E CAYMAN ISLANDS COURT OF APPEAL ON APPEAL
I THE GRAND COURT OF THE CAYMAN ISLANDS CIVIL DIVISION

CICA (CIVIL) APPEAL No. 0019 of 2023
(Formerly FSD 0130 of 2023)

BETWEEN

MINSHENG VOCATIONAL EDUCATION COMPANY LIMITED

Appellant

AND

(1) LEED EDUCATION HOLDING LIMITED
(2) NATIONAL EDUCATION HOLDING LIMITED
(3) HYDE EDUCATION HOLDING LIMITED

Respondents

Before:

The Rt Hon Sir John Goldring, President
The Hon Sir Michael Birt, Justice of Appeal
The Hon Sir Anthony Smellie, Justice of Appeal

Appearances: **Mr. Tom Lowe KC, Mr Erik Bodden and Mr Jordan McErlean of Conyers Dill & Pearman LLP appearing on behalf of the Appellant**
Mr Stephen Moverley Smith KC, Mr Nicholas Dunne and Ms Rebecca Moseley of Walkers (Cayman) LLP appearing on behalf of the Respondents

Heard on the papers: **16 August 2024**

Draft circulated: **19 August 2024**

Judgment delivered: **2 September 2024**

In the matter of the Appellant's Application for leave to apply to the Judicial Committee of the Privy Council

Judgment

Introduction

1. By section 3(1)(a) of the Cayman Islands (Appeals to Privy Council) Order 1984, "*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.*"

2. The Respondents do not seek to argue that the matter in dispute is not of the necessary value. Given that concession, I have proceeded on that basis. The submission of the Respondents is that the decision was not final as required by section 3(1)(a) and that, accordingly, the Appellant requires the Court's leave to appeal under section 3(2) of the Order, which provides:

> "*…an appeal shall lie from decisions of the Court…with the leave of the Court in the following cases-*
>
> (a) *decisions in any civil proceedings, where, in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted…and*
> (b) *such other uses as may be prescribed by any law for the time being in force in the Cayman Islands."*

3. The Respondents submit that the Court should not grant leave as the proposed appeal raises no question of great general or public importance or that otherwise ought to be submitted.

The underlying case

4. In its judgment of 28 March 2024, following a hearing on 27 January 2024, this Court dismissed the Appellant's appeal against the Order of Justice Segal of 29 August 2023 by which, on the basis of section 54 of the Arbitration Act 2012, and on the application of the Respondents (the

Plaintiffs) for an interim injunction seeking to prevent the Appellant (Minsheng) from taking any steps to enforce a series of share charges granted by the Respondents, and upon the Respondents' undertaking as set out in Schedule 1 of the Order, he ordered:

> "*1…the [Appellant]…be restrained from taking any steps to enforce:*
>
> *a. the Share Charge dated 24 December 2018 between the 1st …[Respondent] and the…[Appellant],*
>
> *b. the Share Charge dated 24 December 2018 between the 2nd …[Respondent] and the [Appellant],*
>
> *c. the Share Charge dated 24 December 2018 between the 3rd …[Respondent] and the…[Appellant] respectively (together the "**Share Charges**)",*
>
> *against 49% of the issued share capital of Leed International Education Group Inc., the charged property pursuant to the Share Charges (the **Charged Property**), pursuant to the Share Charges, including taking any steps to sell, transfer or otherwise dispose of the Charged Property or any part thereof…*
>
> *2. Paragraph 1 of this Order will remain in force until the earlier of either:*
>
> *a. The termination or conclusion of the arbitration initiated by a written application lodged with the China International Economic and Trade Arbitration Commission ("**CIETAC**") on 11 May 2023 (the "**PRC Arbitration**"), including but not limited to, the final delivery of a final arbitral award…*
>
> *b. In the event that the CIETAC arbitral tribunal, upon the Plaintiffs' application for permission to continue to rely on this Order pursuant to paragraph (2) of Schedule 1 hereto, having decided it has jurisdiction to hear and deal with such an application and having heard or otherwise determined the application, refuses to grant such permission.*
>
> *3. The [Appellant] shall have liberty to apply, on at least five (5) business days' notice to the [Respondents], to discharge or vary the terms of this Order.*"

