HCCT 29/2023
[2024] HKCFI 575
[amended and redacted copy]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 29 OF 2023

BETWEEN

CNG	Applicant
and	
G	1st Respondent
G	2nd Respondent

Before: Hon Mimmie Chan J in Chambers
Dates of Hearing: 29 and 30 August 2023
Date of Decision: 30 August 2023
Date of Reasons for Decision: 27 February 2024

REASONS FOR DECISION

Introduction

1. This 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. 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. First and foremost, the Court does not sit on appeal against the tribunal's findings of fact or law. Further, the Court must not only respect the autonomy of the tribunal, but also leave the tribunal free to decide the dispute with the proper exercise of its case-management powers, when the tribunal is clearly in the best position to manage its own proceedings and procedure in the light of the issues put before it, the complexities of the case, and the time-table which best suits the tribunal, the parties and their legal representatives, with the aim of achieving a speedy resolution without unneccesary legal expense. Matters which should have been raised with the tribunal, on procedure, pleadings, and timing, but were not so raised or objected to, should not be brought before the Court as a matter of complaint at the time of resistance to enforcement or by way of setting aside of the award.

2. Reminders from the Courts of the above principles, in decisions handed down, have somehow not been effective in discouraging parties from embarking on expensive and time-consuming proceedings by way of unwarranted challenges to an award. Costs have routinely been awarded on indemnity basis for unsuccessful challenges to arbitral awards, but in cases where awards are for very substantial sums, or where the parties are particularly obstinate or unreasonable, these costs orders have not been effective as deterrence, as hoped. 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, bearing in mind that public resources are involved when judicial time is taken up by lengthy but at the root unmeritorious applications. Unfortunately, it appears that arbitration and litigation have become a game of buying time and competing in resources.

3. The aims, objectives and principles of the Arbitration Ordinance ("**Ordinance**") are clearly set out in section 3, which should not need repetition here, and Hong Kong has long been striving to establish and uphold a policy of being supportive of arbitration agreements and awards. It is high time that legal professionals play a much more vigilant role in this regard, at the same time being cognizant of their duties under Order 1A RHC to assist the Court in furthering the underlying objectives of the rules of the Court. Legal professionals should be aware of the exceptional nature of challenges made under section 81 of the Ordinance. They 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.

Background

4. This case concerns a dispute between shareholders of a company (“**SIL**”) which owns and operates a XXXXXXXXXXXXXXXXXX mining and processing project in the (“”) (“**Project**”). Since its incorporation in 2008, SIL had been wholly owned by the 1st Respondent (“”, a limited partnership incorporated in the BVI), until December 2013, when 65% of the shares of SIL were agreed to be sold to the Applicant (“**CNG**”), a wholly-owned subsidiary of , a state-owned enterprise of the PRC.

5. Chronologically, on 18 December 2013, a Share Purchase Agreement (“**SPA**”) was made between CNG, 1st Respondent, and the 2nd Respondent (“”, a company incorporated in Delaware, USA). 2nd Respondent is an affiliate of 1st Respondent, both being part of the G Group, which is a US-based commodities trading house. Under the SPA, 1st Respondent as seller agreed to sell to CNG 65% of the shareholding in SIL, with an initial payment of US $15 million due at completion. Pursuant to the SPA, 65% of the shareholding of SIL was transferred to CNG, with 1st Respondent retaining ownership of 35% of the shares.

6. On 17 March 2014, 1st Respondent, 2nd Respondent, CNG and SIL entered into a Shareholders’ Agreement (“**SHA**”).

7. Disputes then arose as to the rights and obligations of the parties under the SHA, and on 13 November 2020, 1st Respondent and 2nd Respondent (“**G Parties**”) commenced arbitration at the HKIAC against CNG (“**Arbitration**”) pursuant to the arbitration clauses contained in the SHA and the SPA.

8. No matter how protracted the negotiations and dealings, and despite the many issues raised and argued in the Arbitration, the core of the real dispute was clear and not complex. This was reflected in the First Partial Award issued by an esteemed tribunal on 8 February 2023 (for ease of reference referred to hereinafter as "**Award**").

The dispute

9. The claims made by the G Parties in the Arbitration were essentially that CNG was in breach of the SHA by: (1) failing to honour a right of first refusal conferred on 1st Respondent under the SHA in respect of CNG's purported transfer of its shareholding in SIL ("**Share Transfer Claim**"); and (2) failing to obtain the unanimous approval of the board of SIL before shutting down certain operations of the Project in 2020 ("**Defaulting Shareholder Claim**"). Other complaints were made as to the way in which the Project was run and operated. This is as summarized by CNG's own witness (at paragraph 44 of his affirmation of 27 April 2023 filed in these proceedings).

10. CNG referred to the Agreed List of Key Issues submitted to the tribunal in the Arbitration ("**List of Issues**"), which outlined a total of 38 issues (including disputes as to overdue amounts) to demonstrate the complexities involved in the dispute.

11. Essentially, the challenges made by CNG to the Award relate to the manner in which the Share Transfer Claim and the Defaulting Shareholder Claim were dealt with by the tribunal. At the conclusion of the hearing on 30 August 2023, I dismissed the application to set aside, and the following sets out the reasons for my decision.

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Share Transfer Claim

12. The Share Transfer Claim turns on a letter sent by CNG to the G Parties on 2 March 2020 ("**Notice Letter**"), and (1) whether it was a valid "Transfer Notice" provided for under clauses 5.3 and 5.4 of the SHA, or an independent offer made; (2) whether the Transfer Notice/offer had been accepted by the G Parties, or revoked by CNG; and (3) whether the G Parties were entitled to an order for specific performance for the transfer of CNG's shareholding, or to damages.

