Walkers

Less Appeals? Cayman Islands Court of Appeal clarifies the test for leave to appeal to the Privy Council

03 September 2024

In a recent case the Cayman Islands Court of Appeal has refused to grant leave to appeal to the Judicial Committee of the Privy Council in respect of an injunction ordered in support of a foreign arbitration.

Summary

In Minsheng Vocational Education Company Limited v Leed Education Holding Ltd the Cayman Islands Court of Appeal ("**CICA**") has refused to grant leave to appeal to the Judicial Committee of the Privy Council ("**JCPC**") in respect of an injunction ordered in support of a foreign arbitration.

In considering in detail both the question of whether such an injunction was "final" (and thus whether an appeal lay to the JCPC as of right) and then whether the case raised an issue of great general or public importance which would justify a grant of leave, the Court provided important clarification in relation to the availability of final appeals.

Background

In March 2024, the CICA dismissed an appeal by Minsheng Vocational Education Company Limited ("**Minsheng**") against an injunction preventing Minsheng from taking steps to enforce certain share charges over shares in a Cayman Islands company pending the resolution of related arbitrations commenced at both the Hong Kong International Arbitration Centre and at the China International Economic and Trade Arbitration Commission in Beijing, the People's Republic of China. That decision was the first appellate decision dealing with the Grand Court's jurisdiction to grant injunctive relief in support of a foreign-seated arbitration under section 54 of the Arbitration Act 2012.

Minsheng then applied for leave to appeal to the JCPC. The questions before the CICA were:

a) did an appeal lie "*as of right*" on the basis that the Injunction Order was "*final*"; and
b) if there was no automatic right of appeal, should leave to appeal be granted on the basis that the case raised a question of great general or public importance, or otherwise ought to be submitted?

Finalty

Statutory provisions

Section 3(1)(a) of the Cayman Islands (Appeals to Privy Council) Order 1984 provides that "*an appeal shall lie as of right*" in respect of:

"*final decisions in any civil proceedings, where the matter in dispute…is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards*."

There was no disagreement that the value of the dispute was over the £300 threshold. The question for the CICA was whether the Injunction Order was "*final*".

Guidance from the JCPC in *Chhina*

The CICA referred to the recent JCPC decision in *Chhina v Ismail and Another* (which considered the approach to finality under the relevant British Virgin Islands legislation. In that case, the JCPC noted that there have been two general approaches to the question of finality:

a) the "order" approach, whereby an order is final if it finally determines a matter; or
b) the "application" approach, whereby an order is final if it results from an application which would finally determine the matter, for whichever side the decision is given.

The distinction was illustrated by the example of an order striking out a claim: under the "order" approach, an order for strike out would be final as the matter would in fact have been brought to an end, but under the "application" approach it would not be final, as had the strike out application failed, the matter would have continued. The English courts have generally adopted the application test.

The CICA drew in particular the following principles from the *Chhina* judgment:

- The word "final" in provisions governing appeals to the JCPC has no settled meaning;
- When the JCPC is considering an application for leave to appeal, it is sitting as the final Court of Appeal in the relevant jurisdiction. Where the local jurisdiction has a statutory provision, procedural rule or established practice as to the determination of finality the JCPC should follow the same approach; and
- Where there is no local rule or established practice, the JCPC would be likely to apply the application test on the basis that it would be appropriate to look to the practice and procedure of the English courts.

The approach in the Cayman Islands

In the Cayman Islands, the CICA concluded that the answer lay within Rule 12 of the Court of Appeal Rules (2014 Revision):

"(1) For all purposes connected with appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with subrules (2) to (7)…

… (3) A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues

before it."

Rule 12(3) made it clear that the Cayman Islands has adopted the "application" approach to finality in relation to appeals to the Court of Appeal, and that should be carried through into appeals to the JCPC.

Conclusion on finality

The CICA concluded that the Injunction Order was not final because:

- The injunction was "*an interim measure*", parasitic on the underlying arbitration and intended to preserve the *status quo*;
- Until determination of the arbitration, it was open to the parties to seek further, substantive directions, and the injunction gave Minsheng liberty to apply to vary its terms. The CICA noted in this regard Kawaley J's decision in *ArcelorMittal North America Holdings LLC v Essar Global Fund Ltd*, where it was held that a final judgment can only be set aside in "*truly exceptional circumstances.*" The injunction could plainly be varied in circumstances falling well short of that, suggesting it was not final;
- Under the "application" approach, if the injunction was not discharged, the proceedings before the Grand Court would still be live; and
- Although not determinative, it would be "curious" if every grant of interim relief in support of an arbitration attracted an automatic right of appeal, ultimately to the JCPC.

As such, leave was not available as of right.

Discretionary Leave

The CICA went on to consider whether it should grant discretionary leave to appeal, available only where a matter raises issues of "*great general or public importance*" or that it should "*otherwise*" be submitted to the JCPC.

Drawing on the decision of the Court of Appeal for Bermuda in *Siddiqui v Athene Holding Limited* to the effect that where the real question on the proposed appeal is the way that the lower court has applied settled, clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will not ordinarily be granted, the CICA took the view that although the Section 54 jurisdiction had not previously been considered, the case essentially engaged matters of broad principle and did not involve any novel legal principles or reasoning. The principles of international arbitration which the court was obliged to apply under Section 54 were well-known, and the issues at stake were not of general or public importance.

Comment

The decision is a helpful clarification of the availability of final appeals to the JCPC. First, it is now clear that the application test applies in determining whether appeals as of right from the Cayman Islands. Second, insofar as discretionary leave is concerned, novelty in and of itself is insufficient to establish great general importance, and interest to a sector of the legal profession or a particular industry is not necessarily the same thing as public importance. The threshold for discretionary grants of leave to appeal remains very high.

Nick Dunne, John Crook, Victoria Raymond, Christina Lo and Rebecca Moseley of Walkers acted for the successful Respondents and instructed Stephen Moverley-Smith KC of XXIV Old Buildings. Weiheng Chen and Draco Ng of Wilson Sonsini Goodrich & Rosati act as Hong Kong counsel to the Respondents.