5. By their undertaking set out in Schedule 1, the Respondents undertook within five business days of the Order to file an affirmation that they were unable to apply for interim remedies in the PRC, that within five business days after the constitution of the arbitral tribunal in the PRC they would apply for permission to continue to rely on the Order, that if the tribunal refused to grant permission that they would apply to discharge the Order and that they would abide by any order the Court may make to compensate the Appellant for any loss as a result of the Court's Order.

6. The detail of the case is set out in the judgment of Smellie JA, with which Birt JA and I agreed. The essential dispute concerned the interpretation and effect of section 54 of the Arbitration Act 2012, which provides:

> "(*1) A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their seat of arbitration is in the Islands, as it has in relation to the proceedings in court.*
>
> *(2) The court shall exercise those powers in accordance with its own procedures and in consideration of the specific principles of international arbitration.*"

7. In addition to consideration of the principles of international arbitration, the Court, among other things, considered whether the judge was correct in granting an injunction where it had not first been sought from the foreign arbitral tribunal and the sufficiency of the qualification to the Court's Order.

8. As Smellie JA put it (at [56] of his judgment):

> "*The real debate about jurisdiction, both before the Judge and before this Court, has been as to the interpretation and effect of Section 54 itself and as to whether it is properly engaged in this case.*"

9. He also said (at [4] of his judgment):

> "*Subject to those conditions, the Judge concluded essentially that the risk of grave and irreparable harm to the Respondents if Minsheng were not restrained from enforcing the Share Charges pending the outcome of the CIETAC Arbitration, outweighed any risk of prejudice to Minsheng as might arise from the grant of the injunction restraining its enforcement of the Share Charges in the meantime. In effect, as appears from [131] to [134] of the Judgment, the application was framed and granted not as an ordinary injunction but as one needed urgently to preserve the Respondents' interests, to protect the integrity of the CIETAC Arbitration and to assist the arbitral process to operate effectively as contemplated by Section 54 of the Act, in circumstances where the Arbitral Tribunal had not yet been properly constituted*."

The issue of the finality of the decision

10. The question of the finality of the Order arose before Justice Segal in the context of an application by the Appellant for leave to appeal to the Court of Appeal, for unless the Order amounted to a final judgment, leave to appeal was required (see sections 5 and 6(f) of the Court of Appeal Act (2023 Revision)). Justice Segal, having referred to the decision of Justice Kawaley in *ArcelorMittal North America Holdings LLC v Essar Global Fund Limited* [2021] (2) CILR 673 (*ArcelorMittal*), concluded ([6] of his Decision on Need and Application for Leave to Appeal) that:

> "*Section 54 gives the Court "the same power of issuing an interim measure in relation to arbitration proceedings…as it has in relation to the proceedings in court." The relief granted by the Court is "interim" because it regulates the position of the parties to the arbitration before the conclusion of the arbitration. An order made in the exercise of the Section 54 jurisdiction is ancillary to and in aid of the arbitration. <u>But such an order finally determines the proceedings and dispute in this jurisdiction.</u>*" (emphasis added)

11. Having decided that the Order determined the proceedings in the Cayman Islands, Justice Segal found that it amounted to a final order within the terms of Rule 12(3) of the Court of Appeal Rules (2014 Revision) (set out in paragraph 16 below), and that leave to appeal to the Court of Appeal was not required. The judge made it plain however that if leave were required, he would have granted it (see paragraph 27 below).

