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Briefing note October 2015

Australian court refuses to intervene in international arbitration

In *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028, the Federal Court of Australia dismissed applications by a Hong Kong party for orders removing two members of an arbitral tribunal and compelling the production of documents. The decision shows that Australian courts will not intervene in international arbitration unless they have clear authority and good cause.

Background

The parties were Sino Dragon Trading Ltd (**Sino Dragon**) and Noble Resources International Pte Ltd (**Noble**). The dispute between them concerned a contract for the sale and purchase of iron ore governed by the laws of Western Australia. Noble alleged that Sino Dragon, the purchaser, breached the contract by failing to open a letter of credit (as was required by the contract) or failing to perform the contract generally. Sino Dragon claimed that it had given notice of its failure to perform the contract on the same day that Noble had terminated and resold the iron ore to a third party. The dispute focused on whether Noble had suffered damage and whether it had mitigated its loss.

Arbitration

The contract contained an arbitration clause requiring that disputes be resolved by arbitration in Australia in accordance with the prevailing UNCITRAL Arbitration Rules. Pursuant to this clause and Article 3(4)(a) of the UNCITRAL Rules, Noble served a notice of arbitration on Sino Dragon and proposed that the Australian Centre for International Commercial Arbitration (**ACICA**) be designated as appointing authority. In the notice, Noble also appointed Sydney barrister Terry Mehigan as an arbitrator. Sino Dragon did not respond to the notice of arbitration within 30 days and did not appoint an arbitrator.

Noble then wrote to the Permanent Court of Arbitration (**PCA**) at The Hague and requested the Secretary-General to designate the appointing authority pursuant to Articles 4(3) and 9(2) of the UNCITRAL Rules. Noble requested the appointing authority be ACICA. The PCA wrote to Sino Dragon regarding Noble's request but Sino Dragon did not respond. The Secretary-General of the PCA then proceeded to appoint prominent New Zealand arbitrator David Williams QC as the appointing authority.

Following communication between Mr Williams and the parties (to which Sino Dragon did not respond), Mr Williams appointed Sydney arbitration lawyer Max Bonnell as the second arbitrator. Sino Dragon objected to the appointment of Mr Bonnell - without giving reasons - and said that it would appoint another arbitrator in 15 days. On the same day, Mr Mehigan, on behalf of the Tribunal, wrote to Sino Dragon requesting particularisation of its objection to Mr Bonnell. Sino Dragon did not respond. In the same email, Mr Mehigan notified Sino Dragon that Sydney-based barrister Jonathan Kay Hoyle had been appointed as the third (and presiding) arbitrator.

After Sino Dragon failed to provide reasons for its challenge to Mr Bonnell within the relevant time period, Mr Mehigan wrote to the parties on

Key points:

- As Australian judges see more international arbitration cases, they are becoming wary of parties' attempts to use the courts to derail arbitral proceedings.
- An Australian court will only intervene where the arbitration agreement – including the rules incorporated into it and the law of the seat it selects – expressly authorises intervention.

behalf of the Tribunal and explained that Sino Dragon could still pursue its challenge to Mr Bonnell by seeking a decision from the appointing authority within 30 days of the notice of challenge. Sino Dragon did not respond within this period and Mr Mehigan wrote to the parties on behalf of the Tribunal indicating that neither the Tribunal nor the appointing authority had received notice that Sino Dragon intended to pursue its challenge to Mr Bonnell. Subsequently, Mr Kay Hoyle wrote to Sino Dragon giving notice of his appointment as presiding arbitrator.

On 12 January 2015, Noble served its Statement of Claim in the arbitration. Sino Dragon served its Statement of Response on 15 February 2015. In its Response, Sino Dragon challenged the validity of the arbitration agreement and expressed concerns that "*the three arbitrators, who live in Sydney, may have a partial understanding* [of] *the Asian Respondent, which may affect the fairness of the arbitration*". The following month, Sino Dragon sought "*withdrawal of the Tribunal*".

In subsequent submissions to the appointing authority (Mr Williams), Sino Dragon articulated its grounds for challenge as (i) cultural bias, (ii) potential conflict of interest (as all of the Tribunal members and counsel for Noble have offices in Sydney) and (iii) various other procedural issues.

The appointing authority rejected Sino Dragon's challenge on the basis that (i) it was flawed in its scope (Mr Williams considered that Sino Dragon should have challenged the arbitrators individually), (ii) out of time and (iii) the circumstances relied upon did not give rise to any justifiable doubt as to any Tribunal member's impartiality or independence.

A further (third) challenge was brought by Sino Dragon on 27 August 2015, this time against Mr Bonnell and Mr Kay Hoyle. Sino Dragon alleged that Mr Bonnell had failed to disclose a conflict of interest and that Mr Kay Hoyle was not properly appointed. On the same day, Mr Kay Hoyle (on behalf of the Tribunal) replied to Sino Dragon setting out the Tribunal's views on each ground of challenge. Both challenged arbitrators declined to withdraw.

Federal Court proceedings

Sino Dragon then brought proceedings in the Sydney registry of the Federal Court, seeking (i) removal of Mr Bonnell or Mr Kay Hoyle; (ii) a declaration that Mr Kay Hoyle was invalidly appointed and (iii) orders in respect of document production.

(i) Challenge to arbitrators

Sino Dragon's application for the removal of Mr Bonnell and Mr Kay Hoyle was primarily based upon Article 13(3) of the UNCITRAL Model Law (which is given force of law in Australia by section 16 of the *International Arbitration Act 1974* (Cth) (**IAA**)).

