

HONG KONG / JUDGMENT

LY v. HW

[2026] HKCA 936

COURT

Court of Appeal

DECIDED

8 May 2026

CASE / FILE NUMBER

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CACV 409/2022, [2026] HKCA 936

On appeal from [2022] HKCFI 2267

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 409 OF 2022

(ON APPEAL FROM HCCT 96 OF 2021)

IN THE MATTER of section 81 of the Arbitration Ordinance (Cap 609)

and

IN THE MATTER of an arbitral award dated 21 October 2021 by Mr Robert Tang, GBM, SBS, QC,
SC JP, Dr Thomas So, JP and Ms Winnie Tam, SBS, SC, JP

BETWEEN

LY

Plaintiff

(Respondent in the Arbitration)

and

HW

Defendant

(Claimant in the Arbitration)

Before : Hon Kwan VP, Cheung JA and Barma JA in Court

Date of Hearing : 6 June 2023

Date of Judgment : 8 May 2026

J U D G M E N T

Hon Barma JA (giving the Judgment of the Court):

This is an appeal by the plaintiff against the decision of Mimmie Chan J (“the Judge”) dated 26 July 2022 (“the Decision”), by which she dismissed the plaintiff’s application (“the Setting Aside Application”) to set aside the Final Award on Merits and Quantum dated 21 October 2021 (“the Award”) made in Hong Kong by a threemember tribunal (“the Tribunal”) in Arbitration Proceedings No HKIAC/A19169 (“the Arbitration”). The Setting Aside Application was made pursuant to s.81 of the Arbitration Ordinance (Cap 609) (“the Ordinance”) by an Originating Summons filed on 14 December 2021 (“the OS”).

By her Order dated 30 September 2022, for the reasons set out in her decision of that date, the Judge granted leave to the plaintiff to appeal against the Decision. By a Notice of Appeal filed on 13 October 2022 pursuant to that leave, the plaintiff sought orders that the Decision be set aside and that the Setting Aside Application be allowed.

We heard the appeal on 6 June 2023. The plaintiff (“LY”) (the appellant in this appeal and the respondent in the Arbitration) was represented by Mr Benjamin Yu SC and Mr John Leung. The defendant (“HW”) (the respondent in this appeal and the claimant in the Arbitration) was represented by Mr Charles Manzoni SC and Ms Esther Mak. At the conclusion of the hearing, we reserved our judgment on the appeal, which we now give.

Pursuant to an order made by the court on the joint application of the parties shortly before the handing down of this judgment, the parties and witnesses names, and the name of the Product, have been anonymised and other commercially sensitive information including the name of the manufacturer of the Product and related entities has been redacted.

Background to the dispute and material findings and determinations by the Tribunal

The factual background to the Arbitration and the parties’ dispute, insofar as relevant for present purposes may be briefly summarised as follows.

By a distribution agreement entered into between HW and xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx on 29 January 2015 (“the Agreement”), HW became the exclusive distributor of a line of pharmaceutical products (‘S products’: see Schedule 1 of the Agreement) (“the Products”). Under the Agreement, HW was to purchase the Products from xx and sell them in the PRC in its own name, in accordance with the terms of the Agreement (see Decision at [11]-[12]).

(a)

(b)

(c)

“The [ASV] shall be the Sales Volume of the Products throughout [the PRC] during a Calendar Year multiplied by the WASP of the Products for the same Calendar Year.”

(d)

“Any amendment or modification of this Agreement must be in writing and signed by authorised representatives of both Parties.”

Section 11.5 of the Agreement provided for rebate to be paid to HW based on ASV in any given year.

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be included in the calculation of rebate for 2015 and will be included in the 2016 sales value [i.e. ASV] for the calculation of rebate”. In other words, the ASV arising from the number of inventory days exceeding the cap of 55 days in 2015 would be ‘rolled-over’ to 2016 as ‘2016 inventory days/ASV’ for the purpose of calculating rebate in 2016. This arrangement (which HW contended arose from the practice so recorded) that ASV arising from inventory days in a given year which exceeded the agreed cap of inventory days for that year would be rolled-over to the next year for the calculation of rebate, was referred to by the parties, the Tribunal and the Judge as the “Rollover Arrangement/Agreement” (see [50]-[54] of the Decision).

