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RUSSELL THIRGOOD
PARTNER
MCCULLOUGH ROBERTSON
View Profile

ERIKA WILLIAMS
SENIOR ASSOCIATE
MCCULLOUGH ROBERTSON
View Profile

Casenote: Court Slams Sino Dragon's Attempt To Set Aside Arbitral Award

Case: *Sino Dragon Trading Ltd v Noble Resources International*

In *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd*,[1] the Federal Court of Australia heard an application by Sino Dragon Trading Ltd (Sino) to set aside an arbitral award made in Sydney and recognised as enforceable by the Hong Kong High Court. The conduct of Sino throughout the arbitration, and the arguments put forward by Sino for setting aside the award did not assist its cause. The judgment emphasises that Australian courts will only set aside an arbitral award when there are clear grounds for doing so.

Sino's application to set aside the award rested upon three grounds. First, Sino argued that because a notice of repudiation was written in Chinese and not English, the tribunal was not entitled to consider it as it fell outside the scope of the arbitration agreement. Second, Sino contended that technical and translation difficulties, which arose in a video link it had arranged and at the hands of a translator it had appointed, gave rise to a lack of procedural fairness. Finally, it asserted that bias afflicted the arbitral tribunal, including an arbitrator appointed by an independent authority in consequence of Sino's failure to make its own appointment.

Foreshadowing his later criticism of Sino, Justice Barry Beach noted at the outset of his judgment that some of Sino's grounds 'lacked conceptual coherence'[2] and that it 'may be seen largely to be the author of its own misfortune'.[3]

Facts

Sino contracted to purchase 170 000 dry metric tonnes of iron ore from Noble Resources International Pte Ltd (**Noble**). The contract required Sino to obtain a letter of credit, which did not occur within the stipulated time. By email in the Chinese language, Mr Pang of Sino informed Noble that, in consequence of its failure to obtain credit, Sino could not perform the contract. By letter in response, Noble purported to accept Sino's alleged repudiation, and terminated the contract. Noble later asserted that Sino's breach had caused loss and damage to Noble because it was forced to find an alternative buyer for the ore at a lower price.

The contract of sale provided for arbitration of disputes arising thereunder to be referred to arbitration in Australia pursuant to the UNCITRAL Arbitration Rules (**Rules**). On 1 May 2014, Noble issued a notice of arbitration to Sino. Following the appointment of an arbitral panel, an arbitral award was ultimately issued against Sino. Sino then applied to the Federal Court to set aside the award under article 34 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which has the force of law in Australian under the *International Arbitration Act 1974* (Cth) (IA Act).

Awards will not be set aside lightly

Article 34 of the Model Law sets out the bases on which a court at the seat may set aside an arbitral award, including for lack of jurisdiction. Justice Beach was emphatic that Article 34 'significantly limits the circumstances under which an award may be set aside'.[4] This approach is consistent with the courts' promotion of arbitral awards as providing certainty and finality. His Honour considered himself bound to exercise 'significant judicial restraint'[5] in entertaining an application to set aside an award, such a challenge not being an occasion for a merits review of the award.[6] It is unsurprising, then, that Sino's application to set aside the award was refused.

'Floccinaucinihilipilification'

The contract of sale required all notices and documents in connection with the contract to be in the English language. Despite this, the email from Sino to Noble, alleged by Noble to amount to a repudiation of the contract, was in Chinese. Sino argued that the tribunal was wrong to consider the email as evidence of repudiation because the email, not being in English, could not fall to be considered within the terms of the contract of sale.

Justice Beach was highly critical of Sino's contention. His Honour observed that the 'line of reasoning breaks down at a number of levels'[7], that the 'submissions lacked conceptual coherence'[8] and that the argument 'takes it nowhere.'[9] Justice Beach went so far as to say that Sino's arguments were 'little more than a confected attempt to run a merits challenge under the guise of an [article 34] challenge'. Most impressively, His Honour said in relation to Sino's contention:

'Floccinaucinihilipilification is a not inapposite description of my assessment of this argument.'[10]

In addition to his legal qualifications, his Honour holds Bachelors qualifications in physical chemistry and philosophy, and a Masters degree in the philosophy of science. It is, therefore, unsurprising that his Honour is comfortable using such complex words as floccinaucinihilipilification which, for us mere mortals, means to deem something worthless.

Video conferencing and other tragedies

Sino further contended that it had been denied natural justice in consequence of technical faults and mistranslation in the giving of video evidence by its witnesses.

In a pre-trial conference, Sino rebuffed a request by Noble to have certain witnesses attend the hearing in person for cross-examination. Rather, Sino requested that the evidence be given by video link. The tribunal granted this request but noted that any difficulties in the video link would be at the risk of Sino. Sino also was also charged with arranging the attendance of a qualified interpreter.

