

Judicial Support of Arbitration*

The Hon. Chief Justice James Allsop AO
Chief Justice of the Federal Court of Australia
and
The Hon. Justice Clyde Croft**
Supreme Court of Victoria

* A paper presented at the APRAG Tenth Anniversary Conference – Melbourne 2014

** Judge in charge of a Commercial List and the Arbitration List for the Commercial Court of the Supreme Court of Victoria.

Introduction

There has been a very significant increase in international arbitrations being heard in the Asia-Pacific region over the past few decades.¹ In part, this is attributable to the rapid development and industrialisation of Asian economies which leads to an increase in business dealings, hence the potential for disputes. A critical factor in the mix which determines whether a particular jurisdiction is attractive or otherwise for international arbitration is the balance that has been struck in that jurisdiction between court support and court intervention in the arbitration process. With court support and minimum intervention, arbitration has the potential to flourish, but if the balance is struck differently, then parties will avoid that jurisdiction as an arbitral seat.

Role of the courts

It has been observed by Commentators that:²

“The courts have an important role to play through their intervention at various stages of the arbitral process. In the absence of such intervention the fair resolution of disputes before an impartial tribunal, without unnecessary delay or expense, may not be achieved. Whether court intervention is viewed as supporting or interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such intervention. Much will also depend upon the relative importance of the competing concepts of party autonomy and due process. Consequently the question of whether intervention supports or interferes with the arbitral process is often hotly debated.

There is a view, particularly amongst those involved with international arbitration, that the involvement of courts in the arbitral process generally constitutes unwanted interference. But the reality is that arbitration would not survive without the courts. Indeed, as Lord Mustill observed, it is only a court with coercive powers that could rescue an arbitration which is in danger of foundering.”

The UNCITRAL Model Law (whether in its original form or as revised in 2006) has been adopted by the majority of the significant arbitral jurisdictions in the Asia-Pacific region.³ Under both the original and revised Model Law, there are a number of provisions which

¹ See Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) at 33-43.

² John Lurie, “Court Intervention in Arbitration: Support or Interference” (2010) 76(3) *The International Journal of Arbitration, Mediation and Dispute Management* 447.

³ Countries which have adopted the 2006 Model Law include: Australia and its states; Hong Kong; Mauritius; and New Zealand. Countries which have adopted the 1985 Model Law include: Bangladesh; Cambodia; India; Japan; Macao; Malaysia; Oman; Philippines; Republic of Korea; Singapore (but with subsequent amendments to the underlying legislation); Sri Lanka; and Thailand. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

empower courts to assist and, if thought necessary, to intervene in aspects of the arbitral process.

Importantly, Article 5 expressly prohibits any court intervention beyond the provisions of the Model Law:

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

This is an important provision and has been interpreted strictly.⁴ It sets out the boundaries of judicial intervention, which include the following:

- Staying court proceedings when there is a valid arbitration agreement governing the parties’ dispute: Article 8.
- Providing parties with interim measures of protection: Articles 9 and 17J.⁵
- Assisting with the appointment of an arbitral tribunal: Articles 11, 13 and 14.
- Determining the jurisdiction of an arbitral tribunal: Article 16.
- Recognition and enforcement of interim measures issued by an arbitral tribunal subject to a number of grounds for resistance: Articles 17H and 17I.⁶
- Assisting in taking evidence: Article 27.
- Determining whether an arbitral award can be set aside: Article 34.
- Recognising and enforcing an arbitral award: Articles 35 and 36.

It is not the purpose of this paper to examine these species of court support and court intervention comprehensively. Rather, we will focus on a number of important Australian cases in the area of challenges and enforcement.

⁴ See, for example, *teleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd* [2011] NSWSC 1365 at [53].

⁵ Noting that Art 17J is only available under the 2006 Model Law.

⁶ Noting that these articles are only available under the 2006 Model Law.

