HCCT 111/2022
[2023] HKCFI 2540

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 111 OF 2022

BETWEEN

SONG LIHUA (宋丽华) Applicant

and

LEE CHEE HON (李子瀚) Respondent
(FORMER NAME: QUE WENBIN (阙文彬))

Before: Hon Mimmie Chan J in Chambers
Date of Hearing: 24 August 2023
Date of Decision: 24 August 2023
Date of Reasons for Decision: 5 October 2023

REASONS FOR DECISION

Background

1. On 9 December 2022, the Applicant ("**Song**") applied by her Originating Summons for leave to enforce an arbitral award dated 11 October

2021 ("**Award**") made by the tribunal in an arbitration by the Chengdu Arbitration Commission ("**Commission**") on the Mainland ("**Arbitration**"). The Award was for the payment by the Respondent ("**Lee**") of the sum of RMB 337,222,219.90, interest and costs, found to be due and payable to Song under a contract made between Lee and Song on 7 July 2014 ("**Contract**"). Under the Contract, Song had agreed to purchase shares for RMB 210 million, undertaking not to transfer such shares for a "lockup period" of 36 months, upon Lee's guarantee of a rate of return for the shares of not less than RMB 630 million for the lockup period.

2. An order was made by the Court on 12 January 2023, granting leave to Song to enforce the Award as a judgment of the Court ("**Enforcement Order**").

3. Before that, on 12 December 2022, Song had applied for and obtained from the Court an injunction, whereby Lee was restrained from removing his assets from Hong Kong, and from disposing of or diminishing the value of any of his assets, up to the sum of HK $38,400,000 ("**Mareva Injunction**").

4. On 16 December 2022, the Court continued the Mareva Injunction, but the order provided that Lee shall be released from the Mareva Injunction, which shall be discharged, upon Lee's payment into Court of the sum of HK $38,400,000. On 23 December 2022, the sum of HK $38,400,000 was paid into court by Lee, and the Mareva Injunction was discharged.

5. On 26 January 2023, Lee applied to set aside the Enforcement Order under section 95 of the Arbitration Ordinance Cap 609 ("**Ordinance**"),

on the stated grounds that the arbitration agreement was not valid, Lee was unable to present his case in the Arbitration, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement, and/or that it would be contrary to public policy to enforce the Award in Hong Kong ("**Setting Aside Application**").

6. The Setting Aside Application was heard on 24 August 2023. At the conclusion of the hearing, this Court granted the application, set aside the Enforcement Order with costs, and indicated that the reasons for the decision would be handed down. The following sets out my reasons for the decision.

Basic first principles

7. Hong Kong courts adopt a pro-arbitration and pro-enforcement approach, endeavoring to uphold parties' agreement to submit their disputes to arbitration, recognize and enforce arbitral awards, and interfere in the arbitration of the dispute only as expressly provided for in the Ordinance. This is in accordance with the object and principles of the Ordinance, as set out in section 3, to facilitate the fair and speedy resolution of disputes by arbitration. However, as the court has highlighted in the authorities, its recognition and enforcement of arbitral awards is underpinned by the fundamental principle that the award is made as a result of due process, and that recognized rules of natural justice have been observed in the arbitration.

8. In this case, Song places much reliance on the fact that the Mainland Court, exercising its supervisory jurisdiction over the Arbitration, has ruled that the Award is valid and has dismissed Lee's application to set aside the Award on the ground *(inter alia*) of the manner in which the

Arbitration was conducted. For this reason, it is perhaps helpful to repeat some basic, fundamental principles.

9. As explained as early as in the case of *Paklito Investment Limited v Klockner East Asia Limited* [1993] 2 HKLRD 39 as a matter of general principle, there is nothing in the New York Convention which specifies that a defendant is obliged to apply to set aside an award in the jurisdiction where it was made, as a condition of opposing enforcement elsewhere. The Court explained the "choice of remedies" at page 48 of the reported judgment, as follows:

> "… a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention.
>
> Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition."

