High Court Irons Out Cultural Differences

Mary B. AYAD[1]

Australia's High Court decision, yesterday, 2 October 2012, though vague on expounding the precise legal principles underpinning its reasons, sets a sophisticated and pragmatic precedent in the topical matter of the constructions of cross-border commercial contracts, international sales contracts and investor—State contracts. This case raises several key practical and legal matters such as corporate fiduciary duties to stakeholders and investors, the explicit claim to fraud, construction of the notion of a binding agreement with respect to cross-cultural considerations, and adjudicatory risk for investors.

To state that to construct the agreement as binding is to unduly subject a sovereign state (China) to local court action is to conflate the legal and cultural principles relevant to this case. That whether the contract is binding or not does not imply that a sovereign state will be held to court action by a foreign state on the basis that normally disputes such as what may have arisen if these agreements were breached or otherwise not honoured, are adjudicated privately in alternative dispute resolution forums, such as international commercial arbitration, international investment arbitration or a combination of the hybrid mediation-arbitration method, usually in institutional forums such as ACICA which have their own Rules. These arbitrations are as binding as a court judgement. This Court's decision is pragmatic and sophisticated in consideration of its understanding of cross-cultural business practices unique to China. It is customary practice that agreements, such as the ones implicated in this case, are intended in good faith and seen as more fluid than the fixed Western notion of a rigid contract with permanently fixed terms. The High Court, though not ruling on the basis of any specific legal principle, ruled clearly and correctly on the basis of custom or customary practice with sophisticated insight and cross-cultural sensitivity of the cultural and customary usage in trade with one of Australia's most important trading partners.

The High Court's understanding of the correct construction of the agreements between mining mogul Forrest and the Chinese government shows that construction of the agreements is understood as having been made in good faith and therefore allegations of fraud against Forrest whether argued explicitly or implicitly, have no legal standing or merit.

The High Court's ruling signals support for greater future cross-border investor-State agreements made in good faith- as well as a correct and sophisticated understanding and construction of custom as a binding principle at Common Law with respect to commercial matters. There was no intent to deceive on the part of either Forrest or the Chinese government nor was there any indication that these contracts were not going forward or would not be moving forward as planned and agreed upon in future.

Therefore, any discussion of the strict meaning of the term 'binding' with respect to these agreements is irrelevant in that on the basis of good faith these agreements are as binding as any other contract. In fact, it is not uncommon for cross-border contracts such as the ones here to be re-negotiated in consideration of extenuating circumstances on the basis of force majeure and that in no way lessens their binding nature.

The High Court though not explicitly stated, has followed old English Common Law precedent on the basis of custom. This decision is correct and signals consistency and predictability in adjudicatory

[1] Mary B. Ayad Law Lecturer International Human Rights Law, Macquarie University, PhD in Law Candidate, Macquarie University.

precedent and construction of large-scale cross-border commercial contracts involving Australian parties. This article is reprinted with permission from Online Opinion, edited by Graham Young, where it first appeared on 10 October 2012. http://www.onlineopinion.com.au/view.asp?article=14207