Challenges against and enforcement of international arbitral awards

General

Most states in the Asia-Pacific region have adopted the Model Law provisions, including the provisions of Articles 34, 35 and 36, which provide for very limited grounds for setting aside or refusing recognition or enforcement of an international arbitral award.⁷

Australia

Background

Following the recent widespread changes made by Australian legislatures to both international arbitration legislation⁸ and domestic arbitration legislation,⁹ Australian courts are moving to a significantly more positive, pro-arbitration, position. For example, the IAA was amended so that a court may *only* refuse to enforce a foreign award in accordance with the narrow grounds listed under sub-sections 8(5) and (7) of the IAA.¹⁰ Those provisions read as follows:

- “(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
- (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;
 - (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

⁷ The only exceptions are those contained in the provisions of Indonesia’s Arbitration and Dispute Resolution Act 1999 (Art. 70) and China’s Arbitration Law (Arts. 58 and 70). The restrictive grounds of Art 34 of the Model Law is similarly reflected in most other states, though noting that in certain countries the grounds for setting aside an international arbitral award can be narrower (such as France and Switzerland) or wide (such as England).

⁸ See *International Arbitration Act 1974* (Cth).

⁹ See the *Uniform Commercial Arbitration Acts*.

¹⁰ Additionally, it should also be noted that the term “public policy”, which has a history of being broadly defined by local courts, is now limited by section 8(7A) of the IAA to scenarios where: (a) the making of the 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 award. This ensures there is some level of predictability with respect to arguments about award which are not in accordance with Australia’s “public policy”.

- (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;
- (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

...

- (7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
 - (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
 - (b) to enforce the award would be contrary to public policy.
- (7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:
 - (a) the making of the 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 award.”

Pro-arbitration approach of courts

In a Federal Court of Australia decision, *ESCO Corporation v Bradken Resources Pty Ltd*,¹¹ Foster J interpreted these provisions in accordance with international norms:¹²

“...a foreign arbitral award is to be enforced in Australia unless one of the grounds in s 8(5) of the IAA is made out by the party against whom the award is sought to be enforced or unless the public policy of Australia requires that the award not be enforced. The pro-enforcement bias of the Convention and its domestic surrogate, the IAA, requires that this Court weigh very carefully all relevant factors when considering whether to adjourn a proceeding pursuant to s 8(8) of the IAA. The discretion must be exercised against the obligation of the Court to pay due regard to the objects of the IAA and the spirit and intentment of the Convention.”

¹¹ [2011] FCA 905.

¹² *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905 at [85].

The pro-arbitration approach has been highlighted by a number of judges speaking and writing extra-curially. For example, Chief Justice Marilyn Warren of the Supreme Court of Victoria has said:¹³

“In arbitration, the directive role of the Court needs to be minimised. The focus instead turns to ways in which the Court can support the arbitration process and enforce arbitral awards in a timely and cost effective manner.”

Additionally, Justice James Allsop¹⁴ observed at CIArb’s Asia Pacific Conference in 2011:¹⁵

“The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support...In terms of intervention [by the judiciary], restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the courts.”

TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia

Despite the support shown for arbitration, the legal framework establishing international and domestic arbitration was potentially threatened in the very recent and most significant case before the High Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.¹⁶ This case arose from an application by a party seeking to enforce an Australian arbitration award rendered in its favour in the Federal Court of Australia. The unsuccessful party sought to challenge the enforcement of the award. When the Federal Court rejected the challenge, the unsuccessful party sought special leave from the High Court to appeal the Federal Court decision on that the basis the legislative framework of international arbitration in Australia was not constitutionally valid.

The facts of the case are relatively simple and are set out in the joint-judgments of Hayne, Crennan, Kiefel and Bell JJ:¹⁷

“61. Under the agreement, TCL granted Castel the exclusive right to sell in Australia air conditioners manufactured by TCL. In July 2008 Castel submitted to arbitration in Australia a dispute arising from contractual claims against TCL, seeking damages.

¹³ Chief Justice Marilyn Warren, “The Victorian Supreme Court’s Perspective on Arbitration” (Speech delivered at the International Commercial Arbitration Conference, Melbourne, December 4, 2009).

¹⁴ Now the Chief Justice of the Federal Court of Australia.