10. This was confirmed by the Court of Final Appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1992) 2 HKCFAR 111. At page 136 of the reported judgment of Sir Anthony Mason NPJ, the following observations were made:

> "Under the Ordinance and the New York Convention, the primary supervisory function in respect of arbitrations rests with the court of supervisory jurisdiction as distinct from the enforcement court (see Arbitration Ordinance (Cap 341) s 44 (5); New York Convention, art VI; *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 at p 808). But this does not mean that the enforcement court will necessarily defer to the court of supervisory jurisdiction.
>
> The Convention distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction (arts VI and VI (e)) and proceedings in the court of enforcement (art VI). Proceedings to

> set aside are governed by the law under which the award was made or the law of the place where it was made, while proceedings in the court of enforcement are governed by the law of that forum. The Convention, in providing that enforcement of an award may be resisted on certain specified grounds, recognizes that, although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced.
>
> It follows, in my view, that it would be inconsistent with the principles on which the Convention is based to hold that the refusal by a court of supervisory jurisdiction to set aside an award debars an unsuccessful party from resisting enforcement of the award in the court of enforcement."

11. Referring to the decision of Kaplan J in *Paklito Investment Ltd*, and the two options open to the unsuccessful party, Sir Anthony Mason further pointed out that such a party is not bound to elect between the two remedies, at any rate when, in the court of enforcement, he seeks to rely on the public policy ground. His Lordship also explained that a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting on that ground the enforcement of the award in the enforcing court in another jurisdiction, because each jurisdiction has its own public policy.

12. Nothing in the Ordinance, and the scheme for recognition of Mainland awards thereunder, alters the general principles stated in the authorities above.

13. It is clear from the authorities that where public policy is relied upon as a ground to resist enforcement of an award, it is the domestic public policy of the relevant court of enforcement which is relevant. Whereas an

award may be recognized in one jurisdiction, its enforcement may be refused if it would be contrary to the public policy of another jurisdiction to enforce it.

14. "Contrary to public policy" has been held by the Court of Final Appeal to mean "contrary to the fundamental conceptions of morality and justice" of the forum (*Hebei Import & Export Corp*). In *A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389, the Court explained (at para 23) that if the public policy ground is to be raised, there must be "a substantial injustice arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant".

15. In Hong Kong, *audi alteram partem* is a fundamental principle of natural justice which is recognized and enforced. This means that no person shall be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against it, and to be heard on its case.

16. Under the Ordinance, the parties to an arbitration must be treated with equality (section 46(2)). When conducting arbitral proceedings, the tribunal is expressly required to be independent, and to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents.

17. The application of the above principles and statutory provisions means that not only must these rules be applied, but they must be seen by the objective reasonable observer to have been applied. The established and well-known rule is that not only must justice be done, but it must also be seen to

be done. This is borne out by the case cited by Lee in this case, *Cesan v R* (2008) 236 CLR 358, where French CJ observed:

> "There are elements of the judicial process which can be said, at least in a metaphorical way, to play a part in maintaining public confidence in the courts irrespective of their relationship to the actual outcome of the process. The appearance of impartiality is one such. In *North Australian Aboriginal Legal Aid Service Inc v Bradley* the joint judgment quoted with approval the observation by Gaudron J in *Ebner v Official Trustee in Bankruptcy*: 'Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system.' The somewhat elusive criterion of 'public confidence' is in some cases, such as the appearance of bias, subsumed in what a fair and reasonable observer would think. The courts nevertheless depend in a real sense upon public confidence in the judicial system to maintain their authority. The maintenance of that authority depends, inter alia, upon that element of the judicial process which requires that parties before the court be given and be seen to be given a fair hearing. It is necessary to a fair hearing that the court be attentive to the evidence presented by the parties and to the submissions which they make. The appearance of unfairness in the trial can constitute a 'miscarriage of justice' within the ordinary meaning of that term." (Emphases added)

18. Needless to say, the arbitrator is carrying out a quasi-judicial role (see this Court's earlier Decision in this case, [2023] 4 HKLRD 162) and has duties to conduct the arbitral proceedings and decide the case before him with appropriate care, skill and professional integrity (see para 13.04, *International Commercial Arbitration* (Born, 3rd edition).