13. Clause 5 of the SHA, which is headed "Transfer of Shares", provides as follows:

> "5.1 This Clause applies to the transfer, disposal of and/or encumber (*sic*) of any Shares or any interest in Shares by any Shareholder.
>
> 5.2 Except as is expressly required or permitted by this clause no Shareholder shall, without the prior written consent of the other Shareholders, transfer (except to a Permitted Transferee) or otherwise disposed of or encumber any of its Shares or any interest in any of its Shares.
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> 5.3 Except as provided below or a transfer to a Permitted Transferee, no Shareholder shall be entitled to dispose of any interest in any of its Shares without first offering them for transfer to the other Shareholders. The offer shall be in respect of all and not part only of the Shares held by the proposing transferor (the 'Transferor') and shall be made by the Transferor giving notice to each of the other Shareholders in accordance with Clause 5.4 (a 'Transfer Notice').
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> 5.4 The Transfer Notice shall specify the Shares offered (the 'Offered Shares'), the price at which they are offered (the 'Specified Price') and the proposed transferee. The Transfer Notice shall contain a provision that, unless all the Offered Shares are sold under this Clause, none shall be sold. The Transfer Notice may not be revoked. The Transfer Notice shall invite each of the other Shareholders to notify the Transferor whilst the offer remains open whether it is willing to purchase the Offered Shares. A copy of the Transfer Notice shall be served on the Company.

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5.5. The offer shall remain open for a period of 30 days from the date of the Transfer Notice.

5.6 On the expiry of the offer period referred to in Clause 5.5, if any of the other Shareholders (a 'Transferee') has notified the Transferor that it wishes to purchase the Offered Shares, then:

> (a) if there is only one Transferee, the Transferee shall be bound to pay the purchase price for, and to accept a transfer of, the Offered Shares and the Transferor shall be bound, on payment of the purchase price, to transfer such Offered Shares to the Transferee; or
>
> (b) …

5.7 If, within a period of 5 days after the expiry of the Offer Period referred to in Clause 5.5, the Offered Shares are not purchased by any Transferee under Clause 5.6, the Transferor may at any time within a period of 180 days after the expiry of that further 5 day period transfer the Offered Shares to any person and at any price which is not less than the Specified Price provided that the Directors may satisfy that the Offered Shares are to be transferred under a bona fide sale for the consideration stated in the transfer without any deduction, rebate or alarms to the purchaser and, if not so satisfied, refuse to register the instrument of transfer."

14. The Notice Letter in dispute states:

"Pursuant to the shareholders' agreement (the 'Shareholders' Agreement') dated March 17, 2014 between (CNG), (1st Respondent), (2nd Respondent), and (SIL), (1st Respondent) holds a tag along right and right of first refusal under certain circumstances. While the Shareholders' Agreement would not provide (1st Respondent) with a right of first refusal where (CNG) intends to transfer the (SIL) Shares to a party that is a Permitted Transferee, and (CNG) believes that the control it exerts over CGG is sufficient to make CGG an Affiliate for the purposes of the Shareholders' Agreement (and, therefore, a Permitted Transferee), as an indication of the friendly and cooperative spirit that (CNG) and (2nd Respondent) have always enjoyed in this venture, (CNG) is willing to comply with the provisions of Sections 5.2 through 5.9 of the Shareholders' Agreement as if it were proposing to offer the (SIL) Shares to a non-Permitted Transferee.

[…]

This notice shall also constitute a Transfer Notice for the purposes of Sections 5.3 and 5.4 of the Shareholders' Agreement,

> pursuant to which (1st Respondent) may elect to purchase from (CNG) the (SIL) Shares at the price and on the terms set forth in the Transfer Notice. In the interest of time, please notify (CNG) in writing of (1st Respondent)'s intention to purchase all, but not less than all, of the (SIL) Shares, if applicable, as soon as possible, and by no later than the Time of Expiry." (Emphasis added)

15. CGG, the entity named in the Notice Letter for the proposed transfer, is a company whose shares are listed in Hong Kong and Toronto, in which CNG holds 40.01% of the shareholding.

16. As can be seen from the List of Issues, the dispute as to the validity of the Transfer Notice included:

(1) whether CNG had issued a valid Transfer Notice under clauses 5.3 and 5.4 of the SHA, or had made an independent offer to the G Parties of a right of first refusal ("**ROFR**") ("**Issue 1**");

(2) whether CGG is a Permitted Transferee pursuant to the SHA ("**Issue 1a**");

(3) whether the G Parties are estopped from contending that CGG is not a Permitted Transferee ("**Issue 1a (ii)"**), and whether CNG is estopped from contending that CGG is a Permitted Transferee ("**Issue 1a (iii)"**);

(4) the relevance of CGG being a Permitted Transferee to the status and effect of the Notice Letter ("**Issue 1b**");

(5) if CNG gave a valid transfer notice, whether the G Parties had validly elected to exercise its ROFR, and/or otherwise accepted the offer made in the Notice Letter ("**Issue 2**");

(6) if CNG made an independent offer, whether CNG had revoked the offer by the oral communications made on 4, 5, 10 or 12 March 2020 ("**Issue 3**"); and

(7) whether the G Parties were entitled to specific performance, or damages ("**Issue 4**").

17. CNG claimed in its Defence in the Arbitration that CGG falls within the meaning of "Permitted Transferee" under the SHA, such that CNG's proposed transfer of shares to CGG did not engage clause 5 of the SHA, and the Transfer Notice could not constitute a "Transfer Notice" ("**Permitted Transferee Defence**"). It contended that at most, the Notice Letter could be an independent offer which is revocable, and was in fact revoked and withdrawn by CGG ("**Revocability Defence**"). CNG sought to rely on the fact that before the SPA and SHA were executed, CNG and 1st Respondent had already contemplated that CNG's stake and shareholding in SIL might be transferred to CGG, and referred (*inter alia*) to documents including a Memorandum of Understanding signed by the parties in March 2018, which referred to the intended transfer by CNG to CGG, and which confirmed that CGG was an affiliate of CNG.

