

Insights

## HONG KONG COURT RULES THAT IT HAS NO POWER TO EXTEND THE TIME TO CHALLENGE AN ARBITRAL AWARD UNDER ARTICLE 34 OF THE UNCITRAL MODEL LAW

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### SUMMARY

In *AW and others v PY and another* [2022] HKCFI 1397 (judgment date: 13 May 2022), a Hong Kong court held that it has no power to extend the time to challenge an arbitral award under Article 34 of the Model Law, as adopted by Section 81 of the Arbitration Ordinance of Hong Kong.

The present case is important in establishing that Hong Kong courts do not have the power to extend the time for making a setting-aside application under Article 34 of the Model Law. This serves as a reminder to parties seeking to challenge an award under the Article to act in a prompt and timely manner.

### Background

The present judgment was part of a series of judgments and arbitral awards concerning various disputes relating to the intended acquisition of the shareholding of PY (held through W) in AW. The acquisition was not completed. Two set of arbitration proceedings were commenced, separately under a framework agreement and a share redemption agreement, both concerning the same misrepresentation claims made against PY/W.

On 13 March 2020, in the arbitration commenced under the framework agreement (“Arbitration 1”) by PY and W against AW, AW BJ and other shareholders in AW (collectively “AW Group”), the tribunal (“Tribunal 1”) handed down an award dismissing the misrepresentation claims (“Award 1”).

Subsequently, on 13 July 2020, in the arbitration commenced under the share redemption agreement by AW against W, the tribunal handed down an award (“Award 2”) upholding the same misrepresentation claims.

On 12 October 2020, W applied to set aside Award 2. On 30 December 2020, AW applied to enforce Award 2 and for W to provide security in respect of the award. On 26 January 2022, the court held

that Award 2 was manifestly invalid, dismissed AW's application for security, and 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. [Read our article 'Conflicting awards in parallel arbitral proceedings' for a detailed discussion.](#)

The present court decision concerned AW Group's application on 10 June 2021 to set aside Award 1 and two other awards in Arbitration 1, namely the Costs Award and the Correction and Interpretation Award in respect of Award 1. In brief, AW Group relied on the following grounds:

- That Award 1 was obtained by fraud, particularly the deliberate concealment of relevant and material evidence by PY/W.
- That Tribunal 1 failed to consider and deal with AW Group's submissions on PY/W's deliberate concealment of evidence, when making the Costs Award.
- That the Correction and Interpretation Award was authored by persons other than members of the Tribunal.

### **Ruling on merits**

On 13 May 2022, the court dismissed the application to set aside the awards, ruling in essence as follows:

- Under Hong Kong law, a party seeking to challenge an award on the ground of deliberate concealment of evidence must demonstrate that the concealment is the operative cause of the tribunal's decision, or that the concealed evidence entirely would have changed the way the tribunal came to its decision.
- In the present case, the evidence in question was not material to Tribunal 1's findings on the misrepresentations claims. Likewise, to the extent that the evidence might go to PY's credibility as a witness, the court was not satisfied that no reasonable tribunal could be expected to act on PY's witness evidence.
- Tribunal 1 had considered AW Group's submissions inviting Tribunal 1 to take into account PY/W's concealment of evidence in the Costs Award. In particular, Tribunal 1 explained its decision refusing to revisit its ruling on liability in an award for costs.
- There was no evidential or factual basis to challenge the authorship of the Correction and Interpretation Award.

### **Delay in making the setting-aside application**

Notwithstanding its findings against AW Group on merits, the court went on to discuss the extension of time sought by AW Group in respect of its late application to challenge the award.

Previously in *Sun Tian Gang v Hong Kong China Gas (Jilin) Ltd* [2016] 5 HKLRD 221, it had been held that the court has a discretion to permit a setting-aside application to be made under Article 34 of the UNCITRAL Model Law after the expiry of the three-month period specified in Article 34(3).

In the present judgment, the court reached a different conclusion and ruled that it has no power to extend the specified three-month period, reasoning as follows:

- Article 2A of the Model Law, as adopted by section 9 of the Arbitration Ordinance, expressly requires that the court in interpreting the Model Law is to have regard to the Model Law's international original, the need to promote the uniformity in the Model Law's application, and the observance of good faith. Subsequent to the decision in *Sun Tian Gang*, there were decisions in other Model Law jurisdictions holding that the specified three-month period is absolute and cannot be extended by the court. Therefore, the court considered it appropriate to consider the authorities from other Model Law jurisdictions, and followed the majority view of the other Model Law jurisdictions that the time for making a setting-aside application under Article 34 cannot be extended by the court.
- Under Hong Kong law, the English and Chinese texts of legislation are presumed to have the same meaning<sup>[1]</sup>. Unlike the English text of the Model Law which uses "shall not", "may" and "may not" in the various Articles, the same term "不得" is used in the Chinese text and there is no ambiguity that the term "不得" is prohibitory.
- The court has no power to extend a time limit imposed by a statute. In particular, the court derives its power to extend time under the Rules of the High Court, which as a secondary legislation cannot be invoked to override time limits imposed in primary legislation.
- Article 5 of the Model Law, as adopted by section 12 of the Arbitration Ordinance, prohibits intervention by a court in matters governed by the Model Law, except such interventions that are provided for expressly in the Model Law.

The court concluded with the following remark:

*"However desirable it is, in the interests of overall justice, for the Court to exercise its discretion, to grant extensions of time in an appropriate case, justified on the facts to be exceptional and fit for the Court to exercise its discretion, it would be a matter to be resolved by appropriate legislation."*

The court held that in any event there was unexplained delay by AW Group, who failed to act until July 2021, when AW Group had discovered the evidence in question in June 2020, and Tribunal 1 had made clear in July 2020 that Tribunal 1 was *functus* and AW Group's only redress was to apply to court for appropriate relief. Further, the court found that AW Group waived its rights to challenge Award 1 by complying with the orders in the award.

[1] Section 10B of the Interpretation and General Clauses Ordinance (Cap.1)

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