

## Hong Kong Court refuses to enforce a Mainland Chinese Arbitration Award under section 95 of the Arbitration Ordinance

香港法院依据《仲裁条例》第95条拒绝强制执行某内地仲裁裁决

廣東順德展燁商貿有限公司 v Sun Fung Timber Company Limited  
[2021] HKCFI 3823, HCCT 25/2019

2022年2月



### Background

The Respondent was a Hong Kong company incorporated in 1989 carrying on timber retail business ("**Company**"). 50% of its shares are held by Simon Tsang ("**ST**") and 50% by a company, NI, of which Dany Lee ("**DL**") is the majority shareholder and director. ST and DL are the only 2 directors of the Company.

ST's wife and DL's wife are sisters, and DL had entrusted the daily operation of the business of the Company to ST. ST and his wife were the only full-time employees of the Company. As stated in the Decision, this is a shareholders' dispute at the core but also acknowledged the family nature of this dispute.

The disputes arose in late 2016/2017 and the Company had commenced to wind down its operation since that time.

On 14 April 2017, a contract was entered into by ST in the name of the Company for the sale of marble in the amount of RMB220 million by the Company to 廣東順德展燁商貿有限公司 ("**GD**") ("**Contract**"), which is a company incorporated in Mainland China.

On 19 May 2017, an arbitral award was made by the Zhanjiang Arbitration Commission ("**Tribunal**") for payment by the Company to GD of the sum of RMB 59 million, with costs ("**Award**"). The Award was made in an arbitration commenced by GD against the Company ("**Arbitration**") based on the Company's breach of the Contract.

### 背景

被申请人是一家于1989年成立的香港公司，从事木材零售业务 ("**新丰公司**")。该公司50%的股份由 Simon Tsang ("**ST**") 持有，50%的股份由一家 **NI** 公司持有，Dany Lee ("**DL**") 是 NI 公司的大股东和董事。ST 和 DL 是新丰公司仅有的两名董事。

ST 的妻子和 DL 的妻子是姐妹，DL 将新丰公司的日常业务委托给 ST。ST 和其妻子是新丰公司唯一的全职员工。正如判决中所说，本案核心是股东纠纷，但也认为本案具有家庭纠纷性质。

这些纠纷是在 2016/2017 年底产生的，新丰公司从那时起就开始了清盘工作。

2017年4月14日，ST 以新丰公司的名义签订了一份合同，由新丰公司向广东顺德展燁商貿有限公司 ("**展燁公司**") 出售金额为人民币 2.2 亿元的大理石 ("**合同**")，展燁公司是一家在中国内地注册的公司。

2017年5月19日，湛江仲裁委员会 ("**仲裁庭**") 作出仲裁裁决，要求新丰公司向展燁公司支付人民币 5900 万元及费用 ("**仲裁裁决**")。该裁决是在展燁公司针对新丰公司启动的仲裁 ("**仲裁**") 中作出的，其依据是新丰公司违反了合同。

NI and DL were made aware of the Contract, the Arbitration and the Award only in Jan 2018, through the notification of the Official Receiver of the winding-up proceedings commenced by GD against the Company.

The Company applied to the Court to set aside an enforcement order made on 28 June 2019 granting leave to GD to enforce the Award under s 95 of the Arbitration Ordinance.

In April 2020, NI applied for and in March 2021 obtained leave of the Court to intervene in these proceedings to set aside the Award. The winding-up proceedings have been dismissed by the Court, on the basis of a bona fide dispute on the debt. In the meantime, a derivative action has been commenced by NI for the Company, on the basis of the alleged breaches of duty of ST as a director of the Company. That is to be resolved by the Court in HCA 673/2019.

### ***The Decision***

In issue in these proceedings is (1) whether there is a binding Contract under which GD claims to be entitled to commence the Arbitration, (2) whether the Company had proper notice of the Arbitration and the Award, and (3) whether enforcement of the Award made in favour of GD can be refused on the grounds provided for in s 95 of the Arbitration Ordinance (Cap. 609) (“AO”).