18. CNG further claimed that even if the Notice Letter constituted a Transfer Notice, the G Parties had not validly accepted it as it had issued a letter on 30 March 2020 by proposing to put the transactions on hold, thereby seeking to vary the terms of any offer made by CNG ("**Acceptance Defence**").

19. By the Award, the tribunal found in favor of the G Parties on the Share Transfer Claim. It ruled that the Notice Letter was a

Transfer Notice as defined in clauses 5.3 and 5.4 of the SHA, with an offer of all the shares in SIL then held by CNG for purchase by the G Parties, for the sum of US $86.32 million ("**Purchase Price**"). The tribunal found that the G Parties had, within the time stated in the Transfer Notice, accepted CNG's offer, and that CNG was bound to sell the shares to the G Parties according to clause 5.

20. In its Originating Summons issued on 27 April 2023 ("**OS**"), CNG seeks to set aside the Award on the grounds that: (1) CNG was 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 contemplated by or falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission; and/or (4) the Award is in conflict with the public policy of Hong Kong.

21. In a lengthy affirmation of ("**T**") filed in support of the OS, a barrage of complaints were directed against the procedural timetable in the Arbitration and the pressure imposed on CNG, the late applications by the G Parties to admit secret recordings and last-minute ambush in the course of the hearing, the attitude of the President of the tribunal when CNG's witnesses were examined, all allegedly resulting in CNG's inability to present its case. T also referred to "infra petita and related grounds" of CNG's application, namely the tribunal's failure to consider key issues intrinsic to the Share Transfer Claim and the Defaulting Shareholder Claim, which are the issue of whether CGG was an affiliate, the issue of revocability of the Notice Letter, the issue of whether there was valid acceptance of the alleged offer, and in relation to the Defaulting Shareholder Claim, the issue of whether it was appropriate to adopt a

valuation of US $86.32 million made by PWC as the fair price pursuant to clause 7.3 of the SHA.

22. For the hearing of the OS in August 2023, Counsel for CNG argued in the Skeleton Submission that, so far as the Share Transfer Claim is concerned, the tribunal had failed to deal with key issues listed in the List of Issues, these being essentially the Revocability Defence (which comprised Issue 1a and Issue 3) and had failed to give reasons for its decision on the Revocability Defence and the Acceptance Defence. In relation to the procedure, it was argued for CNG that the tribunal had imposed an unequal and very tight timetable on CNG, had allowed the G Parties' last-minute ambushes by adducing late evidence and running an unpleaded case, which resulted in CNG not being able to present its case. Counsel also argued that there was lack of due process, in that the tribunal had drawn adverse inferences on CNG's assertion of legal professional privilege.

Failure to deal with issues/give reasons

23. Objectively reading the Award, in the context of the claims made in the Arbitration and all matters disputed between the parties as summarized by Counsel for CNG, I cannot see how it can be fairly said that the tribunal had failed to deal with the key issues arising in the Arbitration or had failed to give reasons for its decision on the matter. In my view, the tribunal clearly set out its findings on the key issues for determination, and adequately explained the decisions reached.

24. Counsel for CNG emphasized repeatedly the fact that "only" 24 paragraphs of the total 163 paragraphs of the Award were devoted to

the tribunal's reasoning for its decision on the Share Transfer Claim. I have always been skeptical of such criticisms. A long, prolix judgment or award does not mean that it must contain sound reasoning or analysis of an issue or the decision made. A short document likewise cannot indicate that there is no good reasoning or answer to the issues raised for decision.

25. First and foremost, 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. In *AI & ors v LG II* [2023] 4 HKC 135, I already set out (at paragraph 22 of the judgment) the essential principles governing how the Court approaches and deals with a claim that the tribunal had failed to deal with an issue. The parties in this case do not dispute these applicable principles.

26. At the risk of being repetitive, and to the extent pertinent to the facts of this case: 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. The tribunal is not required to deal with each issue seriatim, as it can deal with a number of issues in the composite disposal of them. A tribunal does not fail to deal with an issue if it does not answer every question that qualifies as an issue. It can deal with an issue where that issue does not arise in view of the tribunal's decision on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise. 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. So long as a decision on one argument suffices to resolve an essential issue, the tribunal does not have to consider all arguments canvassed upon the issue. Although awards often respond to parties' submissions, such submissions do not dictate how the tribunal is to structure the disposal of the dispute referred to it. (See the cases cited at para 22 of the judgment in *AI v LG II*, including *Petrochemical Industries v Dow Chemical* [2012] EWHC 2739 (Comm), *Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm)). To put it literally, borrowing the example raised by Leading Counsel for the G Parties, and save as expressly agreed, a list of issues is **not** an exam paper, and I would add that it is not an exam paper with compulsory questions for the tribunal to answer them all.

27. Further, as illustrated in the case of *LY v HW* [2022] HKCFI 2267 and *AKN & anor v ALC & ors* [2015] 3 SLR 488, it is essential to bear in mind the policy of minimal curial intervention, and the approach of the Courts 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".

28. In the Award, the tribunal referred to and set out the parties' submissions on clause 5 of the SHA, and referred to the evidence relied upon by CNG in arguing that there was a common understanding between CNG and the G Parties that CGG was an affiliate of CNG, and thus a Permitted Transferee. At paragraph 70 of the Award, the tribunal

pointed out that if there had been an understanding as to the parties' rights before the service of the Transfer Notice, it was unarguable that any understanding survived the voluntary service of the Transfer Notice. It continued to state:

> "The Transfer Notice itself had been drafted by CNG's lawyers, both in-house and external. (2nd Respondent) accepted that Transfer Notice and agreed to pay the price stipulated in that Notice. It would be difficult to imagine less of a "smash and grab" than the making of a claim based upon the conduct of the party enabling its opposite number to accept its irrevocable offer. The Transfer Notice constituted an offer, which was capable of acceptance. It was accepted, and on acceptance a binding, and irrevocable contract came into existence."

