Neutral Citation Number: [2022] EWHC 662 (Comm)

Case No: CL-2021-000399

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM
AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2022

Before :

MISS JULIA DIAS QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

KEI KIN HUNG	**Applicant**
(a Protected Party by Zhu Lei, his litigation friend)	
- and -	
HUA SHE ASSET MANAGEMENT (SHANGHAI) COMPANY LIMITED	**Respondent**

- -
- -

Mr George Hayman QC (instructed by **Zhong Lun Law Firm**) for the **Applicant**
Ms Lisa Lacob (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing dates: 8, 9 March 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00 am on 25 March 2022.**"

Miss Julia Dias QC:

Introduction

1. This is an application by Kei Kin Hung to set aside an order granting the respondent, Hua She Asset Management (Shanghai) Co. Ltd ("Hua She"), permission to enforce an arbitration award obtained by it against Mr Kei and simultaneously granting a freezing injunction against his assets in the UK.

2. The application is brought under s. 103(2)(c) of the Arbitration Act 1996 (the "Act") which provides that:

   "Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –

   …

   (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;"

3. Hua She resists the application on the basis that Mr Kei unsuccessfully applied to have the award set aside by the supervisory court of the arbitration on the same or substantially the same grounds as are now raised in England and that he is accordingly estopped from having a second bite at the cherry. Alternatively, it would be an abuse of process for him to do so.

Factual background

4. The evidence was less than complete in some respects and on some relevant points was positively exiguous. Mr George Hayman QC who appeared on behalf of Mr Kei submitted that one of the reasons for this was because Mr Kei had been suffering from serious mental health issues since at least August 2021. He relied on a medical report dated 19 August 2021 from a Hong Kong psychiatrist, Dr Choi, who diagnosed Mr Kei as suffering from severe depression with psychotic symptoms, and as lacking the mental capacity required to give instructions and testify in court. Further, on 4 October 2021, a Mr Zhu Lei was appointed to act as Mr Kei's litigation friend and has conducted the proceedings on his behalf since then. Mr Hayman submitted orally that Mr Zhu has been unable to get instructions directly from Mr Kei and has had to obtain such information as he can from third parties. I note, however, that there is no evidence from Mr Zhu as to what, if any, attempts he has made to get instructions from Mr Kei.

5. On behalf of Hua She, Ms Lisa Lacob, while not challenging Dr Choi's report, suggested that Mr Kei's supposed inability to give instructions and engage with the proceedings was both intermittent and selective. I return to this below. Meanwhile, recognising that I do not necessarily have the full picture, and that at least some allowance should be made for Mr Kei's ill health, I find the relevant facts on the evidence before me to be as follows.

6. Mr Kei is a PRC national, whose original name transliterated as Qi Jianhong in mandarin Chinese. He is and was at all material times a 95% shareholder in a PRC

company, Beijing Yaolai Investment Co. Ltd ("Beijing Yaolai"), of which he was also the legal representative until 1 September 2020.

7. In about 2009 Mr Kei moved from the PRC to become a permanent resident of Hong Kong, and at the same time adopted the Cantonese transliteration of his name, viz. Kei Kin Hung.[1] Dr Choi's report nonetheless indicates that he has more recently been living in London with his family with a view to applying for residency here.

8. Hua She is a company incorporated in the PRC engaged in the business of investment management.

9. The arbitration in question related to claims by Hua She:

    i) against Beijing Yaolai as First Respondent for monies allegedly due under what was described as a "Right to Yield/Buy Back Agreement" (the "Agreement") dated 1 September 2017;

    ii) against Mr Kei as guarantor of Beijing Yaolai's obligations under the Agreement pursuant to a guarantee purportedly entered into by Mr Kei on the same day (the "Guarantee").

10. Both the Agreement and the Guarantee contained arbitration clauses, pursuant to which arbitration proceedings were commenced by Hua She against Beijing Yaolai and Mr Kei on 16 April 2020 before the Shanghai International Economic and Trade Commission under the rules of the Shanghai International Arbitration Centre ("SHIAC").

11. At this date, Mr Kei was no longer resident in the PRC and it is his case that he knew nothing about the commencement of the proceedings. The hearing was listed for 20 August 2020, but in the absence of Mr Kei, Beijing Yaolai's lawyer, Ms Liu Xianghui, applied for an adjournment.The basis on which the adjournment was sought and the precise course of events thereafter were matters of some controversy before me but the best evidence before the court is contained in:

    i) The transcript of an interview of Ms Liu conducted in December 2021 in proceedings in Shanghai (referred to below), which states as follows:

    "In or around August 2020, I accepted the engagement of Beijing Yaolai to represent it at the arbitration. Later on, the Arbitration Commission set a date for the hearing, about 26 August… Qi Jianhong was abroad and the case involved a huge amount of money, so we wished to get in contact with Qi Jianhong himself for protection of his rights. Under such circumstances, I applied for an adjournment in the name of Beijing Yaolai. The Arbitration Commission approved the adjournment of the hearing for about a month. Then the Arbitration Commission … set another date for the hearing, and also asked whether I could get the authorization from Qi Jianhong himself. I told the Arbitration Commission that Beijing Yaolai gave me a Power of Attorney affixed with the signature seal of Qi Jianhong and asked whether the Arbitration Commission would recognize it. The Secretary of the Arbitration Commission

[1] He also changed the final Chinese character of his name, apparently for reasons of *feng shui*.

said that the arbitration procedures were comparatively flexible; however, it would be better if the concerned party signed the authorization document in person because it once happened that the concerned parties did not recognize the authorization. Beijing Yaolai stated that Qi Jianhong could not be present, and the Arbitration Commission did not ask for anything else. Later on, I appeared in court as an agent jointly authorized by Beijing Yaolai and Qi Jianhong.

