FEDERAL COURT OF AUSTRALIA

Sino Dragon Trading Ltd v Noble Resources International Pte Ltd

[2016] FCA 1131

File number:	NSD 1333 of 2016
Judge:	**BEACH J**
Date of judgment:	13 September 2016
Catchwords:	**ARBITRATION** – international commercial arbitration – application to set aside arbitral award – *International Arbitration Act 1974* (Cth) – article 34(2) of the *UNCITRAL Model Law on International Commercial Arbitration* – ground to set aside – whether award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration – meaning of "dispute" – ground to set aside – videoconference – mode of providing evidence – whether party able to "present their case" – ground to set aside – arbitrators – whether appointed in "accordance with the agreement of the parties" – ground to set aside – public policy – natural justice – arbitrators – *International Arbitration Act 1974* (Cth) ss 18A and 19 – justifiable doubts as to impartiality or independence – real danger of bias – application dismissed
Legislation:	*International Arbitration Act 1974* (Cth) ss 2D, 16, 18, 18A, 18C, 19, 39 *UNCITRAL Arbitration Rules (as revised in 2010)* arts 6, 9, 11, 12, 13, 17, 28, 32 *UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)* arts 4, 5, 11, 12, 13, 16, 18, 19, 34
Cases cited:	*Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 *BZAID v Minister for Immigration and Border Protection* [2016] FCA 508 *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337

	Gascor v Ellicott [1997] 1 VR 332 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 *R v Gough* [1993] AC 646 *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361
Date of hearing:	13 September 2016
Date of publication of reasons:	16 September 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Category:	Catchwords
Number of paragraphs:	200
Counsel for the Applicant:	Mr P E King with Mr S R Coleman
Solicitors for the Applicant:	Zhang Shijing Lawyers
Counsel for the Respondent:	Mr E Cox
Solicitors for the Respondent:	Holman Fenwick Willan

ORDERS

NSD 1333 of 2016

BETWEEN:	**SINO DRAGON TRADING LTD** Applicant
AND:	**NOBLE RESOURCES INTERNATIONAL PTE LTD** Respondent

JUDGE: **BEACH J**

DATE OF ORDER: **13 SEPTEMBER 2016**

THE COURT ORDERS THAT:

1. The Applicant's originating application dated 11 August 2016 be dismissed.
2. The Applicant's interlocutory application dated 12 August 2016 be dismissed.
3. Subject to order 4, the Applicant pay the Respondent's costs of and incidental to these proceedings to be taxed in default of agreement.
4. If the Respondent seeks an order that its costs be paid on an indemnity basis, then:
   (a) within seven days of the publication of the Court's reasons for judgment, the Respondent file and serve submissions (up to three pages only) on that question;
   (b) within seven days of the receipt of the Respondent's submissions, the Applicant file and serve submissions (up to three pages only) in response.
5. The period of 21 days within which the Applicant is to file and serve any notice of appeal be deemed to commence on the business day after the publication of the Court's reasons for judgment.
6. Subject to the Applicant giving the Court the usual undertaking as to damages, the Respondent by itself, its servants and agents be restrained from taking any further step to enforce the Final Award dated 12 May 2016 in Australia or elsewhere for a period of 21 days from the date of these orders, subject to further order.
7. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 The applicant (Sino Dragon) is a company incorporated in Hong Kong. The respondent, Noble Resources International Pte Ltd (Noble Resources), is a Singaporean-incorporated subsidiary of the Noble Group. On 9 January 2014, Sino Dragon (as purchaser) and Noble Resources (as seller) entered into a contract of sale for the supply and delivery of 170,000 dry metric tonnes of iron ore (the Contract of Sale).

2 A dispute arose between the parties which ultimately proceeded to arbitration pursuant to cl 39.2 of the Contract of Sale and under the UNCITRAL Arbitration Rules (as revised in 2010). The appointment of the arbitrators who constituted the three-person arbitral tribunal was subject to various challenges by Sino Dragon. This included bringing proceedings in the Federal Court of Australia to have two arbitrators removed; that proceeding was subsequently dismissed (*Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028).

3 The arbitration proceeded to a final hearing on 7 December 2015, which was held in Sydney. The arbitral tribunal rendered an award on 12 May 2016, finding in favour of Noble Resources (the Final Award).

4 By application of Noble Resources, the Final Award was recognised and leave to enforce was given in Hong Kong on 4 July 2016 by order of the Honourable Madam Justice Mimmie Chan of the High Court of the Hong Kong Special Administrative Region (the Hong Kong High Court); there has been no appeal from that order or any application to set it aside. Noble Resources has since filed a winding up petition against Sino Dragon in Hong Kong. The petition is due to be advertised on 16 September 2016 and heard on 28 September 2016.

5 By its originating application filed on 11 August 2016 in this Court, Sino Dragon sought an order setting aside the Final Award pursuant to article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (the UNCITRAL Model Law). The UNCITRAL Model Law is given the force of law in Australia under s 16 of the *International Arbitration Act 1974* (Cth) (the Act).

6 In essence, Sino Dragon's challenge to the Final Award has been based on the following grounds:

(a) First, it is said that the arbitral tribunal and the Final Award dealt with a "dispute" not contemplated by the arbitration clause in the Contract of Sale, that "dispute" being the substance and effect of a certain email sent from Mr Haiyang Pang of Sino Dragon to Mr Jim Wong of Noble Resources on 23 January 2014, which was found to be conduct amounting to an act of repudiation on the part of Sino Dragon of its obligations under the Contract of Sale. It is said that in dealing with this "dispute", the arbitral tribunal proceeded outside the arbitration clause and therefore beyond jurisdiction and that the Final Award should be set aside under article 34(2)(a)(iii) of the UNCITRAL Model Law. I note at the outset that this ground is in substance a challenge really going to the merits of legal and factual questions, but superficially characterised and cloaked as an excess of jurisdiction question.

(b) Second, it is said that the evidence of Mr Xiaochun Wang and Mr Dan Li (two witnesses called by Sino Dragon in the arbitration) via videoconference was beset by technical difficulties, which meant that such evidence could not be properly presented. It has been asserted that this gave rise to a lack of procedural fairness and lack of equality of treatment. More generally, it is said that as Sino Dragon could not properly "present their case", the Final Award should be set aside under articles 34(2)(a)(ii) and 34(2)(a)(iv) of the UNCITRAL Model Law. Reliance is also placed on article 34(2)(b)(ii), on the basis that the Final Award is in conflict "with the public policy of this State". I must say that this is the only issue that has troubled me. I have also resisted the temptation to dispose of it on the basis that Sino Dragon may be seen largely to be the author of its own misfortune if there is any. Nevertheless, its conduct is not irrelevant or unimportant to my consideration and disposition of this ground as I will later explain, even though as a matter of law no waiver argument can arise.

(c) Third, it is asserted that two of the three arbitrators were not appointed in "accordance with the agreement of the parties", and therefore the Final Award should be set aside under article 34(2)(a)(iv) of the UNCITRAL Model Law. Further, it is also said that as there was a reasonable apprehension of bias vis-

à-vis the arbitrators constituting the arbitral tribunal, the Final Award was in conflict with the "public policy" of Australia, and therefore the Final Award should be set aside under article 34(2)(b)(ii) of the UNCITRAL Model Law. It is appropriate to say at the outset that this ground lacked substance and seemed to confuse the relevant legal test, including ignoring the statutory prescription of the "real danger" test (*R v Gough* [1993] AC 646) set out in s 18A of the Act.

7 In my view, none of these challenges have been made good. Accordingly, the originating application was dismissed by me on 13 September 2016, with the following discussion setting out my reasons for that dismissal. But before descending into the detail, I should note two other points.

8 First, Sino Dragon sought an order pursuant to article 34(4) of the UNCITRAL Model Law for a stay of the proceedings before me in order to give the arbitral tribunal an opportunity to resume the arbitration or to take such other action which the arbitral tribunal considered would properly eliminate the grounds for setting aside the Final Award. Such an application (see paragraph 5 of the originating application dated 11 August 2016) had no merit, particularly as the grounds for setting aside the Final Award were not sustainable in any event.

9 Second, Sino Dragon also filed an interlocutory application seeking, inter alia, an order restraining Noble Resources from bringing enforcement action in Hong Kong or in any other jurisdiction for recovery of the amounts awarded in its favour under the Final Award, pending resolution of the originating application. But as I have now disposed of the originating application, the interlocutory application falls with the originating application. I brought this matter on for final hearing with a truncated timetable given the time pressures imposed by the procedures relating to the winding up petition in Hong Kong. As a result, the interlocutory application did not need to be separately dealt with. I have nevertheless given Sino Dragon a limited form of injunction so that it can consider its position concerning any appeal. I have also indicated to Sino Dragon that if it wishes to pursue any continuation thereof if an appeal is lodged, then the price may be the provision of appropriate security, whether to support any undertaking as to damages or more broadly for the amount of the Final Award.

10 It is convenient to first set out the relevant background and then to separately deal with each of Sino Dragon's grounds for setting aside the Final Award, some of which I must say lacked conceptual coherence.

THE RELATIONSHIP, DISPUTE AND ARBITRATION

11 On 9 January 2014, Sino Dragon and Noble Resources entered into the Contract of Sale under which Noble Resources would supply and deliver 170,000 dry metric tonnes of iron ore to Sino Dragon.

12 Clause 4.1 of the Contract of Sale required Sino Dragon to open by or on before 17 January 2014 a letter of credit sufficient to cover the shipment value. Sino Dragon failed to open a letter of credit before 17 January 2014.

13 On 23 January 2014, the parties held a telephone conference in which the parties agreed on a reduction in the contracted base price from US$119 to $US115 per metric tonne and for a fully workable letter of credit to be opened by 28 January 2014.

14 Later that day, Mr Haiyang Pang of Sino Dragon informed Mr Jim Wong of Noble Resources by email that Sino Dragon could not open a letter of credit by 28 January 2014, and could therefore not perform the Contract of Sale and the cargo of iron ore should be resold (the Pang email).

15 On 24 January 2014, Mr Xiaochun Wang of Sino Dragon spoke to Mr Ming Li of Noble Resources by telephone (the 24 January 2014 telephone call). According to Mr Wang, Mr Li offered to reduce the contracted base price, allowed Sino Dragon to open a letter of credit at a reduced amount, with Sino Dragon bearing the relevant bank interest. The substance of the 24 January 2014 telephone call was a key subject of contention in the arbitration.

16 Also on that day, Noble Resources sent Sino Dragon a letter which noted that Sino Dragon had failed to open a letter of credit under the Contract of Sale and that the Pang email stated that Sino Dragon could not perform the contract. As such, Noble Resources explained that it had accepted Sino Dragon's repudiation of the contract, and gave notice terminating the contract with immediate effect.

17 On 14 February 2014, Noble Resources sent a letter to Sino Dragon asserting that because of the alleged breaches of contract, Noble Resources had to find an alternative buyer for the iron

ore cargo originally destined for Sino Dragon, and that Noble Resources had suffered loss and damage caused by those breaches.

(a) Appointment of arbitrators

18 Clause 39.2 of the Contract of Sale allowed a party to refer to arbitration in Australia, after a period of time, any "dispute, controversy or claim arising out of, under, in connection with or in relation this Contract". Clause 39.2 provided that the arbitration was to be conducted in accordance with the prevailing UNCITRAL Arbitration Rules, that the language of the arbitration should be English, and that the arbitral tribunal should consist of three arbitrators. The choice of law provision (clause 40.1) stipulated the law of Western Australia as the governing law.

19 On 1 May 2014, Noble Resources issued a notice of arbitration to Sino Dragon pursuant to article 3(1) of the UNCITRAL Arbitration Rules as incorporated by cl 39 of the Contract of Sale. In that notice, Noble Resources alleged that Sino Dragon breached the Contract of Sale by failing to open an irrevocable and workable letter of credit and to perform the contract generally. Noble Resources sought the following:

> [Noble Resources'] claim includes but is not limited to an indemnity from Sino Dragon Trading for any and all loss and damage suffered as a result of Sino Dragon Trading's breaches of the [Contract of Sale], the sum of which is not presently possible to accurately assess but is estimated to be approximately $1,900,000, plus costs and interest.

20 Further, the notice of arbitration appointed Mr Terry Mehigan, a barrister of 12 Wentworth Selbourne Chambers in Sydney, as arbitrator.

21 Article 3(4)(a) of the UNCITRAL Arbitration Rules provides that a notice of arbitration may also include a proposal for the designation of an appointing authority in respect of disputes arising under the Contract of Sale. Noble Resources' notice of arbitration proposed designating the Australian Centre for International Commercial Arbitration (ACICA) as the appointing authority.

22 Sino Dragon did not respond to Noble Resources' proposed designation of ACICA as appointing authority. As such, on 8 July 2014 Noble Resources sent a letter to the Permanent Court of Arbitration (PCA) requesting the designation of an appointing authority pursuant to article 6(1) of the UNCITRAL Arbitration Rules. Sino Dragon did not submit any comments to the PCA in respect of Noble Resources' request for designation of an appointing authority.

23 On 12 September 2014, the PCA appointed Mr David A R Williams QC as appointing authority.

24 Under article 9(2) of the UNCITRAL Arbitration Rules, Sino Dragon had 30 days from Noble Resources' notice of nominating an arbitrator to nominate a second arbitrator. Sino Dragon did not nominate an arbitrator within that time period. On 17 September 2014, the solicitors for Noble Resources sent a letter to Mr Williams QC, explaining that Sino Dragon failed to appoint an arbitrator, and requesting that Mr Williams QC appoint a second arbitrator.

