NEW SOUTH WALES SUPREME COURT

CITATION:
TRANSPAC CAPITAL PTE LIMITED v BUNTORO [2008] NSWSC 671

JURISDICTION:
Common Law

FILE NUMBER(S):
No 11373 of 2008

HEARING DATE(S):
Tuesday 10 June 2008

JUDGMENT DATE:
7 July 2008

PARTIES:
TRANSPAC CAPITAL PTE LIMITED
v ANTHONY BUNTORO

JUDGMENT OF:
Hall J

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
P: A Abadee
D: No appearance

SOLICITORS:
P: Slater & Gordon
D: No appearance

CATCHWORDS:
PRACTICE AND PROCEDURE – INTERNATIONAL ARBITRATION – enforcement of foreign award under International Arbitration Act 1974 (Cth) – whether contractual agreements are arbitration agreements for the purpose of the Act – whether the

Singaporean award is a foreign award for the purpose of the Act – formalities imposed by the Act for recognition of foreign awards

LEGISLATION CITED:
International Arbitration Act 1974 (Cth)

CASES CITED:

TEXTS CITED:

DECISION:
(1) That leave be granted to enforce the Award, that being the Final Award of the Singapore International Arbitration Centre number ARB 057 of 2005, dated 20 August 2007, in this Court as if the Award had been made in this State in accordance with the laws of this State and in the same manner as a judgment of this Court with respect to the amounts set out in paragraph (2) below.
(2) That there be an order for judgment for the plaintiff in accordance with the terms of the Award, as follows:
(a) US$5,000,000 – being $6,282,196.26 Australian dollars (as at the date of the Award).
(b) US$531,014.45 – being $667,187.40 Australian dollars (as at the date of the Award).
(c) US$1,371,784.13 – being $1,723,563.43 Australian dollars (as at the date of the Award).
(d) S$109,461.57 – being $90,143.76 Australian dollars (as at the date of the Award).
(3) The total of the amounts in (2)(a) to (d) above is $8,763,090.85 and an order for judgment in that total sum is, accordingly, to be entered for the plaintiff.
I order the defendant to pay the costs of this application as agreed or assessed.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

HALL J

MONDAY 7 JULY 2008

No 2008/11373

TRANSPAC CAPITAL PTE LTD v ANTHONY BUNTORO

JUDGMENT

1 **HIS HONOUR:** These proceedings concern an application by the plaintiff for leave to enforce a foreign award pursuant to s.8 of the *International Arbitration Act* 1974 (Cth).

2 The plaintiff is a Singaporean company, Registration No. 198904927H. The foreign award in question is that of the Singapore International Arbitration Centre, dated 29 August 2007 (hereafter, "the Award").

3 The plaintiff brought proceedings against the defendant who was one of three respondents named in the overseas arbitration proceedings that led to the making of the award. The award was made against him and the other two respondents to those proceedings. In an affidavit sworn 26 March 2008, Mr Lewis, solicitor for the plaintiff, states that he believes, having been informed by the plaintiff, that the defendant is domiciled in or is ordinarily a resident of New South Wales (Affidavit of Steven Lewis sworn 26 March 2008 at [15]).

4 At the hearing of this application, there was no appearance by or on behalf of the defendant. The defendant, however, had previously appeared through his then solicitor, on 17 April 2008 and on 8 and 29 May 2008.

5 There having been no appearance by the defendant when called at the commencement of the hearing on 10 June 2008, the hearing was adjourned to permit inquiries to be made as to the defendant.

6 Upon resuming, this Court received evidence that disclosed that the defendant had been made aware of the date of the hearing of the application and had instructed his solicitor not to appear (Affidavit of Steven Lewis, filed 10 June 2008 at [2]-[3] and Annexure A). The plaintiff was granted leave to file an affidavit of service of James Bernard McGuinness, sworn 4 April 2008 in which the deponent stated that he personally served the summons and associated documents on the defendant on 3 April 2008 at an address in Chatswood, New South Wales.

