A B C D E F G H I J K L M N O P Q R S T U V

HCCT 111/2022

[2023] HKCFI 1954

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 111 OF 2022

BETWEEN

SONG LIHUA (宋丽华) Applicant

and

LEE CHEE HON (李子瀚) Respondent
(FORMER NAME: QUE WENBIN (阙文彬))

Before: Hon Mimmie Chan J in Chambers
Dates of Written Submissions: 13, 20 and 27 June 2023
Dates of Further Written Submissions: 6, 13 and 18 July 2023
Date of Decision: 31 July 2023

D E C I S I O N

Background

1. On 12 January 2023, this Court granted leave to the Applicant to enforce in Hong Kong an arbitral award of the Chengdu Arbitration

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Commission ("**Commission**") dated 11 October 2021 ("**Award**"). Under the Award, the Respondent ("**Lee**") is to pay to the Applicant a sum of RMB 337,222, 219.90, interest and costs.

2. On 26 January 2023, the Respondent applied to set aside the order of 12 January 2023 ("**Enforcement Order**"), on the ground that the arbitration agreement relied upon by the Applicant was not valid, the Respondent was unable to present his case in the Mainland arbitration ("**Arbitration**"), the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, and/or it would be contrary to public policy to enforce the Award ("**Setting Aside Application**"). In support of the Setting Aside Application, the Respondent filed his 2nd affirmation made on 26 January 2023 ("**Lee 2**"), in which he claimed (*inter alia*) that he had not been validly served with documents in the Arbitration, was not given the opportunity to nominate an arbitrator of his choice, that he could only appoint a lawyer to attend the second (but not the first) hearing of the Arbitration on 26 May 2021, and that submissions had been made on behalf of the Applicant and submitted to the tribunal, which had not been served on him nor produced at the hearing. He claimed that he had already applied to the Chengdu Intermediate People's Court to set aside the Award.

3. Lee also claimed in his 4th affirmation, made on 16 February 2023 ("**Lee 4**") and filed for the Setting Aside Application, that for the purpose of the Setting Aside Application, his Mainland lawyers had made requests to the Commission for materials relating to the Arbitration, and had been able to conduct a search of the files of the arbitral proceedings and to view a video recording of the second hearing of the Arbitration which took place on 26 May 2021 ("**2nd Hearing**"). As a result of the Commission's refusal to

provide a soft copy of the video recording of the entire arbitral proceedings, and having viewed the recording of the 2nd Hearing, Lee applied to the Mainland Court on 1 February 2023 to obtain the video recording of the entire arbitral proceedings, the resumes of the 3 arbitrators, and information relating to and reasons for the physical absence of one of the arbitrators ("**QF**") from the 2nd Hearing.

4. In Lee 4, Lee claims that the materials he sought to be produced by the Commission are highly relevant and important to the Setting Aside Application in Hong Kong. According to the inspection of the files of the arbitral proceedings and the materials Lee have so far obtained, QF was not physically present at the 2nd Hearing and had been attending the hearing remotely, but he was seen moving from place to place throughout the proceedings, in public, and using only his mobile telephone without any earphones. It is claimed that these facts are relevant to Lee's application to set aside the Enforcement Order, on the ground that it would be contrary to public policy to enforce the Award, when the proceedings were conducted in such a manner.

5. The hearing of the Setting Aside Application is scheduled for 24 August 2023.

6. On 22 March 2023, the Respondent applied to this Court by separate summons ("**Summons**"), under the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the HKSAR ("**Arrangement**"), for a letter of request to be issued to the Mainland judicial authority ("**Request**"), to obtain testimonies from QF, and from the secretary to the tribunal ("**Y**"). The order sought in the

Summons was, first, for QF to be examined ("訊問"): as to his location and movements at the time of the 2nd Hearing, from approximately 2 PM to 3:50 PM ("**Hearing**"), the duration of his stay at each location, the electronic equipment or facility utilized by QF (including video and audio equipment/facility) in his participation at the Hearing, and how he participated in the Hearing to ensure compliance with the principles of confidentiality and to ensure the integrity of the Arbitration.