29. The tribunal further explained, at paragraphs 72 to 75 of the Award:

> "In the Tribunal's view, the resolution of the Share Transfer Claim is clear and straightforward. The Tribunal has no doubt that the evidence demonstrates that CNG intended to sell the Shares and had notified (2nd Respondent) of that intention. The contemporaneous correspondence together with the oral evidence and the transcripts of the telephone conversations between Mr. and Mr. make it clear beyond any doubt that CNG (i) acknowledged that (2nd Respondent) had a ROFR; (ii) notified (2nd Respondent) of its intention to sell its (SIL) Shares; and (iii) notified (2nd Respondent) that the price for those shares was US$86.32 million.
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> 73. It is also clear that before sending that letter, CNG had taken legal advice and that the Transfer Notice had been drafted by CNG's lawyers. On 1st March 2020, Mr. told Mr. in the course of a telephone conversation that the letter containing the Transfer Notice was a template that a law firm had drafted for CNG, and that he had read it and seen that there were three options available for (2nd Respondent), including to exercise the ROFR. Furthermore, Mr. said that he had personally approved the Transfer Notice.
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> 74. On the basis of the relevant evidence including those outlined above, the Tribunal has no hesitation in concluding that (a) CNG had been legally advised on the issue and service of the Transfer Notice; (b) the Transfer Notice had been drafted by CNG's lawyers; (c) CNG intended the Transfer Notice to be a Notice which could be accepted by (2nd Respondent) in

> accordance with the terms of the SHA and could not be revoked; and (d) CNG intended to make it clear that it was intending that the Transfer Notice should be treated as if they were offering the Shares to a non-Permitted Transferee.
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> 75. The Transfer Notice was on its face a carefully drafted document, which Mr. explained had gone through multiple levels of approval. It said expressly that it constituted a Transfer Notice pursuant to Clauses 5.3 and 5.4 of the SHA. It referred to all the material terms of the SHA and met the specific requirements of Clause 5.3 of the SHA in that it contained an offer to the other shareholders, of which there was only one, namely, (2nd Respondent), and was in respect of all of CNG's shares."

30. The above sets out the tribunal's finding and decision that on its face, the Transfer Notice clearly stated CNG's intention to sell the shares, that CNG understood the contents and effect of the Transfer Notice in that it was stated to be a Transfer Notice pursuant to clauses 5.3 and 5.4 of the SHA which could be accepted thereunder, and that on its finding, the Transfer Notice was in law an offer which had been accepted and became binding and irrevocable.

31. It has to be borne in mind that this 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.

32. From the authorities, it is clear that in considering the important question of whether a tribunal has dealt with an issue, the 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" (*Zermalt Holdings SA v Nu-Life Upholstery Repairs*

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Ltd [1985] 2 EGLR 14 at p14F *per* Bingham J). It has to be borne in mind that the parties to the arbitration to whom the award was issued were aware of and understood how the issues had been presented to and argued before the tribunal.

33. As summarized at paragraph 26 above, the tribunal is not bound to structure the Award in the same way as the List of Issues is framed. The Award is to be read and understood in the context of how the case was argued before the tribunal. On behalf of the G Parties, Counsel pointed out that considering the way in which the parties had framed the List of Issues, it was in fact logical for the tribunal to deal first with Issue 1(b), ie the relevance of CCG being a Permitted Transferee under clause 5 of the SHA. If the tribunal decides in favour of the G Parties on this issue, that whether CCG is a Permitted Transferee in fact has no relevance to the status and effect of the Transfer Notice, then it would become unnecessary for the tribunal to decide Issue 1(a) and whether CGG is a Permitted Transferee.

34. That was what transpired as is apparent from the Award. On the face of the Transfer Notice, CNG had stated that whilst the SHA would not provide 1st Respondent with any ROFR where CNG intends to transfer the SIL shares to a party which is a Permitted Transferee, and whilst CNG believed that CGG was an affiliate by virtue of its control, the Transfer Notice stated that CNG was "willing to comply with the provisions of sections 5.2 through 5.9 of the (SHA) as if it were proposing to offer the (SIL) shares to a non-Permitted Transferee". The tribunal accordingly came to the clear finding, stated at paragraphs 74 and 75 of the Award, that CNG had expressed its manifest intention in the document, to sell the Shares under a Transfer Notice intended and understood to be in

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accordance with clauses 5.3 and 5.4 of the SHA. Having so found, it was not necessary for the tribunal to decide the question in Issue 1 (a), of whether CGG was in fact a Permitted Transferee.

35. As Counsel for the G Parties correctly pointed out, Issue 3 (and the Revocability Defence) was framed expressly to be on the basis of CNG having made an independent offer, as opposed to its having issued a Transfer Notice under clauses 5.3 and 5.4. The question of whether CNG had revoked such offer was conditioned on the first part of the question: "If CNG had made an independent offer". The tribunal had found that there was a Transfer Notice under clause 5 of the SHA, as opposed to an independent offer outside clause 5. The tribunal also stated expressly, at paragraph 76, that CNG was not entitled to revoke the offer contained in the Transfer Notice found. The reason was set out in paragraph 77: that pursuant to clause 5.6(a), the only obligation of the G Parties was to notify CNG that it wished to purchase the shares offered, and once so notified, CNG was bound to transfer the offered shares to the G Parties on their payment of the purchase price.

36. The tribunal further elaborated on the reasons, at paragraphs 78 and 79 of the Award, and dealt with the arguments made for CNG as to whether payment was required for a valid exercise of the ROFR, by rejecting them.

