

Arbitration — Arbitral Award — Enforcement —
Setting Aside — Case Management — Late
Application for Mainland Chinese Law Expert
Opinion (LIN CHIEN-HSIUNG v LIN HSIU-FEN)



After the Hong Kong Court granted leave to enforce an arbitral award made by the Shanghai Arbitration Commission in Hong Kong, Lin Hsiu-Fen ("LHF") applied by summons to set aside such enforcement order (the "Setting Aside Application"), one of the grounds being that the award has been suspended under Mainland Chinese law. However, expert evidence on Mainland Chinese law was not filed in the affirmation that supported the Setting Aside Application. After Lin Chien-Hsiung ("LCH") filed his evidence in opposition to the Setting Aside Application, LHF filed her reply, which now included expert evidence on Mainland Chinese law. Four months later, LCH sought for leave to file further evidence on Mainland Chinese law. The Court granted the application for LCH to file further evidence but denied LHF the opportunity to reply.

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LIN CHIEN-HSIUNG v LIN HSIU-FEN [2022] HKCU 521

What are the practical implications of this case?

- Under Order 73 rule 10 (6A) of the Hong Kong Rules of High Court, an application to set aside an enforcement must be supplemented by an affidavit filed *at the same time* as the summons, evidencing all the grounds for the set aside. Parties cannot consent to the filing of further evidence.
- Whilst the Court does not tolerate any variation to the milestone dates in the absence of exceptional circumstances, the Court would carry out a balancing exercise against the parties' right to a just resolution of disputes and would not deny a party's right to respond to a particular issue that is raised by the opposing party.

What was the background?

In March 2021, the Court granted leave to LCH to enforce an arbitral award (the "**Award**") made by the Shanghai Arbitration Commission (the "**Enforcement Order**"). In May 2021, LHF applied by summons to set aside the Enforcement Order (the "**Setting Aside Application**"), on the grounds: (1) under section 95 (2) (f) (ii) of the Arbitration Ordinance ("**Ordinance**"), that the Award had been suspended under the law of Mainland China; (2) under section 95 (2) (c) (ii) of the Ordinance, that LHF was unable to present her case; and (3) that the Enforcement Order would be contrary to public policy under section 95 (3) (b) of the Ordinance. The Setting Aside Application was supported by an affirmation ("**First Affirmation**"), which did not include any evidence of Mainland Chinese law. The parties, by consent summons, sought directions from the Court that LHF could file a supplemental affirmation subsequently. The Court disagreed and explained that under Order 73 rule 10 (6A) of the Rules of High Court ("**RHC**"), an application for setting aside an enforcement order must be made by summons and supported by an affidavit which must be filed *at the same time* as the summons. The Court further set out the timeline of the filing of evidence in opposition to the Setting Aside Application by LCH and the filing of reply by LHF.

On 31 August 2021, LCH filed his affirmation in opposition to the Setting Aside Application. LHF filed her reply on 14 September 2021 (the "**Reply**"), which included an expert report on Mainland Chinese law.

On 17 January 2022, LCH applied by summons (the "**Summons**") for leave to adduce further evidence, whereby he sought to produce a supplemental expert report on Mainland Chinese law. This was made on the basis that LHF only raised the evidence of Mainland Chinese law in the Reply and not in the First Affirmation,

thus LCH did not address the issue of Mainland Chinese law when he filed his evidence in opposition to the Setting Aside Application.

LHF opposed the Summons on the grounds that (1) the Court previously directed that Mainland Chinese law evidence is not relevant or required; (2) the Summons was issued four months after the Reply and LCH could not justify the last-minute application; and (3) LHF would be deprived of filing further evidence in response before the hearing of the Setting Aside Application on 17 February 2022.

What did the court decide?

The Court granted the application in the Summons.

There must be exceptional circumstances to justify the variation of milestone dates

The hearing of the Setting Aside Application is a milestone date. Under Order 25 rule 1B (3) of RHC, the Court shall not grant any application to vary a milestone date unless there are exceptional circumstances to justify the variation. The burden is on LCH to explain why the Court should exercise its discretion and grant him leave to file further evidence, especially since the Summons was taken out four months after the Reply was filed.

Despite the delay, the Court would not deprive LCH's right to respond to the case

Whilst the Court could refuse the application in the Summons on the ground of delay, the Court must weigh such delay against the parties' rights to a just resolution of disputes. The Court considered that it is LHF's own case that the Enforcement Order should be set aside as the Award has been suspended under Mainland Chinese law, therefore the late filing of further evidence on Mainland Chinese law by LCH would not be prejudicial to LHF. The Court also determined that it would be unjust to deprive LCH to respond to the point of Mainland Chinese law as this issue was only raised by LHF in the Reply and not in the First Affirmation. The Court further decided that LHF is not to file any further response and the further evidence filed by LCH would be the end of the exchange of evidence. The Court noted that the fact that LHF is now deprived of the last say is entirely her own fault for her failure to comply Order 73 rule 10 (6A) of RHC, as she should have filed the evidence on Mainland Chinese law at the time of issuing the summons for the Setting Aside Application.

Case details

- Court: Hong Kong Court of First Instance
- Judge: Honourable Madam Justice Mimmie Chan
- Date of judgment: 28 January 2022

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