7. Secondly, the Summons seeks an order for Y to be examined: as to the location of QF at the time he was electronically linked with the tribunal, the identities of the people around QF, whether QF had participated in the questioning and examination at the Hearing; the entity or tribunal approving the manner of QF's participation in the Hearing; the communication facilities utilized by QF at the time when he was electronically linked, and whether any security measures had been put in place in respect of the communication facilities at the time when he was linked to the Hearing.

8. The Summons seeks further orders that the testimony of QF and Y be recorded in writing and to be sent to the Hong Kong Court, and for Lee to be notified as to the time and location for the evidence to be obtained from these witnesses.

9. The Applicant raised objections to the Summons and the orders sought thereunder, pointing out that the Arrangement does ***not*** provide for the Hong Kong Court to seek the taking of evidence by "examination of witnesses" ("詢問證人"), as Articles 6 of the Arrangement only enables the Hong Kong Court to seek the Mainland Courts' assistance to "obtain statements" ("取得當事人的陳述及證人證言") from the parties concerned as

to their testimonies, and for the provision of documentary evidence. Only the Mainland Court can, under Article 6, seek assistance from the Hong Kong Court by "examination of witnesses".

10. As a result of these objections, Lee amended the orders sought in the Summons, to seek only that the Mainland Court should "obtain statements" from the witnesses concerned.

11. As the Summons and the Request are for evidence to be taken for consideration in and for the purpose of the Setting Aside Application, this Court directed the Summons to be dealt with on the papers, before the substantive hearing of the Setting Aside Application on 24 August 2023. Written submissions were accordingly filed on behalf of the parties in June 2023, in support of and in opposition to the Summons.

12. On 29 June 2023, this Court issued further directions, for the parties to file further written submissions to address the question whether an arbitrator can be compelled to give evidence on a challenge to the award ("**Question**"), as neither parties had dealt with the Question in their submissions filed for the Summons.

13. Submissions on the Question were thereafter filed in July 2023.

14. This is my ruling on the Summons.

The nature of the Setting Aside Application for which the Request is made

15. It is pertinent that the evidence sought to be obtained under the Request to be issued is to be used in and for the purpose of the Setting Aside

Application. This is an application made to the Hong Kong Court to refuse enforcement of the Mainland Award on the grounds set out in section 95 of the Arbitration Ordinance ("**Ordinance**"). The Setting Aside Application is to be determined, at the enforcement stage, by the Hong Kong Court, under Hong Kong law. On the facts of this case, the evidence sought under the Request and the matters relied upon as to the conduct of QF are relevant as to whether the procedures of the Arbitration were in accordance with the parties' arbitration agreement, or in accordance with the procedural law governing the Arbitration, ***and*** whether it would be contrary to the public policy of Hong Kong to enforce the Award by reason of any serious irregularity or lack of due process in the conduct of the Arbitration. The parties' underlying contract for the acquisition of shares is governed by PRC law, which may also govern the parties' arbitration agreement and the procedure of the Arbitration itself. However, the hearing of the Setting Aside Application is governed by Hong Kong law so far as it relates to procedure and the admissibility of evidence. Needless to say, the Ordinance and the public policy of Hong Kong are other determining matters affecting the consideration of the Setting Aside Application.

16. It is therefore erroneous for Lee's Counsel to rely simply on PRC law or authorities on the power of the Mainland courts, in answering the Question. The fact that the Mainland Court may have power, as Lee claims, to direct an arbitrator or the secretary of the tribunal to provide evidence to the Mainland Court in Mainland proceedings does not mean that the Hong Kong Court has power to compel QF as one of the arbitrators to give evidence for the purposes of the Setting Aside Application before the Hong Kong Court. The provision relied upon by Counsel for Lee, as to the power of the Mainland Court to require the tribunal to provide statements or documents to

the Mainland Court, when the latter is considering whether to refuse enforcement of an arbitral award, only governs proceedings before the Mainland Court, for the purposes stated in the article.

17. The fact that the PRC law expert of the Applicant did not dispute or challenge the views of Lee's expert on PRC law does not mean that the Court is bound to accept the position, that QF may be ordered by the Hong Kong Court to give evidence. Put simply, this is a matter of Hong Kong law, on which the PRC law experts have no qualification to express any opinion.

18. The fact that the Arrangement does not set out the circumstances when the Hong Kong Court may request assistance from the Mainland Court does not mean that the Hong Kong Court can or should make the request for assistance in any case without consideration of the relevance or admissibility of the evidence. It is against common sense, and a waste of costs and resources, for the Court to issue a request to obtain evidence, simply because the request can be made on or within the terms of the Arrangement, if the evidence is not admissible in the Setting Aside Application to be determined by the Hong Kong Court.

