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Hong Kong Court Reiterates the Exceptional Nature of Challenges to Arbitral Awards Under Section 81 of the Arbitration Ordinance

The case illustrates the Hong Kong Court's commitment to upholding party autonomy in arbitration and its longstanding policy of minimal curial intervention.

On 27 February 2024, the Honourable Madam Justice Mimmie Chan delivered her reasons for dismissing an application to set aside an arbitral award in *CNG v G & G* [2024] HKCFI 575.[1] Mimmie Chan J reiterated that such applications under section 81 of the Arbitration Ordinance ("**Ordinance**") are of an *"exceptional nature"* and should not be lightly made. Her Ladyship urged legal professionals to play a more vigilant role in upholding Hong Kong's policy of being supportive of arbitration agreements and awards, and to refrain from facilitating issuance of unmeritorious setting aside applications by *"massaging"* a case to fall within s 81 of the Ordinance.

Gibson Dunn represented the "G Parties".

1. Background

This case involved a dispute between shareholders of a company ("**SIL**") which owned and operated a mining project. The arbitration claimants ("**G Parties**") claimed that the arbitration respondents ("**CNG**") were in breach of the shareholders' agreement by (i) failing to honour a right of first refusal to purchase CNG's shareholding in SIL ("**Share Transfer Claim**") and (ii) failing to honour a contractual Notice of Default with respect to an unauthorised shutdown of operations at the mining project ("**Defaulting Shareholder Claim**").

By a First Partial Award issued on 8 February 2023 ("**Award**"), the Tribunal found in favour of the G Parties on the Share Transfer Claim and held that CNG was bound to sell its SIL shares to the G Parties in accordance with the shareholders' agreement. The Tribunal further stated that, as the Defaulting Shareholder Claim was an alternative to the Share Transfer Claim, it was not necessary to make operative orders on the Defaulting Shareholder Claim.

CNG applied to the Hong Kong Court to set aside the Award on numerous grounds, including that the Tribunal allegedly failed to deal with issues and give reasons in the Award and that there was procedural unfairness resulting in CNG's inability to present its case in the arbitration.

2. Mimmie Chan J's Decision

2.1 Failure to deal with issues or give reasons

Mimmie Chan J rejected CNG's argument that the Tribunal had failed to deal with key issues arising in the arbitration or to give reasons for its decision. Her Ladyship emphasised the relevant principles:

- The approach of the Court is to read an award generously, remedying only meaningful and readily apparent breaches of natural justice. The Court will only draw an inference that a tribunal had missed a pleaded issue if such inference is *"clear and virtually inescapable"*.

- A tribunal is not required to answer every question that qualified as an issue, nor is the tribunal obliged to structure its award in accordance with parties' submissions. It is sufficient for the tribunal to deal with the essential issues for it to come fairly to its decision on the dispute.

- A list of issues submitted by the parties does not dictate how the Tribunal deals with issues raised in the award – it is not an exam paper with compulsory questions for the Tribunal to answer.

- To argue (as CNG did) that the tribunal had placed undue reliance on any aspect of the evidence is impermissible, as it is not the function of the Court to review the evidence again to make its own findings.

2.2 Procedural unfairness

Mimmie Chan J also rejected CNG's complaints regarding alleged procedural unfairness in the arbitration. Such complaints were directed against, *inter alia*, the tight procedural timetable in the arbitration, late applications by the G Parties to admit secret recordings and the attitude of the President of the tribunal when CNG's witnesses were examined, all of which (CNG argued) deprived it of its ability to present its case. Her Ladyship explained that:

- The tribunal is the master of its procedures, and is in the best position to decide on the most appropriate manner in which the arbitration should be conducted. The Court will not interfere with the tribunal's case management decisions unless there was a serious denial of justice.

- Section 46 of the Ordinance only requires the tribunal to give the parties "a reasonable opportunity" (as opposed to a "full opportunity") to present their case. No party can claim to be entitled to all the time it requires to prepare for a hearing.

- Despite CNG's present complaints, it was able to comply with all procedural deadlines in the arbitration and never sought an adjournment. The case took 1.5 years to come to the evidential hearing with both sides supported by large and sophisticated legal teams. Her Ladyship found that there were no unusual features for an international arbitration of this scale, and there was nothing referred to by CNG which can constitute serious and egregious errors on the part of the tribunal.

3. **Comments**

CNG v G & G is a prime illustration of the Hong Kong Court's commitment to upholding party autonomy in arbitration and its longstanding policy of minimal curial intervention. As Mimmie Chan J noted, arbitration is a consensual process of final dispute resolution with only limited avenues of appeal and challenge to the award. It is not for the Court to sit on appeal against the tribunal's findings of fact or law, and it is impermissible for aggrieved parties to *"ask the*

Court after the event to go through the award with a fine-tooth comb, to look for defects and imperfections" or to *"rehearse once again before the Court arguments already made before the Tribunal, or to have different counsel reargue its case with a different focus"*. The Hong Kong Court routinely grants costs on an indemnity basis for unsuccessful challenges to arbitral awards.

Parties should bear in mind the above when considering whether to agree to submit their contractual disputes to arbitration.

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[1] Available here.

The following Gibson Dunn lawyers assisted in preparing this alert: Penny Madden KC, Brian Gilchrist, Elaine Chen, Alex Wong, and Andrew Cheng.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in the firm's Litigation and International Arbitration practice groups:

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