

LET ME HEAR YOUR BODY TALK

Hong Kong court refuses to set aside arbitral award over claim lawyer couldn't read witness' body language in virtual hearing

Written by KATE HOLLAND



In *Sky Power Construction Engineering Limited v Iraero Airlines JSC* [2023] HKCFI 1558, the losing party in an arbitration unsuccessfully applied to set aside the award on the basis that the virtual hearing had prevented it from adequately examining witnesses and presenting its case. The Hong Kong Court of First Instance found 'no merit' to this, and held that an in-person hearing would not have resulted in a different outcome. The decision highlights the Hong Kong courts' acceptance of virtual proceedings as the new normal in a post-pandemic world.

Let's get physical: arbitrator's first order

This case concerned an arbitration between a Hong Kong company, Sky Power Construction Engineering Limited (**Sky Power**) and a Russian company, Iraero Airlines JSC (**Iraero**). The arbitrator was based in London. The parties came to an agreement that while the arbitrator and some of the expert witnesses would attend the hearing remotely via video link, the parties' legal counsel and factual witnesses would attend together in person at a location in Moscow.

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→ The Court acknowledged that virtual proceedings are commonplace since the pandemic, and that any difficulties cross-examining witnesses remotely are experienced by both parties.



The arbitrator made an order to this effect (**arbitrator's first order**).

Let's get virtual: arbitrator's second order

In the event, the hearing had to be postponed because the arbitrator caught Covid-19. Sky Power then announced that its only factual witness could no longer make the journey to Moscow to attend the hearing in person, due to the risk of contracting Covid during travel and also the disruption it would cause to his business.

Sky Power therefore requested that the hearing proceed on a fully virtual basis instead. Iraero objected to this, and wanted the hearing postponed until Sky Power's witness was able to travel to Moscow to attend in person.

Rather than postpone the hearing again, the arbitrator made a new order (in line with Sky Power's request) to proceed on a fully virtual basis (**arbitrator's second order**). The arbitrator would appear remotely by video link from London; Sky Power's counsel and witnesses would appear from Moscow; and Iraero's counsel and witnesses would appear from Irkutsk.

Enforcement order and application for set aside

Following the hearing, the arbitrator made an award in favour of Sky Power. Sky Power then sought recognition and enforcement of the arbitral award in Hong Kong. The Court of First Instance (the **Court**) granted Sky Power's application for an enforcement order.

Iraero applied for an extension of time to apply to set aside the enforcement order. The basis of its setting aside application was that the arbitrator's second order was a serious procedural error, and the outcome of the award would have been different had the hearing not been fully virtual. Iraero argued:

- Power to make order contrary to prior agreement

The arbitrator had no power to alter the parties' prior agreement (and the arbitrator's first order) and make the second order for a fully virtual hearing, especially given Iraero's objections to that change.

- Duty of equal and fair treatment

The arbitrator had failed in her duty to give equal and fair treatment to the parties by siding with Sky Power's

request for a fully virtual hearing, over Iraero's objections.

- Assessment and testing of evidence

The fully virtual nature of the hearing prejudiced Iraero, because its legal counsel was unable to adequately present its case or adequately cross examine Sky Power's factual witness, or assess his demeanour, genuineness and authenticity. Also, Iraero's main witness had wanted the opportunity to present his oral evidence in person, due to his age.

No merits

The Court dismissed the extension of time application, finding no merit in any of Iraero's arguments for setting

aside the enforcement order.

The arbitrator had the power to make an order contrary to the parties' prior agreement

The Court dismissed Iraero's argument that the arbitrator had no power to make the second order that the hearing be fully virtual. Under the arbitration agreement rules (based on sections 33 and 34 of the UK Arbitration Act 1996), an arbitrator has the power to decide all procedural and evidential matters, subject to the parties' right to agree on them.

The Court noted that while the parties had previously agreed on a semi-virtual hearing, once Sky

Power had requested it be changed to a fully virtual hearing and Iraero opposed this, the parties could no longer be said to be in agreement:¹

There is clearly no basis for the Respondent to claim that the tribunal did not have power, in the absence of the Respondent's agreement, to direct the hearing ... to take place in the form ordered, on virtual basis. The tribunal is given wide discretion and powers under the Act...

There was therefore nothing to constrain the arbitrator from deciding how the hearing would proceed; in fact in the absence now of party agreement on the matter it was her

1 *Sky Power Construction Engineering Limited v Iraero Airlines JSC* [2023] HKCFI 1558 at [36].

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duty to make a decision. The parties' prior agreement did not prevail over the arbitration rules or the Act.

The arbitrator complied with her duty of equal and fair treatment

The Court also rejected Iraero's claims that the arbitrator had failed in her duty to act fairly and impartially as between the parties by making the second order for a fully virtual hearing despite Iraero's objections.

Rather, the Court found that the arbitrator had carefully considered this duty in making her decision, as well as her duty to adopt procedures which were suitable to the circumstances and to avoid unnecessary delay and expense.

The Court noted that the hearing had already been delayed and there was continued uncertainty around the pandemic and the risk of future travel restrictions. It agreed that in those circumstances it was appropriate for the arbitrator to decide to proceed on a virtual, rather than an in-person basis.

No prejudice in assessment and testing of evidence

The Court also rejected Iraero's claims that it had been prejudiced by being unable to cross-examine Sky Power's witness in person, and being unable to adequately scrutinise their demeanor. The Court made explicit reference to the fact that virtual hearings are now par for the course given world events. It again referred to the arbitrator's wide discretionary case management powers in matters of procedure, evidence and flexibility;

powers which are not appropriate for the courts to interfere with or question:²

Remote hearings are now commonplace in court proceedings as well as in arbitrations, even before but particularly more so after the pandemic... Whether it is appropriate in any particular case to permit the factual witnesses to give evidence at the hearing remotely, whether the effectiveness of cross-examination can be or was undermined, whether appropriate measures are required or were put in place to ensure the security of the process, are all matters for the consideration and final decision of the tribunal in the case...

Further, the Court found that Sky Power did not gain any unfair advantage, because any inconvenience and difficulties Iraero may have experienced in putting its case and presenting and testing the witnesses' evidence were suffered by both parties.

Overall, the Court found no disadvantage to Iraero and that it had been given a reasonable opportunity to put its case and test Sky Power's case. The Court found no serious procedural error and disagreed that the outcome would have been different if the witnesses had given evidence in person:³

I cannot see any real injustice or prejudice to the Respondent, in the sense that the outcome of the Arbitration

could have been different, if the hearing had not been conducted on fully virtual basis. There is no permissible ground to set aside the Enforcement Order and refuse recognition of the Award.

Conclusion: A different animal?

Evidential procedures have evolved. The Court in this case recognised that virtual hearings are the new normal, and the decision seems to accept that the difficulties in presenting and testing witness evidence in a virtual setting are somewhat unavoidable.

In the face of this new breed of procedure, legal practitioners will have to adapt the traditional methods and approaches of presenting and challenging witness evidence. The days of cross-examination in the witness box are increasingly becoming a thing of the past, so the techniques for undermining an opponent's case will have to evolve too.

About the author

Kate Holland works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with NZDRC and NZIAC. She previously practised as a solicitor in the UK with an international commercial firm and has particular experience in trust law and succession planning.

² Above n 1, at [39].

³ Above n 1, at [41].