25 On 26 September 2014, Mr Williams QC advised Sino Dragon by letter that he had appointed Mr Max Bonnell as the second arbitrator. Mr Bonnell is a partner at a law firm, King & Wood Mallesons (KWM), and a fellow of ACICA. There is no evidence that Sino Dragon responded to Mr Williams QC's letter.

26 On 8 October 2014, Noble Resources sent a letter to Mr Williams QC noting that Noble Resources was not aware of any circumstances that would likely give rise to justifiable doubts as to Mr Bonnell's impartiality or independence. The letter also noted that KWM was acting for a different subsidiary of the Noble Group in a separate and unrelated proceeding in China, and Mr Bonnell was not directly involved in that matter.

27 On that date, Mr Bonnell also informed the parties that the partnership of KWM in China (KWM China) was a financially separate entity to the partnership of KWM in Australia (KWM Australia) of which Mr Bonnell was a partner. Mr Bonnell also explained that KWM China (and not KWM Australia) was acting in a separate proceeding on behalf of a different subsidiary of the Noble Group.

28 On 13 October 2014, Mr Mehigan (on behalf of the arbitral tribunal) proposed appointing Mr Jonathan Kay Hoyle as presiding arbitrator. Mr Hoyle is a barrister of 11th Floor St James' Hall Chambers in Sydney. Later that day Mr Hoyle accepted his nomination as presiding arbitrator. Mr Hoyle's appointment as presiding arbitrator was confirmed on 19 November 2014.

29 In summary, Mr Williams QC was appointed by the PCA as the appointing authority and the arbitral tribunal was constituted by:

(a) Mr Mehigan, who was appointed as arbitrator by Noble Resources;

(b) Mr Bonnell, who was appointed as arbitrator by Mr Williams QC; and

(c) Mr Hoyle, who was appointed as presiding arbitrator by Mr Mehigan and Mr Bonnell.

30 Sino Dragon has challenged the appointments of Mr Bonnell and Mr Hoyle on several occasions. Each of those challenges has been unsuccessful. One of the grounds in support of Sino Dragon's present application to set aside the Final Award concerns the appointment of Mr Bonnell and Mr Hoyle as arbitrators. It is convenient to set out the history of these failed challenges.

(b) First Challenge

31 On 14 October 2014, Sino Dragon notified Mr Williams QC of its objection to the appointment of Mr Bonnell as arbitrator. It did not provide any reasons for that objection. Further, it sought to nominate another person as second arbitrator. The parties had 15 days from the date of the appointment of Mr Bonnell (26 September 2014) to object to that appointment. Accordingly, by 14 October 2014, Sino Dragon's time to object to the nomination of the second arbitrator had expired. However, Noble Resources wrote to the arbitral tribunal saying that although it reserved its right to disagree with any properly made challenge, it requested that Sino Dragon be given until 23 October 2014 to make a challenge to Mr Bonnell's appointment. There is no evidence that Sino Dragon responded to Noble Resources' proposal.

32 On 17 October 2014, Mr Mehigan informed Sino Dragon on behalf of the arbitral tribunal that if Sino Dragon required additional time, it could provide its statement of reasons for the challenge by 23 October 2014.

33 No statement of reasons was submitted by Sino Dragon. On 24 October 2014, Mr Mehigan informed the parties on behalf of the arbitral tribunal that he did not propose to extend the time period for Sino Dragon to submit its statement of reasons. He explained that Sino Dragon could pursue its challenge by seeking a decision from the appointing authority, Mr Williams QC, by 14 November 2014.

34 By 17 November 2014 (when the period for bringing a challenge to Mr Williams QC had already expired), Sino Dragon did not seek a decision from Mr Williams QC. On 17 November 2014, Mr Mehigan wrote to the parties on behalf of the arbitral tribunal observing that neither the arbitral tribunal nor the appointing authority had received notice that Sino

Dragon intended to pursue its challenge to the appointment of Mr Bonnell. Accordingly, on 19 November 2014, Mr Hoyle announced his appointment as presiding arbitrator.

(c) Second Challenge

35 As part of the procedural timetable for the arbitration, Sino Dragon was ordered by the arbitral tribunal to file a Statement of Response by 15 February 2015.

36 On 17 February 2015, Sino Dragon filed its Statement of Response, in which it made the following allegations:

(a) Mr Bonnell's appointment was said to be flawed because Mr Williams QC did not provide detailed information about himself and Mr Bonnell. It was asserted that as such, Sino Dragon was not in a position to challenge Mr Bonnell's appointment.

(b) It was also asserted that the three arbitrators may be "in connection with each other" as they all lived in Sydney, and that they may be "culturally biased" as they shared a "cultural system" which may affect the impartiality of the arbitration.

37 On 24 February 2015, Mr Hoyle responded on behalf of the arbitral tribunal and invited Sino Dragon to file any evidence to accompany its Statement of Response. Mr Hoyle noted that he was a British national who was an Australian resident but not an Australian citizen.

38 On or around 4 March 2015, Sino Dragon filed a "Rejoinder", which stated that Australia shared the same cultural system with the "British Commonwealth of Nations".

39 On 8 May 2015, Mr Williams QC, as the appointing authority, issued a ruling which dismissed Sino Dragon's challenge to the appointment of the arbitrators. Mr Williams QC held that Sino Dragon's application failed because:

(a) Sino Dragon should have challenged the appointment of the arbitrators individually, and not the arbitral tribunal as a whole;

(b) the challenge was made out of time; and

(c) the reasons cited by Sino Dragon in support of the challenge did not give rise to any justifiable doubts as to any of the arbitrators' impartiality or independence.

(d) Third Challenge

40 On 27 August 2015, Sino Dragon emailed Mr Hoyle, raising further objections regarding the composition of the arbitral tribunal. In essence, Sino Dragon objected on the following grounds:

(a) Mr Williams QC failed to appoint the presiding arbitrator;

(b) Mr Mehigan and Mr Bonnell failed to appoint Mr Hoyle in accordance with article 9 of the UNCITRAL Arbitration Rules;

(c) Mr Bonnell failed to disclose to Mr Williams QC an alleged conflict of interest, and further Mr Hoyle had worked with Mallesons Stephen Jaques (the predecessor firm to KWM in Australia) in 2006.

41 Later that day, Mr Hoyle responded on behalf of the arbitral tribunal to Sino Dragon's objections and rejected the assertion that he and Mr Bonnell should withdraw. Mr Hoyle expressed the following views:

(a) Mr Williams QC was not called upon or empowered to appoint the presiding arbitrator.

(b) Mr Hoyle was properly appointed as presiding arbitrator pursuant to article 9(2) of the UNCITRAL Arbitration Rules.

(c) Mr Bonnell and Noble Resources disclosed the existence of KWM's relationship with Noble Resources. The fact that KWM had acted for the Noble Group in a corporate filing in 2005 did not give rise to any justifiable doubt as to Mr Bonnell's impartiality or independence.

(d) Mr Hoyle's employment with Mallesons Stephen Jaques was not sufficient to demonstrate any justifiable doubts as to his impartiality or independence.

(e) Fourth Challenge

42 On 7 September 2015, Sino Dragon filed an originating application in this Court which, in essence, sought an order for the removal of Mr Bonnell and Mr Hoyle as arbitrators. Sino Dragon also filed an interlocutory application, seeking an order to restrain Mr Bonnell and Mr Hoyle "from proceeding further and from taking any further steps upon the references, until the determination of the Court".

43 On 10 September 2015, the originating and interlocutory applications were heard by Edelman J. On 16 September 2015, his Honour dismissed Sino Dragon's interlocutory application, and on 17 September 2015 he dismissed Sino Dragon's originating application (*Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028). His Honour observed at [62] and [63] that Sino Dragon had 30 days to request a decision from the appointing authority, but this time period had not yet expired. His Honour found at [76] to [77] that the Court did not have power under the UNCITRAL Model Law to decide upon Sino Dragon's challenge to the appointment of Messrs Bonnell and Hoyle until such a challenge had been determined by the appointing authority. At the time of the hearing before Edelman J, such a challenge had not yet been determined by Mr Williams QC.

(f) Fifth Challenge

44 On 20 September 2015, Sino Dragon sent an email to Mr Williams QC challenging the appointment of Mr Bonnell and Mr Hoyle as arbitrators on the basis that there were justifiable doubts as to their impartiality or independence.

45 On 21 September 2015, Mr Williams QC requested Sino Dragon to confirm that its grounds of challenge were set out in its email of 20 September 2015 and directed that any additional documents it wished to rely upon to support its challenge be provided by 25 September 2015.

46 On 22 September 2015, Sino Dragon provided further particulars and evidence in support of its challenge. Further material was subsequently filed by the parties. Mr Bonnell and Mr Hoyle were also provided an opportunity to respond to Sino Dragon's challenge to their appointments.

47 On 17 November 2015, Mr Williams QC delivered a ruling, which dismissed Sino Dragon's challenge to the appointment of Mr Bonnell and Mr Hoyle as arbitrators. Mr Williams QC held that based on the information before him, he did not consider that there was a "real danger of bias" against Sino Dragon or any lack of impartiality in general. There was no challenge then made by Sino Dragon to Mr Williams QC's ruling.

(g) The arbitration

48 On 7 and 8 December 2015, the arbitration hearing was held at the Australian Disputes Centre in Sydney. The arbitral tribunal consisted of Mr Mehigan, Mr Bonnell and Mr Hoyle.

49 On 12 May 2016, the arbitral tribunal rendered the Final Award. The arbitral tribunal ordered that Sino Dragon pay Noble Resources:

(a) damages in the amount of US$1,861,073.44;

(b) pre-award interest in the amount of US$194,645.27;

(c) post-award interest from the date of the Final Award at 4.5% per annum until payment of the Final Award on the amount of US$1,861,073.44;

(d) costs in the amount of US$173,939.00; and

(e) fees of the arbitral tribunal in the amount of AU$76,372.15.

(h) Proceedings in Hong Kong

50 On 15 June 2016, Noble Resources filed an originating summons in the Hong Kong High Court, seeking registration of the Final Award.

51 On 4 July 2016, the Hong Kong High Court granted leave to Noble Resources to enforce the Final Award as a judgment or order of that Court (the Enforcement Order). The High Court ordered that Sino Dragon pay Noble Resources the sums stipulated in the Final Award.

52 On or about 4 July 2016, Noble Resources served on Sino Dragon at its registered office in Hong Kong, inter alia, the originating summons filed on 15 June 2016 and a sealed copy of the Enforcement Order.

53 On 18 July 2016, the Enforcement Order became permanent. Accordingly, on that day, Noble Resources served on Sino Dragon a statutory demand issued under Hong Kong law for the amount of the Final Award. That statutory demand was not satisfied.

54 On 21 July 2016, Noble Resources filed a petition in the Hong Kong High Court, seeking to wind up Sino Dragon on the basis that Sino Dragon had failed to comply with the statutory demand, had not applied to set aside the Enforcement Order or otherwise stay Noble Resources' enforcement application, had not responded to the winding up petition and had not applied to the Federal Court of Australia to set aside the Final Award.

55 On 22 July 2016, Noble Resources served the winding up petition on Sino Dragon. As at 13 September 2016, the date of the hearing before me, Sino Dragon had not taken steps in Hong Kong to have the winding up application adjourned or dismissed.

56 Noble Resources was required:

(a) by 16 September 2016 to advertise its winding up petition in the Hong Kong Gazette and one English and one Chinese language newspaper; and

(b) by 19 September 2016 to obtain a certificate of compliance from the Hong Kong High Court.

57 The hearing of Noble Resources' winding up petition is listed for 28 September 2016. As a result of the interlocutory injunction that I have granted, variations to this timetable will now need to be made.

RELEVANT LEGISLATIVE FRAMEWORK AND OTHER INSTRUMENTS

58 It is appropriate to set out relevant provisions of the Act, the UNCITRAL Model Law, the Contract of Sale and the UNCITRAL Arbitration Rules. I will also at this point make some general observations concerning article 34 of the UNCITRAL Model Law.

(a) The Act

59 Section 2D provides:

> **Objects of this Act**
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> The objects of this Act are:
>
> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
>
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
>
> (d) to give effect to Australia's obligations under 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; and
>
> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
>
> (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

60 Section 16 provides:

Model Law to have force of law

(1) Subject to this Part, the Model Law has the force of law in Australia.

(2) In the Model Law:

arbitration agreement has the meaning given in Option 1 of Article 7 of the Model Law.

State means Australia (including the external Territories) and any foreign country.

this State means Australia (including the external Territories).

61 Section 18A provides:

Article 12 – justifiable doubts as to the impartiality or independence of an arbitrator

(1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration.

(2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.

62 Section 18C provides:

Article 18 – reasonable opportunity to present case

For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.

63 Section 19 provides:

Articles 17I, 34 and 36 of Model Law – public policy

Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

(a) the making of the interim measure or award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.

