

# Hong Kong court adjourns award enforcement proceedings pending determination of set-aside proceedings at seat court (A v B)

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**Arbitration analysis: A and ANV obtained an arbitral award in respect of a licence agreement dispute between A and B against B and a joint venture company (JV) owned by ANV and B. The arbitration was seated in the Netherlands and administered by the Netherlands Arbitration Institute (NAI) under its arbitration rules. A sought to enforce the award in Hong Kong against B. B had challenged the arbitral award in the Netherlands on the basis that it was not party to the arbitration agreement. B sought to have the award set aside by the Hong Kong court, or the enforcement proceedings adjourned pending the decision of the Dutch court. The Hong Kong court held that B was not manifestly party to the arbitration agreement, but equally the question of whether the tribunal was wrong in accepting jurisdiction was a matter for the Dutch court. The Hong Kong court adjourned the enforcement proceedings. Written by Andrew Rigden Green, partner, head of International Arbitration in Greater China, at Stephenson Harwood, Hong Kong.**

*A v B [2022] HKCU 1125 (not reported by LexisNexis®UK)*

## What are the practical implications of this case?

In reviewing whether or not an arbitration award will be set aside the Hong Kong court will follow the test set out in *Soleh Boneh International v Government of Uganda* [1993] 2 Lloyd's Rep 208 (not reported by LexisNexis®UK). That is whether on a brief review by the court, the argument that the award was invalid is a strong one.

In circumstances where an application to the supervisory court of a foreign arbitral award has been made, the Hong Kong court will consider whether:

- before proceeding to issue an enforcement order, the application to the foreign court is fanciful
- when considering an application to set-aside an enforcement order, the foreign court is the more competent forum to determine the relevant questions

If the application to the foreign court is not fanciful, and the foreign court is the more competent forum to resolve the relevant question, the Hong Kong court will consider whether an adjournment is the most appropriate course of action.

In circumstances where adjournment of enforcement is ordered, security will only be ordered where there is a real risk of dissipation of assets and prejudice to the award creditor.

## What was the background?

A joint venture company (JV), held 60% by B (a Hong Kong company part of a mainland Chinese technology group ('B Group')) and 40% by ANV (the holding company of a group of Dutch technology companies that includes A), entered into a 2014 licence agreement ('Licence') with A to use A's platform (which provides location-based services for social media platforms) in mainland China.

The Licence was executed by A and JV. It was also signed by ANV and B under the phrase 'acknowledged and agreed' at the end of the 2014 Licence.

In 2016, A and ANV commenced arbitration before the NAI pursuant to the arbitration clause in the Licence, against both JV and B. The claims were for breaches of the Licence for incorporating A/ANV's technology into B Group's products and for failing to make payment to JV which should then be paying dividends to ANV. B contested the jurisdiction of the tribunal on the grounds that B was not a signatory to the Licence and that disputes were not in the scope of the arbitration agreement.

In 2017, the tribunal ruled that it had jurisdiction ('Jurisdiction Award'). In 2019, the tribunal handed down an award that B was in breach of its duties not to interfere with JV's duties under the Licence and not to facilitate the unlawful use of licensed software ('Award') (together 'Awards').

In 2020, B commenced proceedings in the Amsterdam Court of Appeal to set aside the Awards ('Dutch Set-Aside Proceedings') claiming that B never became party to the Licence, that the disputes were outside the scope of the arbitration agreement, and Award contained decisions on matters beyond the mandate of the tribunal and/or were in conflict with Dutch public policy.

On 1 April 2021, A applied to the Hong Kong court for leave to enforce the Award. On 29 April 2021, B applied to set aside the enforcement order, or in the alternative that enforcement proceedings should be adjourned pending the outcome of the Dutch Set-Aside Proceedings.

## **What did the court decide?**

### **Enforcement**

B argued that Dutch law should apply to the interpretation of whether or not a party became party to an arbitration agreement. Under Dutch law, a party must clearly consent to submit disputes to arbitration. B's signature was only as shareholder to approve the activity of JV. It was not sufficient to make B a party.

A argued that the tribunal's decision was made on the basis of facts and that the Hong Kong court should not review the tribunal's findings of fact.

The Hong Kong court held that, on the basis of the arguments and reviewing the reasoning of the Jurisdiction Award, the judge could not conclude that the Jurisdiction Award was manifestly valid, such that there was no risk that it would not be overturned in the Dutch Set-Aside Proceedings.

On the other hand, the Hong Kong court held that since the governing law of the Licence was Dutch law, the Netherlands court would be best able to decide whether the tribunal had correctly decided its jurisdiction. Therefore, the judge could not conclude that the tribunal's decision was manifestly invalid to justify setting aside the enforcement order.

### **Adjournment**

A did not oppose an adjournment bearing in considerations of comity and the need to avoid conflicting court decisions. However, A demanded that B provide security as A would be prejudiced by the delay, and there were risks that B's assets would be removed from Hong Kong.

The judge held that the anticipated delay of six months was not unduly long. Further the arguments as to B's dissipation of assets were speculative. It was insufficient to refer to general risks associated with this type of company and to the probability of formerly listed companies restructuring their assets upon delisting. There was no evidence of dissipation or concealment of assets, and in fact A had already obtained security under a charging order of shares in BVI.

### **Full and frank disclosure**

The usual rule in Hong Kong in ex parte applications such as the application for the enforcement of a foreign arbitral award, is that the party seeking the order must make full and frank disclosure of all material facts. At the time A made the application to enforce the Awards it had commenced proceedings in the US against B Group on the basis of conspiracy of B Group to misappropriate valuable assets of A.

The Hong Kong court stated that applications for leave to enforce arbitral awards are largely mechanistic at the ex parte stage, and A's claims in the US would not have affected the Hong Kong court's decision to grant leave to enforce the Awards.

### **Case details:**

- Court: Hong Kong Court of First Instance
- Judge: Honourable Madam Justice Mimmie Chan
- Date of judgment: 1 March 2022

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