (under *Companies Ordinance section 905 and Rules of High Court Order 23 rule 1*).

THE COURT'S DECISION

This present court decision concerned AW's application for security.

As explained by the court, in determining such an application, the court must first consider the strength of the argument that the underlying award is invalid. Only if an award is manifestly valid would the court consider making either an order for enforcement or an order for security.

The court agreed with W's submission that Tribunal 1 and Tribunal 2 had made inconsistent findings on the same issues of fact and law forming a necessary ingredient in the cause of action of misrepresentation. The court commented that Tribunal 2 may have been wrong in law to ignore the doctrine of issue estoppel. However, as emphasised by the court, in an application to set aside an award, the court does not review the award for errors of fact or law. Instead, the court is concerned with the structural integrity of the arbitral process and the award: if there is serious or egregious conduct that undermines the due process, the court may consider to set aside the award for being contrary to public policy. In this regard, the court held as follows:

- The common arbitrator was aware of the issues decided in Award 1, and that Award 1 contained findings on the essential necessary ingredients for Tribunal 2's findings on the misrepresentations. By failing to issue a dissenting decision, the common arbitrator agreed with all the findings made in both Award 1 and Award 2, despite the fact that such findings were contradictory.
- Tribunal 2 failed to consider whether the parties and Tribunal 2 were bound by the findings made in Award 1 and failed to explain the inconsistent findings. Where the common arbitrator dealt with the same facts differently in the two arbitrations, W was entitled to expect Tribunal 2, including the common arbitrator, to deal with the question of issue estoppel after Award 1

was handed down. Therefore, the court considered the common arbitrator's failure to deal with and explain his contradictory findings to constitute injustice and grave unfairness to W.

- The common arbitrator should have given the parties an opportunity to be heard before making inconsistent findings against either of them. When he became aware of the findings in Award 1, the common arbitrator should have invited submissions on whether, how and to what extent the parties and Tribunal 2 were bound by the findings made in Award 1.
- The confidentiality rules do not prevent the legitimate use of an earlier award in a later arbitration between the same parties. Therefore, the common arbitrator was not prevented from disclosing Award 1 to other members of Tribunal 2.

Accordingly, the court held that Award 2 was manifestly invalid and dismissed AW's application for security. The court further invited the parties sensibly to confer on whether orders could be made by consent for setting aside Award 2 and refusing leave to enforce Award 2.

KEY TAKEAWAYS

Hong Kong courts are known for their pro-enforcement approach in arbitration. This is a rare occasion where a Hong Kong court has held that an arbitral award was manifestly invalid, and the court did so to uphold the important principles of fairness and due process in a case that it considered to be "*highly unusual*".

This case highlights the risks of potential inconsistencies arising in parallel arbitral proceedings involving the same parties. In complex transactions involving multiple related contracts, parties may wish to mitigate such risks by:

- Including an appropriate joinder and consolidation mechanism in their contracts.
- Adopting a set of arbitration rules that provide for such a procedure. For example, the *2018 HKIAC Administered Administration Rules* contain detailed rules and procedures for joining additional parties to an existing arbitration (Article 27), consolidating the proceedings (Article 28), commencing a single arbitration under multiple contracts (Article 29) and ordering the arbitral proceedings to be heard concurrently or consecutively (Article 30).
- Expressly opting-in to *Section 2, Schedule 2 of the Arbitration Ordinance*, which similarly empowers the Hong Kong courts to order two or more arbitral proceedings to be consolidated or to run concurrently or consecutively upon the application by a party to the arbitral proceedings.

In case parallel arbitral proceedings are to take place, tribunals and party representatives should handle them with care.

A party facing parallel arbitral proceedings may wish to nominate the same arbitrator to sit on the separate tribunals of the parallel proceedings. However, the other party will not be obliged to do the same. Here, in *W v AW*, the court confirmed and emphasised that it is a party's right to appoint an arbitrator of its choice. Therefore, a party could not be said to be at fault simply by appointing different arbitrators in the parallel proceedings knowing that the other party appointed the same arbitrator.

1. W also sought to rely on the ground of apparent bias to set aside the award, but the allegations of bias were rejected by the court.

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MEET THE TEAM



Glenn Haley

Co-Author, Hong Kong SAR

glenn.haley@bclplaw.com

+852 3143 8450



Horace Pang

Co-Author, Hong Kong SAR

horace.pang@bclplaw.com

+852 3143 8411

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