Current issues for Maritime Practitioners: a short update on recent Australian cases

Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131

- An application to set aside an arbitral award pursuant to Art 34(2) of the UNCITRAL Model Law and s 16 of the *International Arbitration Act 1974* (Cth).
- Sino Dragon, a Hong Kong Company, and Noble Resources, a Singapore company, entered into a contract of sale for supply and delivery of 170,000 dry metric tonnes of iron ore to Sino Dragon.
- The dispute concerned Sino Dragon's repudiation of the contract because it could not obtain a letter of credit sufficient to cover the shipment value. Noble Resources accepted the repudiation, terminated the contract and claimed damages.
- The contract for sale allowed for arbitration in Australia, governed by the UNCITRAL Rules with the law of Western Australia being applicable.
- Noble Resources issued a notice of arbitration alleging breach of contract. There followed a protracted dispute as to the constitution of the arbitral panel that culminated in an application to the Federal Court, which was dismissed: [2015] FCA 1028.
- The arbitration proceeded in Sydney in December 2015 and the Final Award was rendered in May 2016 ordering Sino Dragon to damages of $1.8 million with equivalent interest. The Final Award was registered in the Hong Kong High Court and Noble Resources commenced winding up proceedings.
- Sino Dragon applied to set aside the award under Art 34, on a number of grounds including the independence of the arbitral panel. Sino Dragon also sought a stay of proceedings and an order restraining enforcement.
- Beach J described some of the grounds as lacking "conceptual coherence" and dismissed them all:
    - *Excess of jurisdiction by proceeding on the basis of non-contractual material and admitting evidence beyond the reference*: the Final Award turned on the receipt of a notice in Chinese that Sino Dragon could not complete, whereas the contract required notices in English. Beach J dismissed on the basis that the dispute concerning the notice fell within the arbitration clause and this was in substance a challenge to the merits rather than an Art 34(2)(a)(ii) challenge.

- *Excess of jurisdiction by failing to accord equal treatment*: this turned largely on technical issues concerned with the giving of evidence by video link and with translators. Beach J held that there could be no failure of natural justice or equal treatment where Sino Dragon caused many of the difficulties and did not object to their resolution by the Tribunal, that there were no difficulties in presenting the case in chief, and that no real practice injustice was demonstrated.

- *Excess of jurisdiction due to conflicts of interest in the arbitral panel:* Sino Dragon contended that appointment of the panel was affected by failures of due process and by an appearance of bias, because two of the arbitrators had worked at a firm that had acted for Noble Resources in unrelated matters. The first complaint was that the default process for appointment favoured Noble Resources. Beach J held that Art 12(2) requires proof of doubts about the independence of the arbitrator to the standard of the "real danger" test. Applying this test, there were no doubts about the independence of either of the challenged arbitrators.

- Postscript: Beach J awarded two-thirds of the costs of the arbitration on the indemnity basis. In doing so he rejected the argument that there was a special rule for indemnity costs in unsuccessful challenges to awards under Art 34(2) of the Model Law, which would reverse the onus by requiring the unsuccessful applicant to show special circumstances as to why an indemnity costs order should not be made. The order was made on the basis that two of the three grounds for challenge had no reasonable prospects of success: [2016] FCA 1169.

MOL Bulk Carriers Pte Ltd v Sin-Tang Development Pte Ltd **[2016] FCA 619**

- MOL, a Singapore bulk carrier operator, and KMG, an Australian iron ore producer, entered into a contract of affreightment for the shipment of iron ore. The contract was novated to Sin-Tang, a Singapore company, as replacement charterer and shipper, and further contracts of affreightment were entered into by recap of the first contract terms.

- MOL commenced proceedings alleging breach of the third such contract alleging a failure to nominate any cargoes over the contract period and alleged that KMG acted as agent for Sin-Tang and was independently liable under s 18 of the *Australian Consumer Law*.

- MOL obtained leave to serve the claim outside the jurisdiction and Sin-Tang applied for service to be set aside and for the proceedings to be stayed on the basis of an arbitration clause in the third contract.

- The application to set aside depended on whether there was a prima facie case that KMG was Sin-Tang's agent for the purposes of the third contract of affreightment so as to bring the claim within r 10.42, item 3 of the FCR. Sin-Tang disputed that this was so, and that it was a party to the contract.

- The application for a stay rested on the arbitration clause in the third contract, which caused MOL to contend that Sin-Tang's position was "schizophrenic" because it could not argue that it was not a party to the contract while relying on the arbitration clause within it. This is said to arise from the requirements of FCR r 28.43 and s 7 of the *International Arbitration Act 1974* (Cth), which provide for a stay of proceedings between parties to the arbitration agreement.

- McKerracher J was not prepared to accept this proposition as fully established, but noted that there was no application under s 7 on foot that would enable the point to be determined, notwithstanding that there is a power to do so in a clear case.

- His Honour was not prepared to accept that there was a basis for a stay of proceedings under the inherent power, because sufficient connecting factors point to Australia, it is convenient for the proceedings to be resolved in the one proceeding, and the jurisdiction to stay on the basis of the arbitration agreement was not invoked.

- The lesson to be learned was that where a stay is sought on the basis of an arbitration agreement, it should not be relied on solely as a factor warranting a stay on abuse of process grounds. In appropriate cases s 7 should be invoked by an application under FCR r 28.43.

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