37. Having read the Award, I fail to see how it can be said that CNG could not understand why it had lost on the Revocability Defence. The arguments made, that the tribunal had focused on CNG's choice to issue the Notice Letter, on the evidence as to CNG's intention to sell the SIL shares, and on the estoppel arguments go nowhere in showing that the

Award should be set aside. CNG has no basis to challenge the Award on the ground that the Award was wrong in law, or was unsupported by the evidence, or that the tribunal's construction of the SHA was erroneous. Nor can CNG's case be assisted by its contention that the tribunal had given "disproportionate weight" to either the "covert recordings" adduced in evidence, or the fact that CNG had received legal advice on the SHA and the Notice Letter. The reference to the fact that CNG had received legal advice simply meant that the tribunal found that there were grounds to support its finding made as to the clear meaning to be given to the Notice Letter. To argue that the tribunal had placed undue reliance on any aspect of the evidence is simply an attempt to challenge the correctness of the Award, which is not permissible. This Court is not to review the evidence again, to make its own findings on the Notice Letter.

38. As for CNG's argument that the tribunal had failed to give reasons on the Acceptance Defence (which was the argument made in the Skeleton Submissions filed on behalf of CNG for the hearing), this is simply without merit. As explained in paragraph 30 above, the tribunal had clearly dealt with and explained the validity of the Transfer Notice served under clause 5 of the SHA, stating (at paragraph 70 of the Award):

> "The Transfer Notice constituted an offer, which was capable of acceptance. It was accepted, and on acceptance a binding, and irrevocable contract came into existence."

The tribunal explained, at paragraph 77 of the Award, the parties' obligations under clause 5.6 of the SHA and upon service of a Transfer Notice. At paragraphs 78 and 79, the tribunal also dealt with and rejected the arguments made by CNG as to why there was (on its case) no acceptance. The finding of the tribunal was made on its construction of clause 5 and of the contents of the Transfer Notice. This is not the occasion

for CNG to repeat or make further arguments as to why the relevant letter issued by the G Parties was equivocal or conditional. As pointed out by Counsel for the G Parties, the tribunal does not have to deal with each and every argument which had been raised on the issue of whether there had been acceptance of the offer, by reason of the purported acceptance being equivocal, or constituting a counteroffer. In this case, the tribunal found that there was an offer, and an acceptance, and stated its reason on the basis of its construction of clause 5 of the SHA.

39. There is the further argument that the tribunal had given no explanation why "there was no convincing reason" to depart from the general rule that damages are inadequate for a failure to transfer unquoted shares. As Counsel for the G Parties pointed out, the decision of the tribunal was to follow the general rule, that damages were inadequate when there was a failure to transfer unquoted shares. The reason for this was given by the tribunal: there was no convincing reason to depart from the general rule. Sensibly and objectively read, this means that the tribunal found no reason on the submissions made and on the evidence adduced before it, to depart from the general rule of awarding damages. I do not accept that there is justification for the Court to intervene and to review such reason given by the tribunal.

The Defaulting Shareholder Claim

40. The relevant background to the Defaulting Shareholder Claim is that on 14 March 2020, the first case of Covid-19 in the was confirmed. The number of cases rose, but vaccines were unavailable and access to healthcare was far from the site of the mine. On 28 March 2020, a nationwide lockdown was announced in the , and by 1 April 2020, only 30

out of 487 of the local employees of the Project were willing to return to work. A board meeting of SIL was held on 2 April 2020, during which the CEO of SIL explained that there was a need to implement a partial shutdown of the Project ("**Shutdown Decision**"). On 12 May 2020, 1st Respondent issued a notice of an Event of Default under clause 7 of the SHA, on the ground that there was lack of unanimous approval as required for the Shutdown Decision. On 18 June 2020, 1st Respondent gave notice of a material breach of the SHA by reason of the Shutdown Decision and on 26 June 2020, gave written notice of an Event of Default under the SHA which triggered a sale of CNG's shares in SIL to 1st Respondent for a Fair Price as defined under clause 7.2 of the SHA. In the Arbitration, the G Parties sought an order for the transfer of such shares.

41. In the Award, it was stated that the Defaulting Shareholder Claim was an alternative to the Share Transfer Claim.

42. Issues 6 to 9 and 11 of the List of Issues reflect the matters in dispute concerning the Defaulting Shareholder Claim. These are:

> "6. Did the decision to shut down certain operations of the Project from April 2020 require unanimous Board approval, because it was a Reserved Matter under the SHA?
>
> 7. Was the decision in fact made without unanimous Board approval?
>
> 8. If the answer to question 7 above is 'yes' and (1st Respondent)'s directors did not in fact approve the decision, was such refusal to approve the Shutdown Decision wrongful, and if so, what are the consequences thereof?
>
> 9. If the answers to questions 6 and 7 above are 'yes', is (1st Respondent) entitled to: (i) an order for specific performance that CNG transfer its 65% shareholding in SIL to (1st Respondent) for a Fair Price; or in the alternative **(ii)** damages in lieu?
>
> ...

> 11. If (1st Respondent) is entitled to specific performance, what should be the terms of any order for specific performance? In particular, should the Fair Price under Clause 7.3 of the SHA be:
>
> > a. the Specific Price valuation by PwC in March 2020, of US$ 86.32 million;
> >
> > b. the actual value of the shares determined by reference to the parties' expert quantum evidence; or
> >
> > c. some other figure to be determined by a separate valuation firm in accordance with Clause 7.3 of the SHA?"

43. According to CNG, the tribunal failed to deal with and failed to give reasons for these issues. In particular, CNG argued that the tribunal failed to analyze the issue of whether there had only been a partial shutdown (as alleged by CNG), had ignored CNG's evidence that various operations of the mine/Project had continued at a limited capacity, and that the tribunal had failed to give any, or any adequate, reason as to why the decision to partially shut down mining activities was a Reserved Matter within the meaning of the SHA.

