

ENGLISH HIGH COURT SETS ASIDE ARBITRATION AWARD DUE TO NON-PARTICIPATION OF PARTY

Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Anor [2016] EWHC 1118 (COMM)

Introduction

On 20 May 2016, the English High Court handed down its decision in *Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Anor* [2016] EWHC 1118 (Comm) in which Sir Bernard Eder ordered that an arbitration award be set aside on the basis of section 72 of the Arbitration Act 1996.

Legal principles

Section 72 of the Arbitration Act 1996 provides, at relevant part, that:

"72. Saving for rights of person who takes no part in proceedings

(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question:

(b) whether the tribunal is properly constituted, or

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in court for a declaration or injunction or other appropriate relief.

(2) He also has the same right as a party to the arbitral proceedings to challenge an award—

(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or

(b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him;

and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case."

Background

The application arose out of arbitration proceedings purportedly commenced by the First Defendant, Dana Shipping and Trading Pte Singapore, against the Claimant, Sino Channel Asia Limited, in connection with disputes arising under a contract of affreightment dated 9 April 2013 between Dana as owner and Sino Channel as charterer.

Dana appointed Christopher J Moss as their arbitrator and emailed their notice of arbitration to Daniel Cai calling upon Sino Channel to appoint their arbitrator. It was common ground that Mr Cai was not an employee of Sino Channel but an employee of a different company, Beijing XCty Trading Limited. Sino Channel's case was that Mr Cai had no authority to accept service on Sino Channel's behalf; that therefore such purported service was ineffective; and that, as a result, Sino Channel did not respond because they were unaware of the arbitration and did not participate in it.

Christopher Moss took on the role of sole arbitrator and subsequently made an award in Dana's favour on 3 February 2015. When the award was sent to Sino Channel, it was the first time that Sino Channel had heard of the arbitration.

Accordingly, Sino Channel applied for a declaration and order pursuant to s72(1)(b) or (c) of the Arbitration Act 1996. In the alternative to its application under s72(1), Sino Channel applied under s67 of the Act for an order setting aside the Award on the ground that the Tribunal lacked jurisdiction; and/or under s68(2)(a) and (b) on the grounds that there was a serious irregularity (although it was accepted that such applications were out of time, and an extension may be necessary).

The issues before the Court included (a) whether an order could be made under s72 after an award had been made, and (b) whether there are any time limits for bringing such application.

Decision

The High Court (Sir Bernard Eder) granted the s72 application.

There was no necessity to confine s72(1) to the position before the issue of an award. Further, although s70 imposes strict time limits for any application or appeal under ss 67, 68 or 69, there is no equivalent time limit stipulated for any application under s72(1).

As to the role of Mr Cai, the Court was required to consider three main substantive issues:

- i) Did Mr Cai/Beijing XCty have implied actual authority to receive the notice of arbitration on behalf of Sino Channel ?
- ii) Did Mr Cai/Beijing XCty have ostensible authority to receive the notice of arbitration on behalf of Sino Channel ?
- iii) Ratification.

On these three points:

- While the Court accepted that Beijing XCty and Mr Cai had a general authority to act on behalf of Sino Channel in connection with the contract of affreightment, it was not persuaded that Beijing XCty or Mr Cai had any implied actual authority to accept notice of arbitration on behalf of Sino Channel.

- There was nothing which constituted an express representation by Sino Channel that Beijing XCty or Mr Cai had any authority to accept notice of an arbitration; nor that Sino Channel put Beijing XCty or Mr Cai in a position where the latter could hold themselves out to such effect and Sino Channel acquiesced in such activity.
- On ratification, both the arguments on silent ratification and positive ratification failed: as to the former, where an arbitral tribunal is not properly constituted, a party who has not participated in the arbitration proceedings cannot be taken to ratify an award by mere silence and inaction; as to the latter, there was no unequivocal act as required for positive ratification.

Accordingly, the s72 application succeeded and Sino Channel was entitled to a declaration and relief, such declaration to include that the arbitral tribunal in this case was not properly constituted and that the Award was made without jurisdiction. It was logical that “other appropriate relief”, as referred to in s72(1), should include an order setting aside the award.

On the basis that Sino Channel succeeded on its s72 application, there was no need to determine the s67 or s68 applications. Had it been necessary to determine these, the applications would have failed as there was no proper basis for granting an extension of time.

21st June 2016