

HONG KONG COURT REFUSES ENFORCEMENT OF MAINLAND AWARD ON PUBLIC POLICY GROUNDS

Is the ability to multitask something to be embraced by arbitrators? In *Song Lihua v Lee Chee Hon* [2023] HKCFI 2540, the Hong Kong Court of First Instance (HKCFI) refused enforcement of a Chengdu Arbitration Commission (CAC) award on public policy grounds, as the failure of an arbitrator to give his full attention to the hearing was a "serious irregularity" where justice was not "seen to be done".

Background

Section 95(3)(b) of the Hong Kong Arbitration Ordinance (Cap. 609, **Arbitration Ordinance**) provides that enforcement of a Mainland award can be refused when it would be contrary to public policy to enforce the award.

The CAC arbitration (the **Arbitration**) arose out of a share dispute between Song and Lee. A CAC award was made on 11 October 2021 (the **Award**), in which Lee was required to pay Song RMB 337,222,219.90 with interest and costs.

Pursuant to Song's application, on 12 January 2023, the HKCFI granted leave to Song to enforce the Award in Hong Kong (the **Enforcement Order**). Lee then applied to set aside the Enforcement Order based on section 95 of the Arbitration Ordinance. Lee raised six grounds as follows:

1. **Contact Methods Complaint** – Lee had not been given proper notice of the Arbitration, as Song had failed to disclose to the tribunal Lee's contact methods as known to Song;
2. **Service Complaint** – Lee had not been properly served with notice of the Arbitration;
3. **Nomination Complaint** – Lee was deprived of the opportunity to nominate an arbitrator because of the Service Complaint;
4. **Arbitrator Complaint** – the conduct of one of the arbitrators (**Arbitrator Q**) deprived Lee of the right to a fair hearing and the opportunity to present his case, which was contrary to public policy;
5. **Supplemental Submissions Complaint** – Lee was not given a copy of the Supplemental Submissions by Song and was therefore unable to address the matters raised therein; and
6. **Invalidity Complaint** – the underlying contract and arbitration agreement was invalid and unenforceable under Mainland law.

The Arbitrator Complaint

The Arbitrator Complaint was the central complaint of the six made by Lee:

1. By way of background, Lee did not participate in the first Arbitration hearing as he was not informed of the arbitration. By the time Lee knew about the arbitration, he instructed his lawyer to attend the second hearing.
2. At the second hearing, the parties' lawyers and two of the three arbitrators attended the hearing in person, while the third arbitrator, Arbitrator Q, attended remotely by video.
3. During the presentation, challenges, and questioning by the tribunal in the second hearing, Arbitrator Q was noted as not concentrating on the hearing – he was moving from one location to another without using headphones or any earpiece, occasionally talking or gesturing to others, or looking into the distance instead of watching the proceedings, before eventually travelling in a private car.
4. There were also numerous occasions where Arbitrator Q was disconnected from the network and was unable to respond when other members of the tribunal were asking whether he could hear them.

It was clear to the court that Arbitrator Q was not concentrating during the Second Hearing.

In deciding whether to refuse enforcement of the Award as a result of the failure of Arbitrator Q to pay full attention to the hearing, Mimmie Chan J revisited the earlier authorities and helpfully summarised the principles for refusing to enforce an arbitral award in Hong Kong when it is deemed to be "contrary to public policy":