…

Qi Jianhong left Beijing at the end of 2019. All creditor's rights and debts related to Beijing Yaolai were handed over to Yuan Lin, Vice President of Beijing Yaolai. The signature seal must have been placed at the office of Beijing Yaolai. When I accepted the engagement, Qi Jianhong was the legal representative and the controlling shareholder of Beijing Yaolai. Later on, the legal representative of Beijing Yaolai was changed."

ii) A statement made by Beijing Yaolai on 5 January 2021 and confirmed by Ms Liu, which was relied on by Mr Kei himself in proceedings in the BVI (also referred to below) and states:

"The case was originally scheduled to be heard on 20 August 2020, but the second respondent, Kei Kin Hong, was unable to return to China to be present for the arbitration due to the epidemic, so we applied for an extension of the hearing of the case to SHIAC for the purpose of protecting Kei Kin Hong's right to be present for the arbitration, and SHIAC agreed to extend the hearing to 23 September 2020. However, Kei Kin Hong had not yet returned to China when the hearing was held, so we helped Kei Kin Hong authorize our attorney to be present for the arbitration on behalf of Kei Kin Hong, and gave Liu Xianghui, the attorney we authorized, a Power of Attorney affixed with Kei Kin Hong's handwritten name seal."

12. Mr Kei denies that he ever gave authority for this power of attorney to be granted to Ms Liu but, be that as it may, Ms Liu appeared for both respondents at the hearing and advanced separate arguments on behalf of each of them.

13. The tribunal issued its award on 26 October 2020, substantially upholding Hua She's claims against both respondents in the sum of over RMB 188,072,095.57 (equivalent currently to around £22.3 million). It accepted a defence that there had been a part payment of the debt (albeit in a smaller amount than asserted by Beijing Yaolai) but rejected a separate defence put forward by Ms Liu on behalf of Mr Kei that Hua She should be required to rely on other security in priority to the Guarantee.

14. Armed with the award but not having received any payment, Hua She set about trying to enforce it. First stop was the BVI on the basis that Mr Kei was the sole beneficial shareholder of a BVI company, Sparkle Roll Holdings Ltd ("Sparkle Holdings") which held a substantial interest in a Hong Kong listed company, Sparkle Roll Group Ltd ("Sparkle Group"). On 9 November 2020, the BVI court registered the award as a judgment and granted worldwide freezing and disclosure orders against Mr Kei and Sparkle Holdings. On 1 December 2020, it continued the freezing order and granted a charge over Mr Kei's shares in Sparkle Holdings.

15. On 13 January 2021, Mr Kei applied to set aside these orders. In support of the application, he served an affirmation dated 11 January 2021, in which he asserted (amongst other things) that:

    i) He had not been involved in the operational management of Beijing Yaolai since January 2017, this having been entrusted to a company called Beijing Zhongxuan Changmei Cultural Communication Co. Ltd pursuant to an agreement with Beijing Yaolai dated 5 January 2017;

    ii) He therefore knew nothing about the Agreement or the Guarantee, only becoming aware of them on 14 December 2020;

    iii) The Guarantee had been signed by someone who had stolen his identity and was attempting to impersonate him;

    iv) He never received the notice of arbitration, never instructed Ms Liu and never agreed to Beijing Yaolai instructing Ms Liu on his behalf;

    v) He was therefore not given proper notice of the arbitration and was otherwise unable to present his case to the tribunal;

    vi) Preliminary investigations indicated that Hua She had been involved in various criminal activities. (This was based on a one-page investigation report dated 28 December 2020 by a Mr Donald Li.)

16. In a second affirmation, Mr Kei claimed that he only became aware of the arbitration award and the BVI action on 14 December 2020 after his lawyers had discovered that someone had been attempting to serve papers on him in Hong Kong and had sent him copies of the documents in question.

17. Mr Kei failed to give any meaningful asset disclosure pursuant to the BVI order and, following a peremptory order, his application was struck out and he was debarred from taking any further part in the proceedings. It appears that between the date of the arbitration award and the BVI freezing order, Mr Kei had been steadily disposing of his interests in Sparkle Group. Shortly after the debarring order, and in *prima facie* breach of the freezing order, he caused the remainder of Sparkle Holdings' shares in Sparkle Group to be transferred away, leaving Sparkle Holdings as an empty shell. By the end of March 2021, he had substantially divested himself of his interest in Sparkle Group. It is fair to say that Mr Kei, while admitting the transfers, denies any breach of the freezing order.

18. Having drawn a blank in the BVI, Hua She then turned its attention to Hong Kong. During the course of February and March 2021, the Hong Kong courts likewise registered the award and granted worldwide freezing and disclosure orders against Mr Kei. However, no asset disclosure at all was made in response to this order.