Under section 27.2.7 of the Agreement, if HW failed to reach the Minimum CAGR in a given Calendar Year due to reasons solely attributable to it, and if that failure was not remedied in the next Calendar Year, xx was entitled unilaterally to terminate the Agreement in the following Calendar Year. However, HW’s and xx’s parent companies agreed on their behalf, as recorded in a jointly signed letter dated 1 August 2016 (“the 2016 Letter”), that, inter alia, xx “shall have the right to terminate” the Agreement under section 27.2.7 if (i) HW fell short of the 2017 ASV target of RMB 307 million (but achieved an ASV higher than RMB 290 million); and (ii) the ASV achieved by HW in 2018 (“the 2018 ASV”) was lower than RMB 354 million (“the Target ASV”).

It was common ground between the parties that sales in 2017 had exceeded RMB 290 million, and that for the calculation of rebate in 2017, excess inventory amounting to around RMB 1.174 million had been deducted from the sales for that year (“the 2017 Excess Inventory”) (see [64] and [130] of the Award). However, the parties disagreed as to whether the 2017 Excess Inventory was to be ‘rolled over’ to 2018.

By a Notice of Assignment dated 27 June 2018 (“the Assignment”) issued by xx to HW, xx’s rights and obligations under the Agreement were assigned, with effect from 28 June 2018, to LY pursuant to section 33.1 of the Agreement. While the Assignment expressly referred to the 2016 Letter (which included the ‘Rollover Arrangement’ for the years 2015/16 as stipulated in the 2016 Minutes) as part of the “contract” between xx and HW, it did not in terms provide for such arrangement to apply to future years.

For present purposes, the crux of the dispute between LY and HW relates to whether there was any Rollover Agreement or Arrangement which enabled excess inventory value to be deducted from one Calendar Year and included in the next. LY contended that any such Rollover Agreement (which it denied), was not mentioned in the Assignment, and was not binding on it as assignee. LY therefore rejected HW’s calculation of the 2018 ASV (of around RMB 354.259 million, which exceeds the Target ASV), which was arrived at by taking into account the excess inventory value deducted in 2017 (for purposes of calculating the rebate for 2017) as part of the ASV for 2018. According to LY, the 2018 ASV (omitting such 2017 excess inventory) was RMB 353.31 million, which fell short of the Target ASV, so that LY was entitled to terminate the Agreement under section 27.2.7 thereof read with the 2016 Letter (see [65][70] of the Award).

It was not disputed that should the Rollover Arrangement contended for by HW be applicable to the 2017/18 years in respect of the 2017 Excess Inventory so that the 2017 Excess Inventory should be carried forward to 2018 for the calculation of rebate and included in the 2018 ASV, the Target ASV would have been met (see [130] of the Award).

LY contends that, by a Notice of Termination dated 17 May 2019 issued pursuant to section 27.4 of the Agreement (“Notice of Termination”) on the basis of the failure to meet the Target ASV, it had rightfully terminated the Agreement (and all supplemental agreements) with HW. HW’s position was that LY had wrongfully terminated the Agreement, as HW had met the Target ASV when 2017 Excess Inventory was rolled over into 2018 for rebate and thus ASV purposes including determination of whether the Target ASV had been met.

The termination by LY led to the arbitration proceedings being brought by HW against LY. The arbitration was adjudicated by the Tribunal in Hong Kong, on the basis that the substantive governing law was PRC law.