19. As the courts have emphasized in the cases, it is only where the fair and reasonable observer can perceive due process in the arbitration, that public confidence can be maintained and the courts can give effect to that confidence by enforcing an award as a judgment of the court.

20. The facts of the present case and of the challenge made to the arbitral process are considered in the light of the principles set out above.

The matters complained of by the Respondent

21. As summarized by Counsel for Song, Lee relied upon 6 grounds for his Setting Aside Application. First, it is alleged that in breach of her duty of good faith, Song had failed to disclose to the tribunal Lee's contact methods as known to Song, which led to Lee not being given proper notice of the Arbitration ("**Contact Methods Complaint**"). Secondly, Lee claims that he had not been properly served with notice of the Arbitration ("**Service Complaint**"), which led to his being deprived of the opportunity to nominate an arbitrator to the tribunal - which formed a further ground of complaint ("**Nomination Complaint**"). Fourthly, Lee claims that the conduct of the Arbitration by one of the arbitrators ("**Q**") deprived him of the opportunity to present his case, and of the right to a fair hearing, which is contrary to public policy ("**Arbitrator Complaint**"). Fifthly, Lee claims that he was not given a copy of the Supplemental Submissions which were filed by Song after the hearing of the arbitration, such that he was not able to address the matters raised in the submissions ("**Supplemental Submissions Complaint**"). Lastly, it is Lee's claim that the underlying Contract and the arbitration agreement contained therein is invalid and unenforceable under Mainland law ("**Invalidity Complaint**").

22. On 28 December 2022, Lee had applied to the Chengdu Intermediate People's Court to resist Song's application to enforce the Award. On 16 March 2023, the Mainland Court rejected his application, in essence finding that there was no illegality in the Contract, that Q's conduct in the arbitration caused a defect in the procedure, but did not have any actual impact on the 2nd Hearing. The notice and documents in the Arbitration had been validly served on Lee, and Lee's lawyer had not raised any objection to either the constitution of the tribunal or to the arbitral procedure.

23. Under section 95(2) of the Ordinance, enforcement of a Mainland award may be refused if the person against whom it is invoked proves one or more of the grounds set out in the subsection. The burden of proof is on Lee, and enforcement may be refused if any one of the grounds is established – subject always to the discretion of the Court to permit enforcement notwithstanding any defect found in the process. Based on the matters raised in Lee's evidence, the relevant grounds of the Setting Aside Application are those set out in section 95(2)(b) (for the Invalidity Complaint), section 95(2)(c)(i) (for the Service Complaint), section 95(2)(c) (for the Arbitrator Complaint and the Supplemental Submissions Complaint), section 95(2)(e) (for the Nomination Complaint), and section 95(3), for the claim that by virtue of his complaints, enforcement of the Award in Hong Kong would be contrary to the public policy of Hong Kong.

The Contact Methods Complaint, the Service Complaint and the Nomination Complaint

24. These complaints can be dealt with together, and briefly.

25. Lee claims that it was insufficient and an act of bad faith on Song's part to have only disclosed to the tribunal Lee's former address, and the telephone number of Lee's assistant, without disclosing Lee's other telephone number and other contact methods of Lee's assistant. Lee claims he had never received any documents which had been served at his old address, from which he had moved and which he had in fact sold. On Song's evidence, she herself had not been able to contact Lee at Lee's telephone number, and she had only been able to reach Lee by calling his assistant's telephone number. She had given to the Commission the last known address of Lee,

and the means by which she had been able to contact Lee (ie the telephone number of his assistant). She apparently also gave to the Commission the email address of Lee's assistant.

26. I am not satisfied that it has been established that Song had acted in breach of any duty of good faith, when on her evidence, she had supplied to the Commission the methods of contacting Lee, as known to her. The Commission was in fact ultimately able to contact Lee through his assistant, by communicating with the assistant by the email address furnished by Song.