¹⁵ Justice James Allsop, “International Arbitration and the Courts: the Australian approach” in CIArb’s Asia Pacific Conference 2011 – *Investment & Innovation: International Dispute Resolution in the Asia Pacific* (2011), 1 and 7.

¹⁶ [2013] HCA 5.

¹⁷ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at [61]-[63].

Following a hearing, on 23 December 2010 an arbitral tribunal constituted by Dr Gavan Griffith AO QC, the Honourable Alan Goldberg AO and Mr Peter Riordan SC ("the tribunal") made an award which upheld Castel's claims and required TCL to pay Castel a sum of \$3,369,351. On 27 January 2011, the tribunal made a further award that TCL pay Castel \$732,500 in respect of the costs of arbitration.

62. TCL failed to pay Castel the amounts owing under the arbitral awards. On 18 March 2011, Castel applied to the Federal Court to enforce the arbitral awards. TCL opposed their enforcement on the ground that the Federal Court lacked jurisdiction and on the alternative ground that, if the Federal Court did have jurisdiction, the arbitral awards should not be enforced as to do so would be contrary to public policy because of an alleged breach of the rules of natural justice by the tribunal. TCL also applied in separate proceedings in the Federal Court to set aside the arbitral awards on the basis that they were contrary to public policy because of that alleged breach of the rules of natural justice.
63. On 23 January 2012, Murphy J ruled that the Federal Court had jurisdiction under the IA Act to enforce the arbitral awards. Subsequently, his Honour rejected TCL's claims of a breach of the rules of natural justice by the tribunal."

TCL's contention rested upon the adoption of Articles 35 and 36 of the Model Law in the IAA.¹⁸ As discussed above, these articles effectively require a court to enforce an international award unless enforcement of the award falls within the narrowly defined exceptions. A court is not permitted to refuse enforcement of an international award on the basis that the award, on its face, contains an error of law. TCL argued that the requirement under the IAA was incompatible with the *Commonwealth of Australia Constitution Act* ("Australian Constitution"). Chapter III of the Australian Constitution specifically provides that "[t]he judicial power of the Commonwealth shall be vested...in federal courts", which includes the Federal Court.

TCL's first argument was that section 16 of the IAA (which gave force to Articles 5, 6, 8 and 35 of the Model Law), together with section 7 and Part III of the IAA, were constitutionally invalid as they were inconsistent with the requirements in Chapter III of the Australian Constitution that Australian courts exercise independent judicial power. TCL contended that the relevant provisions of the IAA sought to remove this independence, and that enforcement of the award in the manner envisaged by the IAA meant that the Federal Court was exercising judicial power without any independent judicial process. Consequently, courts would be required to give "*judicial imprimatur*" to an award despite its legal flaws. The High Court rejected this argument; unanimously holding that arbitral power is not judicial power. In other words, judicial power operates regardless of the parties' consent whereas arbitral power

¹⁸ The IAA gives effect to both the Model Law (as adopted in 2006) and the New York Convention.

is dependent on it. Thus, in enforcing an arbitral award, a court is merely enforcing an agreement between the parties.

TCL's second argument was that the IAA imbues arbitrators with Commonwealth judicial power, which is not compatible with Chapter III of the Australian Constitution. Again, after carefully exploring the differences between judicial and arbitral power, the High Court rejected the argument.

The High Court's unanimous decision was welcomed by the Australian arbitration community; indeed, the Attorneys-General of four Australian states appeared (as well as the Australian Centre for International Commercial Arbitration, the Institute of Arbitrations and Mediators Australia and the Chartered Institute of Arbitrators (Australia), arguing for the constitutional validity of the IAA. The proceeding had very much hung like the "Sword of Damocles" over the recent efforts of the Australian government and the arbitration stakeholders to promote arbitration in Australia. The strong unanimous and pro-arbitration findings of the High Court (consisting of six justices) confirm that Australia sits well within international standards and norms for the enforcement of awards. It also reinforces the legislative measures taken in recent times to position Australia as a pro-arbitration jurisdiction.

Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd

A further example of an Australian decision supportive of international arbitration and the effective enforcement of awards is *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd*¹⁹ where Foster J of the Federal Court of Australia made a declaration that an arbitration award rendered in Uganda and in favour of a Ugandan company ("UTL") and against an Australian company ("Hi-Tech").

Hi-Tech sought to resist the enforcement of the award on a number of grounds under the IAA, arguing that the award contained an error of law, on the basis the arbitrator had miscalculated the quantum of damages, and that enforcement would be contrary to public policy under section 8(7)(b) of the IAA.²⁰ Foster J rejected the arguments and held that it

¹⁹ [2011] FCA 131.

²⁰ This provision reflects Art V(2)(b) of the NY Convention.

was not contrary to public policy for a Court to enforce an award without having to re-examine the merits of the award.²¹

“Section 8(5) of the Act does not permit a party to a foreign award to resist enforcement of that award on such a ground. Nor is it against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. **The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.**” (emphasis added)

His Honour compared the respective approaches taken by Australian and American courts. He noted that:²²

“127 In the United States, the courts have generally regarded the public policy ground for non-enforcement as one to be sparingly applied. It has not been seen as giving a wide discretion to refuse to enforce an award which otherwise meets the definition of foreign arbitral award under the Convention.

128 An example of this approach is *Parsons & Whittemore Overseas Co, Inc v Société Générale De L’Industrie Du Papier* 508 F 2d 969 (2d Cir 1974). In that case, at 974, the Court said that:

We conclude, therefore, that the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.

129 Other courts in the United States have held that there is a pro-enforcement bias informing the Convention (eg *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 at 306 (2004).

130 A more conservative approach has sometimes been taken in Australia (see eg *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428–432).”

Foster J also cited the decision of *Corvetina Technology Ltd v Clough Engineering Ltd*²³ where McDougall J took a very broad interpretation of the enforcement provisions of the IAA:²⁴

“18. It was suggested in the course of argument that if I did not accede to the plaintiff’s notice of motion then, in substance, it would send a warning signal to those who wish to enforce international arbitrations in Australia. Again, I do not agree. **The very point of provisions such as s 8(7)(b) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the inquiry that is required will be limited**

²¹ *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [126].

²² *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [127]-[130].

²³ (2004) 183 FLR 317.

²⁴ *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317 at [18].

and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion, which is expressly referred to it, simply because of some “signal” that this might send to people who engage in arbitrations under the Act. There is, as the cases have recognised, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy. The resolution of that conflict, in my judgment, should be undertaken at a final hearing and not on an interlocutory application.” (emphasis added)

After considering these cases, his Honour expressed the view that the enforcement provisions ought to be given a narrow interpretation:²⁵

“132 Whether or not, in 2004, there was a general discretion in the Court to refuse to enforce a foreign award which was brought to the Court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains. Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in s 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases. The principles articulated in those cases sit more comfortably with the purposes of the Convention and the objects of the Act. To the extent that McDougall J might be thought to have taken a different approach, I would respectfully disagree with him.

133 The complaint in the present case is that the assessment of general damages in the Award is excessive because the arbitrator failed to consider the costs and expenses that would have to be expended by UTL in generating the gross income which he found was likely to be earned. This is quintessentially the type of complaint which ought not be allowed to be raised as a reason for refusing to enforce a foreign award. The time for Hi-Tech to have addressed this matter was during the arbitration proceedings in accordance with the timetable laid down by the arbitrator. It chose not to do so at that time. It cannot do so now. As the Court in *Karaha Bodas* also said at 306:

Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.”

Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd

More recently, in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*,²⁶ Foster J of the Federal Court of Australia, again, was asked to consider an application to enforce an international award under the IAA. The principal issue in this proceeding was

²⁵ *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [132]-[133].
²⁶ [2012] FCA 696.

whether the respondent was a party to the arbitration agreement and whether there was a sufficient ground to prevent enforcement of the award.