12. The issue of the finality of the Order was not an issue raised before the Court of Appeal. At [6] of his judgment Smellie JA said that:

> "*The Injunction, although interim in nature and effect, was in final form and expressed to expire on the delivery of a final award on the merits in respect of the CIETAC Arbitration (or until the CIETAC Arbitral Tribunal otherwise directed).*"

13. In *Chhina v Ismail and Another* [2024] UKPC 10, the Privy Council (Lord Briggs, Lord Hamblen, Lord Stephens, Lord Richards and Lady Simler) considered the approach of the Judicial Committee in deciding whether a decision is final, in that instance, in the case of legislation in the British Virgin Islands materially similar to section 3(2) of the Cayman Islands (Appeals to Privy Council) Order 1984. Lord Hamblen, giving the judgment of the Privy Council, said [11 and following]:

> "*11 The question of whether a decision is final or interlocutory can be difficult to determine- see, for example, the comments of Lord Denning MR in Salter Rex & Co*

Ghosh [1971] 2 QB 597 at pp 600G-601D. In England there have been two general approaches to the determination of that question. The "order" approach or test is that an order is final if it finally determines a matter- it depends upon the nature and effect of the order as made…On this approach a striking out order would, for example, be final as it finally determines the proceedings. The "application" approach or test is that an order is final if it results from an application which finally determines the matter, for whichever side the decision is given- it depends on the nature of the application rather than the order made…On this approach a striking out order would not be final as it involves an application which would not be finally determinative whichever way it is decided- if the application fails the proceedings continue.

12 The English courts eventually adopted the application test as a general rule- see Salter Rex & Co Ghosh and White v Brunton [1984] QB 570…Since 1988 this has been reflected in the rules of court/civil procedure rules- see RSC Order 59 rlA(3)- "A judgment or order shall be treated as final if the entire cause or matter would (subject to any possible appeal) have been finally determined whichever way the court below had decided the issues before it."

13 In the BVI leave to appeal to the Court of Appeal is required in relation to most appeals from interlocutory decisions in civil proceedings. As is common ground, it is well established in the BVI that the application test is applied to determine whether decisions are final or interlocutory…

14 Since the test to be applied in determining whether a decision is final or interlocutory is a procedural matter, the courts of the Eastern Caribbean have taken the view that the application test should similarly be applied to determine whether a decision is final for the purpose of appeals to the Judicial Committee. They consider this is supported by the Board's decision in Haron bin Mohammed Zaid v Central Securities (Holdings) Bhd [1983] 1 AC 16…and the Board's general policy to defer to local courts on matter [sic] of procedure…"

14. At [36]-[38] and [44], Lord Hamblen said:

"*36 The starting point is that the word "final" in provisions governing appeals to the Board has no settled meaning. It can legitimately be interpreted as meaning decisions which meet the order test or decisions which meet the application test. This is illustrated by the history of English Court of Appeal decisions.*

37 In those circumstances a crucial consideration is the context in which the word is used. When the Board is considering an application for leave to appeal from a particular Privy Council jurisdiction, it is sitting as the final Court of Appeal in the jurisdiction. As such,

the practice and procedure of the jurisdiction in question is of particular importance and it informs the relevant context.

38 Where the relevant jurisdiction has a statutory provision, procedural rule or established practice as to how the finality of decisions is to be determined for the purpose of appeals as of right within that jurisdiction the Board considers that the same approach should be followed in relation to how finality is to be determined in relation to appeals as of right to the Board…

…44 In cases such as the present the Board is concerned with a constitutional or statutory provision governing appeals to the Board rather than appeals to the local courts and so is not directly concerned with local courts' procedure… This is particularly so where the question of interpretation turns on the meaning of a word like "final", which has no single, settled meaning which can be derived from the statutory provision itself, without reference to the procedural context in which it is used. "

15. Finally, at [48] and [49] Lord Hamblen said:

"*48…the Board concludes that, where the local jurisdiction has a statutory provision, procedural rule or established practice as to how the finality of decisions is to be determined for the purpose of appeals as of right, the Board should follow the same approach in relation to appeals as of right to the Board.*

49 There may, however, be some jurisdictions in which a distinction is drawn between interlocutory and final decisions in relation to rights of appeal but there is no rule or established practice as to how finality should be determined. In such cases the Board is likely to apply the application test. The reason for doing so is that in such a case it would be appropriate to look to the practice and procedure of the English courts for guidance and the application test is now the established test. This would always, however, be subject to particular considerations that may be relevant to the jurisdiction in question. There can be no rule to this effect."