19. As Lee himself has pointed out, his application to the Mainland Court for the Commission to provide the video recording of the entire arbitral proceedings and the other materials relating to the 2nd Hearing has now been determined by the Mainland Court, and dismissed (paragraph 7 of Lee 5 made on 29 March 2023). The Applicant further pointed out that Lee's application to the Mainland Court to refuse enforcement of the Award, on the ground of QF's conduct, was also rejected by the Mainland Court after consideration of

the relevant Mainland law. It is the Applicant's case that Lee's Summons is an abuse of process, when the Mainland Court has already decided not to order the evidence to be given at Lee's request.

20. The decisions of the Mainland Court may be relevant to the Court's consideration of the Setting Aside Application. However, whether evidence is relevant to and admissible for the Setting Aside Application is a matter for determination by the Hong Kong Court, and the mere fact that the Mainland Court has declined the admission of evidence for the proceedings before the Mainland Court does not by itself mean that Lee is not entitled to refer to or admit such evidence in the Hong Kong proceedings.

Whether QF can be ordered under Hong Kong law to give evidence for admission in the Setting Aside Application

21. The Question was directed to be answered by the parties, since the effect of the Request is to compel QF, the arbitrator, to give evidence for use in the Setting Aside Application when his Award is challenged as being irregular and against public policy.

22. There is no suggestion that QF had been approached by Lee, and had agreed to give the evidence sought by Lee as to the Hearing. As Lee has acknowledged, the Commission has permitted his lawyers to search the files of the arbitral proceedings, and to view the video recording of the 2nd Hearing.

23. The competence of an arbitrator to give evidence does not mean that he can be compelled to give evidence. Counsel for Lee has not cited any authority to support the proposition that an arbitrator can be compelled to give evidence in proceedings to challenge his award.

24. The older authorities referred to by Counsel for the Applicant suggest that an arbitrator may give evidence and be called as witnesses on certain matters. *Phipson on Evidence* (20th edition) (at para 25-28) cited *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5HL 418 in support of the proposition that "arbitrators may give evidence as to what transpired in an arbitration and to state what matters were included in the submissions, but they must not be asked questions about the reason for their award". In *Buccleuch* itself, the umpire in question did not make any objection to give evidence when he was called as a witness, and he was asked questions as to how the sum named in his award had been made up. The question for the Court on appeal was whether the evidence given by the umpire was admissible, and it was held that the umpire was a competent witness, and that he may be questioned as to the subject of the claim put forward and considered by him. In his judgment, Baron Cleasby observed:

> "With respect to those who fill the office of Judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the Courts of law discountenance, and I think I may say prevent them being examined. But those objections do not apply at all to a person selected as arbitrator for the particular occasion by the parties, and he comes within the general obligation of being bound to give evidence."

The Court nevertheless considered that it would not be permissible to examine the umpire for the purpose of showing what he had intended to be included in the award, how it was arrived at, what items were included or excluded, and the meaning intended to be given to the award.

25. In *Warren v Warren* [1997] QB 488, where a party sought to summon a judge to tender evidence as to the extent of an undertaking given by another party to the court, it was held that a judge was not a compellable

witness in relation to his judicial functions. The Court affirmed the rationale identified above, in Baron Cleasby's judgement in *Duke of Buccleuch v Metropolitan Board of Works*.

26. Mr Chen, Counsel for Lee, highlighted the fact that in *Buccleuch,* the judgment of Baron Cleasby had referred specifically to arbitrators, and stated that the objections to judges being cross-examined in relation to proceedings before them did not apply to a person selected as arbitrator, and that such arbitrator comes within the general obligation of being bound to give evidence. Baron Cleasy went on to observe that "being competent generally, it follows that (the arbitrator) may be questioned as to what took place before him, so as to show over what subject matter that he was exercising jurisdiction", for the purpose of enabling the Court to judge whether the arbitrator was acting within his jurisdiction, or not. Counsel further argued that these are only examples of matters on which the arbitrator can be examined, as he is "competent generally" to give evidence relating to the arbitration. Mr Chen argued that this appeared to be supported by the judgment of the Court in *Ward v Shell-Mex and BP Ltd* [1952] 1 KB 280.