At the heart of the Arbitration was the question of whether or not HW had met the Target ASV for 2018. A number of arguments were advanced by HW in support of its contention that it had done so, and that in consequence LY’s calculation of the ASV for that year was (wrongly) too low and below the Target ASV. The Tribunal rejected all except one of HW’s contentions. However, it accepted HW’s argument that the Rollover Arrangement was applicable in relation to the years 2017 and 2018, so that the amount deducted from the ASV for 2017 for the purpose of calculating the rebate to which HW would be entitled under the Agreement to reflect excessive inventory (which was agreed between HW and xx to be stock held for in excess of 40 inventory days in 2017) should be added back to the ASV for the year 2018, both for purposes of calculating the rebate for 2018 and for ascertaining whether or not HW had met the Target ASV for 2018. As it was common ground that the Target ASV would be met if the amount deducted from ASV in 2017 were added back to the ASV in 2018, the Tribunal held that HW had met the Target ASV and that LY was therefore not entitled to terminate the Agreement, and in consequence awarded damages to HW for LY’s wrongful termination of the Agreement.

In contending that the Rollover Agreement did not exist and/or was not binding on LY so as not to be applicable to the relevant calculations of ASV in 2018, LY contended that such an arrangement was inconsistent with the definition of ASV in section 10.2 of the Agreement, which, as we have noted at [8(c)] above, defines ASV as the Sales Volume of the Products throughout the PRC during a Calendar Year multiplied by the WASP (Weighted Average Sales Price) of the Products for the same Calendar Year, and that there had been no written and duly signed amendment or modification of the Agreement as required by section 38.1 of the Agreement. This contention was referred to below and before us as “the sections 10.2 and 38.1 Issue”. It was also contended by LY that the Rollover Arrangement was not, as a matter of PRC law, binding on LY as an assignee under the provisions of Article 82 of the PRC Contract Law, given LY’s alleged lack of knowledge of the arrangement and the practice that may have been adopted by HW and xx. This second issue was referred to as the “Assignment Issue”. There was a third issue concerning sections 13.3 and 38.1 of the Agreement raised before the Judge, which is no longer pursued by LY on appeal.

It is evident from the Award that the Tribunal noted the importance of the definition of ASV, as it was highly relevant to what they regarded as the core issue of whether the Target ASV was satisfied (see [57] and [90] of the Award). It is also apparent from [90] to [135] of the Award that the Tribunal was well aware of the material issues for its determination in the Arbitration.

However, it is undisputed that the Tribunal did not expressly find in the Award:

(a)

whether the Rollover Agreement was consistent with the Agreement given the definition of ASV under s.10.2 and the requirement under s.38.1 (see [56] of the Decision);

(b)

whether the Rollover Agreement was binding on LY as an assignee under Article 82 of the PRC Contract Law, when LY claimed to have no knowledge of the Rollover Arrangement (see [57] of the Decision).

The Tribunal dealt with the Rollover Arrangement at [119] to [135] of the Award, which are set out or summarised by the Judge at [50] to [55] of the Decision. In our view, the Tribunal's findings at [130] to [135] of the Award are of particular pertinence to this appeal, as we explain below. In those paragraphs, the Tribunal stated:

“130.

LY does not dispute that in 2017 for the calculation of rebate in 2017, which as we have said depended on the ASV for 2017, the excess inventory amounting to RMB 1,174,079.00 had been deducted. LY accepts that the rebate attributable to the deducted ASV should be paid in 2018. LY accepts that should the deducted ASV be included in the 2018 ASV, the Claimant would have met the target of RMB 354m.

131.

Dr William Wong submits that the Agreement contains no rollover inventory arrangement. He is right. The Agreement contains no explicit provision. This may explain why in 2016 the JRC dealt specifically with inventory control. Dr Wong is confronted by the undeniable fact that inventory in excess of 40 days were excluded from the calculation of rebate for 2017. As we have said before, rebate depends on the ASV, just as the annual target depends on ASV. There is not an ASV for rebate under Section 11.4 and a different ASV for the purpose of Section 10.1 and 10.2.

132.

We believe the substance of Mr W's evidence supports our view that excess inventory in a year would not be allowed to be counted as part of the sales value in the calculation of sales targets for the same year. Otherwise, ASV targets could be met by excessive inventory.

