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# CHALLENGES TO ARBITRAL AWARD DISMISSED:

## High Court condemns use of arbitration and litigation as a game of buying time and competing in resources

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"Lest it should be unclear, parties should be reminded that arbitration is a consensual process of final dispute resolution to which they voluntarily agree, with whatever inherent defects and risks there may be, 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 them with an opportunity to ask the court after the event to go through the award with a fine-tooth comb, to look for defects and imperfections under the guise that the tribunal had failed to act in accordance with its remit or the agreed procedure. Nor is any party entitled 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, in the hope that the court may be persuaded to come to a different conclusion."

These were the opening remarks of the Honourable Madam Justice Mimmie Chan in her Reasons for Decision delivered in *CNG v. G*[1], a

1 [2024] HKCFI 575.

case which her Ladyship described as 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."

### What happened in *CNG v. G*?

*CNG v. G* involved a conflict between shareholders of a company that operates a mining and processing project. At the core of the conflict was G parties' claims that CNG breached the terms of a shareholders' agreement for its (1) failure to honour G parties' right of first refusal in transferring shares of the company, and (2) failure to obtain unanimous approval of the company's board before shutting down the operation of a project. The conflict later found its way to an arbitration. A total of 38 agreed issues were raised and argued before an arbitral tribunal, which ultimately decided the case in favour of the G parties.

Unsatisfied with the result, CNG applied to the Hong Kong Court to set aside the arbitral award. A barrage of complaints was raised to support CNG's argument that it had been deprived of the ability to present its case in the arbitration. They included the tribunal's setting an "unfairly compressed timetable" for CNG to put forward its evidence, allowing the G parties' "last-minute ambushes" through adducing late evidence and running an unpleaded case, and treating CNG's witnesses in an unfair or hostile manner when they were examined.

CNG also argued that the tribunal failed to deal with key issues or had failed to give reasons for its decision on the key issues required for determination of the dispute submitted to it. One specific criticism raised by CNG was that "only" 24 paragraphs of the total 163 paragraphs of the award were devoted to the tribunal's reasoning for its decision on the claim concerning share transfer.

### High Court's ruling

At the outset, her Ladyship made clear that the court does not sit on appeal against the tribunal's findings of fact or law. 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, and it has to be shown by the applicant that the error complained of is egregious to warrant the setting aside of the award.

In dismissing CNG's claims that the tribunal failed to deal with the key issues or give reasons, her Ladyship laid out the essential principles governing the court's approach:

The court's approach is to read an award generously, remedying only meaningful and readily apparent breaches of the rules of natural justice which can cause actual prejudice, rather than to comb an award in order to assign blame or to find fault in the process. Any inference, that an arbitrator had missed one or more important pleaded issues, can only be drawn if it is shown that the inference is "clear and virtually inescapable".

The tribunal does not have to set out each step by which it reaches its conclusion, and a failure to deal with an argument or a submission made on or relating to an issue is not equivalent to a failure to deal with an issue. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute, it will have dealt with all the issues.

An agreed list of issues submitted by the parties helpfully frames issues which the parties agree to be relevant to the tribunal's consideration for the determination of the dispute submitted to arbitration. However, the list cannot dictate how the tribunal deals with the issues raised in the award, or how it is to structure the award when deciding on the dispute. Save as expressly agreed, a list of issues is not an exam paper with compulsory questions for the tribunal to answer them all.

As to CNG's complaints over the way the tribunal conducted the arbitration, her Ladyship pointed out that:

- The tribunal is the master of its procedures and has the full discretion to decide on the timetable for and on management of the arbitration. A case management decision of the tribunal is not a decision which the court should highly interfere with, in the absence of what the court can find to be a serious denial of justice. Nor is it the function of the court on an application to set aside the award to descend to a level of

reviewing the minutiae of the procedure, in order to examine the correctness or otherwise of case management decisions and orders made by the tribunal.