44. It was further argued that the tribunal failed to give reasons for its rejection of CNG's defence, that there was in fact unanimous approval amongst the directors of SIL with regard to the Shutdown Decision.

45. Again, it was contended for CNG that the Award was brief in its discussion and analysis of the Defaulting Shareholder Claim, confined to 39 paragraphs. However, reading the Award in full and in context, my conclusion is that the tribunal had clearly dealt with the key issues in dispute and had given adequate reasons for its decision.

46. The tribunal started by stating in paragraph 92 of the Award that the Defaulting Shareholder Claim was an alternative to the Share

Transfer Claim, and that as it had already decided in favor of the G Parties on the Share Transfer Claim, it was not necessary to go into all of the details of the Defaulting Shareholder Claim. It pointed out that there were minutes of the relevant board meeting on 2 April 2020, after the G Parties had protested at the shutdown, and that there was an audio recording of the meeting and a transcript produced to the tribunal. The tribunal stated at paragraph 95:

> "There was no vote at the meeting to approve the shutdown decision retrospectively or to approve the continuing shutdown. No vote was taken at any other meeting. The minutes and the transcript of the meeting are contained in Annex 4."

47. The tribunal summarized the areas of dispute at paragraph 99 of the Award: that it was CNG's contention that the decision to implement "the partial shutdown" taken on 28 March 2020 was not a Reserved Matter, and that in any event, the board had approved the shutdown, and if it had not approved, it was due to the unreasonable and unlawful position taken by the directors of the G Parties. At paragraph 100, the tribunal referred to the issues required to be decided, as follows:

> "(a) Was a decision to shut down the mining operations a 'Reserved Matter' either pursuant to paragraph (r) or paragraph (t) of Schedule 2 of the SHA?
>
> (b) If it was a Reserved Matter, was it 'out of the ordinary course of business… having an aggregate value below US$1,000,000 in one or more transactions over a 12-month rolling period' (paragraph r) or was it a 'decision or agreement of any Group Company the subject matter of which ha[d] a value in excess of US$1,000,000 to the Group' (paragraph (t)?
>
> (c) Was the decision to shut down approved by all the Directors? If it was not, did the Shareholders use their 'best endeavours to procure' that the shut down decision was not taken without the unanimous approval of the Directors?
>
> (d) Was the refusal by the G directors to agree to the shutdown unreasonable and unlawful?

> (e) If the decision was not taken with the approval of all of the Directors, what is the remedy?"

48. The tribunal then proceeded to deal with these issues from paragraphs 102 to 163 of the Award.

49. Paragraphs 102 to 108 related to the question "whether the Shutdown Decision was a Reserved Matter". The tribunal referred to paragraph (t) of Schedule 2 of the SHA, which refers to "any decision or agreement of any Group Company the subject matter of which has a value in excess of US $1 million to the Group". Having referred to the contentions made by CNG (as to the Shutdown Decision being an operational decision within the ordinary management of the company's operations) and by the G Parties, the tribunal stated at paragraph 124 that "the decision to shut down mining activities was clearly out of the ordinary course of business". It stated that although there was no financial evidence on the point, the decision to shut down indefinitely clearly had a value above US$1 million, considering the evidence and the description of what was involved in restarting mining operations. What was pointed out by the tribunal was as follows:

> "One only has to look at the description of what was involved in restarting mining operations to understand that the shutdown decision was a very costly decision having a value in excess of US$1,000,000."

50. The tribunal in fact referred in the Award to the evidence of the witnesses and of the communications exchanged before the relevant board meeting, as to the operations of the mines in the Covid-19 situation. At paragraph 156, it came to the conclusion that:

> "it is beyond doubt that a shutdown of all of the mines for an indefinite period was something which was "out of the ordinary course of the Business" and which had a value of in excess of US $1,000,000 to the Group, and was, thus, a reserved matter."

51. On behalf of the G Parties, Counsel pointed out that at paragraph 105 of the Award, the tribunal had already referred to the decision by CNG and the management of SIL to shut down operations of the Project, as including both its mining operations and the Plant, and this was by reference to the Statement of Claim.

52. In any event, it seems clear to me, from reading paragraph 124 and 156 of the Award, that whether or not there was a partial shutdown as contended by CNG, or a complete shutdown of activities as argued for the G Parties, the tribunal was satisfied on the overall evidence that the Shutdown Decision had a value above US $1 million, to fall within the meaning and definition of "Reserved Matter" as stated in the Schedule. As Counsel for the G Parties pointed out, their pleaded case supported by documentary evidence in the Arbitration was that SIL's anticipated fixed costs for the month of April 2020 alone exceeded US $2 million, and that any decision not to operate the Project for any extended period would cause the SIL Group to suffer losses in excess of US $1 million. According to the G Parties, it was simply not necessary for the tribunal to consider whether the Shutdown Decision constituted a Reserved Matter for any other additional reason, as being out of the ordinary course of business. Further, as argued for the G Parties, simply applying common sense, a decision to shut down the operations of a mine and of the Project would not be an operational decision "within the ordinary management of a company's operations".

53. Pertinently, the decision of this Court as to whether the Award should be set aside does not turn on whether the tribunal had evidence to support its decision and findings, nor on whether the tribunal had correctly construed the meaning of "Reserved Matter" under the SHA. Rightly or wrongly, it is clear from the Award that the tribunal had dealt with the issue of whether the Shutdown Decision was a Reserved Matter, and had adequately explained the reasons for its finding. To argue whether or not there was sufficient evidence to justify or provide reasons for a finding on a shutdown of all of the mines is simply a challenge of the factual findings made by the tribunal on the evidence.