19. In May/June 2021, Hua She uncovered grounds for thinking that Mr Kei might have substantial assets in England. Two properties and a horse were identified and on 16 July 2021 at a without notice hearing, Knowles J entered judgment against Mr Kei in terms of the award and granted a domestic freezing injunction against his assets. No disclosure order was made at this stage. I am informed by Ms Lacob that the only reason

for this was because Knowles J felt it unnecessary to go wider when there were already two worldwide freezing orders with accompanying disclosure orders in force against Mr Kei.

20. On 20 August 2021, Mr Kei made the present application to set aside the order of Knowles J.

21. The application was supported by a witness statement of Lin Hou, a solicitor advocate with Zhong Lun Law Firm representing Mr Kei. The primary ground relied upon by Mr Lin was that Mr Kei did not sign the Guarantee. From this it was said to follow that:

    i) The award was not a New York Convention Award for the purposes of section 101 of the Arbitration Act 1996 (the "Act");

    ii) The arbitration agreement was not valid under its governing law;

    iii) Mr Kei was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;

    iv) He was not represented at the arbitration and so was unable to present his case;

    v) He did not give a power of attorney regarding his representation as required under SHIAC rules, such that the arbitration did not take place in accordance with the arbitration agreement.

22. It was further submitted that Hua She had, in breach of its duty of full and frank disclosure, failed to disclose to Knowles J:

    i) Mr Kei's assertion in the BVI proceedings that Ms Liu had not held an authenticated power of attorney when purporting to represent him in the arbitration;

    ii) the effect that difficulties of enforcement in the PRC might have on Hua She's cross-undertaking in damages.

23. Importantly, Lin Hou also deposed to the fact that Mr Kei had taken steps to investigate relations between Beijing Yaolai and Hua She and that, although investigations were still ongoing, preliminary findings had shown that Hua She had caused Beijing Yaolai to transfer shares in five subsidiaries (the "Tangshan companies") without consideration to a company associated with Hua She controlled by one Liu Zheng. It was said that the Tangshan companies between them owned property worth some RMB 2.57 billion (subject to mortgages) and that this transfer had in substance effected an offset of Beijing Yaolai's debt to Hua She. It was asserted that these facts likewise had not been disclosed either in the arbitration or to the English court.

24. This is the first occasion on which any suggestion was made that the debt in respect of which Hua She was claiming had in fact been settled prior to the commencement of the arbitration. The submission seems to have been based on further investigations carried out during the course of 2021 by Mr Donald Li. Although not exhibited to Lin Hou's statement, there is a report from Mr Li dated 19 August 2021 in the documents before the court which contains the following relevant findings: (i) the shares of the Tangshan companies were originally pledged to Hua She to secure a separate loan; (ii) the loan

was subsequently repaid in full; but (iii) sometime thereafter, the entire equity in the Tangshan companies was transferred to a company controlled by Mr Zheng without payment of any consideration to Beijing Yaolai.

25. Lin Hou's witness statement also claimed for the first time that Mr Kei was suffering from serious mental health problems and sought an extension of time for serving further evidence, relying in this respect on Dr Choi's report.

26. Meanwhile, on 8 October 2021, in the light of its concerns that Mr Kei was seeking to obstruct enforcement and may have dissipated his assets in breach of the BVI freezing order, Hua She obtained a variation to the English freezing order. This now required Mr Kei to make disclosure of any assets valued at more than £10,000 in the UK, including the properties identified in the UK, and to give details of all his bank accounts in the UK.

27. On 22 October 2021, Mr Kei's litigation friend, Mr Zhu, served a witness statement in support of the present application, confirming that he had been given instructions on behalf of Mr Kei to make an application to the supervisory court in Shanghai to set aside the arbitration award. He also exhibited the Donald Li report and submitted that the share transfer without consideration amounted to a set-off of the debt.

28. As foreshadowed by Mr Zhu, an application was made on behalf of Mr Kei on 3 November 2021 to the Shanghai Second Intermediate People's Court as the relevant supervisory court of the arbitration to set aside the award. It is common ground that under Article 58 of the Arbitration Law of the PRC, there are only limited grounds on which such an application can be made, including the following on which Mr Kei's application was founded:

> *"Article 58: A part may apply for setting aside an arbitration award to the intermediate people's court in the place where the arbitration commission is located if he can produce evidence which proves that the arbitration award involves one of the following circumstances:*
>
> *…*
>
> *(3) The formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure;*
>
> *…*
>
> *(5) The other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration;*
>
> *…"*

29. In support of the application under Article 58(3), Mr Kei stated that Ms Liu had been appointed by Beijing Yaolai to represent him without his consent. He claimed that Ms Liu had been doubtful about the validity of the power of attorney and had consulted SHIAC who had informed her that it needed to be signed in person. Accordingly, he submitted that under SHIAC Rules the power of attorney was invalid in the absence of

his personal signature. He further claimed to have had no knowledge of the arbitration because of:

"Beijing Yaolai's failure to make timely notice due to improper internal management, the outbreak of COVID-19, Qi Jianhong's being abroad and being unable to go to Shanghai, etc."

30. In support of the application under Article 58(5), Mr Kei asserted that Hua She had withheld from the tribunal the fact that it had acquired an equity pledge of the Tangshan companies in September 2017 and had subsequently illegally procured the transfer of the entire equity in these companies to an affiliate company without payment of any consideration. He submitted that the withholding of this information was sufficient to impact the impartiality of the arbitration. It is noteworthy that Mr Kei did not submit that the share transfer had effected any offset of the debt for which Hua She was claiming.

