

W v AW [2021] HKCFI 1707: A Cautionary Tale on Handling Parallel Arbitral Proceedings and Enforcement of Conflicting Arbitral Awards in Hong Kong SAR 最新案例：平行仲裁导致相互矛盾的仲裁裁决在香港特区的承认与执行



My company obtained two conflicting arbitral awards, what can I do about them in the Hong Kong SAR?

In the Hong Kong SAR, a creditor may bring an arbitral award to court and make an *ex parte* application (i.e. with the debtor being absent) for leave to enforce it. The court may or may not order a summons to be issued and served on the debtor. Either way, if leave is ultimately granted, the creditor will need to serve the court order to that effect on the debtor. Usually, the debtor then has 14 days to decide whether to apply to set aside the order, during which period it remains unenforceable. If the debtor does so apply, the order continues to be unenforceable until after the application is finally disposed of.

Crucially, when the debtor has made such an application, the creditor may apply for a court order commanding the debtor to give security for costs (i.e. a sum of money payable into court primarily to safeguard a party's interest in case the other side loses the application and cannot afford to pay the former's costs).

What happened in the current case?

The Decision in *W v AW* [2021] HKCFI 1707 addresses AW's (as creditor) application for W (as debtor) to provide security for costs. AW and W (the "**Parties**") were parties to a share redemption scheme where various agreements, including a Framework Agreement (the "**Framework Agreement**") and a Share Redemption Agreement (the "**Share Redemption Agreement**"), were entered into. The scheme fell through and the Parties, amongst others, commenced two largely parallel arbitral proceedings:

面对两个相互矛盾的仲裁裁决，可以在香港特区采取什么法律行动？

在香港特别行政区，债权人可以单方面（即债务人缺席的情况下）向特区法院申请执行仲裁裁决。法院可能会指令债权人发出传票并将传票送达债务人。无论是否需要发出传票，如果最终获得法院的许可，债权人都需要将法院作出的许可执行仲裁裁决的指令送达债务人。通常，债务人有十四天的时间来决定是否申请撤销法院许可执行仲裁裁决的指令，在此期间该指令将无法被强制执行。如果债务人申请撤销该指令，该指令将继续无法被强制执行，直到法院对债务人提出撤销法院许可指令的申请作出最终的裁定。

至关重要的是，当债务人提出这类撤销法院指令的申请时，债权人可以向法院申请，要求指令债务人提供讼费保证金（即向法院提供一笔款项作为讼费担保，主要是为了在债务人申请撤销失败且无力支付债权人的讼费的情况下保护债权人的利益）。

案件背景

W v AW [2021] HKCFI 1707 一案中，香港法院处理的是 AW（作为仲裁裁决二的债权人）要求 W（作为仲裁裁决二的债务人）提供讼费保证金的申请。AW 及 W（下称「**缔约方**」）是涉案股份赎回计划的缔约方，他们之间订立了多项协议，包括一份框架协议（下称「**框架协议**」）以及一份股份赎回协议（下称「**股份赎回协议**」）。该计划最终落空，双方继而展开了基本上相互平行的两个仲裁程序：

	Positions of W and AW	Main grounds of claim	Outcome
Arbitration 1	W against AW	<ul style="list-style-type: none"> - Breach of contract by AW under the Framework Agreement - Counterclaim by AW: misrepresentations by W under Framework Agreement - 	Award in favour of W handed down on 13 march 2020 (" Award 1 ")
Arbitration 2	AW against W	Misrepresentations by W under the Share Redemption Agreement	Award in favour of AW, handed down on 13 July 2020 (" Award 2 ")

AW sought the court's leave to enforce Award 2, upon which W applied to set it aside and AW applied for W to provide security for costs. AW's application for security for costs was dismissed.