During the arbitral hearing, which was conducted under the auspices of the London Court of International Arbitration, the respondent argued that they were misdescribed under the relevant charterparty. The arbitrator did not accept the argument and made a first award to that effect (“First Award”); an award which was not challenged. Following the making of the First Award, the arbitrator was notified that the respondent did not intend to defend the arbitration. The arbitrator then closed submissions and proceeded to consider the material for the final award, which he made in favour of the applicant. The respondent subsequently sought to resist the enforcement of the final award in Australia on the grounds that it was not a party to the arbitration agreement having regard to the misdescription in the charterparty. Foster J rejected the respondent’s argument for a number of reasons, one of which was that the arbitrator had, in the First Award, found that the respondent was the relevant party referred to in the charterparty. Under section 67 of the English *Arbitration Act* 1996, the respondent had a limited period of time to appeal the award, which it chose not to do. Given the respondent’s failure to challenge the First Award at this stage, his Honour found that the issue had been determined and ought not to be considered at the enforcement stage. Foster J said:

“102 ... A party who has unsuccessfully challenged the arbitrator’s jurisdiction before the arbitrator may apply to the Court for an order overturning the arbitrator’s decision as to his own jurisdiction (s 67) but must do so within 28 days of the date of the award. In the present case, no such challenge was made within that timeframe, or at all. The first Award cannot now be challenged under English law and is therefore determinative of the point at issue.”

The position reached by Foster J would suggest that a party which fails to challenge an award on a specific point within the jurisdiction of the courts at the seat of the arbitration cannot then seek to rely on that point in resisting enforcement in later enforcement proceedings – at the very least in Australia. His Honour did not make any comment as to the position had the respondent unsuccessfully challenged the First Award – though that the recent decision of *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd*²⁷ certainly sheds some light on this topic.”

²⁷ *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109.

Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)

In *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)*,²⁸ Traxys Europe SA (“Traxys”) had obtained an award in its favour and against Balaji Coke Industry Pty Ltd (“BCI”) to an amount in excess of USD\$3 million in relation to a contractual dispute.

After the award had been made, the parties took various independent steps either to have the award set aside or enforced. In early July 2011 BCI sought to have the award set aside by the Court of the District Judge at Alipore in the South District of India (“Indian District Court”). The Indian District Court refused to grant BCI an interim stay; however, on appeal, the High Court of Kolkata (“Indian High Court”), on an *ex parte* basis, restrained Traxys from enforcing the award. Traxys did not have any involvement in these proceedings. On the other side of the world, the English Commercial Court allowed Traxys to enforce the Award as well as granting an interim injunction restraining BCI from taking further steps in the Indian District Court. BCI were not involved in the English Commercial Court proceedings and did not take steps to challenge the award in England.

Traxys then made an application in the Federal Court of Australia, *inter alia*, to have the award recognised and enforced in Australia pursuant to the IAA. Foster J found that, for the purposes of IAA and *Federal Court Rules* 2011, Traxys had complied with the procedural requirements by producing a certified copy of the award and the arbitration agreement, and that the award had been made pursuant to the arbitration agreement. BCI, however, sought to resist the application on three grounds. BCI first argued that no judicial act was required for a foreign award to become binding as a judgment of the Court and that it became such a judgment the moment any attempt was made to enforce the award. Foster J did not accept BCI’s interpretation of the IAA:²⁹

“72 ...Section 8(3) should, therefore, be interpreted to mean: Subject to Pt II of the IAA, a foreign award (as defined in the IAA), may be enforced in the Federal Court of Australia as it would be if it were a judgment or order of this Court. That is to say, such an award is not, and is not deemed to be, by dint of the operation of s 8(3) alone, a judgment or order of this Court. Steps have to be taken to render it such a judgment or order. But, once those steps have been taken, the terms of the decision embodied in the award become a judgment or order of this Court. That judgment or order must reflect the Award and cannot differ in any material way from the terms thereof.”

²⁸ [2012] FCA 276.

²⁹ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [72].

His Honour considered the *Federal Court Act 1976* (Cth) and the requirements for the exercise of judicial power before any remedy could be pursued.³⁰

“75 ...