64 Section 39 provides:

> **Matters to which court must have regard**
>
> (1) This section applies where:
>
> (a) a court is considering:
>
> (i) exercising a power under section 8 to enforce a foreign award; or
>
> (ii) exercising the power under section 8 to refuse to enforce a foreign award, including a refusal because the enforcement of the award would be contrary to public policy; or
>
> (iii) exercising a power under Article 35 of the Model Law, as in force under subsection 16(1) of this Act, to recognise or enforce an arbitral award; or
>
> (iv) exercising a power under Article 36 of the Model Law, as in force under subsection 16(1) of this Act, to refuse to recognise or enforce an arbitral award, including a refusal under Article 36(1)(b)(ii) because the recognition or enforcement of the arbitral award would be contrary to the public policy of Australia; or
>
> (v) if, under section 18, the court is taken to have been specified in Article 6 of the Model Law as a court competent to perform the functions referred to in that article – performing one or more of those functions; or
>
> (vi) performing any other functions or exercising any other powers under this Act, or the Model Law as in force under subsection 16(1) of this Act; or
>
> (vii) performing any function or exercising any power under an agreement or award to which this Act applies; or
>
> (b) a court is interpreting this Act, or the Model Law as in force under subsection 16(1) of this Act; or
>
> (c) a court is interpreting an agreement or award to which this Act applies; or
>
> (d) if, under section 18, an authority is taken to have been specified in Article 6 of the Model Law as an authority competent to perform the functions referred to in Articles 11(3) or 11(4) of the Model Law – the authority is considering performing one or more of those functions.
>
> (2) The court or authority must, in doing so, have regard to:
>
> (a) the objects of the Act; and
>
> (b) the fact that:
>
> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and

(ii) awards are intended to provide certainty and finality.

(3) In this section:

arbitral award has the same meaning as in the Model Law.

foreign award has the same meaning as in Part II.

Model Law has the same meaning as in Part III.

(b) The UNCITRAL Model Law

65 Articles 4 and 5 provide:

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

66 Article 11 to 13 provide:

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function

entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

67 Article 16 provides:

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

68 Articles 18 and 19 provide:

> *Article 18. Equal treatment of parties*
>
> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.
>
> *Article 19. Determination of rules of procedure*
>
> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

69 Article 34 provides:

> *Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(c) Article 34 - Scope

70 Without wishing to dwell unnecessarily on philosophical themes extolling the virtues of international arbitration as a suitable mechanism for resolving transnational commercial disputes between commercial actors to consensual arrangements regulating their rights and obligations, it is appropriate to make some general observations concerning article 34 and its context.

71 First, it is apparent that the text of article 34 significantly limits the circumstances under which an award may be set aside. So much is apparent from the text of article 34(1), the prefatory words "only if" to article 34(2) and the limited categories in article 34(2).

72 Second, such a limitation is reinforced by considering article 34 in the context of article 5. Indeed, ss 2D and 39 of the Act entail as much. Not to significantly limit such circumstances would be antithetical to the objects prescribed in ss 2D(a) to (c) and (e). Not to significantly limit such circumstances would be to pay insufficient regard to the fact that "arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes" (s 39(2)(b)(i)). And not to significantly limit such circumstances would be to pay insufficient regard to the fact that "awards are intended to provide certainty and finality" (s 39(2)(b)(ii)).

73 Third, the corollary of the foregoing is that significant judicial restraint must be exercised in considering and determining an article 34 challenge. It is not an occasion for a merits review. It is not an occasion for delving into the evidence before the arbitral tribunal to assess legal or factual error. Indeed, there is no free-standing challenge for error of law (whether generally or on the face of the award), although the same may not be entirely irrelevant to other grounds of challenge specified in article 34. Further, it is not an occasion for delving into the adequacy of evidence to support particular findings through the confected mechanism of a procedural fairness type challenge.

74 Fourth, if a procedural fairness type challenge has been made, the context and practical circumstances and consequences are all important. One starts with the context that one is dealing with a significant international commercial dispute between well-represented and well-heeled commercial operators. One adds to that context that the parties have chosen arbitration as the relevant dispute mechanism, which necessarily entails some compromise in the choice of procedures dictated by efficiency and expedition. The normative evaluation involved in deciding whether a party has been given a reasonable opportunity to put its case must necessarily be undertaken in that context. Moreover, this should be able to be readily demonstrated with clarity and expedition. It ought not to involve the contested evaluation of a fact-finding process. Further, taking into account the context I have described, any consequence short of "real unfairness" or "real practical injustice" should be put to one side (*TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [55] per Allsop CJ, Middleton and Foster JJ).

(d) The Contract of Sale

75 Clause 39 provides:

> **39 DISPUTE RESOLUTION**
>
> 39.1 The Parties shall first seek to resolve any dispute, controversy or claim arising out of, under, in connection with or in relation to this Contract by negotiations between them. Any Party may notify the other of its desire to enter into consultation to resolve a dispute, controversy or claim. It is a condition precedent to the commencement of arbitration that the Parties first attempt to resolve any dispute, controversy or claim in this way.
>
> 39.2 Any dispute, controversy or claim arising out of, under, in connection with or in relation to this Contract, which, remains unresolved after 30 days from the date on which notice is given under clause 40.1 [sic], or after a longer period as the Parties may agree in writing, shall be referred to and settled by arbitration in Australia in accordance with the prevailing UNCITRAL Arbitration Rules (Arbitration Rules). The language of the arbitration shall be English and the Tribunal will consist of three arbitrators.
>
> 39.3 Where there is any conflict between the Arbitration Rules and this clause 39, the latter prevails to the extent of the inconsistency.

76 Clause 40 provides:

> **40 GOVERNING LAW**
>
> 40.1 This Contract is governed by and must be construed and interpreted in accordance with the laws of Western Australia. The Convention for the International Sale of Goods and any legislation giving effect to it shall not apply.

77 There are also other relevant provisions such as clauses 2, 3, 4, 29, 31, 34 and 36 which are unnecessary to set out for present purposes save that clauses 29.4, 34 and 36 provide:

> **29.4 English language**
>
> (a) Any notice given under or in connection with this Contract must be in English.
>
> (b) All other documents provided under or in connection with this Contract must be in English. If the Buyer requires any document be [sic] in a language other than English, such document must be accompanied by a certified English translation and, in such case, the English translation will prevail unless the document is a constitutional, statutory or other official document.
>
> **34 CONTRACT LANGUAGE**
>
> This Contract is made in English. If translations in other languages exist, the English wording is decisive.
>
> **36 BREACH OF CONTRACT BY BUYER**
>
> 36.1 The Seller shall be entitled to immediately terminate its obligations to supply Product to the Buyer under this Contract if the Buyer, without legitimate contractual or other overriding legal excuse:

(a) refuses to accept a delivery of Product and the Buyer fails to remedy such breach within 5 Business Days of receiving written notice from the Seller;

(b) fails to make payment in accordance with the Buyer's obligations as set out herein and the Buyer fails to remedy such breach with [4] Business Days of receiving written notice from the Seller;

(c) becomes insolvent;

(d) breaches a representation in clause 29 and, if remediable, does not remedy that breach within [4] Business Days of receiving written notice from the Seller to do so; or

(e) ceases to trade in goods of the type that form the subject matter of this Contract,

provided however that the Seller shall not be entitled to terminate this Contract if breach(es) by the Buyer described in 36.1(a) and 36.1(b) are committed as a consequence of a material breach of this Contract by the Seller.

36.2 Termination pursuant to clause 36.1 is without prejudice to any other rights either Party may have pursuant to this Contract, under statute or at law.

(e) The UNCITRAL Arbitration Rules

78 As is apparent from cl 39.2 of the Contract of Sale, the UNCITRAL Arbitration Rules were to be applied. It is appropriate to refer to various provisions.

79 Article 6 provides:

Article 6

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-

General of the PCA to designate a substitute appointing authority.

5. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.

6. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

80 Article 9 provides:

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

81 Articles 11 to 13 provide:

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

3. In the event that an arbitrator fails to act or in the event of the de jure or de facto

impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

82 Article 17 provides:

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all

parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

83 Article 28 provides:

Article 28

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

84 Article 32 provides:

Article 32

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

85 The annexure to the UNCITRAL Arbitration Rules also contains Model statements of independence:

Model statements of independence pursuant to article 11 of the Rules

No circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement.] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the

> other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.
>
> *Note. Any party may consider requesting from the arbitrator the following addition to the statement of independence:*
>
> I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

GROUND 1 – PROCEEDING UPON NON-CONTRACTUAL MATERIAL AND ADMITTING EVIDENCE (Originating Application at [2])

86 Sino Dragon contends that the Final Award should be set aside or declared to be made without jurisdiction "on the grounds that the panel exceeded the arbitration agreement and their jurisdiction by proceeding upon non-contractual material and/or by admitting evidence which was beyond the jurisdiction of the reference affecting their determination adverse to [Sino Dragon] and/or by proceeding in the absence of the evidence of loss".

87 I propose to set out Sino Dragon's contentions fully as it is instructive on the question of whether Sino Dragon is truly running a jurisdictional point or seeking to challenge the Final Award on its legal or factual merits.

88 Sino Dragon says that the Final Award should be set aside under article 34(2)(a)(iii) of the UNCITRAL Model Law because the Final Award deals with a dispute not contemplated by and not falling within the terms of the submission to arbitration.

89 It is said that the Final Award dealt with a "dispute" not contemplated by the arbitration clause in the Contract of Sale for the reason that the Final Award addressed a dispute raised by Noble Resources concerning the receipt by it on 23 January 2014 of the Pang email (see the Final Award at [167]) which it treated as amounting to a contractual repudiation.

90 Sino Dragon contends that such a dispute was not contemplated by cl 39 of the Contract of Sale because it turned entirely upon the receipt by Noble Resources on 23 January 2014 of the Pang email, which was a written communication in the Chinese language. It is said that the parties expressly agreed that such communications were ineffectual and could not affect their legal or commercial relations. It is said that all notices "in connection with" and "all other documents" in connection with the Contract of Sale "must" be in the English language. Sino Dragon contends that whoever sent the Pang email, with or without authority, and why, are "interesting questions but utterly irrelevant" to the dispute the arbitral tribunal were obligated to consider under cl 39 of the Contract of Sale.

91 Sino Dragon contends that this may be contrasted with the dispute which was submitted by the notice of arbitration dated 1 May 2014, namely the breach of cl 4.1 of the Contract of Sale for Sino Dragon's alleged failure to open a conforming letter of credit. Sino Dragon says that this clearly relates to a question connected with the Contract of Sale and its performance; the question is also one upon which Noble Resources failed before the arbitral tribunal. It is said that the issue relating to the Pang email was a matter "dehors both the referral to arbitration and the contract and its performance". It is said that the arbitral tribunal found that this amounted to a renunciation of the Contract of Sale and accordingly a repudiation. It is said that the arbitral tribunal so found by misunderstanding the nature of a "renunciation" and that by "arguing backwards" treated the Pang email as a contractual document which "it clearly was not".

92 Sino Dragon contends that the Pang email may "as well have been a red balloon or a Chinese New Year blessing sent one day early for all its real commercial relevance". It is said that the "Pang email was not capable of being part of any commercial dispute between these commercial men". It is said that it is irrelevant that Mr Stewart seemingly arranged for the Pang email to be translated on the morning of 24 January 2014. It is said that the fact that it was then used by him to terminate the Contract of Sale on 24 January 2014 at 7pm after he had accepted alternative shippers to take the cargo without checking with Sino Dragon as to its authenticity, or without checking with his own chief commercial negotiator with Sino Dragon, Mr Ming Li, was relevant as evidence only of "an internal failure on his part to respond truly to matters within the agreed scope of the commercial dealings between the parties". It is said that his response, and the motives for it, were also irrelevant. It is said that it was simply not what the parties agreed to. It is said that it was a question not contemplated by or dehors the Contract of Sale.

93 Sino Dragon points to cl 29.4 of the Contract of Sale, which I will set out again for convenience:

> (a) Any notice given under or in connection with this contract must be in English.
>
> (b) All other documents provided under or in connection with this contract must be in English. If the buyer requests that the documents be in a language other than English such documents must be accompanied a certified English translation, and in such case the English translation will prevail unless the document is a constitutional, statutory, or other official document.

94 It is said that the language of cl 29.4 is mandatory and that "[i]t is very clear" and "brooks no doubt". It is said that any notices and documents "in connection with" the Contract of Sale

must be in the English language, and otherwise are ineffectual. It is said that other provisions of the Contract of Sale made it clear that the lingua franca of the commercial relationship as concerns the written word is the English language only.

95 Further reference is made to the Contract of Sale which is said to incorporate the "familiar INCOTERMS". Clause 34 of the Contract of Sale provides that "[t]his contract is made in English" and that if "translations in other languages exist, the English wording is decisive". Further, clause 39.2 of the Contract of Sale provides that the arbitration shall be in Australia and that "[t]he language of the arbitration shall be English." Clause 40 provides that the law of Western Australia (the port of shipment) is the "governing law" and excludes the Vienna Convention. Clause 42, a variant of force majeure, refers to the common law doctrine of frustration, under the governing law of Western Australia. Accordingly, Sino Dragon says that the Contract of Sale is "emphatic, without any equivocation that the English language and common law is to govern the relations of the parties including their written communications". It is said that the dispute that the arbitral tribunal found in favour of Noble Resources was not one contemplated by or within the scope of cl 39.2 and hence must be set aside on the ground provided for in article 34(2)(a)(iii).