The Decision

The court accepted that the first step to decide whether to order security is whether the arbitral award is "manifestly invalid". If the award is manifestly invalid, there should be no order for security. On the contrary, if the award is manifestly valid, the court should either order immediate enforcement or make an order for substantial security. The court also considered the merits of W's set aside application, although that would be dealt with formally in another hearing.

One of W's arguments why Award 2 should be set aside was the "issue estoppel" principle: Tribunal 2 was bound by the findings on common issues between the same parties already determined by Tribunal 1, for example whether W made misrepresentations as to its shareholding. W also argued that making findings inconsistent with the earlier findings made by Tribunal 1 was contrary to the principles of fairness, due process and justice (the "**Procedural Ground**").

	W 及 AW 的立场	申索的主要理由	结果
仲裁一	W 作为申请人, AW 作为被申请人	<ul style="list-style-type: none"> - AW 在框架协议下违约 - AW 的反申索: W 在框架协议下的失实陈述 	仲裁庭一在 2020 年 3 月 13 日颁布了有利 W 的裁决(下称「 裁决一 」)
仲裁二	AW 作为申请人, W 作为被申请人	W 在股份赎回协议项下的失实陈述	仲裁庭二在 2020 年 7 月 13 日颁布了有利 AW 的裁决(下称「 裁决二 」)

AW 寻求法院许可执行裁决二, 据此 W 申请将法院许可执行裁决二的指令搁置, 而 AW 则申请法院指令 W 提供讼费保证金。结果 AW 的讼费保证金申请被驳回。

法院的裁定

法院认为, 是否指令债务人提供讼费保证金的第一步是考虑仲裁裁决是否「明显无效」。如果裁决明显无效, 则不应指令债务人提供讼费担保。相反, 如果裁决明显有效, 法院应指令或者立即执行仲裁裁决或者指令仲裁裁决之债务人提供讼费保证金。法院还考虑了 W 在申请撤销仲裁裁决二中提到的案情, 尽管有关撤销仲裁裁决二的申请将另外开庭审理。

W 要求撤销裁决二的理由之一是「既判争议禁反言」原则: 即第二个仲裁庭受第一个仲裁庭已经作出的裁决中对相同当事人之间的相同争议的裁决结果之约束, 例如 W 是否对其股权做出了失实陈述。W 还提出, 第二个仲裁庭作出与第一个仲裁庭先行作出的裁决结果不一致的裁决该结果违反了公平、正当程序和公正原则(下称「**程序理由**」)。

Before making the Decision, the court highlighted the unusual nature of this case:

- (1) The two sets of proceedings involved overlapping issues and in fact the same claims of misrepresentation between the same parties whose determination was essential for the determination of the disputes;
- (2) AW appointed the same arbitrator (the "**Common Arbitrator**") to both sets of proceedings; and
- (3) Despite having a common arbitrator, the awards contained inconsistent findings as to whether W made misrepresentations.

In reaching the Decision, the court relied heavily on the Procedural Ground and accentuated the injustice which W suffered. The court pointed out that:

- (1) The Common Arbitrator must have been aware of the findings in Award 1, yet he did not explain in Award 2 why the findings on the same facts were different;
- (2) Having submitted its dispute to determination by Tribunal 2 and having informed it of the concurrent Arbitration 1, W was entitled to expect Tribunal 2 to deal with the question of issue estoppel;
- (3) The Common Arbitrator should have invited submissions from both W and AW as soon as he became aware of the findings in Award 1, this would have allowed Tribunal 2 to determine whether they were bound by issue estoppel; and
- (4) Confidentiality of Award 1 was no excuse for the Common Arbitrator.

For the above reasons, the court was of the view that Award 2 was manifestly invalid and therefore dismissed AW's application for security for costs. Without setting aside Award 2, as that would be dealt with in a separate hearing, the court invited the Parties to consider whether the setting aside application could be dealt with by consent instead.