7 On the basis of this evidence, the matter proceeded on an undefended basis.

8 The background to the dispute underlying the Award that the plaintiff seeks to be enforced is set out below.

Factual matters

(a) The Two Agreements

9 The application for leave to enforce the Award has as its background a dispute concerning the operation of two related agreements, a "Bond Subscription Agreement" and an "Investment Agreement" both entered into on 11 May 1993.

10 The plaintiff in these proceedings and an Indonesian company P T Eurasiawood Industries (PTEI) entered into the written Bond Subscription Agreement.

11 As part of the agreement, in consideration of the US$5 million provided by the plaintiff to PTEI, PTEI agreed to issue 50 registered bonds to the plaintiff, each with a principal value of $100,000.

12 The US$5 million was provided by the plaintiff under the agreement to assist in establishing a wood processing project in Indonesia.

13 The bonds had a 10 year maturation date, that being 11 May 2003, and bore interest at one percent per annum, accruing annually on a compound basis. By clause 4 of Schedule 2 to the agreement, at the expiry of the 10 year term, PTEI was obliged to pay the plaintiff the full value of the bonds with interest as stated above. The plaintiff claimed that PTEI failed to repay the plaintiff the full value of the bonds with interest. The award in fact records that no payments were made by PTEI.

14 Pursuant to clause 14 of Schedule 2 of the agreement, Singapore law was the governing law of the Bonds.

15 Related to the Bond Subscription Agreement was a second agreement, an Investment Agreement entered into by the plaintiff, PTEI and PTEI's then-shareholders, Mr Buntoro (the defendant in these proceedings) and Mr Sarwono.

16 Relevantly, under clause 9 of this latter agreement, PTEI's shareholders – the defendant and Mr Sarwono – agreed to unconditionally and irrevocably grant the plaintiff a "Put Option". When exercised, this put option gave the plaintiff a right to require the shareholders to purchase from the plaintiff any or all of its Bonds. Clause 23 of the agreement provided Singapore law as the governing law.

(b) The Arbitration Clauses within the Agreements

17 The Bond Subscription Agreement provided for arbitration in the event of a dispute concerning the agreement (clause 20 and Schedule 2, clause 15).

18 Clause 20(A) of the agreement provided that "at the option of the Investor, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, may be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre". Clause 20(B) provided that any decision of the arbitration is "final, binding and incontestable" and "may be used as a basis for judgment … in the Republic of Indonesia or elsewhere". Under this latter subclause, the contractual parties also recognised the applicability of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter "the New York Convention") to any awards made by the arbitrators. Clause 15 of Schedule 2 of the agreement made similar provision for arbitration, this time specific to any dispute arising out of the Bonds.

19 As with the Bond Subscription Agreement, the Investment Agreement also contained an arbitration clause. Under Clause 24(A) of the Investment Agreement, PTEI and its shareholders (including the defendant) agreed to the referral of any dispute, at the option of the plaintiff, to the Singapore International Arbitration Centre. Again, the decision of the arbitration was to be final, binding and incontestable.

(c) The issues referred to Arbitration

20 On 31 October 2005, the plaintiff (referred to as the claimant in the arbitration) issued a notice of arbitration against PTEI, Mr Sarwono and the defendant (the respondents in the arbitration).

21 Despite maturation of the Bonds on 11 May 2003, the plaintiff, as earlier noted, claimed that PTEI had failed to repay the full value of the Bonds and the attending interest as required under clause 4, Schedule 2 of the Bond Subscription Agreement. In fact, the plaintiff claimed that PTEI had failed to make any payment in respect of the principal or interest owing.

22 Furthermore, the plaintiff claimed that on 28 February 2005, it had exercised its Put Option as provided for under the Investment Agreement. Despite this, neither Mr Sarwono nor the defendant (the plaintiff claimed) had purchased the Bonds.

23 Consequently, two issues fell for determination by the Singapore International Arbitration Centre: (a) whether the plaintiff had paid the sum of US$5 million to PTEI; and (b) whether the plaintiff had validly exercised the Put Option against Mr Sarwono and the defendant.