27. Since the decisions in *Duke of Buccleuch v Metropolitan Board of Works* (in 1872), *Ward v Shell-Mex and BP Ltd* (in 1952) and *Warren v Warren* (in 1997), there has in the last three decades been a rapid and substantial growth in the popularity of arbitrations and an increase in parties' choice of arbitration as an option for dispute resolution. Arbitrations are now a common form of resolution of disputes, and internationally, courts have generally adopted a pro-arbitration approach and policy in the context of recognition and enforcement of both arbitration agreements and arbitral awards as judgments of the court.

28. Arbitrators appointed under the parties' agreement are appointed to decide on their formulated dispute which has arisen, in lieu of having the matter litigated before the courts. Arbitrators decide the parties' dispute on facts and on law, on the evidence presented to them and after hearing submissions and arguments made by and for the parties. The arbitration is conducted in accordance with rules of procedure agreed to by the parties, and arbitrators have the duty to act impartially and fairly. Their awards have to be reasoned to enable the parties to understand why the award was made against them. The parties agreed that such an award will be final and binding.

29. It is accordingly widely recognized that arbitrators perform and exercise a judicial or quasi-judicial function, and that arbitrators' decision-making and judgments are comparable in nature and process to those of judges, such that there is a need to protect the course of their independent judgment from threats of suit as well as from collateral attacks.

30. The Court's policy of encouraging and aiding arbitrations, and of upholding parties' choice of arbitration as the manner of final resolution of their disputes is reflected in the Ordinance, and encapsulated in section 3 of the Ordinance. This refers to the facilitation of the fair and speedy resolution of disputes by arbitration without unnecessary expense, and to the Court's non-interference in arbitrations save as expressly provided for in the Ordinance.

31. In this overall context, my judgment is that arbitrators 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. The purpose and rationale for such immunity is the protection of the discretionary and

independent decision-making process of the arbitrator who performs a judicial function. It is also in line with the public policy and the Court's interest in encouraging private dispute arbitration and to protect the autonomy of the arbitral process. Such arbitral immunity and autonomy will be illusory if the Court is to compel, or enable the parties to compel, an arbitrator to give evidence as to his decision-making, which includes the arbitrator's exercise of his powers and discretion in the arbitral process, or to explain and justify the manner of exercise of such powers and discretion.

32. It is not conducive to the policy of arbitral autonomy, and contrary to the objectives of procedural and costs economy, to define areas or matters on which an arbitrator can be compelled to give evidence, such as on the matters which had been included in the submission to arbitration, for the purpose of deciding on the jurisdiction of the tribunal, or as to what had taken place before the arbitrator (the vagueness of such a generalization being an invitation to satellite litigation). These are matters which can be ascertained from the documents served in the arbitration, and from the award itself, and it will be totally unnecessary to call evidence from the arbitrator. This is particularly so in terms of how arbitrations are conducted in the modern age.

33. No other cases have been cited to me, but the approach described in the preceding paragraphs on arbitral immunity is reflected in decisions of the Canadian Courts, with a line of authorities such as *Sport Maska Inc v Zittrer* [1988] 1 SCR 564, *Flock v Beattie* 2010 ABQB 193 and *Alexander v Neville* [2014] OJ No 969 (ONSC). In both *Flock v Beattie* and *Alexander v Neville*, the Canadian court struck out claims made in proceedings against arbitrators acting in the course of their adjudicative function and duties as arbitrators, on the ground that they are entitled to arbitral immunity and are

immune from civil liability in the absence of fraud and bad faith. The judgment in *Flock v Beattie* referred to the earlier decision in *Sport Maska Inc v Zittrer*, where the Court of Appeal referred to arbitral immunity as follows:

> "As such an arbitrator, who is called on to settle or prevent a dispute, is given certain immunities. These are governed by the rules of public and not private law because of the similarity of arbitration to the judicial function, even when the conclusion of a submission to arbitration is contained in a private contract, when the law does not require recourse to this method of settling disputes. In the absence of fraud or bad faith, an arbitrator enjoys the immunity from civil liability suggested for him by Counsel."