54. On the question of whether there was unanimous approval for the Shutdown Decision, the tribunal had referred in the Award to the evidence of the parties, the communications exchanged between them, and to the other documentary evidence such as the agenda for the board meeting and the transcript of the meeting of the board: including what the attendees had stated as to whether the Shutdown Decision was a reserved matter, whether the shutdown was compulsory, and whether the board had approved it. As Counsel for the G Parties submitted, it was a clear matter of record from the Minutes of the board meeting of 2 April 2020 that there was no assent or decision on the shutdown. This was also pointed out by the tribunal specifically, at paragraph 95 of the Award: that "there was no vote at the meeting to approve the Shutdown Decision retrospectively or to approve the continuing shutdown", and that "no vote was taken at any other meeting". Objectively and sensibly read as a whole, the Award contained and set out a decision on the key issues, that the Shutdown Decision was a Reserved Matter on the tribunal's construction of the SHA, and that on the tribunal's finding, there was no vote on, and no unanimous approval of, the Shutdown Decision.

55. Counsel for CNG criticized the tribunal's conclusion (at paragraph 146 of the Award) that notwithstanding a lengthy debate at the board meeting of 2 April 2020, "it appears that no decision was made as to whether or not a shutdown was necessary". It was contended that the tribunal only focused on whether the shutdown was necessary, and did not address CNG's argument that there was in fact approval of the decision to shut down the Project. From the Statement of Defence, CNG's case was that the Shutdown Decision was in fact discussed and "positively agreed to" by the G directors at the board meeting of 2 April 2020. With respect, paragraph 146 has to be read in context, and in conjunction with paragraph 95. After referring to the directors' discussions at the meeting, the tribunal concluded (at paragraph 155) that the directors' disagreement turned on whether or not the Shutdown Decision was a Reserved Matter under the SHA, and proceeded to deal with that legal issue. To argue again what the directors had said at the meeting on 2 April 2020, and whether such statements could show that the G directors had assented to or acquiesced in the decision to partially shut down the Project is simply an attempt to argue that the tribunal had failed to consider the evidence or that its Award was not supported by the evidence, which is totally outside the scope of the present application. Read as a whole, I am satisfied that the tribunal had dealt with and considered the evidence on the discussions at the meeting, and concluded therefrom that no decision was made and no approval, unanimous or otherwise, was decided upon at the meeting.

56. At paragraphs 159 and 160 of the Award, the tribunal referred to CNG's arguments that it was wrongful of the directors of the G Parties not to agree to the shutdown, and that they should not be entitled to take advantage of their own wrong. The tribunal rejected the submission, for the stated reason that it was contrary to the views of the Government, which

did not treat the pandemic as a justification for stopping all activity. It found therefore (at paragraph 161) that there was an Event of Default under the SHA, which allowed the G Parties to serve notice and require that the Shares be transferred at the "Fair Price".

Fair Price issue

57. Finally, CNG argued that the tribunal failed to give reasons for its decision on the Fair Price (issue 11 of the List of Issues), when it found that such Fair Price was the valuation of US $86.32 million made by PWC.

58. On 26 June 2020, 1st Respondent had given notice of a breach of clause 4 of the SHA which amounted to an Event of Default entitling the G Parties to serve notice triggering clause 7.2 of the SHA. Clause 7.2 provided the process by which CNG's shares in SIL would in such event be transferred to 1st Respondent for a "Fair Price". This is a contractual mechanism apart from and separate to the Transfer Notice mechanism under clause 5 of the SHA.

59. According to CNG, clause 7.3 required evaluation by a firm appointed by SIL, and it is not disputed that PWC had been engaged by *CNG* in the context of CNG's prospective sale to CGG as indicated in the Notice Letter. CNG pointed out that 1st Respondent's own valuation of the Shares exceeded US $644 million. It was emphasized that in the pleadings filed in the Arbitration, the G Parties had asked for the valuation of the Fair Price to be prepared by an experienced valuation firm appointed by the tribunal, and that it was only in the quantum submissions filed in March 2022 that the G Parties claimed, for the first time, that the Fair Price

should be US $86.32 million, as it was prepared to accept the PWC valuation.

60. CNG also submitted that the tribunal's determination on the Fair Price exceeded its jurisdiction, as the issue had not been properly referred to it for determination.

61. I accept the submissions made by Counsel for the G Parties, that the Defaulting Shareholder Claim was an alternative claim to the Share Transfer Claim. As the tribunal pointed out in the Award, having ruled in favor of the G Parties on the Share Transfer Claim, there was no need for the tribunal to make further orders on the Defaulting Shareholder Claim, and it did not in fact make any operative order in the Award in relation to the Defaulting Shareholder Claim.

62. On such approach, after having dealt with the issues concerning the Defaulting Shareholder Claim, the tribunal stated (at paragraph 161 of the Award) that the G Parties were entitled to serve a notice in writing and to require that a Transfer Notice be deemed to be given in respect of the Shares. At paragraph 162, the tribunal stated that PWC had valued the Fair Price at US $86.32 million, which was the price CNG had offered the Shares in its Transfer Notice. The tribunal went on to simply state, at paragraph 163:

> "If necessary because CNG fails to comply with the Tribunal's order in respect of the (Share Transfer Claim), the Tribunal will accept that figure as the Fair Price and make an order to that effect."

63. The tribunal reserved the power (at paragraph 5 of the order made under the Defaulting Shareholder Claim) to give such further or other directions as may be necessary, in respect of both the Share Transfer Claim and the Defaulting Shareholder Claim.

64. As submitted by the G Parties, there is in these circumstances no operative order contained in the Award to be set aside in relation to the Fair Price. CNG having failed to comply with the order made by the tribunal on the Share Transfer Claim, the G Parties are making further applications to the tribunal for the further order/directions contemplated.

