Case Note

Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)

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Introduction

The issues associated with enforcing international arbitration awards in Australia are highlighted by the recent decision of Foster J in *Traxys Europe SA v. Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276.

Background

The Applicant, Traxys Europe SA (*Traxys*) was a company organised in Luxembourg, which provided financial, marketing and distribution services to the mining sector. It had no presence or assets in Australia. In 2009 Traxys entered into a contract with the Respondent, Balaji Coke Industry Pvt Ltd (*Balaji*) (being a company organised under the laws of India) whereby Balaji agreed to purchase 30,000 mt of low ash metallurgical coke from Traxys. Balaji had no presence in Australia beyond holding all of the shares in an Australia company called Booyan Coal Pty Ltd (Booyan), such company having an exploration permit to explore for coal in a region near Bundaberg, Queensland.

Balaji failed to complete the contract, leading Traxys to sell the coke to a third party for less than the sum which Balaji had agreed to pay.

The contract and the arbitration

The contract between Traxys and Balaji contained a clause in the following terms:

> *LAWS/ARBITRATION*
>
> *Any disputes arising out of or in connection with this contract between Balaji and Traxys, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (LCIA), which Rules are deemed to be incorporated by reference to this clause. The seat, or legal place, of arbitration shall be London. The language to be used in the arbitration shall be English.*
>
> *This contract, including the arbitration clause, shall be governed by, interpreted and construed in accordance with the substantive laws of England and Wales excluding the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (CISG).*

Traxys commenced arbitration proceedings in London in accordance with the above clause, seeking damages from Balaji for the short fall in the sale price of the coke, ultimately being awarded the sum of US$2,576,250.38 and €260,668.58 plus interest and fees and expenses relating to the arbitration.

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Importantly, the rules of the London Court of International Arbitration contained the following passage (Rule 26.9):

> *All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.*

Practical issue for Traxys

Despite having the arbitration award in its favour, Traxys had a practical problem in that Balaji had no assets either in England (or in Europe for that matter) against which Traxys could levy execution.

Subsequent conduct

Subsequent to the award being made in the arbitration proceedings:

1. on 26 July 2011, Traxys obtained permission to enforce the award from the High Court of Justice in England and an "anti-suit" injunction preventing Balaji from challenging the arbitration award;
2. on 29 July 2011 (having failed to obtain Orders setting aside the award or alternatively staying its operation at first instance in an Indian Court) Balaji appealed the first instance decision and it sought and obtained an ex parte injunction from the High Court of Kolkata (restraining Traxys from "*... putting the Award into execution*"; and
3. on 1 September 2011, permission was given to Traxys by the English Commercial Court to make an application in Australia for freezing orders.

Federal Court proceedings

Traxys made an Application to the Federal Court seeking, inter alia, pursuant to section 8(3) of the International Arbitration Act 1974 (Cth) (IAA) an Order that there be Judgment for Traxys against Balaji for US$2,576,250.38 and €260,668.58 plus interest and fees and expenses (being terms identical to the arbitration award).

Balaji contend that the Court ought not make the Order for three reasons:

1. it argued that section 8 of the IAA does not give the Court power to enter Judgment or to make an Order giving effect to the arbitration award. The Court's only power being to enforce the award (being a different concept, which neither requires nor permits the entry of Judgment);
2. alternatively, it argued that before Traxys was entitled to enforce the arbitration award, it needed to demonstrate that Balaji had assets within the jurisdiction (Balaji argued that it had sold its interest in Booyan),[2] failing which enforcement ought to be denied (as the concept of "enforcement" of the award naturally connoted enforcement against assets and if there are no assets then there can be no "enforcement"); and

3. in the further alternative, it argued that to enforce the arbitration award would be contrary to public policy. In substance, Balaji's argument amounted to a contention that, if there were no assets in the jurisdiction, then the Application lacked utility (because even if the arbitration award was recognised, there was nothing that it could be enforced against) and the Court ought not grant an Order which was lacking in utility. Further Balaji argued that these proceedings were in breach of the interim injunction granted in India (put in place to ensure that Balaji's appeal from the Order denying its original Application in India did not prove to be nugatory) and consequently the Court ought not endorse Traxys conduct by granting relief.