133.

Moreover, we believe, common sense and logic support this view. Under the principle of ‘first-expired first-sold’, the excess inventory of the previous year would have been sold in the following year, for which sales rebate should be paid. There is no reason not to count them towards the ASV in the following year. So, despite Dr Wong’s submissions, we take the view that the excess inventory in 2017 should be included in the ASV for 2018.

134.

Dr Wong also relied on the fact that reliance on the rollover inventory appears to be an afterthought. Mr C disagreed. But we do not believe it matters. The proper treatment of the 2017 excess inventory has long been part of the Claimant’s case. It is also a question of fact whether the 2018 ASV was satisfied.

135.

It follows that in our view, because of the rollover, HWSP was able to satisfy the ASV for the year 2018 and LY was not entitled to terminate the Agreement on 17 May 2019 or at all. ...”

Having come to this conclusion, the Tribunal ordered LY to pay HW RMB 239.4 million in damages (see [222] of the Award).

The proceedings below and the Judge’s Decision

By the OS, LY applied for the setting-aside of the Award on the grounds that (i) the arbitral procedure was not in accordance with the agreement of the parties in that the Tribunal failed to deal with key issues put before it (including the sections 10.2 and 38.1 Issue, and the Assignment Issue) and for failing to give sufficient reasons; and (ii) that the Award conflicts with Hong Kong’s public policy. In other words, LY mounted an *infra petita* challenge.

Before the Judge, LY was represented by Mr Yu SC, Mr Man SC and Mr Leung, while HW was represented by Mr Manzoni SC.

LY’s case was that the Tribunal had failed to deal or engage with the sections 10.2 and 38.1 and Assignment Issues, and had accordingly failed to provide sufficient reasons to explain why the Rollover Agreement existed and was, under PRC law, binding on LY as an assignee.

The Judge handed down the Decision on 26 July 2022. After setting out the applicable legal principles at [27] to [36] of the Decision, the Judge went on, at [37] to [57] of the Decision, to examine in detail the Tribunal’s reasoning and analysis, including its views as to the problem of overstocking (which would inflate turnover and hence the ASV for any given year) and also LY’s evidence as to its lack of knowledge of the Rollover Agreement.

The Judge noted the lack of express findings by the Tribunal as to the sections 10.2 and 38.1 Issue and the Assignment Issue (see [56] to [57]) of the Decision. However, she nonetheless concluded (at [58]-[68]) that reading the Award fairly as a whole, it could not be said that the Tribunal had failed to adequately explain its reasons, so as to render the arbitration not in accordance with the agreed procedure. Nor did she consider that it would, in these circumstances, be contrary to

public policy to enforce the Award. Ultimately, the Judge held (at [68] of the Decision) that, as parties in an arbitration do not have a right to “have all their arguments addressed by the Tribunal”, this was not a case in which the court should intervene by setting aside the Award, as the sections 10.2 and 38.1 Issue and the Assignment Issue had either been implicitly dealt with by the Tribunal or because there was no need for such determination in the light of the Tribunal’s findings (see [58]-[61] of the Decision).

The Judge therefore dismissed LY’s Setting Aside Application.

The arguments advanced on appeal

The grounds set out in LY’s Notice of Appeal can broadly be summarised as follows:

(a)

the Judge was wrong to find that the Assignment Issue was not a ‘key issue’ or an ‘issue’ at all, and she failed to consider whether the sections 10.2 and 38.1 Issue was an ‘issue’ or ‘key issue’ for the Tribunal;

(b)

the Judge wrongly applied the Singaporean Court of Appeal decision in *AKN v ALC* [2015] 3 SLR 488, in particular the “clear and virtually inescapable inference” test expressed in that decision at [46] to [47], and thus wrongly concluded that the Tribunal did not fail to consider the sections 10.2 and 38.1 and Assignment Issues;

(c)

the Judge was wrong to conclude that there was no egregious error in the Award or committed by the Tribunal, because had either of the sections 10.2 and 38.1 Issue or the Assignment Issue been decided in LY’s favour, its termination of the Agreement would not have been wrongful;

(d)

the Award was insufficiently reasoned and thus contravenes Hong Kong public policy, and should also be set aside on this basis.