(d) Decision of the Singapore International Arbitration Centre

24 On 20 August 2007, a sole arbitrator of the Singapore International Arbitration Centre handed down a Final Award, finding in favour of the plaintiff in respect of both issues referred to in paragraph [23].

25 Accordingly, the arbitrator ordered that PTEI, Mr Sarwono and the defendant pay the plaintiff:-

(a) US$5,000,000 - the principal sum of the Bonds;

(b) US$531,014.45 - the interest attaching to the Bonds (one percent per annum, accruing annually on a compounded basis calculated from the date of issuance of the Bonds to the date of maturation);

(c) US$1,371,784.13 – an award of interest (separate to that attaching to the Bonds, interest at eight percent per annum calculated from 11 May 2003 to the 10 March 2006); and

(d) S$109,461.57 – the costs of the arbitration.

26 The amounts referred to in paragraph [25] convert in Australian currency as at the date of the award to a total of $8,763,090.85. That amount remains unpaid.

27 The arbitrator also ordered that PTEI, Mr Sarwono and the defendant pay the legal costs of the plaintiff (amount not specified).

28 The plaintiff now seeks leave to have this Award enforced as if the Award had been made in this State, being New South Wales, in accordance with the laws of this State.

The Recognition and Enforcement of Foreign Awards under the *International Arbitration Act* 1974 (Cth)

29 The *International Arbitration Act* establishes a mechanism for the recognition and enforcement of foreign awards, thereby implementing Australia's treaty obligations under the New York Convention. Relevant provisions of the Act are discussed in the succeeding paragraphs.

30 Sections 8(1) and (2) of the *International Arbitration Act* relevantly provide that:-

"*(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.*

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award has been made in that State or Territory in accordance with the law of that State or Territory."

31 In light of the wording of s.8(1) and (2), this Court in the present matter is required to enquire into the issue as to whether the Singapore award can be characterised as a foreign award for the purposes of the *International Arbitration Act* and whether the two abovementioned agreements can be characterised as arbitration agreements.

(a) Foreign Awards and Arbitration Agreements under the *International Arbitration Act*

32 Under s.3 of the *International Arbitration Act*, a foreign award is defined as "an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies".

33 An arbitration agreement, as defined by s.3, is "an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention".

34 Before turning to the Singapore award in question, I shall dispose of the question concerning the two contractual agreements.

35 The two agreements – the Bond Subscription Agreement and the Investment Agreement – are arbitration agreements for the purposes of the *International Arbitration Act*. Each agreement takes the form of a contract containing an arbitral clause hence each is an "agreement in writing" as defined by s.3 of the Act: see s.3, *International Arbitration Act* and sub-article II of Article II, New York Convention. Within each agreement, the contracting parties agreed to refer disputes arising out of the agreements to the Singapore International Arbitration Centre and to the application of the New York Convention to any awards flowing from arbitration. Consequently, both agreements are arbitration agreements.

36 Similarly, the Award in question is a foreign award for the purposes of the *International Arbitration Act*, the Award having been made pursuant to the arbitration agreements referring the dispute to the Singapore tribunal: see s.3, *International Arbitration Act* and Article I, New York Convention.

37 For completeness' sake, I note that the plaintiff established, pursuant to s.10 of the Act, that the Republic of Singapore is a Convention country for the purposes of the *International Arbitration Act*. Thus s.8(4) of the Act has no application in the present matter.

(b) Formal Conditions for the Recognition and Enforcement of Foreign Awards under the *International Arbitration Act*

38 The *International Arbitration Act*, in accordance with the New York Convention, imposes formal conditions on the party seeking to enforce the foreign award. Under s.9(1) of the *International Arbitration Act*, the party seeking enforcement of the award is required to produce to the Court:-

"(a) the duly authenticated original award or a duly certified copy; and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy."

39 Subsection 9(2) clarifies that:-

"*For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:-*

(a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or

(b) it has been otherwise authenticated or certified to the satisfaction of the court."