The Constitutional requirement for this court to be seised of a controversy which must be quelled before it can be regarded as exercising the judicial power of the Commonwealth can only satisfactorily be met when a party seeks to enforce a foreign award pursuant to s 8(3) of the IAA (assuming that that provision is a valid law of the Parliament) if the Court gives effect to its decision as to the enforcement of that award by directing the entry of a judgment or by making an order in the terms of the award or by dismissing the application for such relief on one or more of the grounds specified in s 8(5) or s 8(7) of the IAA. Either way, there must be a judicial determination of the question whether the Award is to be enforced or whether enforcement is to be refused.”

Foster J concluded that this meant there could be no “deemed” judgments under the IAA.

BCI then submitted that an award could not be enforced if the award debtor did not have assets in the relevant jurisdiction. Foster J also rejected this argument and concluded that, for the purposes of the IAA, there is no prerequisite to establish proof of assets in the jurisdiction for the rendering of a judgment or the making of an order enforcing an award:³¹

“82 There is nothing in the IAA that, as a matter of law, prevents an Australian court from directing the entry of judgment or the making of an order in the terms of the relevant award if there is evidence which proves that, at the time such a judgment is entered or such an order is made, there may be or, even, definitely are, no assets within Australia against which execution might be levied.

83 The ordinary entitlement of a successful party in litigation to a judgment is a fundamental entitlement and is not dependent upon that party proving to the satisfaction of the court that there are likely to be assets available to the judgment creditor at any particular time against which execution might be levied. The litigious process which culminates in the entry of judgment or the making of an order and the process of levying execution in order to obtain satisfaction in respect of that judgment or order are quite separate processes.

84 A judgment creditor is entitled to levy execution against assets which come into the jurisdiction after the judgment is entered or which did not even exist at the time judgment was entered.”

BCI’s third argument was that enforcement of the award would be contrary to public policy because it would be futile given Traxys’ inability to establish that BCI had any assets in Australia. BCI further noted that there was an unfinalised application to set the award aside in India and an interim injunction in place in that jurisdiction restraining Traxys from

³⁰ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [75].

³¹ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [82]-[84].

enforcing the award. Foster J said, with reference to academic commentary,³² that the public policy exception to the enforcement regime provided for by section 8(7) of the IAA had the potential to provide “a broad loophole for refusing enforcement”.³³ Continuing, his Honour said:³⁴

“90 Clearly the pro-enforcement bias of the Convention, as reflected in the IAA, requires that the public policy ground for refusing enforcement not be allowed to be used as an escape route for a defaulting award debtor. That ground should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the enforcement of foreign arbitral awards embodied in the Convention and in the IAA. As previously observed, arbitration facilitates international trade and commerce by providing an efficient and certain dispute resolution process to commercial parties. If the enforcement of awards is to be subjected to the vagaries of the entire domestic public policy of the enforcement jurisdiction, there is the potential to lose all of the benefits of certainty and efficiency that arbitration provides and which international traders seek.”

Foster J considered the critical issue with respect to notions of “public policy”. Making reference to the New York Convention, Foster J said:³⁵

“94 Article V(2)(b) of the Convention makes clear that, under the Convention, it is the public policy of the enforcement state which matters. There is no express reference in the Convention to any concept of international or transnational public policy. Having regard to s 2D and s 39(2) of the IAA, s 8(7)(b) should be interpreted in a manner which is consistent with Art V(2)(b) of the Convention. For this reason, s 8(7)(b) should be interpreted as requiring the Court to consider the public policy of Australia when the public policy ground of refusal is invoked by an award debtor.

95 What then is the scope of the public policy which must be considered? Is it the entire domestic public policy of Australia or a more refined concept? The expression is not defined in the Convention, in the UNCITRAL Model Law or in the IAA. Nonetheless, some assistance as to its meaning is provided by the examples of matters which would definitely be contrary to public policy which are specified in s 8(7A) of the IAA. The matters covered by s 8(7A) are matters which most fair-minded thinking persons would regard as obvious reasons for refusing to enforce a foreign award.”