96 Sino Dragon points to the fact that in the Final Award at [239] et seq, the arbitral tribunal considered the question as to whether Sino Dragon had repudiated the Contract of Sale. The evidence upon which the arbitral tribunal focussed was the Pang email, which was found by the arbitral tribunal to be an act of repudiation.

97 The Pang email was in the Chinese language (I note that it was not, surprisingly, tendered in evidence before me). The English translation, which at the arbitration Sino Dragon contended to be the correct translation, was set out in [165] of the Final Award:

> After communicating with our company financial section, I knew that the letter of credit could not be issued before 28th January. Therefore our company cannot implement this Contract. In order to avoid losses to your company, please your company deal with the cargo in relation to the Contract as soon as possible. Our company will place your company in priority in future cooperation, when the financial situation turns better and our company do more purchasing. We apologise for any inconvenience cause and we appreciate your understanding.

98 The arbitral tribunal found at [167] of the Final Award:

> As the parties conceded during exchanges with the arbitral tribunal, the distinctions at issue were fine. [Sino Dragon] accepted that "perform" was an equally acceptable translation of "implement" but otherwise submitted that irrespective of the significance of the differences the [arbitral tribunal] should consider an accurate and

> certified translation. [Noble Resources] did not adopt a final position about whether the translation could be considered certified but objected to the manner in which the evidence was presented. For the reasons outlined below, the [arbitral tribunal] considers that nothing of importance turns on the differences. However, having considered the matter it finds that the correct translation for the purposes of the arbitration is as follows:
>
> > "After communicating with our company financial section, I knew that the Letter of Credit could not be issued before 28th January. Therefore our company can not perform this Contract. In order to avoid losses to your company, please your company deal with the cargo in relation to the Contract as soon as possible. Our company will place your company in priority in future co-operation, when the financial situation turns better and our company do more purchasing. We apologise for any inconvenience caused and we appreciate your understanding."
>
> (footnotes omitted)

99 As mentioned, the Pang email was sent by Mr Haiyang Pang, an employee of Sino Dragon, to an employee of Noble Resources, Mr Jim Wong. It was also said that there was no evidence that Mr Pang sent the email with the authority of his manager, Mr Wang. The arbitral tribunal found there to be ostensible authority, although in my view implied actual authority was also open.

100 Sino Dragon submitted that the arbitral tribunal relied on the Pang email as "clear repudiatory conduct" (at [248] of the Final Award), and it accordingly treated the email as important evidence of repudiation. So much may be accepted.

101 Sino Dragon contends that the Pang email in the Chinese language was crucial in the deliberations of the arbitral tribunal. So much may also be accepted. Sino Dragon elaborated in the following terms, although its submissions lacked conceptual coherence at times:

(a) The arbitral tribunal was "of the view that if a party were to 'breach' cl 29.4 and the other party were permitted to treat the communication as of no effect, there would be some odd consequences". But Sino contends that cl 29 is about what are authorised contractual dealings and a communication not conforming to it "is like Lord Atkin's unaccepted repudiation a thing writ in water".

(b) The arbitral tribunal considered that one of the critical features of assessing whether repudiation had occurred by the Pang email was that it was not "reducible to the particular form in which it is conveyed". It is said at that the Final Award stated at [248] that repudiation goes directly to the question of whether a party is going to perform its obligations under the Contract of Sale.

> The arbitral tribunal also considered the intention of the contractual party in relation to the performance of the contract. The arbitral tribunal reached the view that the "intention and conduct of the contractual party goes beyond the narrow contractual code and common law position of repudiation should be considered". Sino Dragon contends that this however adopts a discordant and erroneous test of contractual intention. It submits that if the written communication was not in English it demonstrated nothing about the intention of Mr Pang himself, or Mr Wang or Sino Dragon.

102 Sino Dragon says that it is clear from the Final Award that but for the Pang email, Noble Resources' case of repudiation by Sino Dragon would have failed. I accept that contention.

103 Sino Dragon submits that at [245] of the Final Award the arbitral tribunal referred to Noble Resources' argument that conduct which sits outside the contract is caught by the restriction in cl 29.4 of the Contract of Sale. It is said that the arbitral tribunal acknowledged that this "sits uneasily" with the words of cl 29.4 especially the words "in connection with".

104 Sino Dragon submits that having apparently agreed with its submission that this view, if correct, would mean that the common law of repudiation was "supplanted" (at [248] of the Final Award), the arbitral tribunal then ruled that the Pang email was "clear repudiatory conduct" even though falling outside "the mechanisms of the contract".

105 It is said that "having noted in [247] the views of the Court in *Laurinda*, and *Satelite*, as drawing attention to the effect of contractual conduct on the part of a reasonable person, at the end of [24] [sic] the arbitrators inconsistently concluded that any conduct, whether in writing or not, has the same repudiatory consequence". However it is said that "this is the whole reason that the Contract of Sale made express provision to exclude non-English language documents from consideration".

106 It is said that the result is "capricious and at worst discriminatory". Sino Dragon says that it treats the Chinese email as conduct, yet is inconsistent with the conduct of Mr Xiaochun Wang and Mr Dan Li who also provided evidence, regarding a mutually acceptable forbearance of the contract performance until 27 January 2014 over the Chinese New Year weekend. It is said that "it was unreasonable in such circumstances to treat the Chinese language email as repudiatory *conduct*, but the Chinese communications which preceded and

succeeded it" on the basis that the Contract of Sale was ongoing as conduct having no consequence.

107 Generally it is said that the Pang email was "not a document that was contemplated by the submission, measured with reference to cl 39 and the terms of the [Contract of Sale], and relates to matters beyond the scope of the submission to arbitration within Article 34(2)(a)(iii)". It is said that the arbitral tribunal wrongly admitted into evidence (and then took into account the Pang email), and that the Final Award should be set aside on this ground.

108 Further, it is said that if the Pang email is repudiatory conduct, the conversation between Mr Ming Li and Mr Xiaochun Wang is an election to affirm the Contract of Sale and for it to remain on foot, after the repudiatory conduct of Mr Pang. It is said that the arbitral tribunal "cannot approbate and reprobate as to what is 'dehors' and beyond the scope of the contract, treating one as a renunciation and the other as irrelevant."

109 Generally, Sino Dragon contends that the "submission to arbitration" in article 34(2)(a)(iii) of the UNCITRAL Model Law means the dispute or controversy contemplated by cl 39 in the Contract of Sale, and not a dispute without a "connection with or in relation to" the contract, its performance, meaning or operation. In summary, it is said that the Final Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions beyond the scope of the submission to arbitration, and which cannot be separated from the result and so should be set aside under article 34(2)(a)(iii). For these reasons, so it is said, the first ground for setting aside the Final Award ought succeed.

110 In my view, this ground lacks substance.

111 The starting point is the construction and scope of cl 39.2 of the Contract of Sale which I will set out again for convenience:

> Any dispute, controversy or claim arising out of, under, in connection with or in relation to this Contract, which, remains unresolved after 30 days from the date on which notice is given under clause 40.1 [sic], or after a longer period as the Parties may agree in writing, shall be referred to and settled by arbitration in Australia in accordance with the prevailing UNCITRAL Arbitration Rules (Arbitration Rules). The language of the arbitration shall be English and the Tribunal will consist of three arbitrators.

112 What is said in essence by Sino Dragon is that the Pang email does not fit within cl 29.4 as it was not in English. Building on that theme, Sino Dragon submits that it could not be

considered or relied upon by the arbitral tribunal as it was, somehow, outside the Contract of Sale. Therefore, as I understood the argument, it somehow fell outside the scope of what could be considered by the arbitral tribunal under cl 39.2.

113 This line of reasoning breaks down at a number of levels.

114 First, the expression "[a]ny dispute, controversy or claim arising out of, under, in connection with or in relation to this Contract" in cl 39.2 are words of broad ambit. So much is plain from the text and commercial context, applying the usual principles for the interpretation of commercial contracts (see most recently *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46] to [52] per French CJ, Nettle and Gordon JJ). Further, when one is dealing with an arbitration clause, such principles would normally support an expansive or liberal approach consonant with the objectively ascertained commercial purpose, so long as to do so would not be inconsistent with the plain text construed in context. I would prefer neither to expound nor to rely upon any special rule or rebuttable presumption for interpreting an arbitration clause, let alone to use "one stop shop" metaphors and the like.

115 Second, it is well apparent that cl 39.2 embraced the question of whether the Contract of Sale had been terminated through the common law doctrine relating to the acceptance by Noble Resources of Sino Dragon's act of repudiation. Such a dispute was one "arising out of … in connection with or in relation to …" the Contract of Sale. Moreover, common law methods of termination exogenous to the express contractual terms were preserved by cl 36.2.

116 Third, Sino Dragon's argument concerning the Pang email not falling within cl 29.4 takes it nowhere. As to this:

(a) A dispute as to whether the Pang email fell within cl 29.4 was itself something to be resolved under the arbitration clause. It was itself a dispute or controversy forming part of the broader reference under cl 39.2. Clause 29.4 regulates the relationship between the contracting parties, and thus any dispute regarding the scope and interpretation of cl 29.4 is a "dispute" which can be arbitrated by the arbitral tribunal;

(b) Further, a dispute as to whether non-English communications (assuming that such communications fell outside cl 29.4) could constitute conduct amounting

to repudiation was itself a dispute or controversy forming part of the broader reference.

(c) Further, Sino Dragon's contention was predicated on an acceptance that the Pang email fell outside cl 29.4 and as a consequence could not be used or relied upon for any purpose by Noble Resources. Putting to one side for the moment such a counter-intuitive proposition given that it was an employee of Sino Dragon that was the author and sender of the Pang email, the debate as to the soundness of this contention was part of the very dispute that was embraced by cl 39.2.

(d) Further, Sino Dragon, as I understood its argument, appeared to contend that anything falling outside cl 29.4 necessarily fell outside cl 39.2. It appeared to be submitted that because both clauses were in the Contract of Sale that they had to be read together and therefore the latter could not embrace communications falling outside the former. Floccinaucinihilipilification is a not inapposite description of my assessment of this argument. The argument is a misconception mixing apples and oranges. Clause 39.2 can deal with a dispute concerning whether a communication falls within or outside cl 29.4 and if outside, whether it can in any event be used as an act of repudiation. And to so treat cl 39.2 involves no disharmony with cl 29.4.

117 Fourth, I am not entirely confident that this matter was even properly and fully raised as a *jurisdiction* question or scope of cl 39.2 question before the arbitral tribunal, as distinct from a scope of cl 29.4 issue. The arbitral tribunal in their thorough and thoughtful reasons discussed jurisdictional issues at [132] to [141], but these did not include the Pang email *jurisdictional/scope* point run before me. The matter was only faintly touched on (T18) at the first day of the arbitration hearing but there is little other elucidation and it does not seem to have been firmly pressed as a matter outside cl 39.2; at T175, the discussion is a merits question concerning the scope of cl 29.4. The Pang email was dealt with on its *merits* at [164] to [168], [195(b)], [216] to [228], [230], [231], [238] to [249], [256] to [259], [283] and [342(a) & (b)]. Moreover, Sino Dragon's arguments before me are little more than a confected attempt to run a merits challenge of the arbitral tribunal's legal and factual analysis concerning the Pang email under the guise of an article 34(2)(a)(iii) challenge. Sino Dragon also, surprisingly, sought to invoke article 34(2)(b)(i), but its invocation fails for similar reasons. It is not necessary to delve into general concepts of arbitrability or the cases cited by

Sino Dragon on this aspect. Its argument fails on the more straightforward contractual analysis that I have set out above.

118 Fifth, even if I delved further into the legal and factual merits of the arbitral tribunal's treatment of the Pang email, none of Sino Dragon's submissions are made good; see the last sentence of [15], [16], [20], [26(b)], [28], [29], [30], [31] (which I will return to in a moment) and [34] of Sino Dragon's submissions dated 7 September 2016.

119 Sixth, even if there is a legal or factual error in the arbitral tribunal's determination concerning the construction or application of a contractual provision (assuming that the arbitral tribunal is acting within jurisdiction or the submission to arbitration and it has been validly constituted), and I do not for one moment say that there is such an error, that is not a ground for challenge under article 34(2)(a) in and of itself.

120 Seventh, the assertion at [33] of Sino Dragon's submissions that the Pang email ought not to have been admitted into evidence is misconceived. The arbitral tribunal was entitled to determine (as it did) what material was admitted by it without applying the strict rules of evidence (article 19(2) of the UNCITRAL Model Law as modified by article 17 of the UNCITRAL Arbitration Rules). Moreover, the Pang email was properly admitted so that the relevant dispute concerning its significance could be adjudicated on by the arbitral tribunal. But in any event, even if this complaint had substance, which it does not, it does not provide any ground of review.

121 Eighth, much of Sino Dragon's submissions (indeed its late served additional list of authorities) referred to authorities concerning the misconception or the misapprehension of limits of jurisdiction in other contexts. But on any view such a misconception or misapprehension is not shown to have been made by the arbitral tribunal in the present case.