Mr Yu SC (with Mr Man SC, leading Mr Leung) lodged written submissions for LY on 9 May 2023 (“LY’s Skel”). Mr Manzoni SC (leading Ms Mak) lodged written submissions for HW dated 23 May 2023 (“HW’s Skel”).

Mr Yu’s contention was is that the sections 10.2 and 38.1 Issue and the Assignment Issue are key issues which required express determination by the Tribunal. He submitted that they were the “very disputes which the arbitration has to resolve”, in that they were critical to the question whether LY was entitled to terminate the Agreement, and fairness demanded that they be dealt with and not overlooked or ignored by the Tribunal. See e.g. *ZCCM Investments Holdings Plc v Kansanshi Holdings Plc* [2019] EWHC 1285 (Comm) at [54]; *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm) at [38]; *Petrochemical*

Industries Co v Dow Chemical Co [2013] 2 CLC 864 at [21].

Mr Yu also points out that LY pleaded these issues in its Amended Statement of Defence dated 3 July 2020 (“ASD”) in the Arbitration, which made them essential issues to be resolved. See e.g. World Trade Corporation v C Czarnikow Sugar Ltd [2005] 1 Lloyd’s Rep 422 at 426.

Accordingly, Mr Yu submits that the Judge was wrong to hold that the issue in the Arbitration was simply whether LY’s termination of the Agreement was wrongful, and that other questions (including the sections 10.2 and 38.1 Issue and the Assignment Issue) were merely “arguments” rather than “issues” (see LY’s Skel at [13]-[15]).

He also contends that the Judge wrongly applied the Singaporean Court of Appeal authority of AKN v ALC, and that the “clear and virtually inescapable test” (i.e. that the court should not infer that the Tribunal failed or omitted to deal with an essential issue unless the inference is “clear and virtually inescapable”) sets a threshold that is too high and is inconsistent with the test in Z v R [2021] HKCFI 2312 at [18], which simply asks whether it is “apparent” to the parties from the award whether key issues have been determined or otherwise dealt with (see [20] of LY’s Skel).

On the basis of those submissions, Mr Yu contends that the Judge should have found that the Tribunal had failed to give sufficient reasons or deliberation in the Award on the essential issues, and had thereby fallen foul of public policy requirements and committed an egregious error, resulting in the Award being liable to be set aside.

For HW, Mr Manzoni SC submitted that the question of whether to set aside the Award is a mixed question of law and fact, in that the Judge had to evaluate matters such as whether there was disturbance to the “structural integrity of the arbitral process” and that this court should accord due respect to the decision of the first-instance Decision in this regard (see [1] to [2] of HW’s Skel). See El Dupont De Nemours and Co v ST Dupont [2003] EWCA Civ 1368 at [94].

In essence, Mr Manzoni adopted and agreed with the reasoning given by the Judge in refusing to set aside the Award, on the basis that the Tribunal had given detailed reasons for reaching its conclusion on whether the Target ASV had been met (see [12] of HW’s Skel), and the Tribunal was clearly aware of LY’s contention that there was no contractual basis for the Rollover Agreement (whether as to its existence, effect on LY, or impact on the Target ASV) (see [21] to [25] of HW’s Skel) and as to the requirement of written notice, and had adequately addressed the Assignment Issue (see [26] of HW’s Skel).

Mr Manzoni also submitted that the ‘public policy’ ground relied upon by LY should be narrowly construed and sparingly applied, such that it would not be engaged unless the enforcement of an arbitral award in Hong Kong would be “so shocking to the court’s conscience” as to render enforcement of the award repugnant (see [39] of HW’s Skel; U v A (unrep., HCCT 34/2016, 23 February 2017 at [65]).

