Litigation Alert
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Refusing Enforcement of Mainland China Arbitral Award on Ground of Not Being Able to Present One's Case 'Will Always Be One of Fact and Degree' says Hong Kong Court

Applying for an order from the Hong Kong court to refuse enforcement of an arbitral award from Mainland China is notoriously difficult. Generally speaking, an award is final and binding, to the extent that the court will not consider the substantive merits of the dispute, nor will the court consider the correctness of the award.

Nonetheless, one valid ground to refuse enforcement is that the aggrieved party was unable to present its case.

How high is the threshold for being unable to present a case? On the one hand, it is of paramount importance that the findings (factual, legal or otherwise) in an award be based on the case presented by all parties, but on the other hand, it is impractical to expect that each and every single minute detail in an award would be subject to lengthy submissions by all parties in the course of presenting their cases.

So how should the line be drawn?

In the recent case of *G v. X*, decided in June 2022, the Court of First Instance (CFI) in Hong Kong shed some light on the issue.

Arbitration Proceedings

G (as seller) entered into eight agreements with X and its subsidiaries (as buyers), whereby G agreed to sell certain shares in a company.

After completion of the transaction, G commenced arbitration at CIETAC (the China International Economic and Trade Arbitration Commission) and claimed that as a result of X's fraudulent concealment of relevant information:

- the eight agreements should be rescinded and the shares sold by G should be returned to G, or alternatively,
- X is liable for damages represented by the market value of the shares of which G had been deprived as a result of the fraud.

X's defense was that no fraud had been committed, and zero damages should be awarded.

In the award, the arbitral tribunal (1) rejected X's defense, (2) found that X's conduct constituted fraud against G and (3) decided to award damages to G.

In calculating damages, the tribunal employed a formula that took into account various factors, including the closing price of the shares on a particular date multiplied by the number of shares of the common stock traded in the market in the relevant year, with a relevant discount.

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Enforcement Proceedings

When G applied to enforce the award against X at the CFI in Hong Kong, X argued, among other assertions, that X lacked the opportunity to make submissions on the damages formula employed by the tribunal.

In particular, X argued that the formula had been applied by the tribunal of its own accord, without giving any notice to the parties. X highlighted that the tribunal made a material error in that the relevant price was based on the wrong share price assumption—the price was of one ordinary share, when in fact, it was the price of an American depositary receipt (ADR) unit, equivalent to two ordinary shares. In so doing, the tribunal had awarded G twice the amount it had intended.

X emphasized that he was not seeking to set aside the award on the basis of an error of law or fact made by the tribunal. X's complaint was that he had not been given the opportunity to address the tribunal and to make submissions on the tribunal's proposed manner of calculating damages or on the formula the tribunal chose to adopt without first informing the parties, which resulted in a huge difference in the amount of the award and consequent grave prejudice to X.

The CFI rejected X's arguments.

The CFI relied on the 2018 case of Reliance Industries Ltd v. Union of India, and it stated that whether there has been a reasonable opportunity to present or meet a case is a matter of fairness and always will be one of fact and degree, which is sensitive to the specific circumstances of each individual case.

On the facts of this case and as a matter of degree, the CFI was not satisfied that X had been deprived of a reasonable opportunity to address G's case.

In particular, the CFI was not persuaded the tribunal was required, after finding that liability was established, to invite further submissions from the parties on the calculation of damages based on the data available to the public and the tribunal, given that X chose to confine his submissions to the fact that G had no viable claim for any relief and that effectively zero damages should be awarded. X initially chose to make no submissions on the claim of quantum or, viewed another way, X did make submissions, but to the extent only that the quantum should be nil.

Regarding X's submissions that the tribunal had erred in awarding G twice the amount it had intended, the CFI also examined Article 53 of the CIETAC Arbitration Rules, which provide that within 30 days from receipt of an arbitral award, a party may request a tribunal in writing for correction of "any clerical, typographical or calculation errors, or any errors of a similar nature" contained in the award. The CFI found that it would have been open to X's applying to the tribunal to point out the error and to give the tribunal the opportunity to correct any error it had made in the calculation of the damages to be paid to G. By failing to alert the tribunal to the error X claims it had made, X deprived the tribunal of the opportunity to clarify the calculation in the award and to correct any error therein. X should be held to have waived any irregularity.

The Decision

Despite the above findings, the court decided to grant a three-month adjournment of the enforcement proceedings because X made an application to the Chinese court to set aside the award, on the basis that it was wrong for the tribunal to consolidate the disputes under eight different agreements into one single arbitration. Pending the determination by the Chinese court, the CFI was willing to grant an adjournment, but only for a relatively short period of time.

Takeaways

First, given X's position that the tribunal had erred in awarding G twice the amount it had intended, in addition to going down the path of not being able to present his case (which "will always be one of fact and degree which is sensitive to the specific circumstances of each individual case"), X should have also applied under Article 53 of the CIETAC Arbitration Rules for a correction of "calculation errors" contained in the award.

Second, even if X were confident that its defense of no fraud had a good chance of success, it would have been prudent to make detailed submissions on the calculation of damages (rather than simply submitting zero damages). Had X done so, and had the tribunal prevented X from making these submissions, X would have a stronger argument for not being able to present his case.

Third, depending on the outcome of X's application to the Chinese court to set aside the award, X may be able to turn the tide. It would be interesting to follow the developments in this case.

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