

Chinese company told to pay up by New York court

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A US appeals court has rejected a petition by a Chinese coal-blending company to overturn an ICDR award issued by three-well known New York arbitrators in a dispute over financing.



On 19 January, the US Court of Appeals for the Second Circuit emphasised the “extremely deferential standard of review” given to arbitral awards and ordered China’s Petrocom to pay the US\$2.9 million award owed to its US financial adviser, Westminster Securities.

The dispute stemmed from four agreements executed between 2005 and 2007 in which Petrocom hired Westminster as its placement agent for debt and equity market offerings. Three of the agreements contained a tail provision that, for up to two years after their termination, Westminster should be compensated for any “financing in [Petrocom]” that it had helped to facilitate. They also contained a clause ensuring that the tail provision would

survive the termination and expiry of the agreements.

By 2008, the parties had fallen out over Westminster's compensation entitlements, and Petrocom commenced arbitration in New York under the AAA/ ICDR rules in line with an arbitration clause in some of the agreements. A panel comprising three New York international arbitration practitioners, John Fellas of Hughes Hubbard & Reed, Paul Friedland of White & Case and David W Rivkin of Debevoise & Plimpton, handed down the US\$2.9 million award in Westminster's favour in September 2010.

Petrocom challenged the award on the basis that the tribunal had manifestly disregarded the law when it compensated Westminster for financing transactions that had taken place after the expiry of the agreement, interpreting the tail provision in conjunction with the survival clause. In fact the tail provision only applied in the event of termination of the agreements and not after their expiry, it claimed.

It also argued that the tribunal should not have upheld an "unjust enrichment" claim by Westminster on the grounds that it had helped Petrocom's CEO and chairman, Howard Au, to sell some personal shares in the company by introducing buyers. Petrocom said this claim was precluded by New York's Statute of Frauds, since Westminster had not entered a written contract entitling it to a "finder's fee".

The lower court denied Petrocom's challenge in full, noting that the arbitrators' choice to reconcile the tail provision and survival clause was "rational" in the context of imperfectly drafted contracts and that the arbitration clause was worded broadly enough to encompass the unjust enrichment claim.

Affirming the lower court judgment, the Second Circuit said that Petrocom had failed to make the Statute of Frauds argument explicitly enough before the arbitrators to be able to demonstrate manifest disregard of New York contract law later in court.

The company presented the issue only as a brief point: "Petrocom has not demonstrated that this was enough to alert the arbitrators to what it now calls [a] governing legal principle," the court said.

Brian Neville, a partner at Lax & Neville and counsel to Westminster, says the arbitration was "straightforward" and Petrocom's attempts to vacate the award "nearly frivolous".

"I think the Statute of Frauds argument was nothing more than one of those 'throw everything into the mix and see if anything sticks' types of defences that was not really part of the arbitration at all and then used desperately in the appeal," he says.

Counsel to Petrocom declined to comment.

In the AAA/ ICDR arbitration

Tribunal

**John Fellas
Paul Friedland
David W Rivkin**

Counsel to Westminster Securities

Lax & Neville
Partners **Brian Neville** and **Barry Lax** with associate **Brian Maddox** in New York

Counsel to Petrocom

Jones Day
Partner **Todd Geremia** and associate **Nicholas Haddad** at Jones Day

In the US Court of Appeals for the Second Circuit

Judges

**Richard Wesley
Peter Hall
Stefan Underhill**

Counsel to Westminster Securities

Lax & Neville
Partners **Brian Neville** and **Barry Lax** with associate **Raquel Terrigno** in New York

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