Article 13 of the Model Law provides, in relevant part, that: (1) the parties are free to agree a procedure for challenging an arbitrator, subject to sub-section (3) of the Article; (2) in the absence of such agreement, a party may challenge an arbitrator within 15 days – and in this situation, the challenge is to be decided by the Tribunal; and (3) if a challenge (under any procedure agreed by the parties or pursuant to sub-section (2)) is "*not successful*", the challenging party may, within 30 days, refer the challenge to the Court.

In considering the application of Article 13(3) of the Model Law, Edelman J held that the parties' agreement to the UNCITRAL Rules (which, in Articles 12 and 13, contain a procedure for challenging arbitrators) was an agreement for the purposes of Article 13(1) of the Model Law.

Edelman J concluded that, under the arbitration agreement (specially the combination of the UNCITRAL Rules and the Model Law), Sino Dragon had to take its challenge to the appointing authority first, and it could only take that challenge to the Court if it was rejected by the appointing authority (rejection by the appointing authority making the challenge "*not successful*" for the purposes of Article 13(3) of the Model Law).

Sino Dragon's third challenge was the only one of its challenges that was brought in time (i.e. within the 30 day period specified in Article 13(3)). However, on Sino Dragon's case, its third challenge was currently pending before the appointing authority and was, therefore, not (yet) *unsuccessful*. On this basis, Edelman J held that the Court's power to determine the challenge under Article 13(3) of the Model Law was not enlivened.

In the alternative to its arguments under Article 13(3) of the Model Law, Sino Dragon submitted that the Court had an implied common law power to remove an arbitrator. Edelman J disagreed, citing four key reasons. First, the existence of such an implied common law power to remove would be contrary to Article 5 of the Model Law, which provides that in "*matters governed by this Law, no court shall intervene except where so provided in this Law*". Second, recognising an unrestricted regime at common law to challenge an arbitrator would undermine the efficacy of the carefully

constructed regime of Article 13 of the Model Law. Third, such a common law power would be contrary to existing authority, especially *teleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd* [2011] NSWSC 1365. Fourth, Sino Dragon could not point to any authority for the implied power to remove an arbitrator.

Sino Dragon raised a further argument based on Article 14 of the Model Law, which deals with where an arbitrator is *de jure* or *de facto* unable to perform his or her functions or for other reasons fails to act without undue delay. This was based on the Tribunal's decision to defer consideration of jurisdictional issues to the hearing of the arbitration. Edelman J dismissed this argument, stating that there was no such failure to act without undue delay and that deferral of jurisdictional issues to the hearing did not involve undue delay within the meaning of Article 14.

(ii) Declaration of invalid appointment

Sino Dragon also sought declarations that Mr Kay Hoyle and Mr Bonnell had not been appointed in accordance with the UNCITRAL Rules. Counsel for Sino Dragon framed this as a question of jurisdiction. Edelman J held that the Court did not have the power to rule on this point, as the Tribunal had not yet decided it (jurisdictional objections being first a matter for the Tribunal under Article 16 of the Model Law).

Edelman J further considered that, even if the Court did have such a power (under Article 16(3)), a declaration is a discretionary remedy and there were strong reasons not to exercise that discretion in the circumstances.

(iii) Orders for production of documents and issue of subpoenas

Sino Dragon also sought orders from the Federal Court for production of certain documents. The Tribunal had already rejected Sino Dragon's applications for production orders on the basis that some of the documents were irrelevant and others had already been produced. Production orders were made for some documents, but with an allowance for redactions.

In effect, Sino Dragon sought to have the Federal Court revisit the Tribunal's decision and issue subpoenas for the production of the documents.

Edelman J held that the Court did not have the power to order the production of the requested documents under section 23 of the IAA as the Tribunal had not given Sino Dragon permission to seek such orders, as required by that section. Additionally, his Honour held that none of the conditions in sections 23A(1) or 23A(2) of the IAA were satisfied for the Court to order production under IAA section 23A.

Sino Dragon also requested the Court to order production of the relevant documents under Article 17J of the Model Law (i.e. as an interim measure). Edelman J rejected this request for four reasons. First, doing so would be contrary to the intention of sections 23 and 23A of the IAA; second, Article 17J empowers the Court to issue interim measures in relation to the arbitral proceedings, and does not mandate the Court to reconsider a procedural order the Tribunal has consciously refused to make; third, Sino Dragon's proposed approach to Article 17J was inconsistent with the narrow purpose of the provision; and fourth, the power under Article 17J should only be exercised sparingly and in circumstances in which such orders are effectively the only means by which the position of a party can be protected until the arbitral tribunal is constituted.

Conclusion

While the Federal Court was not required to decide some of the more controversial aspects of Sino Dragon's application, Justice Edelman's decision not to intervene in the arbitration is itself significant.

In respect of the challenge to the arbitrators, the Court considered its jurisdiction was not yet enlivened (as the only challenge brought in time was still pending determination by the appointing authority).

In respect of the applications for documents/subpoenas, the Court took the position that those matters had already been decided (in the negative) by the arbitrators.

In its approach to these issues, the Court showed itself to be willing to operate the applicable contractual/legal framework (being the combination of the arbitration agreement, the UNCITRAL Rules, the IAA and the Model Law) in a strict manner. As Edelman J noted, Sino Dragon's applications were "*brought in the teeth of the express provisions of the International Arbitration Act and the Model Law*".

The Court's strict treatment of the arbitral mechanics agreed by the parties – particularly those relating to arbitrator challenges – illustrates the general reluctance of Australian courts to intervene in arbitral proceedings except where expressly authorised to do so.

Considering that bias challenges are an increasingly common occurrence in international arbitration (being described by some practitioners as a "guerrilla tactic"), the strict approach the Court took in this case reaffirms Australia's status as a pro-arbitration seat.

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