122 There is one other matter that I need to discuss before turning to the next ground.

123 Before me, Mr Peter King, counsel for Sino Dragon, sought to finesse into the first ground (paragraph 2 of the originating application) that his client was raising the "principle of equal treatment", which it was said that the arbitral tribunal did not accord his client. I will discuss this under the next ground, but for the moment let me observe the following. First, such an issue is not mentioned in paragraph 2 of the originating application. Second, there is no reference to this principle until [41] of Sino Dragon's written submissions (ie under the next

ground). Third, reference was made by Mr King to [31] of Sino Dragon's written submissions. For convenience let me set it out:

> The result is capricious and at worst discriminatory. It treats the Chinese email as conduct, yet treated as conduct it is inconsistent with the conduct of Mr Wang and Mr Li Dan also provided in statement and by video link to the arbitrators of conversations the next day regarding a mutually acceptable forbearance of the contract performance until Monday 27 1 2014 over the Chinese New Year weekend. It was unreasonable in such circumstances to treat the Chinese language email as repudiatory conduct, but the Chinese communications which preceded and succeeded it on the basis that the contract was ongoing and not repudiated as conduct having no consequence.

124 One can appreciate that what is raised in [31] is a merits issue, and a misconceived one at that. The arbitral tribunal assessed the Pang email as I have earlier indicated. It also separately analysed the conduct of Mr Xiaochun Wang and Mr Dan Li particularly as regards the events on 24 January 2014 (see [171] to [178], [184], [195(c)], [233] and [260] to [265] of the Final Award). After properly analysing the evidence, it did not find any "mutually acceptable forbearance of the contract performance". That involved no inconsistency. That involved no "failure to accord equal treatment". That involved no linguistic inconsistency that turned on the language used. That involved nothing more than a plain vanilla forensic analysis with the application of well accepted legal principles. The submission fails.

125 In my view the first ground is not made out.

GROUND 2 – EXCEEDING JURISDICTION BY FAILING TO CONDUCT THE REFERENCE CONFORMABLY TO PUBLIC POLICY, FAILING TO ACCORD EQUAL TREATMENT ETC (Originating Application at [3])

126 It is appropriate to again start by setting out Sino Dragon's contentions although they have not been well formulated. Sino Dragon contends that the Final Award should be set aside as without jurisdiction "on the grounds that the panel exceeded the arbitration agreement and their jurisdiction by failing to conduct the reference conformably to the public policy of the forum and the principle of equal treatment and/or use of a video-link facility to attempt the taking of evidence adversely affecting [Sino Dragon's] case and/or by failing to take all reasonable steps to receive and have regard to the evidence of Sino Dragon".

127 Sino Dragon has contended that it was unable to present its case because there was an inability to provide evidence by virtue of "the partial exclusion of witness[es] through technical faults causing confusion and hampering effective examination or mistranslation of evidence". It is said that this is a natural justice issue, which is said to be a matter of public

policy. Its central complaint turns on evidence given by its witnesses on a video link, which had technical difficulties and was replaced by even less satisfactory technology. It is said that the evidence was affected by an inability to properly present a case on a critical point, in this instance evidence going to whether or not there was a concluded agreement to vary the Contract of Sale.

128 Sino Dragon says the evidence was incomplete because of technical difficulties, and was arguably not the evidence which was in fact given, because of translation errors.

129 Sino Dragon contends that the arbitral tribunal did not properly receive the evidence that its witnesses Mr Dan Li and Mr Xiaochun Wang intended to give because of technical issues in the mode of communication. It is said that these difficulties hindered their ability to communicate and resulted in "effectively excluding and confusing them", including because of issues relating to translation.

130 Sino Dragon asserts that in light of the difficulties created by the video-link and associated technologies, the Final Award should be set aside. Further, it is said that Sino Dragon was not treated equally because although it was asserted that Mr Xiaochun Wang's written statement furnished proof of a concluded agreement to vary the contract "this was undermined, after [Noble Resources] sought to cross-examine him and Mr Dan Li at a time when it knew it was not feasible for them to come to Australia for the hearing". This proposition lacks coherence on its face.

131 As to the problems concerning translation, Sino Dragon accepts that it organised a registered interpreter. But it now seeks to run the point that its interpreter had only been recently qualified, and was not a level three interpreter. Accordingly it says that it suffered procedural unfairness through the deficiencies in translation.

132 Sino Dragon asserts that the arbitral tribunal's "premature determination as to the way in which it would assign blame for difficulties with the video link was symptomatic of the lack of procedural fairness accorded" to it. It says that to "pre-allocate 'risk' because of anticipated difficulties in communication (which may well be beyond the control of [Sino Dragon] and it is not asserted that it was within its control) is inherently unfair". This is not an entirely accurate description or characterisation of what occurred.

133 Sino Dragon asserts that the non-attendance of witnesses from China necessitating a video-link resulted from the inability of the witnesses to obtain visas.

134 Generally, Sino Dragon says that the unreliability of the video-link and the consequent effect on the attendance of its witnesses who were in China and their ability to give evidence and be properly heard is "not somehow made less of an issue because the applicant organised the link and the tribunal had pre-ordained the responsibility for that situation". I should say that the arbitral tribunal had not pre-ordained anything.

135 Generally, Sino Dragon contends that a "deficit in the ability to present one's case is a matter dealt with directly by the Article [sic], but it is also a natural justice issue". It is said that the Final Award was based upon evidence which was given under an inability of Sino Dragon to present its case through technical faults which were not of Sino Dragon's doing. It is also said that the Final Award is "in conflict with the public policy of this State" and should be set aside on this basis.

Chronology of events

136 Before analysing the various legal questions and the proper characterisation of what occurred, it is necessary to set out some relevant aspects of the chronology of events.

137 By email dated 25 November 2015, Noble Resources informed Sino Dragon that it required Mr Dan Li and Mr Xiaochun Wang to be available for cross-examination in the arbitration hearing commencing 7 December 2015. It may be said that this request was predictable and should have been anticipated by Sino Dragon given the significance of their evidence.

138 On 30 November 2015, a pre-trial conference was held between the arbitral tribunal, Noble Resources and Sino Dragon. During that pre-trial conference, counsel for Noble Resources submitted that Sino Dragon's witnesses ought to appear at the arbitral hearing in person and stated that Noble Resources would be put at a "forensic disadvantage" if those witnesses were permitted to give evidence by video-link, particularly if giving evidence via an interpreter. Sino Dragon opposed this submission and in fact requested that the arbitral tribunal permit its witnesses to give evidence by video-link.

139 The arbitral tribunal acceded to Sino Dragon's request, but stated that to the extent the presentation of Sino Dragon's evidence involved any difficulties caused by video-link, this would be at Sino Dragon's risk. This was not "pre-ordaining" anything and in any event the arbitral tribunal did not make any determination about the risk when it later eventuated because Sino Dragon made no complaint to it during or after the arbitration hearing. I accept of course that although the arbitral tribunal's statement, and indeed Sino Dragon's casual role

in the events that occurred, are relevant, they do not foreclose Sino Dragon's present challenge. The arbitral tribunal also instructed Sino Dragon to inform it and Noble Resources with respect to the procedures for the giving of evidence by video-link.

140 By email dated 1 December 2015, the arbitral tribunal provided the parties with an annotated agenda of the pre-trial conference, which summarised the outcomes of the conference of 30 November 2015. The annotated agenda confirmed that Sino Dragon was to be responsible for arranging the attendance of the witnesses by video-link.

141 By email dated 1 December 2015, Mr Jeh Coutinho on behalf of the arbitral tribunal informed the parties that the hearing venue management required Sino Dragon to provide the following details:

(a) the proposed date and time of the video-link;

(b) the dial in details; and

(c) the name and contact details of the person organising the video-link.

Mr Coutinho further requested that the above details be provided as soon as practicable, to provide the staff at the hearing venue an opportunity to test the video-link.

142 By email dated 4 December 2015, Mr Coutinho repeated his request to Sino Dragon to provide, as soon as possible, the following information:

(a) the proposed date and time of the video-link;

(b) the dial in details; and

(c) the name and contact details of the person organising the video-link in China.

143 By email dated 6 December 2015, Noble Resources requested Sino Dragon to confirm the time at which the video-conference appearances of Messrs Li and Wang had been scheduled for 7 December 2015.

144 By email of the same date, Sino Dragon stated that "video/wechat-conference appearances Messrs Li and Wang [sic] have been scheduled for tomorrow, from 2pm to 4pm 7 December"; it is interesting to note that Sino Dragon mentioned "wechat" in advance of the hearing. By a further email of the same date, Sino Dragon informed the arbitral tribunal that Ms Ma Zhao, a qualified interpreter, would attend the arbitration hearing.

145 I should note that at the pre-trial conference of 30 November 2015, the arbitral tribunal stated that, if any interpreter was required, Sino Dragon would need to arrange for the attendance of a qualified interpreter. In response, counsel for Sino Dragon stated that Sino Dragon would advise the arbitral tribunal and Noble Resources of the identity and qualifications of the interpreter. The annotated agenda of the pre-trial conference, provided to the parties by email dated 1 December 2015, recorded that Sino Dragon was to be responsible for the provision of an appropriately qualified, registered interpreter.

146 Further, I note that on 6 December 2015 Noble Resources requested Sino Dragon to ensure that Messrs Li and Wang had before them during their appearance at the arbitration hearing by video-link on 7 December 2015, copies of the following documents, which Noble Resources attached to its email:

(a) the Contract of Sale;

(b) email from Noble Resources to Sino Dragon dated 23 January 2014;

(c) email from Sino Dragon to Noble Resources dated 23 January 2014;

(d) letter from Noble Resources to Sino Dragon dated 24 January 2014;

(e) letter from Noble Resources to Sino Dragon dated 14 February 2014;

(f) letter from Noble Resources to Sino Dragon dated 17 February 2014

(g) letter from Noble Resources to Sino Dragon dated 24 February 2014;

(h) letter from Sino Dragon to Noble Resources dated 24 February 2014;

(i) letter from Noble Resources to Sino Dragon dated 26 February 2014;

(j) letter from Sino Dragon to Noble Resources dated 26 February 2014; and

(k) letter from Noble Resources to Sino Dragon dated 7 March 2014.

147 Further, by email dated 7 December 2015, Noble Resources requested Sino Dragon to arrange for Messrs Li and Wang to have before them, during their appearance at the arbitration hearing by video-link, copies of Sino Dragon's Statement of Response dated 17 February 2015 and Rejoinder dated 3 March 2015, each of which was attached to Noble Resources' email. According to the evidence filed before me, Messrs Li and Wang only had some of this material. Moreover, some of this had not been translated for them. This created difficulties for the witnesses when they were cross-examined (and also counsel for Noble Resources who was cross-examining). I should say that such difficulties were partly attributable to Sino Dragon and its lawyers.

148 The arbitration hearing occurred on 7 and 8 December 2015.

149 Mr Dan Li gave his evidence on 7 December 2015 and Mr Xiaochun Wang gave his evidence on 8 December 2015. There were considerable technical difficulties in the mode of communication and the quality of the interpretation. The arbitral tribunal was aware of this and took it into account. See its reasons at [130], [131] and [174] to [178] which it is convenient to set out:

> [130] Two other matters about the course of the hearing need to be noted. First, the Claimant, in an e-mail dated 25 November 2015, notified the Respondent that it required Mr Li and Mr Wang to be available for cross-examination by the Claimant. The Respondent stated that due to the inability of the witnesses to secure visas in time that neither Mr Li nor Mr Wang could attend the hearing in person but that both could be made available by videoconference. On the first day of the hearing, the Respondent endeavoured to facilitate Mr Li giving evidence by video-conference; however, for reasons that were not clear, the relevant links failed and the video-conferencing facility could not be used. At this stage, the Respondent suggested an alternative method of taking Mr Li's evidence by using Skype with the assistance of a computer. The Claimant objected to this, arguing that it was unsatisfactory to have to cross-examine witnesses about credit (based on contemporaneous documents) conducted by "*Chinese Skype with poor quality*" when the question of video-conferencing had been raised at the pre-hearing conference. The Claimant submitted that in these circumstances that the evidence should be excluded or that steps be taken by the Respondent to ensure that an appropriate video-link facility be made available. The Tribunal decided to proceed with the evidence, although noting the constraints, which counsel for the Claimant was under in conducting his cross-examination. Those constraints were increased when, due to further technical difficulties, the evidence of Mr Li had to be given in a split format: his picture being transmitted by the screen but his voice being heard by a telephone link. On the second day, the evidence of Mr Wang was given in a similar fashion although without the need for a separate telephone link. There were further difficulties when it became clear that neither witness had been provided with copies of the documents that the Claimant wished to cross-examine on. Given the highly unusual circumstances in which the evidence was given, the Tribunal, although admitting the evidence, has weighed the circumstances in which it was given and the difficulties that the Claimant encountered in cross-examination of the Respondent's witnesses.
>
> [131] Secondly, on the second day it became clear to the Tribunal and the parties that the interpreter who was undertaking the task of interpreting Mr Wang's evidence was struggling with interpreting his evidence into English. In order to resolve these difficulties, and in the absence of another accredited interpreter, the Tribunal suggested that Ms Wu, solicitor for the Respondent, interpret. Simultaneously, an interpreter engaged by the Claimant who was present at the hearing would follow the interpreting and identify any areas of disagreement with Ms Wu's interpreting. The parties agreed to proceed to deal with Mr Wang's evidence on this basis.