Sino failed to respond to requests for testing of the video link, and instead arranged for the evidence to be given over the Skype-like Chinese service, 'WeChat'. During the course of the hearing, the video link broke down and alternative arrangements to have the evidence received over poor-quality internet and telephone

HFW WINS NOBLE CASE

Sol Dolor
Ausralasian Lawyer
22 September 2016

The Federal Court of Australia has struck down a commodities trading firm's push to quash a $2m arbitration award stemming from a botched iron ore deal.

On Friday, the court ruled in favour of Singapore's Noble Resources International, represented by Holman Fenwick Willan, in a case brought by Hong Kong's Sino Dragon Trading citing the latter's contradictory arguments.

In January 2014, Sino Dragon inked a contract governed by the laws of Western Australia with Noble to buy 170,000 metric tons of iron ore. However, it subsequently missed two deadlines to open a letter of credit as required by the contract.

The HK-based company claimed that the same day Noble cancelled and sold the iron ore to another firm, it had given notice of its failure to perform the contract.

As the contract contained an arbitration clause for disputes to be resolved by arbitration in Australia under UNCITRAL rules, Noble took Sino Dragon to the Australian Centre for International Commercial Arbitration (ACICA).

Earlier this year, Noble won $2m in damages against Sino Dragon.

Sino Dragon, in a bid to quash the award, asked the Federal Court of Australia to rule in its favour because it claimed technical difficulties and translation problems for a couple of their witnesses who appeared via video link from China caused the whole arbitration proceedings to be prejudiced against the company.

However, Justice Barry Beach pointed out this argument contradicts Sino Dragon's claim during arbitration that the witness testimonies were not too hampered by technical difficulties and that the company was itself to be partly blamed for the technical and translation problems.

"Sino Dragon's own counsel perceived and said to the arbitral tribunal that, notwithstanding the technical difficulties, the evidence of his witnesses had come out clearly and consistently with their evidence in chief," the judge noted. "Sino Dragon's present challenge and its assertions of substantial injustice because of misunderstanding or mistranslation are puzzling to say the least." Read More

connections were made. In its award, the tribunal found the giving of evidence to be 'quite unsatisfactory'. Further, the accredited translator appointed by Sino struggled to translate the evidence into English, and translating responsibilities had to be assumed by a paralegal employed by the solicitor for Sino.

Before the Federal Court, Sino alleged that the procedure for the giving of evidence was unfair, that its witnesses were mistranslated and misunderstood, and that it was denied a proper opportunity to present its case.

Justice Beach rejected these contentions, noting that the issues were not raised with the tribunal at any stage during or after the hearing, and that Sino, despite possessing the transcript of evidence upon which the tribunal would rely, did not seek to correct any mistranslation. His Honour said:

'At the time of the arbitration hearing, Sino Dragon took no objection to the procedure which had been adopted… Indeed, its acts and omissions were principally its cause.'[11]

Remarkably, in his closing address, counsel for Sino said that the witnesses 'gave their evidence clearly' and submitted that the tribunal 'would accept their evidence'.[12] In light of this, Beach J said that Sino's later assertions of injustice were 'puzzling to say the least'.[13] His Honour also noted that the technical difficulties arose in cross-examination of the witnesses by Noble, such that it was Noble who was 'put in a more unequal and less favourable position by reason of the mode and technical difficulties.'[14] Finally, the difficulties in receiving evidence did not lead the tribunal to wholly or partially exclude the evidence of Sino's witnesses and, as such, did not provide a justification for setting aside the award.

If at first you don't appoint…

When Noble issued its notice of arbitration to Sino, it appointed **Terry Mehigan** as arbitrator and proposed the Australian Centre for International Commercial Arbitration (ACICA) as the appointing authority in accordance with Article 2 of the UNCITRAL Arbitration Rules. Under the Rules, Sino had 30 days to appoint the second arbitrator and to respond to Noble's proposal of ACICA as the designated appointing authority. Sino failed to do either within the time required.

The Rules provide that, where the parties have not agreed on the appointing authority, any party may request the Secretary-General of the Permanent Court of Arbitration (PCA) to designate the appointing authority.[15] Accordingly, on application by Noble, the PCA designated **David Williams QC** as appointing authority. As Sino had also failed to appoint an arbitrator, in accordance with the Rules, Noble requested Mr Williams QC appoint the second arbitrator. Mr Williams QC appointed **Max Bonnell** to the tribunal. The two arbitrators then appointed **Jonathan Hoyle** as the presiding arbitrator. In large part, then, Sino's complaints in relation to the arbitrators were grounded in its own failure to exercise its right to influence the composition of the tribunal.

Prior to the present proceedings, Sino had instituted five challenges against the appointed arbitrators, both within the arbitration and before the Federal Court. These prior challenges included complaints such as the arbitrators were not properly appointed and that they were 'culturally biased', shared a 'cultural system' and were 'in connection with each other' because they all lived in Sydney.[16] All five challenges failed.