31. In the light of the Shanghai proceedings, Mr Kei applied for and was granted permission by the English court to amend his application in this jurisdiction to seek alternatively an adjournment or stay of enforcement pursuant to s. 103(5) of the Act pending the decision of the Shanghai court.

32. On 10 December 2021, Hua She submitted its response in the Shanghai proceedings. The first point on which it relied was that, even accepting Mr Kei's evidence that he only received a copy of the award on 14 December 2020, the application was well outside the applicable six month time limit. As regards the power of attorney, Hua She denied that Ms Liu had consulted SHIAC or been told by them that a handwritten signature was required as alleged. In relation to the allegation of concealment, Hua She stated that the equity pledge and share transfer relied upon were irrelevant to the claim made in the arbitration and related to a different transaction. Hua She also asserted that Mr Kei was attempting to resist and delay enforcement and to dissipate his assets.

33. The Shanghai proceedings were heard by the court on 17 December 2021. A few days earlier, on 14 December 2021, the court took what I understand to be the unusual step of interviewing Ms Liu as to the circumstances surrounding the power of attorney and her representation of Mr Kei. The material part of the transcript of her interview is set out at paragraph 11.i) above.

34. At the hearing, the court invited both parties to make submissions on the transcript of Ms Liu's interview. Mr Kei's lawyer relied on it as support for his submission that the power of attorney given to Ms Liu had not been authorised by Mr Kei himself, and that Beijing Yaolai had affixed his signature seal without his knowledge or authorisation. He submitted that service on Ms Liu was accordingly insufficient to constitute proper service on Mr Kei. For its part, Hua She asserted that the change in legal representative of Beijing Yaolai did not take place until 1 September 2020, after commencement of the arbitration, and that since the authority of Mr Kei was required for such a change to take place, it was impossible for him not to have known about the proceedings.

35. The Shanghai court rendered its decision on 27 December 2021 dismissing Mr Kei's application. It set out the facts of the case, including that the power of attorney submitted by Ms Liu had been stamped with Mr Kei's signature seal but not signed by him personally. It also recorded Mr Kei's submission that his signature seal had been

placed at Beijing Yaolai but that the company had been entrusted to a third party manager since 5 January 2017 and that he had not been informed about the arbitration.

36. The court found expressly (i) that Mr Kei was a 95% shareholder of Beijing Yaolai and also its legal representative prior to 1 September 2020 and (ii) that he had himself placed his signature seal with the company for it to use. In these circumstances, it held that the tribunal did not violate any provisions of the SHIAC arbitration rules in accepting the power of attorney as valid authorisation of Ms Liu to represent Mr Kei in the arbitration. Accordingly, service of the award on Ms Liu was procedurally valid and Mr Kei's application was time-barred.

37. The court nonetheless went on to address the concealment allegation. It held that this had not been established as the representative jointly authorised by Beijing Yaolai and Mr Kei (i.e., Ms Liu) had participated fully in the arbitration but had not requested Hua She to submit the allegedly concealed evidence.

38. The only other evidence to which it is necessary to refer is a witness statement of Mr Yuan Lin dated 11 February 2021 which was served as part of Mr Kei's reply evidence in this application. Mr Yuan is an employee of Beijing Yaolai who joined the company in September 2019 as Head of the Debt Restructuring Management Committee. In his statement he relies on information given to him by Liu Zheng to support an assertion that the debt claimed by Hua She had already been settled in full by Beijing Yaolai prior to commencement of the arbitration. While Mr Yuan accepts that he knew about the arbitration proceedings and indeed was the exclusive point of contact between Beijing Yaolai and Ms Liu, he states that he was completely unaware of this fact at the time and that it had only recently come to his attention following his own investigations into the historical commercial dealings between Beijing Yaolai and Hua She. Accordingly, he had not been able to make Ms Liu aware of the defence and mistakenly thought that the debts claimed were genuine.

39. More specifically, Mr Yuan states that he became aware in the summer of 2021 from Donald Li that the shares in the Tangshan companies had been transferred to Liu Zheng's company without payment and that this aroused his suspicions. It was not disputed that Mr Yuan can only have become aware of the existence of Mr Li's investigations through Mr Kei. Mr Yuan then communicated directly with Liu Zheng on several occasions by WeChat and telephone, the last of these exchanges taking place on 2-3 September 2021.

40. During the course of these communications, Liu Zheng explained to Mr Yuan that the share transfer had taken place because Beijing Yaolai wanted an extension of time for repayment of its outstanding liabilities. However, Hua She was concerned that Beijing Yaolai was in dire financial straits and at risk of claims from other creditors. Accordingly, it was agreed that the equity in the Tangshan companies would be transferred to a nominee company for nil consideration and that Hua She could then either sell the shares or the underlying assets or use them to raise further funds to cover Beijing Yaolai's outstanding liabilities. If true, this was a blatant attempt to prefer the interests of Hua She and defraud other creditors in the event that Beijing Yaolai became insolvent. According to Mr Yuan, Liu Zheng also said that Hua She had been unable to sell either the shares or the assets and that the controller of Hua She, a Mr Jiang, had been unable to contact Mr Kei to discuss the position.

41. Mr Yuan accepts that Liu Zheng did not actually state expressly during their exchanges that the purpose of the share transfer was to settle Beijing Yaolai's outstanding debts; this was an assumption which he, Mr Yuan, had made given the explanation for the transfer.