The Judgment

Having set out section 8 of the IAA in detail, Foster J then went on to consider Balaji's opposition to the Order sought be Traxys.

In substance the Court (in rejecting Balaji's contentions) held that:

1. section 8 of IAA indeed did grant the Court the power to make the Order sought by Traxys;
2. it was not a prerequisite to the exercise of the Court's power under section 8 of the IAA. In making that finding Foster J made the following points:
    (a) subject to the due consideration of sections 8(5) and 8(7) of the IAA, Australia Courts are obliged to enforce foreign arbitration awards;
    (b) there is nothing in the IAA which prevents an Australian Court from entering Judgment even if there is evidence that proves that there are no assets in Australia at the time of the entry of the Judgment (based on the arbitration award) because:
        (i) the process leading up to and granting the Judgment is a distinct process from the Judgment's enforcement;
        (ii) the successful party in litigation is entitled to Judgment and it is not a prerequisite to that right that the party demonstrate that there are assets against which execution may be levied;
        (iii) indeed, a creditor is entitled to levy execution against assets:
            (A) which are not in the jurisdiction when the Judgment is entered; and
            (B) which do not even exist at that time; and
3. the power to be exercised in section 8(7)(b) of the IAA (that an enforcing Court may refuse to enter Judgment because to enforce the arbitration award would be against public policy):

2 The beneficial ownership of the shares is yet to be determined by the Court

(a) needed to construed against the pro-enforcement bias of the convention upon which it is based;[3]

(b) consequently, the power is not "wide" as suggested by McDougall J in *Corvetina Techonology Ltd v. Clough Engineering Ltd* [2004] NSWSC 700 [6] – [14], but it should only be invoked when the enforcement of the particular arbitration award would "*violate the forum state's most basic notions of morality and justice*";[4] and

(c) the effect in this case was that Balaji's public policy contentions were rejected because:

(i) the Court had already accepted that there was no necessity to demonstrate that Balaji had assets within the jurisdiction and it was not contrary to public policy to grant relief in the absence of assets against which Traxys could levy execution;

(ii) the proceedings commenced in India were considered invalid and a breach of the Rules of London Court of International Arbitration (which deemed the arbitration award to be final) and the anti-suit injunction which Traxys had obtained against Balaji in England (Foster J described Balaji's proceedings as "nothing more than a tactic designed to *out manoeuvre Traxys and to avoid its obligations under the Award…*");

(iii) Balaji had been able to convince the Indian High Court to grant an ex parte injunction; and ultimately

(iv) it was held that they did not engage the core of morals and justice in Australia so as to enliven the discretion to refuse to enforce the arbitration award.

Conclusion

Two things ought to be apparent as a result of this case.

The first is that Australian Courts continue to follow the American example by allowing the enforcement of international arbitration awards other than in circumstances where enforcement offends the very principles that underline the "*most basic notions of morality and justice*" of Australia's court system.

Second, it suggests that had Traxys appropriately drawn the arbitration clause of the contract with Balaji to ensure that the seat of the arbitration was consistent with where Balaji had assets against which execution could be levied, it could have avoided the need for the Federal Court proceedings which ultimately ensued (noting that at the date of this article, the second phase of the case had yet to be determined and consequently it remains to be seen whether the shares in Booyan will be available to satisfy the arbitration award and the Federal Court Order).

3 Being the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting

4 Taken from *Parsons & Whittemore Overseas Co, Inc v. Société Générale De L'Industrie Du Papier (RAKTA)* [1974] USCA2 836 (US Second Circuit Court of Appeals)