The position in the Cayman Islands

16. In the light of *Chhina*, it is necessary to decide the approach in the Cayman Islands to finality. The answer in my view lies within Rule 12 of the Court of Appeal Rules (2014 Revision) which states:

"*(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." (emphasis added)

17. Subrule (5) sets out those orders which shall be treated as final. The present order does not fall within it. Subrule (6) sets out those orders which "*shall be treated as interlocutory.*" By subrule(6)(r), "*an order granting an interlocutory injunction or for the appointment of a receiver shall be treated*" as interlocutory.

18. The wording of Rule 12(3) is similar to that of RSC Order 59 rlA(3). Its terms make it clear that the approach in the Cayman Islands is the "application" approach. Moreover, I see no reason why in the present case the Privy Council, in deciding the finality of the decision, would not follow the approach as set out in Rule 12(3). It follows that unless it can be said that the application for an interim injunction, whether granted or not, would finally decide the dispute, the resulting order would not be final, but interlocutory.

19. In *ArcelorMittal* Justice Kawaley had , among other things, todecide whether *Norwich Pharmacal* orders (NPO) were final or interlocutory in the context of an application to set aside such an order. He concluded that such an order was final. He said [15]:

> "*I [previously] expressed the tentative view that the NPO might perhaps be viewed as a form of interim relief in aid of contemplated foreign proceedings for the purposes of section 11A of the Grand Court Law. This is not necessarily at odds with viewing the NPO from a purely domestic perspective, as falling within the ambit of rule 12(3) and qualifying as a final order. However, it is more straightforward to regard the Norwich Pharmacal jurisdiction as an 'action for [equitable] discovery only' falling within the ambit of Rule 12(5)(a) [which states that such an order shall be treated as final]…* "

20. It does not seem to me that that aspect of the decision in *ArcelorMittal* helps resolve whether the Order in the present case is final or interlocutory. Firstly, an NPO is different from the Order in this case. Secondly, the primary basis of Justice Kawaley's decision was his view that an NPO fell within Rule 12(5)(a).

21. Justice Kawaley also had to consider the different hurdles faced by an applicant seeking to set aside a final, as opposed to an interlocutory order. Referring to the inherent jurisdiction of the court to set aside a final judgment, he said [46]:

> "*In my judgment, the starting point for any analysis of whether recourse to such a truly exceptional inherent jurisdiction is available in the circumstances of any particular case must be to remember that, apart from the nuclear option of setting aside, judgment debtors have access to a broad array of lesser remedies…Applying to set aside a final order on the grounds it was procured by fraud would ordinarily be pursued through a separate action. Apart from that, the sort of exceptional circumstances which would justify this court setting aside one of its own final orders made on an inter partes basis would have to be circumstances which, like fraud, undermine the basis upon which the order was made in a fundamental way.*"

22. I agree. If the present Order is final, it may only be set aside in "*truly exceptional circumstances*."

My conclusion on finality

23. By the terms of section 54 of the Arbitration Act, the Order was "*an interim measure*." Unlike an NPO, it is, as the Respondents submit, parasitical on the underlying litigation, namely the arbitration in the PRC. It amounts to relief in order to preserve the status quo pending the determination of that arbitration. Until determination, it is open to the parties to seek further, substantive directions. Paragraph 3 of the Order specifically contemplates that events in the PRC may require, among other things, the Order to be varied. It plainly was not intended that such a variation could only be made in the "*truly exceptional circumstances*" spoken of by Justice Kawaley in *ArcelorMittal*. None of that suggests a final order.