The Court set aside the enforcement order on the following grounds, pursuant to section 95 of the AO:

#### **(1) The arbitration agreement was not valid under Hong Kong law**

The Court has observed many unusual features of the Contract. It was for the selling of a substantial amount of marble by the Company to GD for a significant price of RMB 220 million. The purchaser, GD, had only been incorporated 3 months prior to the Contract. The Contract amount was equivalent to 62 times larger than the Company’s entire sales revenue in 2015. The marble was stated in the Contract to be for delivery by the Company within 6 days of the Contract, in respect of which the Company was liable under a penalty clause in the Contract, for up to RMB 2.2 million per day of delay in delivery. The cash and bank balances maintained by the Company over the years had been less than HK\$12,000.

2018年1月，NI和DL才从由破产管理人发出的关于展煒公司对新丰公司启动清算程序的通知得知上述合同、仲裁和仲裁裁决。

新丰公司向法院申请撤销2019年6月28日作出的强制执行令，该强制执行令根据《仲裁条例》第95条批准了展煒公司在香港执行该仲裁裁决。

2020年4月，NI申请并在2021年3月获得香港法院许可，以审理是否应当撤销该仲裁裁决。基于此债务争议，有关申请新丰公司清盘的程序已被香港法院驳回。同时，NI已经开始为新丰公司提起衍生诉讼，理由是ST作为公司的董事被指控违反了董事职责。这将由法院在HCA 673/2019另案解决。

### ***判决***

本香港诉讼的争论焦点是：（1）是否存在一个有约束力的仲裁协议，根据该仲裁协议，展煒公司声称有权启动湛江仲裁；（2）新丰公司是否获得有关仲裁和仲裁裁决的恰当通知；以及（3）法院是否可以根据《仲裁条例》（第609章）第95条中的理由拒绝执行该案中有利于展煒公司的湛江仲裁裁决。

法院根据《仲裁条例》第95条下述理由撤销了强制执行令。

#### **(1) 仲裁协议在香港法律下无效**

法院注意到该合同有许多不寻常的特点。该合同是新丰公司以2.2亿元人民币的高价向展煒公司出售大量大理石。买方展煒公司在签订合同前仅成立了3个月。合同金额相当于新丰公司2015年全部销售收入的62倍。合同中规定，大理石要在合同签订后6天内由新丰公司交付，根据合同中的罚金条款，新丰公司要对延迟交付的每一天承担最高220万元的罚款。新丰公司多年来保持的现金和银行余额不足12,000港元。

Notably, the Court also remarked that the Contract was of a different nature and scale from the previous ones between the Company and GD in terms of quantity, products involved, and the price involved. The Court determined that the evidence obviously did not establish that ST had the implied authority to enter into the Contract and concluded that the Contract was void, and therefore arbitration agreement contained therein was not valid.

(2) The respondent had not been given proper notice of the arbitration

Section 95 of the Arbitration Ordinance specifies as a ground of refusal of enforcement of an arbitral award is that the party was not given "proper notice" of the arbitral proceedings or was unable to present its case.

In this case, the Court found that there is no evidence of the service of the notice of Arbitration on the Company. The Award itself does not refer to the fact, details or manner of service of the Arbitration documents on the Company. It was served at the registered office address of the Company, however, the Company had sold the property. No one in the Company was notified of the Arbitration apart from ST. The Company was represented by ST in the Arbitration hearing, and in respect of the Company's consent to the summary procedure for the Arbitration as well as to the claims of breach of contract and payment of damages to GD.

(3) The enforcement of the arbitral award would be contrary to the public policy of Hong Kong

From a holistic consideration of all the circumstantial materials and on the entirety of the evidence adduced, including the timing of the Contract, its terms, and the Company's usual business pattern and financial situation at the time of the Contract, Madam Justice Mimmie Chan concluded that GD was a party to ST's plan to orchestrate an Award whereby the Company would be held liable for a debt under the Contract, which was part of the scheme to enable ST to enforce the debt by winding-up proceedings.

In the particular facts and evidence in this case, the Court considers that it would indeed be shocking to the conscience of the Court to permit GD to enforce the Award. The terms of the Contract cast serious doubt on the genuineness of the dealing between ST and GD. The arbitral process and the Award had been misused by ST with the assistance of GD, and it would be contrary to the public policy of Hong Kong to permit enforcement of such an Award.