- Article 34(2)(a)(ii) of the Model Law permits the court to set aside an award if a party was "unable to present" its case. What the court seeks to enforce and protect is a standard of due process which can satisfy basic minimum requirements and is generally accepted as essential to a fair hearing. In this context, the requirement under section 46 of the Arbitration Ordinance is for the arbitral tribunal to give the parties "a reasonable opportunity" to present their cases and to deal with the cases of their opponents. However, no party can claim the right to have all the time it needs to prepare for the hearing.
- On the facts of *CNG v. G*, her Ladyship observed that, despite CNG's complaints of alleged ambushes and unfair timetables, CNG was able to comply with all the procedural deadlines and it never sought to apply for an adjournment of the evidentiary hearing. Further, both sides had a large and sophisticated team of lawyers working on disclosure, evidence preparation and submissions, and the case took 1.5 years to come to the evidential hearing. In the end, her Ladyship found no unusual features for an international arbitration of this scale and concluded that there was nothing contrary to the fundamental conceptions of morality and justice to justify setting aside the award.

## Commentaries

*CNG v. G* illustrates the Hong Kong court's continued adherence to a policy of minimal curial intervention when it comes to reviewing applications to set aside arbitral awards under section 81 of the Arbitration Ordinance. In her Reasons for Decision, her Ladyship urged the legal practitioners to carry out their duties to the court and to act responsibly when advising their clients on whether an award can be properly challenged. Her Ladyship added that the legal practitioners should only prepare papers for such applications to the court and raise issues therein which have merit, instead of irresponsibly "massaging" a case to fall within the limbs of section 81.

Yet unmeritorious challenges to arbitral awards seem to be all too common. Just three days after handing down the decision in *CNG v. G*, her Ladyship fired a further warning shot across the bow in another decision[2], in which the learned judge referred to her observations made in *CNG v. G* and indicated that, if there should be further unreasonable and unwarranted applications made, the court will consider the appropriateness of a wasted costs

2 *G v. X and Others* (01/03/2024, HCCT58/2021) [2024] HKCFI 652.

order under Order 62 rule 8[3].

Whilst the court's supportive attitude towards arbitral awards should be applauded, the absence of substantive rights to appeal may prove a double-edged sword. Indeed, final determination of a dispute at the first instance should only be welcomed if justice is done at the same time. However, the reality is filled with unfortunate situations where the results of a case are tainted by human errors or misjudgments, which could only be corrected by way of an appeal. When choosing a dispute resolution forum, one must carefully compare the key features and drawbacks of each option. Those who prefer arbitrations over conventional court litigations but wish to enjoy greater rights to invoke the court's intervention (such as a right to appeal against an arbitral award on point of law) are advised to consider opting in such rights in the arbitration agreement under section 99 of the Arbitration Ordinance.

3 A wasted costs order under this rule is one that directs towards a legal representative, requiring him or her to bear any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission of the legal representative.

## About the authors

**Keith Brandt** is Managing Partner and head of Litigation and Dispute Resolution group of Dentons Hong Kong. He is also a member of the Dentons Global Board and serves on a number of the Global Boards' subcommittees. He has more than 38 years' experience in heavyweight dispute resolution, including high court/commercial court litigation, domestic and international arbitration, expert determinations, alternative dispute resolution, and mediations with particular focus on the energy, construction and financial services sectors.

Keith is widely recognised by various legal publications including Chambers Greater China, Legal 500 Asia Pacific and Who's Who Legal. He was named one of the Top 15 Litigators in Asia by Asian Legal Business. Most recently, he was recognised as an elite practitioner in The Legal 500 Arbitration Powerlist: Hong Kong 2023.

Keith is a member of the Advisory Committee on Promotion of Arbitration of the Department of Justice and an appointed panel arbitrator of the Guangzhou Arbitration Committee. He is also an appointed Vice Chairman of the ICC Hong Kong.

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