27. According to the Award, the notice and documents of the commencement of the Arbitration had been served on Lee at the address indicated in his identity registration record on the Mainland (ie his Mainland identity card) and as specified in the underlying Contract. The tribunal accepted the address so indicated as Lee's usual or habitual address. The applicable rules of the Chengdu Arbitration Commission ("**CAC Rules**") provide for deemed service of documents on the party served, when documents relating to the Arbitration are sent by registered post or courier to the usual or habitual address of the party, and if such cannot be found, the CAC Rules provide that they shall be deemed to have been duly served if sent to the habitual or usual residence or other addresses last known of the party to be served.

28. Lee's claim is that he had not received notice of the commencement of the Arbitration sent to his former address, and it was only after the first hearing of the Arbitration which had taken place on 26 March 2021 ("**1st Hearing**"), that he was informed by his assistant of the Arbitration. The Commission had sent an email to Lee's assistant on 2 April 2021, with

the intention of informing Lee of the 1st Hearing held, and to invite Lee to contact the Commission and to attend the next hearing of the Arbitration. Lee then instructed his lawyers, who received certain documents relating to the Arbitration on 21 April 2021, and attended the second hearing of the Arbitration on 26 May 2021 ("**2nd Hearing**"). By then, the tribunal had already been empaneled, despite there being no nomination by Lee. The tribunal pointed out in the Award that the Commission is empowered by Article 12 of the PRC Arbitration Law to designate an arbitrator when a party to the arbitration has defaulted in choosing an arbitrator within the time designated.

29. Lee participated in the 2nd Hearing through his lawyer, Cai.

30. The service of documents relating to the Arbitration to the last known and usual place of address of Lee is deemed valid under the CAC Rules. Even if the deemed service was not effective, Lee had participated in the Arbitration through his lawyer without any protest, and without any application to adjourn the 2nd Hearing. If the notice of the Arbitration had been validly served by operation of the CAC Rules, then the Commission and the tribunal were entitled to complete the appointment to the tribunal pursuant to and in accordance with the applicable rules and the Arbitration Law.

31. It can also be said that Lee had waived any irregularity concerning the service of the notice and documents of the Arbitration, and any irregularity in the constitution of the tribunal. He had knowledge of the composition of the tribunal by the time of the 2nd Hearing, at the latest, but no objection had been raised on Lee's behalf. In this context, Counsel for

Song has highlighted the fact that at the conclusion of the 2nd Hearing, Lee's lawyer had, at the request of the tribunal, confirmed that there was no objection to any procedural defect in the Arbitration. I accept that the nomination and empaneling of the tribunal is a procedural matter, which can be and was waived by Lee.

The Arbitrator Complaint

32. This is the most serious complaint made.

33. The background of Lee's complaint is that he had not received any notice of or documents relating to the Arbitration which had been sent to his former address, and by the time he was informed of the Arbitration, the 1st Hearing had already taken place and he could only instruct his lawyer to attend the 2nd Hearing.

34. Also by way of background, it was only after Lee had applied to the Mainland Court to set aside the Award, and while he was preparing for his opposition to Song's application to enforce the Award on the Mainland and in Hong Kong, that Lee's lawyers were able on 4 January 2023 to conduct a search of the Commission's files of the arbitral proceedings, and obtained copies of the notice of arbitration, transcripts of the 1st Hearing and of the 2nd Hearing, and two sets of submissions filed on behalf of Song, dated 9 April 2021 and 31 May 2021. The April submissions had been filed by Song after the 1st Hearing, which Lee had never received before his participation in the Arbitration. The May submissions were filed by Song after the 2nd Hearing (as directed by the tribunal at the hearing), but had never been served on or received by Lee or his lawyers.

35. Lee's lawyers had asked for a copy of the video recording of the entire arbitral proceedings. This request was not acceded to by the Commission, but eventually, on 29 January 2023, Lee's lawyers were able to arrange with the Commission to view the video recording of the 2nd Hearing. They were also able to obtain screen shot captures of the video.