42. This, then, is the factual and procedural background against which the present application falls to be determined.

The applicable legal principles

43. Unsurprisingly, there was little dispute as regards the applicable legal principles. They have in any event been comprehensively considered very recently by Butcher J in *Carpatsky Petroleum Corp. v Ukrnafta,* [2020] EWHC 769 (Comm) whose exposition at [120]-[126] I gratefully adopt and incorporate.

44. In summary:

    i) The fundamental policy underlying the Act is to promote the enforcement of New York Convention arbitration awards. Accordingly, the default position is that an award *must* be recognised and enforced by the English courts unless one of the limited number of grounds set out in s. 103 is established. If none of these grounds can be made out, there is no basis for refusing recognition or enforcement and the court has no residual discretion in this regard.

    ii) The converse is not true, however. Even if one of the permitted grounds is established, the court is not bound to refuse recognition or enforcement but has a discretion whether to do so or not.

    iii) Where the award has been challenged unsuccessfully in the courts of the supervisory jurisdiction, that decision will give rise to an issue estoppel if the issues determined by the court are substantially the same as those sought to be raised under s. 103.

    iv) Alternatively, an application under s. 103 may be held to be an abuse of process under the principle in *Henderson v Henderson* (1843), 3 Hare 100 if it seeks to raise a challenge which could and should have been made before the supervisory court.

    v) Nonetheless, there may be exceptional cases where it would be unjust to recognise an issue estoppel or apply the abuse of process principle.

Mr Kei's case

45. It was accepted by Mr Hayman that Mr Kei's application was doomed to failure unless he could bring himself within s. 103 as a starting point. His argument was two-fold:

    i) s. 103(2)(c) was engaged in this case because Mr Kei was not aware that arbitration had been commenced against him at any time prior to 14 December 2020 and his purported representation in the proceedings was without authority. Accordingly, he could not give proper instructions and was thus unable to present his defence.

ii) The defence which he was thus deprived of the opportunity to present, was that the debt claimed by Hua She had in fact been settled by the share transfer of the Tangshan companies.

46. Ms Lacob's response on behalf of Hua She was that substantially the same arguments had been raised before the Shanghai court and that Mr Kei was therefore issue estopped from raising them again and/or to permit him to do so would be an abuse of process.

47. Mr Hayman's riposte to this was that there were exceptional circumstances because Hua She must have known that the debt had been settled by the share transfer but nonetheless concealed that fact from the arbitration tribunal and the Shanghai court and instead gave a misleading explanation for the transfer. It continued to conceal this fact from the BVI and Hong Kong courts and also from the English court in breach of its duty of full and frank disclosure.

48. I put it to Mr Hayman that the substance of this allegation came perilously close to asserting that Hua She had obtained the award by fraud. If so, the public policy exception in s. 103(3) of the Act would be engaged and wholly different considerations would apply. Not least, such a case would need to be properly set out with the degree of particularity appropriate to an allegation of fraud. In response, Mr Hayman expressly confirmed that he did not put his case in this way and that he was not relying on s.103(3). The scope of his application was instead confined to s. 103(2)(c) on the basis outlined above. He further accepted that the alleged concealment on which he relied was not *per se* a ground for refusing enforcement under s. 103; rather he was relying on it as a factor bringing the case within the category of exceptional circumstances which would defeat Hua She's argument based on issue estoppel/abuse. But of course, as Mr Hayman also realistically accepted, the question of exceptional circumstances does not arise at all unless Mr Kei can prove (the burden of proof being expressly on him) that the case falls within s. 103(2)(c) to begin with.

Section 103(2)(c): lack of knowledge

49. Mr Kei's argument is that he was unable to present his case because he was not given proper notice of the arbitration proceedings and was therefore not properly represented. Both parties made their submissions before me on the basis that the validity of Ms Liu's appointment had been raised before the Shanghai court and that there was therefore a *prima facie* issue estoppel unless Mr Kei could establish exceptional circumstances.

50. However, it seemed to me that there was a potential distinction to be drawn between procedural validity and actual knowledge, since it is by no means impossible that Mr Kei may have been validly served and/or represented for the purposes of the applicable procedural rules without ever actually becoming aware of the proceedings. For example, a litigant may provide an address for service and service at that address might be sufficient for the purposes of the particular arbitration rules, but there may be no-one at that address at the relevant time to receive service or to inform the litigant that it had taken place.

51. I note, in particular, that in using the word *"otherwise"*, s. 103(2)(c) expressly contemplates that a party may find itself unable to present its case for reasons going beyond mere procedural invalidity. I therefore queried with the parties whether there could be an issue estoppel if the Shanghai court had adjudicated only on the procedural

validity of the service which had taken place and not on the question of actual knowledge.

52. In response, Ms Lacob submitted: (1) that I should not adopt too narrow a focus when assessing whether the same or substantially the same issues had been raised before the Shanghai court; (2) the Shanghai court had at least implicitly found that Mr Kei had actual knowledge of the proceedings; (3) in any event, the weight of the evidence suggested that he did know about them.

53. It is clear from his submissions to the Shanghai court (see paragraphs 29-32 above) that Mr Kei relied on both his lack of actual knowledge and the alleged procedural invalidity relating to Ms Liu's power of attorney, and that Hua She's response was that he must have known about the arbitration. The question of actual knowledge was therefore squarely before the court.