Takeaway

Parallel arbitral proceedings are not uncommon, especially when multiple parties and multiple contracts are involved in series of related commercial transactions. Sophisticated arbitral institution rules, such as the HKIAC Administered Arbitration Rules (2018) provide opportunities for and rules on joinder (Article 27), consolidation (Article 28) and concurrent proceedings (Article 30). In principle, parties

本文中，香港法院在作出裁定之前特别指出了本案的不寻常之处：

- (1) 两个仲裁程序涉及重迭的争议事项(即相同当事人之间的相同的有关失实陈述的主张)，且两个仲裁庭对该问题的判断对两个仲裁程序的最终结果皆有重大影响；
- (2) AW 在两个仲裁程序中指定了同一位仲裁员（下称「**同一仲裁员**」）；以及
- (3) 尽管这位同一仲裁员出现在这两个仲裁程序中，但裁决一与裁决二对于 W 是否做出失实陈述的判断却得出了不一致的结论。

本文中，香港法院主要依据了 W 提出的程序理由，并着重关注 W 所遭受的不公正待遇。法院指出：

- (1) 该同一仲裁员必定知道裁决一的结果，但他没有在裁决二中解释为什么这两个裁决得出了不同的结论；
- (2) 由于 W 向第二个仲裁庭披露并告知第一个仲裁程序当时也在进行之中，因此 W 有权期望第二个仲裁庭应当考虑「既判争议禁反言」原则的问题；
- (3) 该同一仲裁员应当在得知裁决一中的结果后立即邀请 W 和 AW 对此予以回应，这将允许第二个仲裁庭能够考量并对他们是否受「既判争议禁反言」原则约束的问题作出判断；以及
- (4) 裁决一的保密性不能为该同一仲裁员开脱。

基于上述原因，法院认为裁决二明显无效，因此驳回了 AW 的讼费保证金申请。法院目前还没有撤销裁决二，因为是否撤销裁决二的问题将另外开庭处理。但是，本案中香港法院最后邀请双方考虑是否可以通过协议 (consent) 的方式来处理撤销裁决二的申请。

启示

平行仲裁程序在实践中并不少见，尤其是当一系列相互关联的商业交易涉及多方当事人或多个合同时。高端复杂的仲裁机构规则，例如《HKIAC 机构仲裁规则》(2018)，为新增当事人的追加（第 27 条）、合并（第 28 条）和平行仲裁程序（第 30 条）提供了可行性以及相应的规则。原则上，当事人应当尽可能地避免平行仲裁程序，从而避免相互矛盾的仲裁裁决，并节省时间和成本费用。当事人应当就如何有效地运用这些错综复杂的规则，尽早及时地寻求专业的法律意见。

should consider and seek early and proper legal advice on how best to utilise these rules to avoid parallel arbitral proceedings so as to avoid conflicting arbitral awards and to save time and costs.

In the event that parallel or concurrent arbitral proceedings are unavoidable or tolerated due to strategic considerations, then early and careful legal advice on the availability and effect of interim measures, such as security for costs on the enforcement or non-enforcement of conflicting arbitral awards are crucial in pro-arbitration and pro-enforcement arbitral seats, such as Hong Kong SAR.

一旦出现不可避免的平行仲裁程序，或当事人出于策略考量而容忍平行仲裁程序时，就更加应当尽早及时地寻求专业的法律意见。香港作为国际知名的对仲裁友好的仲裁地，香港法院通常偏向支持仲裁和支持承认与执行仲裁裁决。对申请撤销仲裁裁决的债务人，债权人可以向香港法院申请要求债务人提供诉讼费保证金的这一制度本身就是香港法院偏向支持仲裁和支持承认与执行仲裁裁决的具体例证之一。要灵活有效地运用香港法院对有关平行仲裁及相互矛盾的仲裁裁决的承认与执行中的各种高度复杂和精准的临时措施制度，当事人及时谨慎地寻求专业的法律意见对能否在香港特区成功地承认或拒绝承认仲裁裁决都至关重要。

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