36. There is no dispute that whereas the parties' lawyers, and two of the three arbitrators, had attended the 2nd Hearing in person, the third arbitrator Q had attended by video conferencing facilities.

37. As summarized by Lee's Counsel, the proceedings of the 2nd Hearing can be broadly divided into 5 parts. The first part of the hearing dealt with housekeeping and administrative matters. The second part concerned the presentation of Lee's case by his lawyer. The third part was for adducing and challenging the evidence adduced by both parties. There was a fourth part for questions from the tribunal, and the last part was for the parties' debate and submissions to the tribunal.

38. In gist, Lee's complaint is that Q had not meaningfully participated in the 2nd Hearing of the Arbitration. For at least the second half of the hearing, Q was moving from one location to another, indoors and outdoors, and had eventually left his premises, and traveled in a car, without giving his undivided attention to the hearing. He was off-line for periods of time from the second half, and obviously could not hear what was being said by the parties' lawyers or by the other members of the tribunal.

39. At the hearing before this Court on 24 August 2023, excerpts of the entire video recording of the 2nd Hearing ("**Video**") (which had been obtained by Lee after the Award) was played.

40. Having carefully reviewed the entire Video (which lasted 2 hours 17 minutes until the end of the recording), and the excerpts thereof of the second half of the 2nd Hearing ("**Excerpt**") (which Excerpt lasted approximately 12 minutes), it is quite obvious that essentially for the second half of the hearing, commencing approximately 1 hour 36 minutes after the start of the 2nd Hearing, Q had scarcely been stationary for more than 1 minute (apart from the last part of the Video when he was inside a car). The Video clearly showed the background of Q's various locations, and it could be observed that he had moved from one room of the premises to another, at times talking to and/or gesturing to others in the room. Q could also be seen to be looking into the distance frequently, instead of watching the screen and the video of the proceedings.

41. References below are, for ease of my identification, made to the timing of the Excerpt, but the Excerpt is itself extracted from the full Video which I have examined in detail. Counsel for Lee have, in their skeleton submissions, referred to the exact timing of the Video itself.

42. Approximately 6 minutes from the commencement of the Excerpt of the Video, Q could be seen walking out of the main door of the premises into an open public area. He remained standing there for a short period of time, and then went off-line at around 7:50 minutes after the commencement of the Excerpt. Q went online again at approximately 8:20 minutes, before going off-line again at around 8:28, and again at 9:14.

When Q appeared online again at 9:56 minutes, he was seen inside a vehicle which appeared to be a private car as he was sitting in the front seat and adjusting his seatbelt. The video image froze again at 10:35 minutes of the Excerpt, and when Q appeared online at 10:58, the chairman of the tribunal could be heard asking if Q could hear him but there was no response whatsoever from Q for some time. At 11:25 minutes of the Excerpt, Q spoke for the first time to state that he had no reception as he was on or proceeding to the high-speed railway. The manner of Q's attendance of the 2nd Hearing, by going outdoors where reception was poor, was obviously disruptive of the proceedings, to say the least.

43. It may well be Q's claim that he had *in fact* heard the entirety of the proceedings of the 2nd Hearing throughout. It should be pointed out, however, that it does not appear from the Video that Q was using a headphone or any earpiece, so it can be inferred that he was only relying on the speaker of his mobile telephone or other handheld device. It can also be observed from the Excerpt that on at least 2 occasions when members of the tribunal or the secretary of the tribunal attending the hearing had spoken to ask if Q could hear them, or was online, Q had made no answer at all, nor had he made any indication or gesture that he had heard the questions. Neither did Q give any explanation for the times when he was disconnected, as to whether he had heard the proceedings, or otherwise.

44. During the time when Q was seen wandering around in the manner described above, Lee's lawyer, and then Song's lawyers, were addressing the tribunal. Significantly, as Counsel for Lee pointed out, Q's movements took place during the time when the parties' lawyers were adducing and challenging the evidence produced, and when members of the

tribunal were asking questions as to the evidence and the parties' respective case.

