

Must an award deal with all key issues and failing which amounts to a ground for setting aside?

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In a recent decision in the case of *LY v HW* [2022] HKCFI 2267, the Hong Kong court of first instance dismissed an application to set aside an award based on the ground that the tribunal failed to deal with an issue in its award, which would amount to a failure to follow the parties' agreed arbitral procedure or contravene public policy or the Arbitration Ordinance (Cap.609) ("AO"). The court clarified that though such a failure may be an error of law, unless such error is too egregious to cause a substantial failure of justice which would justify setting aside.

The facts

LY was a company incorporated in Hong Kong, and HW was a company incorporated in the Mainland China. Both are in the business of pharmaceutical distribution in the Mainland China.

HW entered into a distribution agreement dated 29 January 2015, under which HW was appointed as the exclusive distributor of S products of AZ, a company also engaged in the business of manufacturing and distributing pharmaceutical products. Under the agreement, HW was required to achieve a minimum annual sales value target ("ASV").

In June 2018, LY stepped into the shoes of AZ upon assignment and HW became LY's exclusive distributor of the products in the Mainland.

In May 2019, LY issued a notice of termination of the agreement, on the ground that HW had failed to achieve the ASV as agreed for 2018. The purported termination was disputed by HW.

On 29 July 2019, HW filed a notice of arbitration in accordance with the dispute resolution mechanism prescribed under the agreement.

On 21 October 2021, a tribunal of 3 arbitrators published its final arbitral award in favour of HW, ruling that LY's termination was invalid under the agreement.

LY subsequently applied to set aside the award on the grounds that (a) the arbitral procedure was not in accordance with the parties' agreement, in that the tribunal failed to deal with all the key issues which had been put before it; and/or (b) the tribunal had failed to provide sufficient reasons for its decisions on the key issues; and (c) the award was in conflict with the public policy of Hong Kong.

The law

Mimmie Chan J heard the parties' submissions and dismissed the application to set aside the award by concluding that there were no grounds to do so.

The judge firstly pointed out that the grounds for setting aside and refusal of enforcement of an award were to be construed narrowly, and it has to be shown by the applicant that the error complained of was egregious to warrant the setting aside of the award.

Under s.67 of AO applying article 31 of the UNCITRAL Model Law, an award shall state the reasons upon which it was based, unless the parties have agreed that no reasons were to be given.

From the judge's point of view, it was clear from the authorities, that in considering the important question of whether a tribunal has dealt with an issue, the approach was to read the award in a reasonable and commercial way expecting, as was usually the case, that there would be no substantial fault that can be found with it. Reading the award may involve taking account of the parties' submissions, but the submissions made by the parties could not dictate how the tribunal structures the disposal of the dispute referred to it. Although awards often respond to the parties' submissions, they should not be read in a vacuum, and the question was whether, properly understood, the award has dealt with an issue which was key to the tribunal's decision on the dispute referred to it in the arbitration. The tribunal was only required, under article 31(2) of UNCITRAL Model Law, to state the reasons upon which the award was based.

By referring to a number of authorities, the judge opined that it sufficed that the tribunal should clearly state its determination on the essential questions in dispute, and explain the reasons it came to the decision on the dispute. The reasons did not have to be elaborate or lengthy, as the object of the AO was to facilitate fair and speedy dispute resolution without unnecessary expense or delay. Parties to an arbitration did not have a right to have all their arguments addressed by the tribunal. The court would be extremely slow to interfere with the tribunal's decision on which issues were essential and necessary to be addressed in the award. So long as the tribunal set out its decision on the dispute and gave sufficient reasons as to why it came to this particular decision, the parties were bound. No party was entitled to apply to the court, to repeat its arguments or make further submissions to seek an outcome which enabled it to avoid an unfavourable award. Any error in an award made by an arbitrator could not by itself counterbalance the public policy bias towards enforcement of arbitration agreement and awards.

The judge agreed with LY that the tribunal did not make any express findings on the issue highlighted by LY. However, by emphasising that an award should be read in a reasonable and commercial way, without a meticulous legal eye endeavouring to pick holes, inconsistencies and faults, but generally, and only to remedy serious breaches of rules of natural justice which caused injustice, the judge accepted that it was not necessary for the tribunal to deal at length or with further details on those issues. In addition, the judge also thought that the issues were not so crucial to the tribunal's ultimate decision.

The judge held that even if the tribunal failed to consider or deal with the issues complained of by LY, it was a matter which went to the substantive decision of the tribunal, which may amount to an error of law, but was not a ground for challenging

the award. The judge also did not find no serious or egregious error which justified the setting aside of the award, whether on the ground of arbitral procedure or public policy.

Comments

Hong Kong is well recognised as a pro-arbitration jurisdiction, so it is very rare to see the court setting aside an arbitral award. This case is another example of such stance.

As the judge highlighted in her decision, an award must be read generously and in a reasonable and commercial way. The tribunal has not dealt with all the arguments raised the parties in the proceedings. In view of the policy of minimal curial intervention, the courts should avoid intervening in an arbitral tribunal's decision on what issues are necessary and must be resolved in an award, as long as clear and sufficient reasons are given. Thus, prior to challenging an award, the losing party should be reminded to carefully assess whether the issues that the tribunal fails to deal with are so serious or egregious to justify procedural irregularity and/or breach of public policy.

It is worth noting that the decision is contrary to the same court's approach in dealing with the ground that the award was beyond the scope of what the parties pleaded in the arbitration. In the case of *Arjowiggins HKK2 Ltd v X Co* [2022] HKCFI 128, it was confirmed that the court will not hesitate to set aside an arbitral award which falls outside the scope of the parties' pleadings as such error could be viewed as an assault on due process and fairness to both parties in arbitrations.