1. Before an arbitral award can be recognised and enforced in Hong Kong, natural justice must be observed and the award must be made as a result of due process.
2. When evaluating notions of due process and natural justice, the Hong Kong court will apply its own standards. This is because the Hong Kong court, as a court of enforcement, plays a distinct role when compared to a court of the supervisory jurisdiction.
3. Even though an award has been upheld by the court of the supervisory jurisdiction, Hong Kong courts may still refuse enforcement if the making of the award is contrary to the notions of justice in Hong Kong.
4. In Hong Kong, merely complying with natural justice and due process is not sufficient, as set out in the aphorism '*not only must justice be done, but it must also be seen to be done*', and as seen by a reasonable observer. This maintains public confidence in the arbitration system.
5. Moreover, the right to be heard is an important procedural right under the rules of natural justice in Hong Kong. Not only does the right to be heard encompass the litigant's right of access to the courts, but also that the court actually hears the litigant.
6. If an arbitrator is not concentrating on or not hearing the parties' submissions, a fair and reasonable observer would doubt whether this arbitrator was keeping an open mind as he was not properly hearing the parties, or that his decision was supported by the evidence. Consequently, there will be no apparent justice or fairness as a result. This is analogous to the situation where an employment tribunal member fell asleep during a hearing, as in the English authority of *Stansbury v Datapulse plc & another*¹.

Taking into account the facts and applicable principles, the court held that the second hearing lacked due process and failed to meet the standard of a fair and impartial hearing. In Mimmie Chan J's words, "*It would be shocking to the conscience of the Court to give recognition to the Award*"².

Further, the court rejected the arguments that consideration should be given to the fact that the Award had not been set aside in Mainland China or that the failure of Lee's lawyers to raise objections during the second hearing constituted a waiver of the irregularities. The irregularities owing to Arbitrator Q's conduct were too serious to be fully waived during the second hearing, and, in any event, the ground of public policy under section 95(3) of the Arbitration Ordinance enabled the court to refuse enforcement.

The Other Complaints

Since the court had already ruled that the Award should be set aside on grounds of public policy, the court rejected or decided not to make further findings on the other complaints:

1. **Contact Methods Complaint** – The court was satisfied that Song had supplied the CAC with the methods of contacting Lee as known to her and the Commission had succeeded in contacting Lee.
2. **Service Complaint** – Since the CAC rules provided for deemed service of documents and the rules had been fully complied with, service was deemed valid, alternatively Lee had waived any irregularity on service.
3. **Nomination Complaint** – As the PRC Arbitration Law provided that the Commission could appoint an arbitrator when a party fails to, the constitution of the tribunal was valid, alternatively Lee had waived any irregularity on the composition of the tribunal.
4. **Supplemental Submissions Complaint** and **Invalidity Complaint** – The court did not make findings on these two grounds.

Conclusion

The decision in *Song Lihua v Lee Chee Hon* is to be welcomed as highlighting the independence of the Hong Kong courts, and shows that they will not simply defer and follow decisions made by courts or tribunals in other jurisdictions.

The Hong Kong courts are capable and ready to refuse the enforcement of a non-Hong Kong award, when the underlying arbitral proceedings have not met the high threshold of natural justice and due process as maintained by Hong Kong courts.

This judgment also serves as a practical reminder to practitioners in the arbitration arena, as well as parties to an arbitration, that it is of paramount importance for arbitrators to uphold a high degree of professionalism and that

¹ *Stansbury v Datapulse plc & Another* [2003] EWCA Civ 1951

² *Song Lihua v Lee Chee Hon* [2023] HKCFI 2540, [53]

their conduct will be scrutinised by the court. The same also applies to the parties and the parties' lawyers, as highlighted by the very recent case of *Federal Republic of Nigeria v Process & Industrial Development Ltd*³, where the English High Court set aside an award obtained by fraud and conduct contrary to public policy, including knowingly using false evidence, committing bribery, and improperly retaining the opponent's legal documents, which represented the "*most severe abuses of the arbitral process*"⁴. Therefore, when a party to an arbitration feels that it has been prejudiced in the arbitral proceedings owing to misconduct, the party should carefully consider the need to seek assistance from the court by challenging the award. This decision supports the importance of properly conducted international arbitrations as an attractive and important method of resolving disputes.

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³ *Federal Republic of Nigeria v Process & Industrial Development Ltd* [2023] EWHC 2638 (Comm)

⁴ *Federal Republic of Nigeria v Process & Industrial Development Ltd* [2023] EWHC 2638 (Comm), [516]

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