45. Paragraphs 15 to 17 above of my Decision set out fundamental and important principles of natural justice observed by the Hong Kong courts. As Counsel for Lee submitted, the Hong Kong Bill of Rights Ordinance guarantees equality before the courts and the right to a fair and public hearing (section 8). In the case of *Lau Siu Lai v Kwok Wai Fun Franco (Returning Officer)* (2020) 23 HKCFAR 338, Cheung PJ (as the Chief Justice then was) pointed out (at paragraph 13 of the judgment) that the right to be heard is an important procedural right under the rules of natural justice going directly to the question of fairness. On behalf of Lee, it was argued that such right to be heard encompasses not only the litigant's right of access to the courts, but also the court actually hearing the litigant.

46. The case of *Stansbury v Datapulse plc and anor* [2003] EWCA Civ 1951 concerned a more extreme case of the improper conduct of a member of the employment tribunal, who appeared to have fallen asleep during a hearing. The applicant had made no complaint during the course of the hearing before the employment tribunal, where he was legally represented. The English Court of Appeal held that a hearing should be by a tribunal each member of which was concentrating on the case before him or her, and that a hearing might be held to be unfair if a member of a tribunal did not appear to be alert as to what was being said in the course of the hearing, or by reason of a member's inability to give his full attention to the hearing. Peter Gibson LJ referred to the decision of *Whitehart v Rayman Thompson Ltd* (unreported) 11 September 1984, and the observation made by Popplewell J in the case:

> "It is axiomatic that all members of a tribunal must hear all the evidence and to have a trial in which one member of the tribunal is asleep even for a short part of the time, cannot be categorized as a proper trial. Justice does not appear to have been done." (Emphasis added)

47. In *Stansbury*, Peter Gibson LJ also referred to the opinion of the Appellate Committee of the House of Lords in *Lawal v Northern Spirit Ltd* [2003] ICR 856, and the following observation of Lord Steyn:

> "What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago."

48. In *Cesan v R* (2008) 236 CLR 358, the Court stated the important principles of appearance of impartiality, as being essential to the maintenance of public confidence in the judicial system. These can be found at paragraph 71 of the judgment, cited at paragraph 17 above.

49. The above authorities all highlight that it is not only important for there to be justice and fairness in the process of a trial or a hearing, but that it is just as, if not more, essential that an objective and reasonable third-party observer should see that there was fairness and impartiality in the process. Only then can there be confidence in and respect for the system whereby a party and his case is judged.

50. It is the duty of an arbitrator to decide the dispute submitted to him, after giving to the parties the reasonable opportunity to present their case, and after hearing the parties. In fact, it can be said that the first role of the judge and the arbitrator is to preside and hear the case. A hearing takes

place to inform the judge and tribunal of the material required for the determination called for.

51. If Q was not concentrating on or not hearing the submissions made by the lawyers, an objective observer would have reasonable doubts as to firstly, whether Q had already made up his mind as to the dispute before or without hearing the parties, and was not interested in what the parties had to say on the evidence or on the law. Secondly, the observer would have reasonable doubts as to whether Q's decision in the case can be actually supported by the evidence, when he had not properly focused on the parties' submissions at the 2nd Hearing. A hearing is for the finding of facts and for a fair consideration of contrary argument, and if the arbitrator is not focused on or does not appear to be interested in that, confidence in his judgment can be impaired and a party can fairly doubt if his case has been truly heard and considered at all.

52. In my judgment, there is no apparent justice and fairness, when a member of the decision-making tribunal was not hearing and focused on hearing the parties in the course of the trial.

53. Song placed reliance on the fact that the supervisory court on the Mainland has not set the Award aside and has permitted its enforcement on the Mainland, despite the complaint made by Lee as to the manner of Q's conduct of the proceedings. However, Hong Kong as the enforcement court has to apply its own standards and law when deciding whether it would be contrary to the public policy of Hong Kong to enforce the Award. Having considered the facts of this case, and for the reasons set out in the preceding paragraphs, I take the view that the conduct of the 2nd Hearing lacked due

process and falls short of the high standards expected by the Hong Kong courts for a fair and impartial hearing, which gives recognition to the parties' fundamental and basic rights. It would be shocking to the conscience of the Court to give recognition to the Award.