34. The rationale for judicial immunity, and its close relationship with immunity from being compelled to give evidence, is explained in *Credit Transit Inc v Chartrand* 2021 QCCS 4329. In that case, the Quebec Supreme Court quashed a summons to compel a judge to give evidence relating to an application to disqualify him on the ground of bias. The court pointed out that judicial immunity safeguards judicial independence, and also protects judges from being compelled as witnesses in relation to the exercise of their judicial functions. Judicial immunity is invoked to defeat liability claims against judges, which means that they are immune for any act committed in the exercise of their judicial functions, and such immunity protects a judge from being compelled to testify as a witness in relation to the exercise of their judicial functions.

35. The extension of judicial immunity to arbitrators means that an arbitrator is likewise immune from being compelled to testify in relation to how he or she exercised his/her functions in the arbitration. Such immunity is an essential foundation for judicial and arbitral integrity and independence, to ensure that arbitrators and judges can make their decisions on the right result without fear or distractions as to whether they could be made liable for claims of any party.

36. In the present case, it is within the power and discretion of the tribunal, which includes QF, to decide whether to allow the 2nd Hearing to take place remotely, with QF participating by video and audio link, and how the 2nd Hearing should be conducted. It is part of the tribunal's decision-making process and its control of the proceedings before it. If Lee contends that the manner in which QF had participated in the 2nd Hearing was unfair or had affected due process, or was in breach of the agreed arbitral procedure, it was open to Lee to make the proper objection to the tribunal at the relevant time. It is also open to Lee to challenge the Award on the grounds set out in section 95 of the Ordinance, as he has now done, but it is not open to him to compel QF as the arbitrator to justify or explain or to give evidence generally on his conduct of the process of the 2nd Hearing, or of how and why he exercised his power and discretion to proceed with the 2nd Hearing in the manner in which it was held. The arbitrator's discretionary powers have to be exercised judicially, and in making the decision and exercising his power in conducting the 2nd Hearing in the way he did, QF was performing his function as an arbitrator. As such, he is entitled to immunity and cannot be compelled to give evidence on these matters.

37. Accordingly, I decline to issue a Request for evidence to be obtained from QF.

38. In any event, the evidence as to QF's conduct and the manner of his participation in the Hearing is already apparent from the materials inspected by Lee's Mainland lawyers and now in Lee's possession. He should be able to establish his case on the information and materials available to him, even without the testimony sought from QF.

The Request as against Y

39. As against Y, the Request seeks statements and documents from her as to QF's location at the time of the Hearing, whether he had participated in the questioning at the Hearing, information on the entity or tribunal which had approved QF's manner of participation, particulars of the electronic facilities employed by QF and whether there were security measures adopted in respect of such facilities.

40. Before the Court issues the Request on Lee's application, the Court should be satisfied as to the relevance, necessity and probative value of the evidence sought. Otherwise, it will be a total or disproportionate waste of time and costs, which is neither conducive to the underlying objectives of the CJR nor consistent with the principles and object set out in section 3 of the Ordinance.

41. Lee has not disclosed whether he has ascertained if Y is or was at any relevant time in possession of the information sought from her and whether she or the Commission would consent to releasing any of the particulars sought by Lee. Applying common sense, Y would only be able to give evidence as to QF's location and the persons around him by viewing the video of the Hearing which shows QF's participation. This can just as effectively be done by Lee himself, by those advising or assisting him, and if necessary by the Court at the hearing of the Setting Aside Application (since screen captures of the video have been produced by Lee). Lee and his advisers who had attended the 2nd Hearing have information as to whether QF had asked questions or voiced opinions at the Hearing, without Y's further evidence. They also have information and knowledge as to whether there were disruptions in the communication at the Hearing.

42. Having taken all the above matters into account, I consider that it would be totally disproportionate to issue the Request for the limited evidence which Y may provide, and decline to issue the Request for the purpose of the determination of the Setting Aside Application. I do not consider that the interests of justice would be defeated by declining the application for the issue of the Request.

Disposition

43. For all the above reasons, the Summons is dismissed, with an order *nisi* that Lee should pay to the Applicant the costs of and occasioned by the Summons, including any costs reserved, with certificate for counsel. The order *nisi* shall become absolute unless application for variation is made within 14 days.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Byron Chiu, instructed by Grandall Zimmern Law Firm, for the applicant

Mr David Chen, instructed by DS Cheung & Co, for the respondent