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HK COURT DISMISSED APPLICATION TO SET ASIDE ARBITRATION AWARD

HAS ARBITRATION AND LITIGATION BECOME "A GAME OF BUYING TIME AND COMPETING IN RESOURCES"?

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SUMMARY

In *CNG v G & G* (HCCT 29/2023) [2024] HKCFI 575 (date of reasons for decision: 27 February 2024), the Hong Kong Court of First Instance ("**the Court**") dismissed an application to set aside an arbitration award, reiterating important principles regarding challenges to arbitration awards and/or enforcement of arbitration awards.

The judgment began with the remark that: "*[t]his is a typical example of a party which has agreed to submit its contractual disputes to the final and binding determination of an arbitral tribunal, but being aggrieved when the tribunal makes an award against it, makes all attempts to find loopholes and problems in the award*".

The Court gave a timely reminder to legal professionals – that the Court can only look to and trust legal professionals to carry out their duties to the Court, and to act responsibly when advising their clients on whether an award can be "***properly*** *challenged*", and that "*lengthy but at the root unmeritorious applications*" take up precious judicial time and public resources in the process.

BACKGROUND

The arbitration involved a shareholder dispute of a company which owns and operates a mining and processing project. A Share Purchase Agreement was first entered into in 2013, and subsequently a Shareholders' Agreement was entered into in 2014. Disputes arose as to the rights and obligations of the parties under the Shareholders' Agreement. The Court remarked that the core of the real dispute was "*clear and not complex*", making reference to the First Partial Award by the arbitral tribunal.

The challenges to the award essentially related to how the tribunal dealt with the claims (share transfer claim and the defaulting shareholder claim). In its Originating Summons, the applicant sought to set aside the award on the grounds of: (1) applicant unable to present its case; (2) the arbitral procedure was not in accordance with the parties' agreement; (3) the award deals with a dispute not falling within the terms of the submission to arbitration / decisions beyond the scope of submission; and (4) the award is in conflict with the public policy of Hong Kong. To demonstrate the complexities involved in the dispute, the applicant referred to the Agreed Key List of Key Issues ("**List of Issues**") submitted to the tribunal in the arbitration, totalling 38 issues.

At the hearing of the Originating Summons, counsel for the applicant argued *inter alia* that: (A) the tribunal failed to deal with key issues listed in the List of Issues; (B) the tribunal failed to give reasons for its decision on two defences (Revocability Defence and Acceptance Defence); (C) tribunal had imposed an unequal and very tight timetable on the applicant; (D) the tribunal allowed the other parties' last-minute ambushes by adducing late evidence and running an unpleaded case, which resulted in the applicant not being able to present its case; and (E) there was lack of due process in that the Tribunal had drawn adverse inferences on the applicant's assertion of legal professional privilege.

COURT'S DECISION

In the Court's view, the tribunal clearly set out its findings on the key issues for determination, and adequately explained the decisions reached. When considering whether a tribunal has dealt with an issue, the correct approach is to read the award "*in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it*".

Regarding the complaints of the arbitrator's procedural decisions in relation to the "unfairly compressed timetable", last-minute ambushes by the other parties, and applicant's inability to present its case, the Court found no substance in these "*bemoanings and gripes*". The Court reiterated that the tribunal has the full discretion to decide on the timetable for management of the arbitration. A case management decision of the tribunal – in the absence of a serious denial of justice – is not a decision with which the Court should interfere. The Court also agreed with counsel of the respondents that there was nothing in the award to show the tribunal had drawn any inference in relation to the applicant's assertion of legal professional privilege.

Lastly, the Court also held that it saw nothing contrary to the fundamental conceptions of morality and justice that would justify bringing this case within the public policy ground. The Court dismissed the application to set aside the arbitration award, awarding costs to the respondents on an indemnity basis.

COURT'S REMINDER OF APPLICABLE PRINCIPLES

In its judgment, the Court reiterated a number of important principles which serve as a good reminder to the legal profession:-

- Arbitration is a consensual process of final dispute resolution to which the parties voluntarily agree, and there are only **limited avenues of appeal and challenge to the award**
- The limited recourse parties have under the Arbitration Ordinance is **not intended** to afford the parties with an opportunity to ask the Court, after the event, to look for defects and imperfections under the guise that the tribunal went beyond the scope of the submission to arbitration
- No party is entitled to rehearse the same arguments made before the tribunal, or reargue the case with a different focus, before the Courts, in the hopes of a different result
- The Court does **not** sit on appeal against the tribunal's finding of fact or law
- The Court must respect both the autonomy of the tribunal, and the freedom of the tribunal to decide the dispute in accordance with its case management powers
- Matters which should have been raised with the tribunal (or objected to) regarding timing, procedure and pleadings should not be brought before the Court as a complaint in applying to set aside the award or in resisting enforcement of the award
- The Court is **not** concerned with whether the tribunal had come to the right decision, for the correct reasons, or whether there was evidence to support its findings in the decision
- The grounds for setting aside and refusal of enforcement of an award are to be **construed narrowly**; it has to be shown that the error complained of is "*egregious to warrant the setting aside of the award*"

BCLP TAKEAWAYS

As the Court observed, it would seem that even the expectation that in Hong Kong an unsuccessful challenge will attract an adverse costs order on an indemnity basis has not been effective deterrent in all cases, including in particular cases where (1) awards are for very substantial sums (i.e. the parties feel the expensive and time-consuming proceedings are worth the risk or "having a go"), or (2) where the parties are "particularly obstinate or unreasonable" (in our experience not uncommon when the party feels or feigns to be particularly aggrieved by the outcome of the arbitration).

Has arbitration and litigation become "a game of buying time and competing in resources" as the Court remarked? One thing is for certain – this is another case which demonstrates that Hong Kong is and remains a pro-arbitration and pro-enforcement jurisdiction with minimal intervention to arbitral awards. Although in certain circumstances, the Court can and will step in to protect parties'

right to a fair hearing and due process, that does not mean that parties should pursue set-aside applications as an indirect way of “appeal” of an arbitral award.

RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Business & Commercial Disputes
- International Arbitration

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