40 At the hearing, counsel for the plaintiff provided to this Court a copy of the foreign award, certified by a Singaporean public notary as a true and identical copy, as well as copies of the two agreements, certified by the same Singaporean public notary. Accordingly, I find that the plaintiff has met the formal conditions imposed by ss.9(1)(a) and (b) of the Act, as facilitated by s.9(2)(b).

41 Consequently, these documents – the Award and the two agreements – form *prima facie* evidence of the matters to which they relate: s.9(5), *International Arbitration Act*. The only issue that remains for consideration is whether there exists any basis for the Court refusing to recognise and enforce the Award in question.

(c) Grounds for refusal of recognition and enforcement of Foreign Awards

42 Whilst establishing a mechanism for the enforcement of foreign awards, s.8 of the *International Arbitration Act* also prescribes the circumstances in which the Court may refuse to recognise and enforce a foreign award, or in which it may adjourn proceedings in which enforcement of a foreign award is sought.

43 Section 8(5) of the Act prescribes grounds upon which the Court may refuse to recognise and enforce a foreign award. This section, however, operates "at the request of the party against whom [this Part] is invoked", conferring a discretion on the Court to refuse to enforce the Award "if that party proves to the satisfaction of the court" one of matters listed therein. Given the non-appearance by the defendant in these proceedings, this subsection has no application.

44 Sections 8(7) and 8(8) of the *International Arbitration Act* prescribe further circumstances in which the Court may refuse to enforce a foreign award (s.8(7)) or adjourn proceedings in which the enforcement of an award is sought (s.8(8)). These two subsections are not dependent on any request coming from the party against whom the Award is invoked.

45 In the present matter, there is no evidence supporting the existence of any of the grounds contemplated in ss.8(7) and 8(8) of the Act. There is no basis upon which to find that the contractual dispute would not be amenable to arbitration in the event the dispute were governed by the laws of this State or that to enforce the Award would be contrary to the public policy: see s.8(7). Additionally, this Court was not directed to any evidence suggesting that an application is on foot in an overseas jurisdiction to set aside the Award in question: see s.8(8).

46 Accordingly, I am of the opinion that, pursuant to the *International Arbitration Act*, this Court recognise and enforce the Award in question as if the Award had been made in this State in accordance with the laws of this State.

Enforcement of the award in question

47 For the reasons stated above, I make the following orders:-

(1) That leave be granted to enforce the Award, that being the Final Award of the Singapore International Arbitration Centre number ARB 057 of 2005, dated 20 August 2007, in this Court as if the Award had been made in this State in accordance with the laws of this State and in the same manner as a judgment of this Court with respect to the amounts set out in paragraph (2) below.

(2) That there be an order for judgment for the plaintiff in accordance with the terms of the Award, as follows:-

(a) US$5,000,000 – being $6,282,196.26 Australian dollars (as at the date of the Award).

(b) US$531,014.45 – being $667,187.40 Australian dollars (as at the date of the Award).

(c) US$1,371,784.13 – being $1,723,563.43 Australian dollars (as at the date of the Award).

(d) S$109,461.57 – being $90,143.76 Australian dollars (as at the date of the Award).

(3) The total of the amounts in (2)(a) to (d) above is $8,763,090.85 and an order for judgment in that total sum is, accordingly, to be entered for the plaintiff.

48 The plaintiff having been successful in this application, the ordinary costs follow the event rule should apply. Accordingly, pursuant to s.98(1) of the *Civil Procedure Act* 2005 and Rule 42.1 of the *Uniform Civil Procedure Rules* 2005, I order the defendant to pay the costs of this application as agreed or assessed.

49 I note that no order is made for interest up to the order for judgment pursuant to s.100(1) of the *Civil Procedure Act* 2005. Such an award of interest, calculated from the date of the award (20 August 2007) until the date of judgment, was claimed within the written submissions of the plaintiff. However, interest had not been claimed in the summons as a head of relief. The plaintiff, accordingly, did not seek to press any claim for interest between the date of the award and the order for judgment.

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LAST UPDATED:
7 July 2008