24. The Appellant submits that were the Privy Council to discharge the Order, it would finally determine the proceedings. However, as the Respondents submit, if the Order were not discharged, the proceedings before the Grand Court would be alive.

25. Finally, while not determinative, it would, as the Respondents submit, be 'curious' if every grant of interim relief in support of an arbitration attracted an automatic right of appeal, ultimately to the Privy Council.

26. Accordingly, I have concluded that Justice Segal's order is not final. Leave to appeal to the Privy Council is required under section 3(1)(a).

Should the Court grant leave?

27. Justice Segal said that had he not found the Order to be final, he would have granted leave on the sole basis that [12]:

"*…it can be fairly be said that these matters, in the context of this dispute, raise an issue which in the public interest should be examined by the Court of Appeal and have the benefit of appellate review. It does not seem to me that the costs and adverse impact on the Respondents of an appeal would outweigh the need for appellate review and justify a refusal of leave…[I]n this case, had leave been required, I would have granted it on the basis that this is a case raising a question of public importance which would benefit from appellate review.*"

28. The Appellant endorses the judge's comments. It submits that the novel nature of the section 54 jurisdiction raises a point of great general or public importance from which the jurisdiction as a whole would benefit from judicial review at the highest level and further clarification of the law.

29. In deciding whether to grant leave, I bear in mind paragraph 3.3.3(a) of the JCPC Practice Direction 3, which provides that the Privy Council will only grant permission to appeal:

"*in civil cases for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal*."

30. As the Respondents submit, section 3(2)(a) of the Cayman Islands (Appeals to Privy Council) Order 1984 requires not simply that the appeal is novel, but that it raises issues of "*great general or public importance*" or that it should "*otherwise*" be submitted to the Privy Council.

31. In *Siddiqui v Athene Holding Limited* [2019] Bda LR 96 the Court of Appeal for Bermuda cited with approval the judgment of the British Virgin Islands Court of Appeal in *Renaissance Ventures Ltd v Comodo Holdings* [2018] ECSC J1008-3 in the context of Bermudan legislation materially identical to section 3(2)(a). Smellie JA, giving the judgment of the Court, said [54]:

"*Where the principle is one established by this Court but is either unsettled, in the sense that there are different views or conflicting data, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordship's Board.* ***Where however the real question on the proposed appeal is the way that this Court has applied settled law and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will not ordinarily be granted on this ground.*** *In such a case the question on the proposed appeal*

may be of great importance to the aggrieved applicant, but would not for that reason alone be a question of great general or public importance." (original emphasis)

32. Whilst I accept that the specific issue of the conditions for granting of relief under section 54 of the Arbitration Act 2012 may not previously have come before the courts of the Cayman Islands, the case, both at first instance and on appeal, essentially engaged matters of broad principle. Their resolution did not involve the application of novel legal principles or reasoning of great general or public importance. The principles of international arbitration which the court was obliged to apply under section 54(2) are well-known. The right of the Court to grant an injunction where it had not first been sought from the foreign arbitral tribunal does not in my judgment raise a matter of great general or public importance. Neither does resolution of the argument as to whether the Court sufficiently qualified its Order when granting the injunction.

33. Finally, whilst I do not suggest it is necessarily something of the greatest significance, I do note that the section 54 jurisdiction has been in existence since 2012. The fact that it has not before troubled the courts may suggest it does not raise a matter of great general or public importance for the Cayman Islands.

34. In the result, for the reasons I have set out, I conclude that this Court should not grant leave. The issues raised are not of "*great general or public importance*." There is no reason "*otherwise*" for the case to be considered by the Privy Council. Of course, that does not preclude the Appellant itself from seeking leave.

35. **Smellie JA:**

I agree.

36. **Birt JA:**

I also agree.