

Insights

ATTEMPT TO RESIST ENFORCEMENT OF A PRC ARBITRAL AWARD IN HONG KONG, BY ARGUING THAT THE ARBITRATION AGREEMENT WAS TAINTED BY FORGERY

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Introduction

Shenzhen Honeycomb System Co Ltd v HCT Technologies (Hong Kong) Co Limited (HCCT 20/2019, [2020] HKCFI 3175, 31 December 2020) confirms the Hong Kong court's pro-arbitration and pro-enforcement approach.

The case involved how the Hong Kong Court of First Instance (the “**Court**”) approached an attempt to resist enforcement of an arbitral award obtained in Mainland China on the basis of the award debtor's claim of forgery of the underlying agreement.

Laws on enforcement of Mainland awards in Hong Kong

Given that Hong Kong is part of the PRC, strictly speaking the New York Convention does not apply to assist in cross-border enforcement of arbitration awards. To solve this, Hong Kong and Mainland China put in place an arrangement to facilitate mutual cross-border enforcement. The Arrangement Concerning Mutual Enforcement of Arbitral Awards between Mainland China and the HKSAR has been implemented since 1 February 2000 through sections 92 to 98 of the Arbitration Ordinance (Cap. 609). (There have been some recent enhancements to this arrangement, details of which can be found [here](#).)

Section 92 of the Arbitration Ordinance provides that, with leave of the court, an arbitral award obtained in Mainland China is enforceable in Hong Kong in the same manner as a judgment of the courts of Hong Kong.

However, the courts in Hong Kong are empowered to refuse enforcement of a Mainland Award on the very limited grounds stated in section 95 of the Arbitration Ordinance, including:-

- proof by the person against whom the award is invoked that the arbitration agreement was not valid (section 95(2)(b)); or
- it would be contrary to public policy to enforce the Mainland award (section 95(3)).

Opposition by the Award Debtor (Respondent)

The Arbitration had been submitted to the arbitral tribunal in Mainland China based on a sale and purchase agreement dated 1 January 2013 between the Applicant and the Respondent (the “**Agreement**”). Through a series of arbitration proceedings commenced in Mainland China (the “**Arbitration**”), the Applicant had obtained an arbitral award against the Respondent. The Applicant applied to the Court for enforcement of the arbitral award in Hong Kong.

The Respondent opposed the enforcement on the ground that the Agreement had been forged and was entered into without the authority of the Respondent. It was the Respondent’s submission, therefore, that there was no valid and binding arbitration agreement and the Respondent had never consented to the submission of the dispute to the arbitral tribunal which made the award.

The Respondent further submitted that the enforcement of the Mainland award based on a forged document would be in conflict with the public policy of Hong Kong.

Burden of proof

As expressly provided for in section 95(2) of the Arbitration Ordinance, the Respondent bears the burden of proof of forgery.

The Court made the obviously correct point that it is not sufficient for the Respondent simply to rely on the absence of evidence from the Applicant to establish the authenticity of the Agreement.

Standard of proof

The Court emphasised the high hurdle to be surmounted by anyone making an allegation of forgery. The standard of proof for forgery must be commensurate with the inherent seriousness of such allegation. Evidence to a very high standard of cogency is required for there to be a finding of forgery. Inferences of fraud and serious misconduct are not to be reached by conjecture, nor on a mere balance of probability, but have to be plainly established as a matter of inference from “proved facts”.

When assessing the probabilities, the Court must have in mind as a factor that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before concluding that the allegation is established on a balance of probability. (This is similar to the preponderance of probability test with which practitioners will be familiar in other contexts.)

The decision of the Court

The Court dismissed the Respondent’s application to resist enforcement, on the basis that the Court was of the view that “*there is no evidence at all to support the claim of forgery*”. Since the Respondent’s opposition on the public policy ground solely was based on the forgery claim, the public policy ground likewise fell away. The reasons for the Court’s decision are discussed below.

The Court granted leave for the Applicant to enforce the arbitral award against the Respondent, with costs to be paid by the Respondent on the indemnity basis.

Documentary evidence

The claims and assertion of forgery were made in two affirmations by a director of the Respondent (the “**Affirmations**”), which in turn had been exhibited to the affirmations of the Respondent’s lawyers in Hong Kong.

The Court regarded the Affirmations as unsatisfactory, because:-

- the Affirmations were not notarised, or signed before any witness or lawyer in Mainland China; and
- the Affirmations were typed in in English but had been signed by the director in Chinese, and there was no declaration or statement made by the lawyer that the Affirmations had been explained to the director or translated to him.

The Court also made the point that the respondent simply had put forward the (unsatisfactory) Affirmations, but had not made any application in a timely manner for witnesses to be called and cross-examination to take place, to explore in detail the circumstances regarding the making of the Agreement. Accordingly, all that was before the Court in the forgery issue was the unsatisfactory Affirmations, which contained bare and untested assertions.

Conduct of the Respondent

The Court took into account the following conduct of the Respondent, which the Court considered was consistent with the existence of a genuine and effective Agreement:-

- issuing purchase orders in September 2016 and making payment in January 2016 for the products supplied by the Respondent; and
- making payment of US\$2 million under the first award in May 2016 based on the Agreement – the Respondent made no claim that that award was invalid and made no application to challenge or set aside the first award on the basis of the Agreement being forged.

Application of company chop in the Agreement

As part of its claim of forgery, the Respondent had relied upon the actions of a former director and the change of the company chop. The company chop of the Respondent that had been applied to the Agreement was oval in shape, which a former director of the Respondent had retained in his possession and refused to return after he ceased to be involved in the Respondent’s business in July 2015. The current company chop of the Respondent was round in shape.

The Court found that, at the time when the Agreement was entered into, the former director had not been removed from his directorship and indeed at that time was the general manager of the Respondent. Therefore, the former director was empowered – at the relevant time - to execute the Agreement by affixing the oval company chop. The later change of the company chop could not be regarded as any evidence that the Agreement had been forged.

Personal knowledge of the existing director

The Respondent submitted that the Agreement was entered into without its authority, because the current director claimed to have no knowledge of the Agreement, and that the Agreement had been executed by the former director.

The Court rejected the Respondent's submission and said "*lack of personal knowledge [by the current director] of the execution of the Agreement in 2013 does not mean that the Agreement was not genuine, but had been forged*".

Absence of signature in the Agreement

One of the submissions of the Respondent was that the Agreement bore no signatures and only contained the company chops of the parties.

Based on the judge's experience in dealing with evidence of Mainland contracts in the Arbitration Court and the Commercial Court, the Court found that this form of execution of agreement is neither rare nor unusual in Mainland China, and provided no support to the Respondent's forgery claim. The Court also said that it found "some support" from the fact that the Shenzhen Intermediate People's Court by a decision on 9 February 2017 had decided that the Agreement was valid.

Conclusion

The Court's decision in this case emphasised the very high threshold for challenging an arbitral award either on the basis of a claim of forgery or on the basis of the public policy ground. An award debtor, who intends to oppose the enforcement of an arbitral award should consider carefully the merits of its opposition. When this sort of opposition fails, the court is likely to order the costs to be paid by the losing opponent on the indemnity basis.

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