[…]

[174] At the hearing, as noted above, Mr Li gave evidence in highly unusual circumstances. The result was that the examination and cross-examination of Mr Li was carried out in a way that was quite unsatisfactory. It was often unclear whether Mr Li had heard or understood the question that was being put to him and he did not appear to have some of the documents about which the Claimant wished to cross-examine him. At one stage, it appeared to be the case that Mr Wang, the other witness relied on by the Respondent, was present in the same room as Mr Li whilst Mr Li was giving evidence. The other witness was asked to leave the room where Mr Li was giving evidence and did so. The Tribunal has taken these circumstances into account in considering the probative value of Mr Li's evidence.

[175] In response to questions from counsel for the Respondent, Mr Li stated that he was present when Mr Wang had the conversation with Mr Li Ming on 24 January 2014. In cross-examination that evidence was challenged on the basis that he had not mentioned this in his written statement and it was suggested to him that his knowledge of the conversation was based purely on what Mr Wang had told him. Mr Li denied this. The Tribunal is sceptical about this aspect of Mr Li's evidence: no explanation was provided for why he only raised this aspect of his evidence at the hearing. Furthermore, Mr Wang made no reference in either his written statement or his evidence to the fact that Mr Li was with him when the conversation occurred. Nor did Mr Wang give evidence that he had the conversation with Mr Li Ming on "speaker" (as Mr Li had done in order to explain how he had heard what Mr Li Ming was saying).

[176] The Tribunal weighed whether it was prepared to accept Mr Li's evidence on this point. However, it was not necessary to decide the point because counsel for the Claimant then questioned Mr Li on the basis that the conversation had occurred but not in the terms Mr Li gave evidence about. Mr Li's evidence was the same as Mr Wang's as to the contents of the conversation on 24 January 2014. During cross-examination, it was put to Mr Li that the conversation included reference to the three additional shipments. Mr Li could not recall this. He also denied that there had been discussion about the need for an L/C to be opened by 28 January 2014. However, he accepted that there was to be further discussion on 27 January 2014.

[177] As noted above, Mr Wang was also cross-examined in somewhat unusual circumstances. After Mr Wang finished giving his evidence, the Claimant confirmed that it had no difficulty with the interpreting of Mr Wang's evidence. It was put to Mr Wang by counsel for the Claimant that no agreement was reached with Mr Li Ming on 24 January. Mr Wang's evidence was that the price reduction had "almost been settled" and the letter of credit issue was also "almost settled". Mr Wang denied that there had been any discussion about three further shipments although he accepted that he was aware at the time of the conversation with Mr Li Ming that the offer of a price reduction from the Claimant was "with two conditions". Mr Wang denied the suggestion that the Claimant "*was only prepared to give you that price reduction if you were to pay back that reduced price over time through further shipments*"; Mr Wang's evidence was that the only discussion was about the terms of the letter of credit. Mr Wang also appeared to accept that

> any agreement would have to be put in writing when he stated that "*we have the agreement that we will further execute this matter on 27 January 2014*".
>
> [178] In cross-examination the Claimant did not contest that a conversation took place between Mr Wang and Mr Li Ming on the afternoon of 24 January 2014. The Tribunal finds that such a conversation did take place. The substance of the conversation as described by Mr Wang was left undisturbed in cross-examination. For that reason, the Tribunal accepts that Mr Wang and Mr Li Ming talked about a reduction in the price of the goods and the letter of credit. As to the other aspects of Mr Wang's evidence of the conversation, the Tribunal does not accept that there was a concluded agreement to vary the Contract on the terms suggested in Mr Wang's evidence. These findings are of some importance in relation to the Respondent's case about waiver and estoppel. Given this, the reasons for these findings are set out in more detail in the dispositive section of the award dealing with the Respondent's case on the legal significance of the conversation.
>
> (footnotes omitted)

150 At the time of the arbitration hearing, Sino Dragon took no objection to the procedure which had been adopted, nor did it seek an adjournment or to deal with the evidence of its witnesses in any other way. It acquiesced in the procedure that was adopted. Indeed, its acts and omissions were principally its cause.

151 Before me, Sino Dragon has now filed and relies upon a plethora of affidavit material in an attempt to demonstrate that the procedure adopted was unfair, that its witnesses, Mr Dan Li and Mr Xiaochun Wang (who were in China) were mistranslated and misunderstood and that it did not have a proper opportunity to present its case. Before proceeding further, I should say that the arbitral tribunal's recitation of the events set out above concerning the procedure adopted was not contradicted by Sino Dragon's evidence.

152 It is necessary to refer to some of this evidence:

(a) The solicitor for Sino Dragon, Shijing Zhang, gave evidence of the breakdown of the video-link facility. He gave evidence that at the arbitration hearing, the witnesses at Sino Dragon's office in China were unable to connect via video-link with the hearing room. An alternative mode was then used to examine the witnesses, which was "to use an Ipad connected through Wechat [sic], a video call method equivalent to Skype". But apparently WeChat's sound settings were not working. So Mr Wang and Mr Li were then examined and cross-examined through use of a telephone, with the WeChat video facilities turned on. But as a result, two different media were used to communicate. I accept that this led to some level of dislocation between sound and sight. He also

gave evidence that the interpreter organised by Sino Dragon was only a level 2 registered interpreter. On the second day of the arbitration hearing Ms Xiqiong "Carol" Wu, a paralegal employed by him, took over as an interpreter.

(b) Mr Zhang also deposed in [14] of his affidavit affirmed 23 August 2016:

> I spoke with the witnesses shortly after the hearing dates in 7 and 8 December 2015:
>
> (a) Witness Mr Dan Li said to me: "I was extremely confused during the taking of the evidence. I could not see the arbitrators nor the lawyer asking me questions. I also could not hear the questions properly, and some questions I answered what I understood had been asked. I am not sure my evidence was fully received".
>
> (b) Witness Mr Xiaochun Wang said to me: "I was confused by the interpreter at first and later during the taking of evidence. I could not see the arbitrators nor the lawyer asking me questions. I also could not hear all the questions properly. I don't know if my evidence was received properly as I attempted my best to give it."

(c) Stopping at this point, I would note that none of these problems raised by the witnesses with Mr Zhang were raised with the arbitral tribunal at any stage after they had given their evidence, even though Mr Zhang had, apparently, been put on notice. Moreover, Sino Dragon had the transcript of the evidence given but raised no problems with the arbitral tribunal at any time concerning any mistranslation. Sino Dragon also knew that the arbitral tribunal was acting upon the transcript and its assumed accuracy that it had before them. But nothing was said. These issues were only raised for the first time after the Final Award had been handed down against Sino Dragon. I am left to speculate why it was that Sino Dragon only raised these issues for the first time after the Final Award was handed down. I did not find Mr King's purported justification to have any substance. Indeed during closing address, Mr King said to the arbitral tribunal (at T165 lines 33 to 42):

> In contrast, we would say, respectfully, gentlemen, that Mr Li Dan and Mr Wang gave their evidence clearly. Allowing for the difficulties of communication, both of them nonetheless answered questions, some of which were not easy for my learned friend, clearly.
>
> And in essence each of them supported their own statements. In my respectful submission, you would accept their evidence, particularly in circumstances where either Mr Li Ming nor Mr Dar nor Ms Chung

> were called to contradict the case of Sino on the facts.

What am I to make of this statement? Sino Dragon's own counsel perceived and said to the arbitral tribunal that, notwithstanding the technical difficulties, the evidence of his witnesses had come out clearly and consistently with their evidence in chief. Sino Dragon's present challenge and its assertions of substantial injustice because of misunderstanding or mistranslation are puzzling to say the least. The perception and submission at the time seems to be to the opposite effect. Let me continue with the evidence before me.

(d) Mr Dan Li and Mr Xiaochun Wang provided affidavits setting out their position. Both of them said that they could not organise visas in time to come to Australia, but no detailed evidence was given as to the steps taken or why visas could not be expedited. Further, each of them deposed to problems in giving evidence. Mr Li said he was confused by a number of questions and could not hear clearly, there were other problems and he didn't have all documents before him that he was cross-examined on. Mr Wang gave similar evidence. I should say that in the hearing before me I received some of their evidence only provisionally, but I am prepared to accept it absolutely as evidence of the version of events that they would have given. Mr Wang at [25] of his affidavit affirmed 31 August 2016 also deposed to the following which I will return to later:

> At one stage I recall that I was asked a question during my evidence about the agreement on 24 January 2014 with Mr Ming Li to vary the contract for sale. I am informed that the Tribunal understood my answer describing what happened as meaning that there was no agreement between myself and Mr Ming Li on that day, because I said that there was 'almost' an agreement between Mr Ming Li and I. This is incorrect. Ming Li called me on Friday 24 January 2014. We reached an agreement as to a variation as I stated in my evidence. I informed the Tribunal, as was the fact according to my evidence of events which occurred on 24 January 2014, that Ming Li and I had reached an agreement to vary the contract as to the price and that we had almost finalised that varied price ie $114 or $115 per tonne, which was to be decided finally between us on Monday 27 January 2014. I relied on our conversation in assuming that Noble would pursue this agreement and that no termination of the contract would occur before a finalisation of the price on 27 January 2014.

(e) Mr Zhengqing Liu, described as "the director of the Legal Department" of Sino Dragon, was in attendance at the arbitration hearing. In his affidavit

affirmed 31 August 2016, he deposed to problems with the interpreter that Sino Dragon had retained. At [7] to [13] he deposed as follows:

> On 7 December 2015, an interpreter interpreted for the examination of Mr Li.
>
> Mr Li appeared to have difficulty hearing and understanding what was being asked during the examination and was unsure of the documents that were being referred to during the examination.
>
> Shortly after the hearing, I called Mr Li. Shijing Zhang was also present as I put the phone on loudspeaker. Mr Li said to Terry [ie Shijing Zhang] and me that: "I was extremely confused while presenting my evidence. I could not see either the arbitrators or the lawyer who was asking the questions and could not hear the questions clearly. I answered what I understood had been asked but I am not sure my evidence was understood correctly".
>
> On 8 December 2015, the same Wechat and phone setup was used for the examination of Mr Xiaochun Wang. As with the previous day, there was also difficulty with the connection, affecting the sound and video reception and affecting the evidence that was presented to the tribunal.
>
> A different interpreter to the one from the previous day interpreted for the examination of Mr Xiaochun Wang. However, the interpreter had to stop interpreting because she could not understand the questions being asked and therefore could not adequately interpret for Mr Wang.
>
> Ms Carol Wu was used instead to interpret for the tribunal and Mr Wang. However I understand that she was not a qualified interpreter.
>
> After the hearing, I gave Mr Wang a phone call. Terry was also present and the conversation was again conducted with the loudspeaker on. Mr Wang told us that: "I could not hear properly and could not see who was talking. I could only see the interpreter, so I didn't know who was speaking at all time. I was confused and did not understand what was being asked so I am concerned that my evidence may have been misunderstood."

(f) Ms Xiqiong Wu, at the time a paralegal employed by Sino Dragon's solicitors, was in attendance during the arbitration hearing. She deposed to the difficulties with the technology and explained how she took over as an interpreter on 8 December 2015. At [6] of her affidavit affirmed on 30 August 2016, she said the following:

> During the Examination and Cross-examination, Mr Xiaochun Wang never said, according to his evidence which I interpreted, that there was no agreement on the reduction of the price.

(g) In addition to the foregoing evidence, on 9 September 2016, Sino Dragon filed and served an affidavit of Jiajia Chen affirmed 6 September 2016. She was a

nationally accredited translator who was only very recently given the tapes of the arbitration hearing and asked to "check the interpretation of the testimonies of Dan Li and Xiaochun Wang" against the original transcript. As she said, the "instruction was to transcribe the Chinese of the parts of the interpretation that I did not agree with or considered incorrect and to offer my translation". The affidavit was filed and served late; I had allowed for reply affidavits to be filed and served by 7 September 2016 and there is no good reason why Ms Chen's affidavit could not have been filed and served on 6 September 2016. Noble Resources did not have time to engage its own expert. But more underwhelming was the fact that Ms Chen was not available for cross-examination before me. Indeed, Sino Dragon had not even seen fit to allow for that possibility. At one stage it was even suggested that she had left for China. At the time of the hearing I was unclear as to where she was. Ms Chen's affidavit was unclear as to which parts of the original translation were said to be in error and which parts were said to involve a different but reasonably open interpretation. I received her evidence in these unsatisfactory circumstances, but made a direction under s 136 of the *Evidence Act 1995* (Cth) to the effect that such an assessment was to be made on the face of the marked up transcript without the need for cross-examination. It is appropriate to make some observations on the marked up transcript annexed to Ms Chen's affidavit. First, there were few changes, which gives me confidence in the translation/interpretation task that was originally engaged in before the arbitral tribunal. Indeed Mr King's statement to the arbitral tribunal in closing address, that I have set out earlier, also fortifies my confidence. Moreover, some of the changes shown on the marked up transcript seem to be more matters of nuanced interpretation. Second, there is little if any change to the substance of Mr Dan Li's evidence in relation to relevant events on 23 and 24 January 2014 in terms of how that was translated originally before the arbitral tribunal. Third, in relation to Mr Xiaochun Wang's evidence, similar observations can be made. But there are more changes in terms of whether the parties "agreed" or "almost agreed" on a position as at 24 January 2014. If one considers pages 11 to 15 of annexure "JC-02" to the affidavit of Ms Chen, Mr Wang, taking into account Ms Chen's changes, vacillates between "agreed" and "almost agreed" in terms of what was discussed between the

parties on 24 January 2014. The passages at pages 14 and 15 are illuminating. The witness fluctuates between "agreed" and "almost agreed", and also accepts that details of shipments had not been settled or discussed and that the price had not been finalised. In the circumstances, let it be assumed that the marked up transcript had been before the arbitral tribunal. I do not consider there to have been any realistic possibility that the arbitral tribunal's findings and conclusions would have been different. I will elaborate on this later. Generally, the original transcript of Mr Li's and Mr Wang's evidence is not shown to be unreliable. Whilst initially there were difficulties with the witnesses' understanding of questions and access to documents, those difficulties were substantially resolved and the evidence was received.

