Harmonisation of Chinese Legal Culture with English Common Law Principles through International Customary Law

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Chinese legal culture is compatible with ancient and current English Common Law principles in applications of international customary law construction of contracts. Proof of this is found in a recent Australian High Court decision on the Forrest Mining case[2] which from the Australian perspective,[3] though vague on expounding the precise legal principles underpinning its reasons,[4] 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 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'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. 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. There was no intent to deceive on either the part of 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. 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 Chinese government. Thus, though not explicitly stated, The High Court followed old English Common Law precedent

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[2] *Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission* **P44/2011; P45/2011:** [2012] HCA 39. French CJ, Gummow, Hayne, Heydon and Kiefel JJ.

[3] This case raised 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.

[4] For all the reasons contained herein, the author submits that Justice Gilmour was correct in 'questioning why ASIC had pursued the case: "In my view, these allegations of dishonesty should not have been made," he said. "I have concluded that Fortescue's disclosures were not misleading or deceptive."' Jonathan Barrett, ASIC questions Fortescue legal advice, The Australian Financial Review, 16 November 2010, p. 13.

on the basis of custom. This decision is correct and signals consistency and predictability in adjudicatory precedent and construction of large-scale cross-border commercial contracts involving Australian parties.

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. The relevance of this to China is twofold. First, China still follows a culture of non-litigation harking back to the sage advices of Confucius, 'The Master said, "In hearing litigations, I am like anyone else. What is necessary, however, is to cause the people to have no litigations."'[5] In fact, non-litigation, or arbitration (and mediation) can be traced back to China's early history, for example, 'Arbitration in China can be traced back to about 2100-1600 BC. Mediation gained an even stronger foothold in China because of Confucianism. Confucius is said to have believed that conflict and litigation were sources of great disharmony which in turn damaged social relationships.'[6] This is a vital aspect of Chinese legal culture continuing until the present. The director of the Kuala Lumpur arbitration centre in Malaysia recently stated China is doing so well economically because they resort to arbitration on a regular basis.[7] The second reason this case is highly relevant to China has to do with the fact that these types of disputes are normally arbitrated rather than litigated and this is compatible with Chinese legal culture. Australia and China cross-border disputes can be arbitrated either in China or Australia. Thus, 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 case attests to the harmonising strength of international customary law and the High Court's recognition of is highly significant.

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[5] *Confucius, from the Analects of Confucius*
[6] S Greenberg, C Kee, J R Weeramantry, *International Commercial Arbitration, An Asia-Pacific Perspective*, (Cambridge University Press, 2011) 494.
[7] S Rajoo, 15 October 2010 remarks at '*Financial Revie*w International Dispute Resolution Conference', Four Seasons Hotel, Sydney, in a conference attended by judges, MPs, arbitrators, directors of arbitration centres, lawyers and scholars.