54. The Shanghai court's findings are set out in paragraph 35-37 above. Ms Lacob submitted, in reliance on expert evidence adduced by Mr Kei, that actual authority was relevant to the validity of the power of attorney as a matter of Chinese law and that the Shanghai court must therefore have decided that Mr Kei knew about the proceedings otherwise it could not have held that the power of attorney was procedurally valid.

55. I am not persuaded by this. The expert evidence in question was based on the premise that Article 17 of the SHIAC rules required a power of attorney to be notarised by virtue of Article 264 of the Civil Procedure Law of the PRC. However, it is by no means obvious – at least to me – that Article 264 in fact applies to Mr Kei. I would certainly be reluctant to make any findings on this basis without more detailed investigation and analysis of Chinese law in this regard.

56. That said, I accept that the submission was squarely put before the Shanghai court that the power of attorney was invalid without Mr Kei's actual knowledge and that Hua She submitted in response that he did have such knowledge. The court's findings must be read in this context. It is therefore significant that the court did not say that the question of knowledge was irrelevant to the procedural validity of the power of attorney, which (if it was the case) might have been expected given the nature of Mr Kei's submissions. I am therefore inclined to accept Ms Lacob's argument that there was an implicit finding of knowledge sufficient to support an issue estoppel.

57. But it is not necessary for me to go so far, because I am in any event not satisfied that Mr Kei had no knowledge of the arbitration. I take into account, in particular, the following:

    i) Mr Kei was a 95% shareholder of Beijing Yaolai and its legal representative at the date of commencement of the arbitration. It is therefore inherently unlikely that he would not have been told about the proceedings.

    ii) This is all the more so given that he was apparently the guarantor of the company in respect of the obligations the subject of the arbitration. While Mr Kei asserted in the BVI proceedings that he did not sign the Guarantee and that his identity must have been stolen, that is not an allegation which he has chosen to pursue before me.

iii) There was no challenge to the evidence that Mr Kei must have known about the change of Beijing Yaolai's legal representative on 1 September 2020. It is again extremely unlikely that this change could have taken place against a background of ongoing arbitration proceedings and an imminent hearing without Mr Kei being made aware of the fact.

iv) The evidence of Ms Liu set out at paragraph 11.i) above strongly suggests that Beijing Yaolai applied for an adjournment specifically in order to enable Mr Kei to fly to China for the hearing and that when this proved impossible, it was discussed and agreed with him that Ms Liu should be given a power of attorney using the signature seal which he had previously left with Beijing Yaolai.

v) If Mr Kei had genuinely been unaware of the arbitration until he received the award on 14 December 2020, it might have been expected that he would complain to Mr Yuan immediately. However, Mr Yuan says nothing to suggest that any such complaint was made. To the contrary, he merely states that:

"I understand that Mr Kei did not know about the Arbitration until attempts were made by Hua She to enforce the Award against him in the BVI in late 2020. I do not know why Mr Kei has not relied upon this defence[2] since then."

If the correct inference from this is that Mr Yuan did not tell Mr Kei about the arbitration when it was commenced, he does not explain why he did not tell him.

vi) Mr Kei's mental health was not so bad in December 2020 as to prevent him filing an application in the BVI proceedings to set aside the enforcement order on the basis that he did not know about the proceedings. However, he provided no evidence at all – either then or now – as to where he was physically situated when the arbitration commenced, or what, if any, communications he was having at the time with Mr Yuan or other personnel at Beijing Yaolai (including the third party manager). In his application to the Shanghai court, Mr Kei attributes his lack of knowledge to improper internal management, Covid and his absence from Shanghai. However, I agree with Ms Lacob that the latter two reasons would not in themselves have prevented him from finding out about the arbitration and that he signally fails to explain what he means by *"improper internal management".*

vii) There is no evidence from Mr Kei's litigation friend as to whether he has even attempted to ask Mr Kei about these matters, let alone what answers he received if he did.

58. In short, the only concrete evidence to support Mr Kei's assertion that he did not know about the arbitration is the undisputed fact that he did not sign the power of attorney in person. In my judgment this falls a long way short of proving on a balance of probabilities as required by s. 103(2) that Mr Kei did not have actual knowledge of the arbitration and so was unable to present his defence.

59. That in itself is sufficient to dispose of this application and accordingly the question of whether there are exceptional circumstances capable of defeating an argument of issue

[2] I.e., the set off defence.

estoppel or abuse of process does not strictly arise. Nonetheless, the submissions on this issue formed a substantial part of the argument on both sides and it is right that I express my views briefly.

Exceptional circumstances: the share transfer

60. As explained in paragraphs 45-48 above, Mr Hayman does not rely on the share transfer as an independent ground for setting aside the enforcement order under s. 103(2). Moreover, he expressly confirmed that there was no challenge to Mr Yuan's evidence that Mr Kei was himself a party to the alleged settlement agreement. In those circumstances, his argument ran as follows:

    i) Mr Kei would have raised a defence of settlement/set-off in the arbitration but was unable to do so because he had no knowledge of the proceedings;

    ii) This brings the case within s. 103(2)(c) of the Act;

    iii) The relevance of the concealment is that it constitutes an exceptional circumstance sufficient to defeat any allegation of issue estoppel or abuse of process in relation to Mr Kei's lack of knowledge.

61. It follows that the argument under this head must be approached on the hypothesis (contrary to my findings above) that Mr Kei has established that he had no knowledge of the arbitration and so was unable to raise the defence for that reason.