Analysis

153 Let me begin with some preliminary observations.

154 First, the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce "real unfairness" or "real practical injustice".

155 Second, the difficulties with the evidence by video conference and then telephone evidence could have been avoided by Sino Dragon in the following ways:

(a) First, Sino Dragon could have made the video-link arrangements through a recognised and experienced provider and could have had the link tested in advance to confirm it was operational. There is no explanation for why those steps were not taken by Sino Dragon. This has particular significance in relation to the evidence given on the second day of the arbitration hearing, in light of the difficulties experienced on the first day of the hearing.

(b) Second, if it was thought sufficiently important, arrangements should have been made for the witnesses to travel to Australia. That process could have been started before the procedural hearing on 30 November 2015. Alternatively, an application could have been made to delay the witnesses' evidence for a few days until visas could be obtained.

(c) Third, a short adjournment could have been sought by Sino Dragon at the time of the arbitration hearing to engage a different video conference provider and to test the connection in advance of the evidence being adduced.

(d) Fourth, shortly after 8 December 2015, Sino Dragon could have sought to relist the arbitration to reopen its case or to recall the witnesses. After all, the perceived difficulty with Mr Li's and Mr Wang's evidence was drawn to Mr Zhang's attention on or shortly after the arbitration hearing on 7 and 8 December 2015. Instead, Sino Dragon's approach was to take no step to raise the issue with the arbitral tribunal until *after* the Final Award was delivered.

156 Let me now address the substantive issues.

157 First, Sino Dragon submits that it was "unable to present" its case within the meaning of article 34(2)(a)(ii)". As part of this contention, Sino Dragon asserts that it was not "treated with equality" and not given "a full opportunity of presenting" its case within the meaning of article 18 of the UNCITRAL Model Law. I would note that the operation of article 18 is modified by s 18C of the Act such that a party is taken to have been given a full opportunity if it was given a *reasonable* opportunity to present its case. Article 18 is non-derogable, such that the waiver provision of article 4 does not operate. Nevertheless, the conduct of the party who complains of a lack of procedural fairness or a lack of equality is relevant to any asserted inability to present its case or any asserted lack of opportunity in that respect.

158 Second, and relatedly, Sino Dragon seeks to invoke article 34(2)(a)(iv) in asserting that the arbitral procedure was not in accordance with cl 39.2 of the Contract of Sale. It will be recalled that cl 39.2 effectively incorporates by reference the prevailing UNCITRAL Arbitration Rules. Relevantly for present purposes, article 17(1) of the UNCITRAL Arbitration Rules is analogous to article 18 of the UNCITRAL Model Law as modified by s 18C of the Act. Interestingly, the waiver provision in article 32 of the UNCITRAL Arbitration Rules can apply to article 17, but for present purposes I will proceed on the basis that no waiver argument can be made, particularly given the proviso appearing in the second half of article 34(2)(a)(iv) of the UNCITRAL Model Law.

159 Third and relatedly, Sino Dragon seeks to invoke article 34(2)(b)(ii) to the effect that the Final Award is "in conflict with the public policy of this State" because of the lack of procedural fairness. Relevantly, contrary to public policy for present purposes includes "a breach of the rules of natural justice" (see s 19(b) of the Act). For present purposes, I will

take this to embrace the asserted lack of equality point and the point concerning the asserted failure to give Sino Dragon a reasonable opportunity to present its case. I will assume that the *concepts* in article 18 may also inform "public policy" under article 34(2)(b)(ii).

160 Stripping away this multi-dimensional conceptual framework, there are two principal but related questions to consider. Was there a failure to give Sino Dragon a reasonable opportunity to present its case? Was there a lack of equality of treatment? I do not think so.

161 First, the mode used for the evidence of Sino Dragon's witnesses was that chosen by Sino Dragon. Indeed, this was over the objection to some extent of Noble Resources.

162 Second, if there were technical difficulties in the mode used, this was partly caused by Sino Dragon's acts or omissions. Moreover, when technical difficulties occurred, Sino Dragon was nevertheless prepared to continue with the hearing.

163 Third, the evidence of Sino Dragon's witnesses was hardly wholly or partially excluded by the technical difficulties.

164 Fourth, on any view, there were no difficulties with the evidence in chief of Sino Dragon and accordingly the presentation of its case in that respect. It was in a written form from both witnesses and tendered. The technical difficulties arose in cross-examination. And if anything, they caused more problems for cross-examining counsel for Noble Resources. Indeed, it might be said for Noble Resources that it was put in a more unequal and less favourable position by reason of the mode and technical difficulties than Sino Dragon. It was in cross-examination of Messrs Li and Wang that *Noble Resources* was seeking to "present" its case, not Sino Dragon.

165 Fifth, Mr King did not perceive at the time of closing address in the arbitration hearing any lack of reasonable opportunity to present Sino Dragon's case. His statement to the arbitral tribunal is at odds with such a suggestion. Moreover, no issue was raised with the arbitral tribunal then or thereafter about such a lack of opportunity, although Sino Dragon's witnesses appeared to have misgivings after the event. I am entitled to infer from such conduct and the absence of complaint that those charged with running the case for Sino Dragon did not perceive any lack of reasonable opportunity. Such an inference does, together with the other evidence, assist in assessing whether, objectively, there was a lack of reasonable opportunity or a lack of equal treatment.

166 Sixth, I cannot see how it can sensibly be said that if the "corrected" transcript marked up by Ms Chen had been before the arbitral tribunal that it would have made any difference to the result (*Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145). The evidence of Mr Dan Li did not change. As for the evidence of Mr Xiaochun Wang, it still vacillated between "agreed" and "almost agreed" in relation to the communication on 24 January 2014. One also notes that his witness statement filed in the arbitration referred to "agreed". The arbitral tribunal would have still had the vacillation before it (even on the "corrected" transcript) as well as the fact that essential matters had *not* been agreed. I do not see how the arbitral tribunal's reasoning at [177], [178] and [260] to [265] could realistically have been different. I accept that Sino Dragon does not have to prove that there would have been a different result, but it must show a reasonable possibility of some difference. It is appropriate to set out [263] to [265] of the Final Award (I have already set out [177] and [178]):

> The substance of Mr Wang's evidence was that the Claimant and Respondent agreed to reduce the price of the cargo to $114 and to vary the credit terms so that payment could be effected by issuing an L/C for sixty million yuan but with the Respondent paying for the "*relevant bank interest arisen from issuing the Letter of Credit by our company*". However, in cross-examination Mr Wang agreed that the price was not agreed but "almost agreed" and that this discussion occurred in the context of discussion about the full L/ C being opened by 28 January 2014. Mr Wang also agreed that any agreement that may have been reached on 24 January 2014 would have to be reduced to writing. It was also put to Mr Wang that the Claimant was being asked to provide a price reduction and that such a price reduction would only be offered in circumstances where the difference would be paid back through further shipments and that there was no other practical way for the Respondent to pay the Claimant other than through further shipments. Mr Wang did not agree with this.
>
> Mr Wang accepted that the "without prejudice" offer from the Claimant was sent to his e-mail address; however, he said that he had not read it. Mr Dan Li read it. He did concede that when he spoke with Mr Li Ming he was aware that there was a proposal from the Claimant for a price reduction from US$119 to US$115 along with the need for an L/C to be opened by 28 January 2014.
>
> Given Mr Wang's acceptance that no agreement was reached on the price reduction or the terms of any variation to the L/C this suggests to the Tribunal that his evidence mischaracterises the conversation as an agreement. The Tribunal does not accept that there was an agreement. It finds that the conversation involved a discussion of potential terms for a resolution of the Respondent's problem but no firm commitment on the part of the Claimant. Given that the Tribunal finds that there was no agreement reached in the conversation, it is unnecessary to make any further finding as to whether or not there was a discussion about further shipments.
>
> (footnotes omitted)

167 Seventh, Sino Dragon made reference to [175] of the Final Award and that the adverse credit comment against Mr Dan Li arose from the technical difficulties. This is patently incorrect.

The adverse comment arose from a deficiency in Mr Li's written statement. Sino Dragon now seeks to plug that hole with [3] and [4] of Mr Li's affidavit affirmed on 23 August 2016. That is impermissible. The failure to give that evidence was not causally related to any technical deficiency.

168 Eighth, Sino Dragon has also sought to recast Mr Xiaochun Wang's evidence in chief (see his affidavit affirmed on 31 August 2016 at [4]). That attempt fails for similar reasons. As to his affidavit at [25], that takes the matter no further than the "corrected" transcript marked up by Ms Chen. But when one reads that transcript, there was still vacillation between "agreed" and "almost agreed". Moreover, whatever the label given by the witness, it does not answer the point identified by the arbitral tribunal at [265].

169 Ninth, as to a mistranslation, it needs to be demonstrated that this led to "a material unfairness, that is, relating to a matter of significance or potential significance for the applicant's case" (*SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at [66] per Robertson J, albeit in an entirely different setting). His Honour also went on to say at [67] to [72]:

> Attention must be given to the course the hearing took as well as to the ultimate reasoning of the decision-maker. A causative impact on the decision-maker's ultimate conclusion would usually be sufficient to establish a lack of procedural fairness, but may not be necessary. Even where a causative impact is being examined, the court on judicial review should consider whether the mistranslation or non-translation had or could have had significance if the applicant's words had not been mistranslated or, in the case of a non-translation, had been translated.
>
> The significance of the error or errors is not to be assessed by reference only to the reasoning in fact used by the decision-maker because the decision-maker was, by definition, unaware of the mistranslation or non-translation, singular or plural and because the process is central.
>
> If a mistranslation or non-translation could have affected the outcome then, depending on the circumstances, that may be sufficient to establish denial of procedural fairness.
>
> It will often be important to distinguish between a case where the mistranslation or non-translation is frequent or continuous, on the one hand, and a case, such as the present, where the errors are intermittent.
>
> In the former case it will be easier to conclude that there has been a denial of procedural fairness because, considered overall, the process has miscarried. The cause may be incompetence of the translator in English or in the particular non-English language but the cause is of very little relevance in my opinion.
>
> In the latter case, where the errors are intermittent, care must be taken to evaluate the overall fairness of the hearing as well as the individual instances in order to assess the quality of the process and whether it amounts to the applicant having had a

reasonable opportunity to be heard and to present his or her claim.

170 It must also not be forgotten that there is no such thing as a "perfect" interpretation and that an interpreter is using expertise and an evaluative judgment in order to give a close correspondence of meaning (see *BZAID v Minister for Immigration and Border Protection* [2016] FCA 508 at [52] per Edelman J). It may be sufficient if the interpretation conveys the substance of what was said (*SZRMQ* at [9] per Allsop CJ).

171 On balance, in my view, the original translation was adequate and no material unfairness has been caused to Sino Dragon by the arbitral tribunal's reliance on it.

172 Further on this aspect, I note that in relation to the interpreter that had been engaged for the hearing by Sino Dragon, Ms Ma Zhao, Mr Zhang solicitor for Sino Dragon expressly represented to Noble Resources and the arbitral tribunal by an email sent on 6 December 2015 at 7.45pm that the interpreter was a "qualified interpreter in Australia".

173 Finally, on the mistranslation question Noble Resources contended that it was not embraced by ground 2 and that Sino Dragon was out of time to raise it. There is force in this submission, but on balance ground 2 is sufficiently broad to embrace it.

174 Tenth, as I have said and as the Full Federal Court in *TCL Air Conditioner* at [55] and [111] explains, where a denial of natural justice is asserted and the public policy limb of article 34(2)(b)(ii) is sought to be invoked, there must be demonstrated "real unfairness" or "real practical injustice". This has not been shown in the present case.

175 Further, as the Full Federal Court in *TCL Air Conditioner* at [154] noted:

> Thirdly, the notion of prejudice or unfairness does not involve re-running the arbitration and quantifying the causal effect of the breach of some rule. The task of the Court in assessing prejudice or unfairness or practical injustice is not to require proof of a different result: see generally the discussion in *LW Infrastructure* at [50]-[54]. *If a party has been denied a hearing on an issue, for instance, it is relevant to enquire whether, in a real and not fanciful way, that could reasonably have made a difference*. It should be recalled that the proper framework of analysis for the [International Arbitration Act] is the setting aside or non-recognition or enforcement of an international commercial arbitration. In that context, it is essential to demonstrate *real unfairness* or *real practical injustice*. (my emphasis)

176 And relatedly at [169] it said:

> The appellant argued that even so-called minor or technical breaches of the rules of natural justice would suffice for the setting aside or non-recognition or non-enforcement of an international commercial arbitration award, unless the Court could exclude any possibility of a different result being reached. This was said to flow from the lack of any reference to prejudice in the [International Arbitration Act] and

> the unqualified statement of Parliament in effect that any breach of the rules of natural justice was contrary to Australian public policy. This should be rejected for the reasons that we have given. It confuses and misstates the relevant conception of natural justice as one divorced from unfairness or practical injustice, it disembodies the words of Parliament from their statutory context, and it would impute to Parliament an intention to interfere with arbitral awards in a manner that would undermine fatally the facilitation and encouragement of international commercial arbitration in Australia.