Discussion

With respect, we are unable to agree with Mr Yu's submissions. There can be little or no real controversy regarding the principles stated in the authorities cited by the Judge at [27] to [36] of the Decision. Her reference to and reliance upon those well-established principles cannot be faulted. The only point of possible controversy rests upon her reference to the Singapore case of AKN, which might arguably be thought to require an applicant seeking to set aside an award to meet a threshold even higher than the already high threshold which he faces. However, it seems to us that this is not, at the end of the day, a point that we need resolve, as we are firmly of the view that even applying the test in *Z v R* contended for by Mr Yu, it is (or should be) apparent to the parties why the arguments on the sections 10.2 and 38.1 Issue and the Assignment Issue were handled by the Tribunal as they were.

As the Judge pointed out, the Tribunal, having cited section 10.2 in the Award, was clearly alive to the definition of ASV contained therein.

Further, from its reasons set out in particular at [130] to [135] of the Award, it is clear that the Tribunal was engaging with the Rollover Arrangement issue, which was undoubtedly an important issue in the determination of the ultimate issue of whether HW had met the Target ASV for 2018. At [130] the Tribunal observed that LY did not dispute that in 2017, for the purposes of calculation of rebate, excess inventory of RMB 1,174,079.00 had been deducted from the ASV for 2017. In the same paragraph, the Tribunal recorded that LY accepted that the rebate attributable to the 2017 deducted ASV should be paid in 2018. From this, it follows that the amount deducted from the ASV in 2017, was accepted by LY to be properly included in the ASV for 2018, for the purposes of calculating the rebate to which HW was entitled. In [131] of the Award, the Tribunal went on to point out that there was only one ASV, which was the same concept for both rebate purposes and for the purpose of ascertaining whether any target such as the Target ASV was met. There were not different definitions of ASV for these two purposes. It thus followed, the Tribunal reasoned, that as the amount deducted from the 2017 ASV for rebate purposes was included, with LY's concurrence, for calculating the ASV for the purposes of rebate in 2018, so it must also be included for the calculation of ASV for the attainment or otherwise of the Target ASV. In effect, it was to be deemed to be part of the 2018 ASV. On this basis, it is difficult to see how any point arises on section 10.2, and there was accordingly no need for the Tribunal to address that argument.

As to the Assignment Issue, this raised the question of whether the Rollover Arrangement was binding on LY if it did not have knowledge of it, as a matter of PRC law. But the Tribunal's finding at [130] of the Award referenced above was that LY accepted that the amount of ASV deducted in 2017 for rebate purposes should be added to the 2018 ASV for rebate (and hence, to the Tribunal's mind, all other) purposes. The premise of lack of knowledge on the part of LY about the arrangement was therefore without foundation. Again, this meant that it was not strictly necessary for the Tribunal to address this point.

For the reasons explained above, we are satisfied that neither the sections 10.2 and 38.1 Issue nor the Assignment Issue were, in the light of the findings of the Tribunal which we have highlighted, key issues in relation to which the lack of detailed discussion by the Tribunal rendered its Award susceptible to challenge, whether on the ground that the Tribunal had thus committed an egregious error, or on the ground that the Award was insufficiently reasoned and so contravened Hong Kong public policy.

We therefore agree with the Judge that the Award should not be set aside, and that LY's application should be dismissed. We therefore dismiss LY's appeal.

Like the Judge, we also consider that there is no need to deal with HW's argument based on Article 34(4) of the Model Law.

So far as costs are concerned, there is no reason why these should not follow the event, and we make an order nisi that LY is to pay HW its costs of this appeal, on an indemnity basis.

(Susan Kwan)

(Peter Cheung)

(Aarif Barma)

Vice-President

Justice of Appeal

Justice of Appeal

Mr Benjamin Yu SC, Mr Bernard Man SC (not present at the hearing) and Mr John Leung, instructed by Anthony Siu & Co, for the plaintiff

Mr Charles Manzoni SC and Ms Esther Mak, instructed by Fangda Partners, for the defendant

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