

August 2023

Arbitration – arbitral autonomy and immunity – arbitrator compelled to give evidence

Song Lihua v Lee Chee Hon (former name: Que Wenbin) [2023] HKCFI 1954



Summary

A dispute arose as to whether an arbitrator ("QF") and a secretary to a tribunal ("Y") could be compelled to give evidence with regards to the conduct of QF during an arbitration hearing. The Respondent applied to set aside the Court's order ("Setting Aside Application") to enforce the arbitral award ("Award") of the Chengdu Arbitration Commission ("Commission"). The Respondent claimed that QF's conduct during the 2nd hearing ("Hearing") makes the enforcement of the Award contrary to public policy.

The Hong Kong Court of First Instance ("the Court") discussed i) the nature of the Setting Aside Application, ii) whether QF can be ordered to give evidence as to his conduct during the Hearing, and iii) whether Y can be ordered to make statements and documents regarding QF's location at the time of the Hearing.

The Court made the following decision:

- (1) The procedure and admissibility of evidence for the Setting Aside Application should be determined by the Court under Hong Kong law; and
- (2) Courts' objective is to aid and encourage arbitration, as well as to protect arbitrators from threats of suit and collateral attacks; and
- (3) Arbitrators exercise judicial or quasi-judicial function, thus they are entitled to autonomy and judicial immunity.

Practical implications

Cannot compel arbitrators to give evidence

Hong Kong courts adopt a pro-arbitration approach, keeping court interference to a minimum, and recognizing and enforcing arbitration agreements and arbitral awards as judgements of the court. It is widely recognised that arbitrators exercise a judicial or quasi-judicial function. Therefore, in the absence of fraud or bad faith, arbitrators are entitled to immunity and autonomy, as well as court's non-interference. These approaches align with the public policy of Hong Kong, and courts' objective of encouraging the speedy resolution of disputes through arbitration.

PRC law and Hong Kong law

It was made clear throughout the judgement that proceedings and hearings taking place in Hong Kong are governed by Hong Kong law. Although the arbitration agreement and the Hearing in question are governed by Mainland law, it was repeatedly emphasised that the Setting Aside Application, and the admissibility and relevance of evidence to the Application are to be determined by the Court, under Hong Kong law.

Background

The Court granted leave to the Application to enforce the Award in Hong Kong. In January 2023, the Respondent made the Setting Aside Application on the grounds set out in s.95 of the Arbitration Ordinance. Together with the Setting Aside Application, the Respondent also filed several affirmations. In his 4th affirmation, the Respondent claimed that he sought to obtain the video recording of the entire arbitral proceedings, and information relating to the physical absence of QF from the Hearing. He asserted that these are relevant to the Setting Aside Application. The Respondent then applied to the Court by separate summons for a letter of request to be issued to the mainland Chinese judicial authority, to obtain testimonies from QF and Y. Relying on Article 6 of the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of mainland China and the HKSAR, the Applicant objected the Summons and orders sought. Following the objections raised by the Applicant, the Respondent amended the orders sought in the Summons, to seek only that the mainland Chinese Court should obtain statements from the witnesses.

Court's decision

Does the Hong Kong Court have jurisdiction to determine the admissibility of evidence?

The Court clarified that mainland Chinese law governs the parties' arbitration agreement and the procedures of arbitration, while Hong Kong law governs the hearing of the Setting Aside Application, so far as it relates to the procedures and admissibility of evidence. Therefore, it was wrong for the Respondent's counsel to suggest that the Court has the power to compel an arbitrator to give evidence, merely because the mainland Chinese Court does. The Court stated that it may take into consideration the fact that the mainland Chinese Court i) refused to request the Chengdu Arbitration Commission to provide the video recording of the arbitral proceedings, and ii) dismissed the Respondent's application to refuse enforcement of the Award.

Nonetheless, the admissibility of evidence for the Setting Aside Application is still a matter to be determined by the Hong Kong Court.

Can the Court compel an arbitrator to give evidence?

Rejecting the older authorities referred to by the Respondent's counsel, the Court decided that:

- (1) To protect arbitrators' discretionary and independent decision-making process, arbitrators, who perform a judicial function, should be entitled to the same immunity available to judges in respect of their decision-making in the process of arbitration, absent fraud or bad faith;
- (2) Courts should encourage and aid arbitrations, uphold parties' choice of arbitration as the manner of final resolution of their dispute, as well as ensure Court's non-interference, as per s.3 of the Arbitration Ordinance;

(3) It is within the power and discretion of the tribunal, including QF, to decide how the Hearing was to be conducted. It is part of their decision-making process.

In making the decision and exercising his power in conducting the Hearing in the way he did, QF was performing his function as an arbitrator. Thus, he is entitled to immunity and cannot be compelled to give evidence.

As for the Request made to Y, due to the limited evidence Y could provide, the Court decided that it would be disproportionate to issue a Request for evidence from Y.

In view of all the above reasons, the Court decided that both QF and Y could not be asked to give evidence. The Summons were dismissed.

Case details

- Court: Court of First Instance
- Judge: Hon Mimmie Chan J
- Date of judgment: 31/7/2023

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