65. In any event, having pointed out that it was not necessary to go into all the details in the determination of the Defaulting Shareholder Claim, the tribunal had simply valued the Fair Price on the basis of the PWC valuation which was the evidence of CNG as to the fair price at which the Shares were to be transferred to CGG. As Counsel for the G Parties rightly pointed out, the PWC valuation had been in evidence in the Arbitration, and the parties had both been given the reasonable opportunity to present their cases and to make their submissions on the appropriateness or otherwise of adopting the PWC valuation in substitution of the contractual machinery under the SHA. It was highlighted for the G Parties that CNG never claimed in the Arbitration that the tribunal did not have the necessary jurisdiction to value the Fair Price on the basis of the PWC valuation. As held in *Brunswick Bowling & Billiards v Shanghai Zhonglu* [2011] 1 HKLRD 707, a tribunal does not act in excess of its jurisdiction by awarding damages on a basis not contended for by the parties. The determination of quantum does not involve any investigation of facts not disclosed to the parties. The quantum of the Fair Price was the very issue submitted to the tribunal for determination in the Arbitration,

and the tribunal is not bound by the position taken by the parties, if it can come to a different conclusion on the basis of the evidence canvassed and the submissions made - as the tribunal did in the present case.

Procedural decisions and alleged inability to present case

66. Finally, CNG has raised complaints of the "unfairly compressed timetable", the inequality of time afforded to it to put forward its evidence, and last minute ambushes made by the G Parties, all of which according to CNG constitute serious or egregious conduct on the part of the tribunal or in the conduct of the Arbitration, which effectively deprived CNG of the ability to present its case. There were also remonstrations of CNG's witnesses being treated unfairly or with hostility, suggesting bias. In summary, I find no substance in these bemoanings and gripes.

67. As pointed out in paragraph 1 above, 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 (*COG v ES* [2023] HKCFI 294, para 17). 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. The tribunal is obviously in the best position to decide on the most appropriate and fair manner of proceeding with the Arbitration in accordance with the principles of the Ordinance and the time available to the parties, their legal representatives and members of the tribunal.

68. No party can claim the right to have **all** the time it needs to prepare for the hearing. 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 courts seek to enforce and protect is a standard of due process which can satisfy basic minimum requirements and are generally accepted as essential to a fair hearing. In this context, it is relevant to note that section 46 of the Ordinance requires the arbitral tribunal to give the parties "a reasonable opportunity" to present their cases and to deal with the cases of their opponents. Section 46 reflects that a party's right is to have a reasonable opportunity, as opposed to a "full opportunity" (as used in Article 18 of the Model Law), to present its case, and that such a right is not unlimited in scope and breadth, to entitle a party to make unreasonable demands and to ignore other relevant principles and aims of efficiency and speedy resolution of the dispute.

69. As the G Parties pointed out, despite the complaints made by CNG in the course of the Arbitration, CNG was able to comply with all the procedural deadlines and it never sought to apply for an adjournment of the evidentiary hearing, if it was true that it was indeed unable to present its case by reason of the alleged ambushes and unfair timetables. 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. As rightly pointed out by Counsel for the G Parties, there are no unusual features for an international arbitration of this scale, and there is nothing to which I have been referred which can constitute serious and egregious errors.

70. In relation to the alleged ambushes in the disclosure of and reliance on recorded conversations, I am not satisfied on the facts of the

case that as a result, CNG had been deprived of the reasonable opportunity to respond to the evidence, or to make submissions thereon, and in fact, CNG did make full submissions. It did not claim to the tribunal that it required more time to gather evidence as a result.

71. One of the complaints pursued in Counsel's skeleton submissions was the tribunal's unjustified reliance on the fact that CNG had been given legal advice on the Notice Letter, despite CNG's claim of privilege. It was contended that the tribunal had drawn inferences about the legal advice received by CNG, without overruling CNG's assertion of legal privilege, which was a deviation from the parties' agreement as to the due process required in the Arbitration.

72. With respect, this is but a spurious claim and perhaps goes to demonstrate the unrelenting endeavors by CNG as the losing party in the Arbitration to make unjustified challenges to the Award.

73. I agree with Counsel for the G Parties, that there is nothing in the Award to show that the tribunal had drawn any inference as to the content of any legal advice given to CNG. It is correct that the tribunal did state in the Award that CNG had received or must have received legal advice on the Notice Letter, and that the Notice Letter had been drafted by lawyers. I find nothing objectionable in that, as a tribunal or the court is entitled to take note of the fact that a document had been prepared and drafted by lawyers, when construing the document as to what it must have been understood to mean. Counsel refers to *Wood v Capita* [2017] AC 1173, para 13, by way of illustration. Equally, the tribunal is entitled to consider that it is improbable that a party would not have understood a document drafted by its lawyers, and that it is improbable that the lawyers

would not have had explained such document to the client. There is no lack of due process by virtue of the tribunal taking note of and recognizing such fact.

Disposition

74. By reason of all the foregoing matters, I find no merit in the claims that the tribunal had failed to deal with the key issues, or had failed to give reasons for its decision on the key issues required for determination of the dispute submitted to it. CNG has the burden to prove that it was unable to present its case, and I am not satisfied that it has demonstrated that in relation to any of the claims made in the Arbitration. Nor can I see any deviation from the parties' agreed procedure. There is no other matter which can make the case come within the public policy ground, as I see nothing contrary to the fundamental conceptions of morality and justice of this forum, and there is nothing which can in any way be said to be shocking to the conscience of the Court, to justify setting aside the Award.

75. The order made at the conclusion of the hearing on 30 August 2023 was that the costs of the application made by CNG are to be paid by it to the G Parties, with certificate for 3 counsel, on indemnity basis.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Ms Teresa Cheng SC, Mr Jason Yu and Ms Natalie So,
instructed by Linklaters, for the applicant

Mr Benjamin Yu SC, Mr Ali Malek KC and Mr Danny Tang,
instructed by Gibson, Dunn & Crutcher, for the 1st and 2nd respondents