

ReResolution: In Brief



Farm Debt Mediation Bill (No 2) Select Committee Report Released

The Farm Debt Mediation Bill was introduced in June 2019. On Wednesday, 30 October, the Select Committee released its report recommending the Bill be passed with amendments.

The Bill would establish a mediation scheme for resolving farm debt disputes. If the Bill is passed, creditors with security interests in farm property will not be able to take enforcement action in relation to farm debt without first offering mediation to farmers.

Mediation should provide a more fair, equitable and timely resolution of farm debt disputes. The discussion it facilitates may reveal numerous options to resolving debt disputes and so prevent enforcement action in situations where it is avoidable.

The New Zealand Bankers' Association supports the legislation, which is in line with the "pro-active and cooperative approach" they say their banks take in dealing with distressed agribusiness customers.

A similar scheme which has been implemented in Australia has already proved very effective.

China's International Commercial Court: on Arbitration

The First International Commercial Court of the Supreme People's Court of China (CICC) – established in June 2018 – issued its first rulings in September. The decisions have implications for arbitration, namely in that they uphold the principle of severability for arbitration agreements, under People's Republic of China (PRC) law at least.

The dispute

The parties to the dispute were negotiating a sale of shares where Luck Treat Limited (the Seller) was to sell shares in Newpower Enterprise Inc. (the Target) to Zhongyuan Cheng Commercial Investment Holdings Co Ltd (the Purchaser).

In 2017, the parties negotiated by email correspondence the terms of the sale-purchase agreement and an additional debt settlement agreement they intended to enter into (under this debt settlement agreement, the purchaser was to pay certain debts owed by the target and the seller's affiliates). While the Seller and the Target were incorporated in the British Virgin Islands, the Purchaser was a PRC company. The draft agreements stated that PRC law would govern the sale. In May 2017, the Seller indicated to the Purchaser that they would be required to apply for certain governmental approval, as the purchase of the shares would constitute an overseas investment under the applicable PRC laws. Subsequently, the parties did not proceed to sign the agreements.

When the Purchaser commenced an arbitration proceeding against the Seller and its affiliates in April 2018, the latter sought a confirmation from the Intermediate People's Court of Shenzhen that the arbitration agreements were not valid, because the underlying contract was not formed.

The decision

The CICC – who took the case over – determined in line with PRC law that the arbitration agreement was, in fact, valid. Article 19(1) of the relevant PRC

Arbitration Law provides that an arbitration agreement shall exist independently, and that any invalidity of the underlying contract shall not affect the validity of the arbitration agreement. Further, the Interpretation of the Supreme People's Court specifies at section 10(2) that if parties reach an agreement for arbitration when entering into a contract, the validity of the agreement shall not be impacted even where the underlying contract is not formed.

Having regard to email communications between the Seller and Purchaser, the CICC determined that an arbitration agreement had been reached in this case. Accordingly, it was held to be valid despite the fact the underlying contracts had not been signed. These first rulings will interest many who wish to note the approach the CICC takes to its cases.



Council succeeds in referring construction dispute to arbitration

In a dispute between The Rintoul Group Ltd (Rintoul) and the Far North District Council (the Council,) the Court has stayed proceedings and referred the dispute to arbitration.

The construction project from which the dispute arose included a culvert replacement on West Coast Rd and slip repairs on Awaroa Rd, Broadwood Rd and Mangakahia Rd which the Council had contracted Rintoul to complete.

This case commenced when Rintoul filed an application for summary judgment against the Council with respect to retention monies for the construction project in the District Court. The Council, in response, filed an appearance under protest and sought a stay of proceedings and a referral to arbitration.

Both parties relied on *Zurich Australian Insurance Limited v Cognition Education Limited*, a case which also concerned an application for summary judgment and a competing application for a referral to arbitration. In that case, it was found that the Court was required to grant a stay of proceedings where there were competing applications for summary judgment and a referral to arbitration, as per the Arbitration Act 1996. The exception to this rule, according to Article 8(1), Schedule 1 of the Act, is where the Court finds that the arbitration agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

Rintoul submitted that there was no dispute and therefore that the application for a stay could not succeed.

The Court found, however, that although "there is very little if in fact any dispute about the essential background facts relating to this proceeding.... there is dispute about the applicability of the summary judgment procedure, the Arbitration Act 1996 and the provisions of the Construction Contracts Act 2002."

Accordingly, the Court issued an order staying the plaintiff's proceedings and referred the dispute to arbitration.

The District Court decision has now been upheld on appeal by Rintoul to the High Court.

ReSolution: In Brief



China responds to Vietnam's arbitration comments

On Wednesday, Vietnamese Deputy Foreign Minister Le Hoai Trung raised the possibility of arbitration to address the territorial dispute between China and Vietnam.

Briefly: The Dispute

China and Vietnam have long been in dispute over territory in the Nam Con Son Basin, a 35,000-square-mile energy rich area in the South China Sea. The islands concerned – the Paracel and Spratly Islands – fall within 200 nautical miles of Vietnam's coastline which, by international standards, is within Vietnam's exclusive economic zone. China also claims the Islands. Tension over the territory escalated in July, when Beijing sent a ship to conduct seismic surveying in the area for several weeks, despite Vietnam's protests.

Vietnam's Stance

At a government-organised conference on Wednesday 6 November, the Vietnamese Deputy Foreign Minister raised the possibility of other methods of dispute resolution. Trung said, if negotiations with China did not yield solutions, Hanoi would look to arbitration and other measures. "We know that these measures include fact-finding, mediation, conciliation, negotiation, arbitration and litigation measures," he said. He then added, "The UN Charter and UNCLOS 1982 have sufficient mechanisms for us to apply those measures."

China's Stance

A spokesperson for the Chinese Ministry of Foreign Affairs, Geng Shuang, said in response to Vietnam's comments, that Vietnam "needs to avoid taking actions that may complicate matters or undermine peace and stability in the South China Sea as well as our bilateral relations." China is a major trading partner of Vietnam. Shuang also said the dispute was a case of "occupation of China's Nansha Islands by Vietnam and other countries concerned."

Previous Arbitration

Other countries which have territory disputes with China in the South China Sea include Brunei, Malaysia, Taiwan and the Philippines. In 2016, The Permanent Court of Arbitration in The Hague ruled that China's claim over most of the area was invalid. The case was filed by the Philippines and awarded in their favour, but China largely ignored the decision.

This is an interesting case for the enforcement of arbitration awards. While the United States and many of its allies insisted China comply with the binding award, China maintained that the arbitral proceedings were invalid.

If Vietnam chose to pursue litigation or bring a claim in arbitration against China, it would increase the strain on their relationship. Bill Hayton, a South China Sea expert from the Chatham House said, "It would have major political ramifications for the Vietnam-China relationship, but maybe that's the only thing left for Vietnam."