值得注意的是，法院还指出，该合同的性质和规模与新丰公司与展焯公司之前签订的合同在数量、涉及的产品和价格方面都有所不同。法院认为，该等证据显然不能证明 ST 公司有签订该合同的默示授权，并得出结论，该合同是无效的，因此其中的仲裁条款无效。

(2) 被申请人没有获得有关仲裁程序的恰当通知

《仲裁条例》第 95 条规定，拒绝执行仲裁裁决的理由是当事人没有得到关于仲裁程序的 "恰当通知"，或者无法陈述其案情。

在本案中，法院认为，没有证据表明仲裁通知已向新丰公司送达。仲裁裁决书本身并没有提到向公司送达仲裁文件的事实、细节或方式。香港法院认为仲裁通知书确实被送达至新丰公司物业的注册办公地址，但是，当时新丰公司已经出售了该物业。除 ST 外，新丰公司没有其他人被告知仲裁事宜。ST 代表新丰公司参加了湛江的仲裁审理，也代表新丰公司同意在湛江仲裁中采用简易程序以及承认新丰公司违约和同意向展焯公司支付赔偿金的要求。

(3) 强制执行仲裁裁决有违公共政策

根据对所有证据和佐证材料的整体考虑，包括合同签订的时间、合同条款以及香港新丰公司在签订涉案合同时的通常商业模式和财务状况，陈美兰法官得出结论，展焯公司乃 ST 所策划的整个湛江仲裁裁决的一方，其计谋是要让新丰公司对涉案合同项下的债务承担责任，这也是 ST 后来在香港以强制执行该债务为由申请清盘的计划的一部分。

就本案的具体事实和证据而言，香港法院认为，允许展焯公司在香港强制执行该湛江仲裁裁决，确实会让法院的良心受到冲击。涉案合同的条款让人严重怀疑 ST 和展焯公司之间交易的真实性。湛江的仲裁程序和仲裁裁决被 ST 在展焯公司的协助下滥用，允许强制执行这样的仲裁裁决将违背香港的公共政策。

## **Takeaways**

1. This case reinforces the fact that enforcement of China Mainland arbitral awards in Hong Kong SAR is not merely a rubber-stamping exercise. Although Hong Kong court maintains its pro-arbitration and pro-enforcement approach towards the enforcement of arbitral awards, it will not allow itself to be an instrument to promote a fraud. Hong Kong court would not hesitate to deny recognition and enforcement under section 95 of the Hong Kong Arbitration Ordinance and uphold rule of law.

2. This decision illustrates the circumstances in which Hong Kong court would step in to set aside an arbitral award and summarises the applicable legal principles. The outcome of this case is a reminder that parties in arbitration proceedings and commercial dealings should always adhere to the basic principles of good faith and fairness and respect rule of law.

## **启示**

1. 本案说明在香港特别行政区承认与执行中国内地的仲裁裁决并不仅仅是一项“形式上像盖橡皮章”的工作。尽管香港法院对仲裁裁决的执行保持着支持仲裁和支持执行的态度，但它不会允许自己成为促进欺诈的工具。香港法院会按照《香港仲裁条例》第 95 条拒绝承认与执行仲裁裁决，坚持法律至上(rule of law)。

2. 本案还说明了香港法院在哪些情况下会拒绝承认与执行仲裁裁决，并总结了相关法律原则。本案的结果提醒我们，在仲裁程序和商业交往中，当事人始终应当遵守诚信和公平的基本原则并尊重法律至上 (rule of law) 。

## Get in touch 联系我们



**Dr. Fan Yang 扬帆博士**

Barrister (England and Wales) Partner  
大律师 (英格兰及威尔士) 合伙人,  
Stephenson Harwood LLP  
T: +852 9806 3521  
Email: [Fan.Yang@shlegal.com](mailto:Fan.Yang@shlegal.com)



**Mr. Andrew Ridgen Green 林瑞杰**

Partner 合伙人, Stephenson Harwood  
T: +852 2533 2761  
Email: [andrew.ridgengreen@shlegal.com](mailto:andrew.ridgengreen@shlegal.com)

©Stephenson Harwood LLP 2022. Any reference to Stephenson Harwood in this document means Stephenson Harwood LLP and its affiliated undertakings. The term partner is used to refer to a member of Stephenson Harwood LLP or a partner, employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Stephenson Harwood LLP's affiliated undertakings.

Full details of Stephenson Harwood LLP and its affiliated undertakings can be found at [www.shlegal.com/legal-notices](http://www.shlegal.com/legal-notices) .

Information contained in this alert is current as at the date of first publication and is for general information only. It is not intended to provide legal advice.

Unless you have consented to receiving marketing messages in relation to services of interest to you in your personal capacity, the services marketed in this message are offered only to the business for which you work.