177 Eleventh, in the present case, the article 34(2)(a)(ii) question and the article 34(2)(b)(ii) limb overlap for reasons analogous to those explained by Croft J in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 at [26] where his Honour said:

> The "unable to present its case" and "public policy" grounds were argued together and as alternatives to one another in these proceedings. In my view, and for the reasons that follow, there is no practical difference between these two grounds in the way in which they relate to natural justice and procedural fairness in the circumstances of this case. Nevertheless, it is important to note that these grounds are conceptually different. The "public policy" ground is directed towards contraventions of "fundamental principles of justice and morality" of Victoria. By contrast, the "unable to present its case" ground focuses on whether the party seeking to set aside the award has been accorded procedural fairness. As the following reasons show, this point may be a distinction without a difference in the present context because the requirement that parties in arbitrations be accorded procedural fairness or natural justice within the meaning of those terms in the relevant legislative context is part of the public policy of Victoria, and for that matter, Australia. In accordance with the approach adopted by the parties then, I will consider the "unable to present its case" ground and the "public policy" ground together.
>
> (footnotes omitted)

178 Finally, article 18 and the review powers under article 34 of the UNCITRAL Model Law are not intended to apply to unfairness caused by a party's own conduct including forensic or strategic decisions (*Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 at [73] per Lax J, applied by Croft J in *Amasya Enterprises* at [29]).

179 In summary I reject this ground however it is put in terms of the permutations and combinations as identified in [157] to [160] above.

GROUND 3 – EXCEEDING OR WITHOUT JURISDICTION BY REASON THAT TWO ARBITRATORS HAD A CONFLICT OF INTEREST OR THE MODE OF APPOINTMENT WAS DEFECTIVE (Originating Application at [4])

180 Sino Dragon contends that the Final Award should be set aside "on the grounds that the panel exceeded the arbitration agreement and their jurisdiction in that the panel was comprised of two arbitrators interested in the result the subject of the arbitration agreement and/or who had

a conflict or apparent conflict and/or because the mode of appointment required by [the] UNCITRAL model law was not complied with".

181 Sino Dragon contends that I should set aside the Final Award because the "composition of the Tribunal did not accord with the agreement of the parties or 'this Law' ie the UNCITRAL Rules [sic] or the public policy of 'this State' ie of Australia". It is said that the power to set aside the Final Award on these grounds is provided under articles 34(2)(a)(iv) and 34(2)(b)(ii) of the UNCITRAL Model Law.

182 Sino Dragon asserts that two issues arise being, first, the "failure of due process" in the appointment of Messrs Bonnell and Hoyle in contravention of article 34(2)(a)(iv) of the UNCITRAL Model Law and second, the appearance of bias of the three arbitrators and of Messrs Bonnell and Hoyle in particular under the Australian standards of public policy (article 34(2)(b)(ii)). It is said that there is a question of construction that is relevant to the latter point, ie whether articles 34(2)(a)(iv) and 34(2)(b)(ii) are true alternatives offering different standards, which is apparently Sino Dragon's position. I should say at this point that whatever standard is used, Sino Dragon's challenge fails.

183 Sino Dragon says that the appointing authority did not consider the substance of Sino Dragon's complaints in either his rulings of 8 May 2015 and 17 November 2015, and failed to consider at all the operation of article 34(2)(b)(ii) of the UNCITRAL Model Law. I should note at this point that article 34(2)(b)(ii) and the test therein has little to do with the appointing authority who was acting under the relevant provisions of the UNCITRAL Arbitration Rules (see in particular articles 11 to 13); note also articles 12 and 13 of the UNCITRAL Model Law. I would also say at this point that there is no substance to the suggestion that the appointing authority failed to consider the submissions properly before him.

184 Further, it is said that the Final Award did not accord with the agreement of Sino Dragon because "by a default appointment not in conformity with the agreed Rules all three arbitrators that were appointed were associated with the Respondent or had an actual or apparent conflict of interest with their duty as impartial and independent arbitrators".

185 Sino Dragon challenges the appointment of Messrs Bonnell and Hoyle on the grounds that each had an interest in the Final Award as Mr Bonnell is a partner of KWM, "the current and

former lawyers for [Noble Resources] in both China and Australia, and [Mr Hoyle is] a former associate partner".

186 Sino Dragon says in its written submissions (at [82] to [86]) the following, which is said to support its position of "an appearance of a conflict of interest and duty":

> [82] According to KWM Website article on 1 11 2013, its "new global organisational structure" has an International Management Committee, which is the overall governing body of KWM and is responsible for strategy, integration, governance, and other major decisions. The Executive Committee is responsible for operational decisions regarding KWM network and integration of the member firms. The Global Practice areas and co-ordinators are responsible for coordinating business plans into a global strategy for their practice team. It could be seen that KWM is a global organisation that each member of KWM will serve the interest of the global practice of KWM.
>
> [83] In the present case, according to Annexure XW7 at pages 5-15 the Amended Second Affidavit of Ms WU filed on 14 September 2015 [Tab 89 AB Vol 3], King & Wood Mallesons is registered as a partnership in Australia (KWM Australia) and P.R.China (KWM China). According to Annexure XW8 at pages 16-18, there is a partner named Cheng Ke (Kevin) representing Noble Group Ltd as a client, which wholly owns the Claimant as a subsidiary.
>
> [84] Even if KWM China and KWM Australia are separate legal entities with no obligations to each other [which is not the case here the partners clearly being fiduciaries], as members in a verein structure KWM International, the goal of the merger of KWM global organisation is to ensure KWM Australia get access to the market in China and maximise profits within KWM global organisation but not to sabotage the interest of one member from the other.
>
> [85] According to the evidence, Mr Bonnell is a partner of King and Wood.
>
> [86] Mallesons ['KWM'] is a large and successful international law firm [Mr Zhang page 133-4]. It has a clear financial interest in its clientele and clients where ever they may be as that is the nature of international businesses, with ongoing general prosperity and immediate profitability issues. There are others who are partners and act for Noble Group Ltd or its subsidiaries. Noble Group Ltd is a client describing itself as No 56 on the list of top 500 companies in the world. Noble is a successful very large international trading company, of which the Claimant is a wholly owned subsidiary [Mr Zhang page 136]. Although Noble does not instruct KWM in the reference at the present time, Mr Bonnell, as a partner in KWM Australia, would not sabotage or be seen to disregard the interest of its peer firm KWM China, especially whose client is a successful international trading company with subsidiaries all over the world.

187 I have set out verbatim what Sino Dragon has asserted, as it is preferable to do so rather than to attempt to paraphrase some of these disjointed and conceptually misconceived propositions.

188 Further, Sino Dragon submits that the appointing authority was in error to rule that Sino Dragon had not objected to the appointment of Mr Bonnell in time. I disagree, but this hardly

now matters. I am prepared to entertain Sino Dragon's challenge to the Final Award on the bias ground as brought within articles 34(2)(a)(iv) and 34(2)(b)(ii) even though it might be said that an appropriate course may have been to separately challenge the appointing authority's ruling of 17 November 2015, which was never separately done under article 13(3).

189 Further, Sino Dragon says that the terms of article 9 of the UNCITRAL Arbitration Rules were not complied with in relation to the appointment of Mr Hoyle, which was not effective or agreed to by him until 19 November 2014. It is said that the result was that Messrs Mehigan and Bonnell then "excluded" Sino Dragon from having a say, under the procedure set out in the UNCITRAL Arbitration Rules, in the appointment of the presiding arbitrator. In this way, so it is said, "they finessed [Sino Dragon] out of the room, when the serious decisions were then and later to be made". This aspect of the complaint has no substance. It was for the two arbitrators to appoint the presiding arbitrator which they properly did.

190 Further, in relation to article 34(2)(b)(ii) of the UNCITRAL Model Law, Sino Dragon says that the public policy of Australia includes the "laws of natural justice" and that these give rise to different considerations affecting the composition of the arbitral tribunal and the conduct of the arbitration. It is said that article 34(2)(b)(ii) is different both in language and effect to the ground in article 34(2)(a)(iv), which is said to be more focussed on the process of appointment and not the essential core of the rules of natural justice.

Analysis

191 First, I accept that the "bias rule" is an aspect of procedural fairness and it therefore falls within article 34(2)(b)(ii) as part of the public policy of the forum. That requirement for the purposes of the arbitration was prescribed by article 12(2) and requires justifiable doubts as to the impartiality or independence of an arbitrator. That in turn brings within it the "real danger" test (see s 18A of the Act). I reject the notion that "public policy" in article 34(2)(b)(ii) only brings within it the lower *Ebner* test. Such a result would be anomalous. The concept of "public policy" must, in the context of an international commercial arbitration, be informed by other provisions of the UNCITRAL Model Law and the Act. I also accept for present purposes, that article 34(2)(a)(iv) can be invoked as cl 39.2 of the Contract of Sale incorporates relevant provisions of the UNCITRAL Arbitration Rules dealing with the appointment and impartiality of arbitrators. But when one works this through, one is back to the "real danger" test.

192 Second, in respect of Mr Bonnell, and applying the "real danger" test, there are no justifiable doubts as to his impartiality or independence and the decisions of the appointing authority were correct. In this regard:

(a) Mr Bonnell is a partner of KWM Australia, and he is not in partnership with KWM China. Further, neither Mr Bonnell nor any of his partners has Noble Resources as a client. Further, there is no evidence of a connection between the different Australian and Chinese partnerships of KWM, beyond an association of name and marketing under a "Swiss Verein" structure. This is not sufficient to create a conflict of interest or doubts about impartiality.

(b) The vague connections between KWM China and Mr Bonnell are insufficient to create a real danger of bias. Mr Bonnell is an experienced professional arbitrator and adjunct professor at Sydney University. He was admitted to practice in 1989, becoming a partner in 1999. He does not now act, and has never acted for Noble Resources and there was no reasonable basis for supposing he would prefer Noble Resources over Sino Dragon.

(c) No probative evidence has been called by Sino Dragon to question Mr Bonnell's statement (see his email to the appointing authority and the parties on 8 October 2014 in evidence) that KWM Australia is financially separate from KWM China.

(d) Neither Mr Bonnell nor KWM Australia have done any legal work for Noble Resources or any connected companies.

193 At one stage, Mr King sought to assert that there was evidence suggesting a financial relationship between KWM China and KWM Australia. This was surprising. No such material had been put at any stage during the arbitral process and Sino Dragon did not challenge in that process any assertions made by Mr Bonnell about the non-existence of that suggested financial relationship. All that was in evidence was material showing the "Swiss Verein" structure; Sino Dragon's downloaded internet material added little. But even if the firms were integrated, this does not satisfy any "real danger" test or the lower threshold *Ebner* test. The fact is that Mr Bonnell does not act for and has not acted for Noble Resources or any related company and neither has KWM Australia. Moreover, KWM China has only acted for a related company in an unrelated matter. There is no basis for any disqualification.

194 Moreover, one can in one sense calibrate these conclusions against the IBA Guidelines on Conflicts of Interest in International Arbitration, which the appointing authority made reference to. At most the matters raised by Sino Dragon against Mr Bonnell fell into the "Green List" as matters not requiring disclosure let alone disqualification; see Part I, clauses (1), (2), (3), (6) and (7) and Part II paragraph 7 and clauses 4.1 and 4.2 (pages 25 and 26).

195 Sino Dragon has referred to various cases, but none is an appropriate analogue for the present scenario and do not support disqualification.

196 Third, the asserted connections with Mr Hoyle are even more tenuous. Mr Hoyle has not worked for KWM since 2009 and he is at the NSW Bar. Further, he has no connection with KWM China or Noble Resources. Further, as to any association between Mr Hoyle and Mr Bonnell, the appointing authority at [7.17] to [7.22] disposed of this ground in his ruling of 17 November 2015. I agree with his reasons.

197 Fourth and generally, in determining the content of "justifiable doubts" as to the "impartiality" or "independence" of an arbitrator under article 12(2) the test under the Act is not the same as the test at common law. The different test for arbitration is expressly provided for in s 18A of the Act. The explanatory memorandum to the Bill introducing that provision at [85] to [92] referred to the test stated in *R v Gough* [1993] AC 646 at 670. The *R v Gough* test incorporates notions of "real danger of bias" from the perspective of the Court as opposed to merely that of a reasonable lay person. I proceed on the basis that s 18A also incorporates the different perspective as well.

198 Fifth, even if one adopted the common law test propounded by Sino Dragon, no fair-minded lay observer would perceive any possibility of bias. The relevant test is whether a fair-minded lay observer might reasonably apprehend that the arbitrator might not bring an impartial mind to the relevant adjudication and determination (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] to [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ). And the question is "one of possibility (real and not remote), not probability". But the present case goes nowhere near satisfying even that test. Indeed, even if that test were to be applied, Sino Dragon has an even weaker case than the stronger but unsuccessful challenge to the arbitrator in *Gascor v Ellicott* [1997] 1 VR 332.

199 This ground fails.

CONCLUSION

200 For the foregoing reasons I dismissed Sino Dragon's originating application.

I certify that the preceding two hundred (200) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:

Dated: 16 September 2016