54. Song argued that Lee's lawyer who attended the 2nd Hearing had waived any irregularities of the 2nd Hearing, by failing to raise objection to the tribunal with regard to Q. Cai in fact confirmed to the tribunal, when asked at the end of the hearing, that he had no objection to the procedures of the Arbitration.

55. First, it can be expected that an advocate at a hearing would be focused on presenting his case, on the submissions being made by his opponent, and on the papers and materials being presented, rather than to focus on observing the image of the arbitrator on the screen - unless the arbitrator was asking questions or making a comment. From experience, it can be appreciated that Cai may not have observed and noted all the activities of Q on the screen, such that his confirmation of no objection at the end of the 2nd Hearing cannot fairly be considered to be a full waiver of the serious irregularities on Q's part. Cai has claimed in this case that he had not in fact noticed during the 2nd Hearing that Q had been moving from place to place.

56. Even if Cai had failed to raise any objection at the 2nd Hearing, the ground of public policy can be raised and relied upon by the Court, if it appears to the Court, under section 95(3) of the Ordinance, that it would be contrary to the public policy of Hong Kong to enforce the Award.

57. My clear conclusion on the evidence is that enforcement of the Award in Hong Kong would violate the most basic notions of justice in our forum and should be refused under section 95(3) of the Ordinance.

Supplemental Submissions Complaint and other complaints

58. It is Lee's complaint that he had not received the Supplemental Submissions which Song's lawyers had sent to the tribunal after the 2nd Hearing, and was not able to present Lee's case on issues which had not been orally addressed at the 2nd Hearing but had been raised in the submissions filed at the 1st Hearing, and in the Supplemental Submissions filed after the 2nd Hearing (pursuant to the directions of the tribunal). They are issues identified by Lee's counsel as being relevant to the validity of the Contract.

59. It may be said that looking at the history of the Arbitration as a whole, bearing in mind that Lee had been absent at the 1st Hearing, it was somewhat surprising if the tribunal had not, at the 2nd Hearing, inquired as to whether the submissions filed by Song's lawyers at the 1st Hearing had been received by Lee. It may also be said that it was the fault of Lee and his own lawyers, that they had not conducted a search of the Commission's file on the Arbitration, or otherwise made inquiries with the tribunal or Song's lawyers, before the 2nd Hearing, to obtain copies of the documents and submissions which had been filed with the tribunal at the 1st Hearing, or subsequent thereto but before the 2nd Hearing, and/or to seek an adjournment to review such documents. Further, no evidence has been adduced, and no submissions have been made before this Court, as to the directions made at the conclusion of the 2nd Hearing for the manner of *service* of the Supplemental Submissions.

60. Having found that enforcement of the Award would be contrary to public policy, such that the Enforcement Order should be set aside, it is not necessary to make further findings on these issues, as to whether Lee had been unable to present his case on the points raised in the Supplemental Submissions, or at the 1st Hearing, as to the alleged illegality of the Contract. On the illegality ground, the Mainland Court has found, under Mainland law, that the Contract is valid and Counsel for Lee accepts that the enforcement Court should pay due heed to such a finding at least on the alleged defence of illegality.

61. Suffices it to say that the manner of the conduct of the 2nd Hearing is sufficiently egregious to warrant the Enforcement Order to be set aside, on the ground of public policy.

Disposition

62. The Enforcement Order is set aside, and enforcement of the Award is refused. The order made on 24 August 2023 was that the costs of the summons of 26 January 2023 are to be paid by Song to Lee, with certificate for 2 Counsel, on indemnity basis.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Byron Chiu, instructed by Grandall Zimmern Law Firm, for the applicant

Mr Douglas Lam SC and Mr. David Chen, instructed by DS Cheung & Co, for the respondent