In the setting aside proceeding, Sino again objected to the appointed arbitrators, arguing that they were not appointed in accordance with the agreement of the parties and that Mr Bonnell and Mr Hoyle were biased because they had a financial interest in the outcome of the arbitration. In relation to the appointment procedure, Justice Beach found this complaint to have no substance as the tribunal was property appointed. In relation to the alleged bias of two of the arbitrators, Sino's argument was based on the fact that Mr Bonnell was a partner in the law firm King & Wood Mallesons (KWM) and Mr Hoyle was an associate partner at the firm until 2009, and that the Chinese arm of KWM had acted as lawyers for Noble in an unrelated matter.

His Honour was unimpressed with the 'disjointed and conceptually misconceived propositions'[17] in relation to bias. It was noted that Mr Bonnell is a partner of the Australian arm of KWM, whereas Noble is a client of the Chinese arm, with no connection between the Australian and Chinese partnerships apart from an association of name and marketing. It was also relevant that Mr Bonnell had never acted for Noble, and that KWM China's involvement was in an unrelated matter.[18] It was held that Sino's case went 'nowhere near' satisfying the test for bias,[19] which requires a 'real danger of bias'.[20] Justice Beach also noted that the conduct alleged to constitute bias on the part of Mr Bonnell was within the 'green list' of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.[21] Matters on this list, including the allegations against Mr Bonnell, give rise to 'no appearance of, and no actual, conflict of interest'.[22] His Honour also referred to the common law test for bias and remarked that 'no fair-minded lay observer would perceive any possibility of bias'.[23]

Indemnity costs?

On application by Noble, the Court ordered Sino to pay two-thirds of the costs of the setting aside application on an indemnity basis, and pay the remaining one-third on a party/party basis. Justice Beach noted that the Model Law and IA Act are silent as to the allocation of costs in an article 34 challenge, implying an intention that costs be determined by the law of the forum.[24]

Noting the Court's broad discretion on costs,[25] Beach J found that an order for indemnity costs would be warranted where a party makes an unsuccessful article 34 challenge that did not have reasonable prospects of success.[26] It is not necessary that the party had actual or constructive knowledge of its poor prospects at the outset of the challenge.[27] Justice Beach noted that the threat of an adverse costs order on an indemnity basis would 'discourage the bringing of unmeritorious article 34 challenges',[28] and that '[a] party launching an article 34 challenge should take positive steps to ensure that at inception it does have reasonable prospects of success'.[29]

His Honour determined that Sino's challenges on the basis of the Chinese email, and on the basis of bias of the arbitrators, did not have reasonable prospects of success.[30] The challenge on the basis of the faulty video link was not found to be so lacking.[31] Given that two of three grounds of challenge lacked reasonable prospects of success, the justice of the case required Sino to pay two-thirds of the costs on an indemnity basis.[32]

Conclusion

The decision of the Federal Court in *Sino Dragon v Noble Resources* reaffirms the Australian courts' restrictive approach to the grounds on which an arbitral award will be set aside. Most significantly, the decision demonstrates the courts' vigilance towards applications which are disguised as natural justice arguments but are, in essence, challenges to the merits of an award. It is also clear that the courts will not refrain from criticism of an applicant which asserts tenuous and poorly constructed grounds for such an application. Rather, the Australian judiciary looks favourably upon arbitration as a means of 'efficient, impartial, enforceable and timely' resolution of disputes and will seek to uphold arbitral awards unless grounds for refusal of enforcement are clearly established.

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1. *[2016] FCA 1131.*
2. *Ibid [10].*
3. *Ibid [6].*
4. *Ibid [71].*
5. *Ibid [73].*
6. *Ibid [73].*
7. *Ibid [113].*
8. *Ibid [101].*
9. *Ibid [116].*
10. *Ibid [116].*
11. *Ibid [150].*
12. *Ibid [152].*
13. *Ibid [152].*
14. *Ibid [164].*
15. *UNCITRAL Arbitration Rules (as revised in 2010), article 6(2).*
16. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131 [36].*
17. *Ibid [187].*
18. *Ibid [192].*
19. *Ibid [198].*
20. *Article 12 Model Law; ibid [61], [191]-[193].*
21. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131 [194].*
22. *International Bar Association Guidelines on Conflicts of Interest in International Arbitration Pt II [6].*
23. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131 [198].*
24. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2) [2016] FCA 1169 [6]-[7].*
25. *Federal Court of Australia Act 1976 (Cth) s 43.*
26. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2) [2016] FCA 1169 [26].*
27. *Ibid.*
28. *Ibid [28].*
29. *Ibid [26].*
30. *Ibid [31]-[32].*
31. *Ibid [33].*
32. *Ibid [34].*
33. *International Arbitration Act 1974 (Cth) s 39(2)(b)(i).*