62. Two broad questions therefore arise:

    i) Was there any relevant concealment? This in turn depends on whether there was indeed a settlement/set-off as alleged;

    ii) If established, does the concealment amount to an exceptional circumstance?

Concealment

63. I am satisfied on the basis of the evidence before me that the loan in respect of which the shares of the Tangshan companies were originally pledged was repaid to the knowledge of Hua She and that the subsequent share transfer must therefore have had some different purpose. Moreover, there is force in Mr Hayman's submission that Hua She has been decidedly coy about that purpose. Before the Shanghai court, it simply denied that either the equity pledges or the share transfer had any relevance to its claim; it did not either then or now attempt to explain the real rationale of the transaction.

64. Notwithstanding this reticence, I note that:

    i) There is no independent or documentary evidence of any settlement agreement or set-off.

    ii) Mr Li does not refer to any such settlement or set-off in his report or suggest that this was something he was asked to investigate. This is somewhat surprising given that Mr Kei was a party to the supposed settlement agreement and could therefore have been expected at least to mention it when instructing Mr Li.

iii) Mr Yuan accepts that there was never any express admission of a settlement or set-off by Liu Zheng.

65. While the evidence does not enable me to make a finding one way or the other, all of this casts some doubt on Mr Kei's assertion that there had been an agreed settlement of Beijing Yaolai's debt by set-off. Nonetheless, it is not disputed that Beijing Yaolai was in serious financial difficulties in 2018 and I am prepared to assume in Mr Kei's favour that he has at least an arguable case that the purpose of the transfer was to avoid the consequences of Beijing Yaolai's insolvency and that it may have given rise to an offset of the debt claimed by Hua She in the arbitration.

66. However, an arguable case is not sufficient basis in my judgment for an allegation of concealment. Absent a finding that there *was* a settlement/set-off, there can have been nothing for Hua She to conceal unless it knew that Mr Kei had already raised the point or had reason to believe that he might do so in the future. It is one thing to say that Hua She knew for a fact that its claim had been settled and deliberately concealed this from the court. But short of that, the most it could have been expected to disclose was any potential defence of which it was or ought to have been aware.

67. As to this:

i) It is common ground that nothing at all was said by either side about the share transfer in their submissions to the arbitration tribunal;

ii) However, there is no evidence before me to suggest that a set-off/settlement defence had ever been asserted by Mr Kei prior to the arbitration;

iii) Even if Hua She had been aware that this was a defence which Beijing Yaolai and/or Mr Kei had in mind, Mr Kei was a party to the alleged settlement, and Hua She could therefore reasonably have expected one or other of them to raise it in the arbitration proceedings.

iv) There is no reason why Hua She would have known that the reason it was not so raised was because Mr Kei (on the hypothesis under consideration) did not have notice of the proceedings.

68. It is true that there is an air of unreality about the Shanghai court's later finding that there was no concealment because Ms Liu could have requested the concealed evidence to be disclosed. I accept that Mr Yuan did not know about the evidence and that Mr Kei could not have made any such request because, *ex hypothesi*, he did not know about the arbitration. Nonetheless, this seems to me to be irrelevant. For the reasons given, Mr Kei fails to satisfy me that there was any relevant concealment at all.

69. I reach a similar conclusion in relation to the alleged failure to make full and frank disclosure to the BVI, Hong Kong and English courts.[3] As appears from the factual narrative set out above, Mr Kei did not refer to the share transfer at all in the BVI proceedings, despite being party to the alleged settlement agreement. Indeed, it was not until the present application in August 2021 that a defence of settlement or set-off was first raised by him. It is not disputed that Hua She put before Knowles J the defences

[3] In this respect, Mr Hayman was at pains to make clear that no criticism was made of Hua She's legal representatives.

that had been raised by Mr Kei in the BVI and Hong Kong proceedings. There is some complaint as to whether they were adequately or properly explained but that is by the by. I have been unable to find affirmatively that there was a settlement/set-off, and there is no evidence on which I can find that Hua She either could or should have anticipated that such a defence was to be raised prior to Mr Kei's subsequent application in August 2021. Accordingly, I likewise find that there was no failure to make full and frank disclosure.

70. This leaves the proceedings before the Shanghai court. Mr Kei's application to the Shanghai court under Article 58(5) substantially reflected Mr Li's report of 19 August 2021, alleging concealment by Hua She of the fact that it had previously held equity pledges of the shares of the Tangshan companies, and then subsequently illegally procured an outright transfer of the shares without consideration. Nothing at all was said about any settlement agreement or set off, despite the evidence served in support of the English application, only that the award should be set aside because the value of the companies transferred exceeded the amount of the debt.

71. This is extraordinary. Mr Hayman submitted that Mr Yuan's evidence was not available to Mr Kei at that date but I am unable to accept this. According to Mr Yuan, his own investigations were prompted by Donald Li's findings. No evidence has been put before the court from either Mr Yuan or Mr Kei as to what communications were taking place between the two of them during the course of 2021, but it was not contended that Mr Yuan could have become aware of Mr Li's investigations otherwise than from Mr Kei. In those circumstances, it simply beggars belief that Mr Yuan did not tell Mr Kei about the information he had obtained from Liu Zheng culminating in their exchanges in the first week in September 2021. Indeed, the reference to set-off in Zhu Lei's statement of 22 October 2021 could not have been derived from Mr Li's report and was therefore most likely based on what Mr Yuan had been told by Liu Zheng. The overwhelming probability is thus that Mr Kei had all the information he needed in order to raise the defence prior to his application to the Shanghai court.