After considering the authorities,³⁶ Foster J ultimately concluded that in the circumstances of the case enforcement of the award would not be contrary to the public policy.³⁷

³² See Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008) at 218-9.

³³ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [89].

³⁴ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [90].

³⁵ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [94]-[95].

³⁶ See *Hebei Import and Export Corporation v Polytek Engineering Co. Ltd* [1999] HKCFA, *Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier (RAKTA)* 508 F 2d 969 (2d Cir 1974) and *Corventina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317 and also referring to his Honour's own decision in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415.

“105 Thus, in my view, the scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state. This view is consistent with the language of s 8(7), the terms of s 8(7A), the text of Art V(2) of the [New York] Convention, the fundamental objects of the Convention and the objects of the IAA. This approach also ensures that due respect is given to Convention-based awards as an aspect of international comity in our interconnected and globalised world which, after all, are the product of freely negotiated arbitration agreements entered into between relatively sophisticated parties.”

The importance of this decision lies in the way in which Foster J analysed and emphasised the purpose of the IAA provisions as being directed to the application and implementation of the New York Convention and its pro-enforcement provisions contained in the Australian IAA. It follows that any infelicity in the drafting of the IAA should not be taken to stand in the way of the application of the New York Convention according to its terms as understood internationally.

Eopply New Energy Technology Co Ltd v EP Solar

In the decision *Eopply New Energy Technology Co Ltd v EP Solar*,³⁸ Eopply New Energy Co Ltd (“Eopply”), the award creditor sought to have a CIETAC (Shanghai Sub-Commission) award enforced against EP Solar (“EP”). Prior to the hearing of the application, Eopply was informed that liquidators had been appointed over EP for the purposes of winding up. The liquidators did not oppose Eopply’s claim or leave for Eopply to proceed. Under section 500(2) of the *Corporations Act 2001* (Cth), where there has been the passing of a resolution for voluntary winding up of a company, no action or other civil proceeding can proceed against that company, except where the court grants leave upon imposed conditions. Foster J gave consideration to various factors in determining whether to exercise the Court’s discretion.³⁹ Although his Honour had some concern about the lack of evidence as to the financial position of EP for the purpose of making an assessment whether

³⁷ *Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [105].

³⁸ [2013] FCA 356.

³⁹ *Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356 at [22].

Eopply could in factor recover any part of an amount awarded to it, there were considerations which weighed heavily in allowing the award to be enforced. His Honour said:⁴⁰

“23 In the present case, the following considerations point to the grant of leave:

...

(b) The applicant’s claim is based upon a foreign award. Although that award is binding upon the parties to it without any further step needing to be taken (s 8(1) of the IAA), if the award is to be enforced in Australia, steps must be taken either in an appropriate State or Territory court or in this Court to obtain a judgment in order to give effect to the award. When appropriate regard is had to s 2D of the IAA⁴¹ which specifies the objects of the IAA and to s 39 of the IAA,⁴² there is good reason to make the path to recovery by the award creditor easier by granting leave and allowing judgment to be entered rather than leave the award creditor to the vagaries of the proof of debt process.”

***Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109**

Recently the Full Federal Court of Australia handed down a decision which again affirmed Australia’s pro-enforcement approach – in *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd*.⁴³ Allsop CJ, Besanko and Middleton JJ unanimously dismissed an appeal from an earlier decision which had enforced an international arbitral award.⁴⁴

The decision not only affirms Australia’s pro-enforcement approach, but confirms that Australian courts will give great weight to prior decisions of courts at the seat of arbitration

⁴⁰ *Eoply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356 at [23].

⁴¹ Section 2D of the IAA provides that 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.”

⁴² Section 39 of the IAA sets out the matters which the court must have regard to in exercising its powers under section 8 of the IAA and Articles 35 and 36 of the Model Law (as in force in subsection 16(1) of the IAA).

⁴³ [2013] FCAFC 109.

⁴⁴ *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited* [2013] FCA 882.

dealing with the same issues. The award debtor in this case had attempted to challenge the award before the English High Court on procedural grounds but had failed. The Federal Court agreed with the English High Court's findings and said that it would generally be inappropriate for an enforcement court applying the New York Convention to reach a different conclusion from the court at the seat of the arbitration.

