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# A Tale of Two Cases: Public Policy Defence to Award Enforcement in Hong Kong

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Public policy defences to the recognition and enforcement of arbitral awards continue to generate uncertainty. Under Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), an award may be refused recognition or enforcement if "[t]*he recognition or enforcement of the award would be contrary to the public policy of that country*". The parameters of this defence have never been entirely straightforward as examined in a previous post, "*The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places*?". A recent decision in the Hong Kong courts illustrates this prevailing uncertainty and the different approaches courts might take to public policy defences.

**Public policy defences to enforcement**

The public policy defence is available under Article 36(1)(b)(ii) of the UNCITRAL Model Law, but no definition as to the scope of this defence is included. The Report on the Public Policy Exception in the New York Convention published by the International Bar Association in October 2015 confirmed that although there is no uniform approach, the majority of jurisdictions adopt a narrow interpretation of what public policy is and "*require a certain level of intensity for a given circumstance to be held contrary to public policy*". What constitutes "*a certain level of intensity*" is highly fact-specific, and leaves courts with rather wide discretion to rely on public policy grounds to refuse enforcement.

The English courts have taken a restrictive interpretation to the public policy defence. The English Court of Appeal affirmed that there is a high standard to meet for refusing enforcement of an arbitral award on this basis (see *RBRG Trading (UK) v Sinocore International* [2018] EWCA Civ 838). This is also the approach followed in Singapore, where the Singapore Court of Appeal stated that an award should only be set aside if upholding it would "*shock the conscience*" or violate the "*most basic notion of morality and justice*" (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank* [2006] SGCA 41).

The Australian position has the advantage of a statutory definition of public policy. Sections 8 and 19 of the Australian International Arbitration Act 1974 stipulate that it would be contrary to Australian public policy if "*(a) the making of the interim measure or award was induced or*

*affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award*". The Australian courts have construed the definition of public policy *"narrowly as referring to the most basic, fundamental principles of morality and justice in the jurisdiction*" (see *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5).

**Hong Kong's approach to public policy**

In Hong Kong, the public policy defence has been adopted in Section 86(2)(b) of the Hong Kong Arbitration Ordinance (Cap 609) ("**Arbitration Ordinance**").[1] The position of public policy is similarly of a high threshold as set out by the Hong Kong Court of Final Appeal in *Hebei Import & Export Corporation v. Polytek Engineering Company Limited*.[2] The Court in that case stated that that foreign arbitral awards should be given effect "*unless to do so would violate the most basic notions of morality and justice* [which] *would take a very strong case before such conclusion can be properly reached*".

In considering potential public policy defences under Hong Kong law, Hong Kong courts look to identify any *"substantial injustice arising out of the award which is so shocking to the Court's conscience as to render enforcement repugnant"* (see *A v R* [2009] 3 HKLRD 389, para 23, per Reyes J). The defence is construed narrowly, and in *Paklito Investment Ltd v Klockner East Asia Ltd*,[3] Kaplan J lamented *"the attempt to wheel it out on all occasions"*. The public policy defence has failed on several occasions, including where apparent bias on the part of the tribunal was alleged in *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKC 335, and where non-disclosure on the part of the award creditor was alleged in *Medison Co Ltd v Victor (Far East) Ltd* [2000] 2 HKC 502. One of the rare instances where the public policy defence succeeded was in the case of *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] 5 HKLRD 221 and it concerned a respondent who was in prison and was found to have been unable to present his case. The public policy defence is also likely to succeed if actual bias on the part of the tribunal can be demonstrated (see e.g. *Granton Natural Resources Co Ltd v Armco Metals International Ltd* [2012] HKCFI 1938).

Hong Kong courts actively avoid reviewing the merits of an arbitral award, but recognise their duty to look to the reasoning of an award to ensure that the significant issues, in particular illegality claims, have been adequately considered and addressed by the tribunal.

In *Z v Y*[4] ("***Z v Y***"), the Hong Kong Court of First Instance refused to enforce an award on public policy grounds, citing the tribunal's failure to address the respondent's claim that the relevant agreements were a sham and illegal under PRC law. Yet in the recent decision in *X v Jemmy Chien*[5] ("***Jemmy Chien***"), the Hong Kong Court of First Instance allowed leave to enforce an award notwithstanding that one party alleged that the underlying agreements were a sham and would necessitate the commission of a criminal offence in Taiwan.

*Jemmy Chien* may be distinguished on its facts.

- In *Jemmy Chien*, the Plaintiff claimed the underlying agreement was a sham to conceal the true intentions that necessitated the performance of illegal acts. In other words, whilst the agreement

was legal, the true intent behind the agreement was tainted by illegality. On this point, the Court noted that if it were to accept the agreements were a sham, this would also mean that the Plaintiff had acted in concert with the Defendant. Refusing enforcement in these circumstances would be to permit the Plaintiff to rely on its own wrongdoing to avoid its contractual obligations. With this is in mind, the Court could not identify any public policy interests that would justify the Plaintiff's application to resist the enforcement of the award. In contrast, in *Z v Y*, the underlying loan agreements disguised as supply contracts were illegal and a sham because they contravened the law and constituted the criminal offence of "fraudulent contracts".

- Unlike the tribunal in *Z v Y*, the tribunal in *Jemmy Chien* was taken to have thoroughly reviewed and addressed the Plaintiff's illegality claim by providing sufficient reasoning and analysis as to why it was rejected. The tribunal provided reasons as to why the Defendant was the true party to the agreement and applied factors under Hong Kong Law to determine whether or not a party contracted personally or as agents for third party. Whereas in *Z v Y*, on a careful review of the award, the court was unable to determine whether the tribunal had thoroughly considered the issues of illegality, here the converse was true.

That said, a party would not be denied the opportunity to raise what it considers to be a legitimate defence to enforcement within the ambit of the New York Convention. Hong Kong courts have displayed their willingness to assess and scrutinise these defences in the ordinary course. However, the use of terms such as *"substantial injustice"*, *"shocking"*, *"repugnant"*, and *"violat*[ing] *the most basic notions of morality and justice"*, serve as a reminder that a party falling back on the public policy defence to enforcement has a very high threshold to overcome, and should approach any such defence with an element of trepidation. Hong Kong courts have also historically taken a robust approach and awarded indemnity costs against the unsuccessful party applying to set aside an award. Parties should bear this in mind before commencing such set aside applications.

## Conclusion

It is likely that uncertainty as to the prospects of successfully invoking public policy defence to enforcement will continue to prevail. The outcome may well be impacted by the attitude of the enforcement courts to the manner in which tribunals have dealt with public policy issues in the award. Whilst the circumstances may be the same, a party resisting enforcement of an award on public policy grounds may well face 'a tale of two cases'.

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References

**?1** Note that Hong Kong is a signatory to the New York Convention by virtue of China's accession, and an enforcement of arbitral awards is subject to Section 85 of the Arbitration Ordinance.

**?2** (1999) 2 HKCFAR 111.

**?3** [1993] 2 HKLR 39.

**?4** [2018] HKCFI 2342.

**?5** [2020] HKCFI 286.

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