72. No explanation has been put before the court as to why he did not do so. Mr Kei's litigation friend does not say that he has ever attempted to find out from Mr Kei why this was, and Mr Yuan merely says that he does not know why the defence has never previously been raised. Plainly Mr Kei could with reasonable diligence have raised the point and if there was any concealment by Hua She at that stage it cannot have had any causative effect.

73. This in turn led to a debate in argument as to whether Mr Kei was issue estopped from raising his concealment argument (even in the guise of "exceptional circumstances") on the basis that it had been adjudicated upon by the Shanghai court, alternatively whether taking the point when it could have been taken earlier was an abuse of process. While the share transfer was in issue before the Shanghai court (albeit not in the context of settlement/set-off), I would have been reluctant to find any issue estoppel on the basis of the Shanghai court's somewhat illogical decision on concealment (see paragraph 68 above), particularly since it was also *obiter* given that the application was primarily dismissed on grounds of time-bar. However, to the extent that the specific issue of settlement/set-off was not raised before the court it clearly could and should have been. Ms Lacob was therefore on strong ground in arguing that it is an abuse of process for Mr Kei to seek a second bite of the cherry: see the discussion in *Alexander Bros Ltd*

(Hong Kong S.A.R.) v Alstom Transport SA, [2020] EWHC 1584 (Comm) at [132]-[148].

74. But it is unnecessary to get into any of this since, in my judgment, Mr Kei has failed at the first hurdle to establish that there was any relevant concealment by Hua She. To the extent that its explanation of the share transfer before the Shanghai court left something to be desired, this in itself cannot have caused him any prejudice as by then he had all the information required to run the point himself. Accordingly, there are no circumstances which in my view can be categorised as exceptional.

Residual discretion

75. Should I have been minded to find that there was indeed a *prima facie* case for setting aside the order, Ms Lacob invited me as a fall-back to exercise my residual discretion not to do so.

76. I do not propose to deal with this argument in any detail as it does not arise on my findings. Suffice it to say that she made a number of forceful points based on Mr Kei's conduct, and suggested that these disclosed a pattern of non-compliance and obfuscation by him in a clear attempt to avoid or delay any meaningful enforcement. She drew attention to the following:

i) The allegation in the BVI proceedings that the Guarantee had been procured through theft of his identity – an allegation which (albeit not abandoned) was not pursued at this hearing – surprisingly, if the allegation had merit;

ii) Mr Kei's failure, notwithstanding asset disclosure orders in three separate jurisdictions, to disclose any assets or bank accounts in which he has an interest anywhere in the world. Indeed, the only assets he has disclosed are those which Hua She had already discovered for itself and even then he claims to have no interest in them. For example, the £78 million property in which he resided while in London prior to his return to Hong Kong in June 2020 is said to be owned by his daughter having been purchased with funds provided by his wife;

iii) Mr Kei's failure, despite the evidence in Dr Choi's report that he had been living in London with his family with a view to applying for residency, to disclose any bank accounts or other means of support in the UK;

iv) Mr Kei's failure to disclose any property at all in Hong Kong despite currently being a permanent resident there. Moreover, the Hong Kong address provided on multiple occasions by Mr Kei (and which Mr Hayman was instructed was his residence) had turned out upon investigation to consist of no more than a mailbox on the edge of a squatter village. This evidence had not been refuted and to this day there is no evidence as to where Mr Kei is actually living;

v) The dissipation of his entire shareholding in Sparkle Group – in part at least while subject to the BVI freezing order – and the implausibility of his supposed justification for this transaction when a sizeable portion of the shares were subsequently re-transferred to his wife;

vi) The abandonment of the application to set aside the enforcement order in the BVI once the disposal of the shares had taken place;

vii) Scepticism as to the extent to which Mr Kei's mental state has genuinely hampered him in providing instructions and evidence for these proceedings when it does not appear to have prevented him from:

a) Entering into a share pledge of Sparkle Group shares in July 2020, upon which he relies as justification for the subsequent disposal of those shares;

b) Bringing the set-aside application in the BVI;

c) Instructing Donald Li; and

d) Taking advice and instructing solicitors to make the present application in August 2021.

77. In the light of Dr Choi's report, there can be little doubt that Mr Kei is currently suffering from a serious depressive illness and I have every sympathy for him in that regard. Nonetheless, it does not appear to have impeded him from engaging meaningfully over the last 18 months in various sets of legal proceedings. There are clearly issues as to his credibility arising from the matters relied on by Ms Lacob and, as she submits, there is a striking absence of evidence from Mr Zhu as to why he has not sought relevant instructions from Mr Kei or, if he has, what response he received.

78. Had it been necessary to do so, therefore, I would have needed to consider very carefully whether it was indeed appropriate to set aside the enforcement order or whether I should exercise my discretion to maintain it. In the event, of course, the question does not arise and I express no opinion on the point.

79. No separate argument was addressed by counsel regarding the freezing order but this clearly stands or falls together with the enforcement order. The amended application under s. 103(5) has fallen away following the decision of the Shanghai court and was not pursued.

80. Accordingly, the application is hereby dismissed.