In this case, Coeclerici Asia (Pte) Ltd ("Coeclerici") sought to recover payments from Gujarat NRE Coke Limited ("Gujarat") and Mr Jagatramka (together the "respondents") in relation to an agreement for the sale of metallurgical coke. The agreement was governed by English law and disputes between the parties had to be arbitrated in London under the terms of the London Maritime Arbitration Association. Prior to the commencement of the arbitration hearing, the parties reached a settlement whereby the respondents admitted liability and agreed to a settlement payment structure. It was also agreed that if the settlement payments were not made by the respondents, Coeclerici would be entitled to an immediate consent award, without the need for any pleadings or hearing. Following the respondent's failure to make the first payment, on 4 February 2013, Coeclerici requested the tribunal to make an award in its favour. The tribunal emailed the solicitors for the respondents asking whether there was any reason why the award should not be made. After a slight delay in receiving instructions, the respondents' solicitors emailed the arbitrators over a number of days stressing that they had not been afforded a reasonable opportunity to present their case that there had been a breach of the settlement agreement.

The tribunal ultimately made the award on 14 February 2013. The respondents then unsuccessfully sought to have the award set aside by the English High Court on the basis that they had not been provided with an opportunity to be heard and there was serious irregularity.⁴⁵

Coeclerici then sought to have the award enforced by the Federal Court pursuant to s 8 of the IAA. The respondents resisted the enforcement on similar grounds to those raised before the English High Court, namely that they had not been afforded a reasonable opportunity to present their case in arbitration (see section 8(5)(c) of the IAA) and there had been a breach of the rules of natural justice so that enforcement would be contrary to public policy (see subsections 8(7)(b) and 8(7A)(b) of the IAA). Foster J granted the application to enforce the

⁴⁵ *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Limited* [2013] EWHC 1987 (Comm); and noting that the "serious irregularity" is confined to the English *Arbitration Act* 1996.

award. His Honour rejected the respondents' argument and found that they had ample opportunity to put their case before the arbitrators before 14 February 2013. Notably, his Honour also said that given the evidence and submissions that were before him were similar to those before the English High Court, there was a possibility that the question of reasonable opportunity was issue estoppel and *res judicata*. In any event, even if that were incorrect, his Honour observed it would be inappropriate to reach a different conclusion to the same question already answered by the court in the seat of the arbitration; namely the English High Court.

On appeal, the Full Court agreed with Foster J's finding that the English High Court was correct in determining that the respondents had been afforded a reasonable opportunity to plead their case.⁴⁶ The Full Court also noted that generally speaking it would be inappropriate for an enforcement court in a New York Convention country to reach a different conclusion on the same question as that reached a court at the seat of the arbitration. With respect to issue estoppel, the Full Court said that it was not necessary to deal with the issue but made the following and important observations, including the following:⁴⁷

- “65. ...[T]he primary judge was correct to hold that it will generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration. We endorse and apply the following observations of Colman J in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 as to the weight to be given to the views of the supervising court of the seat of the arbitration. That experienced commercial judge said at 331:

In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards, so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be

⁴⁶ *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 at [42]-[54].

⁴⁷ *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 at [65].

reinvestigated by the English courts on an enforcement application is to be most strongly deprecated.”

As discussed previously, a similar approach was adopted by Forster J in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*.⁴⁸

Court Assistance through specialist lists

From an Australian perspective, the Supreme Court of Victoria and other State and territory Supreme Courts are vested with broad jurisdiction with respect to both domestic and international commercial arbitration. The Federal Court of Australia only has jurisdiction with respect to international arbitration.⁴⁹ On 1 January 2010, the Arbitration List of the Commercial Court in the Supreme Court of Victoria began operation. The Commercial Arbitration List of the New South Wales Supreme Court⁵⁰ is the only other specialist arbitration list in Australia.⁵¹ The benefits flowing from having a specialist arbitration list in a state Supreme Court are many;⁵² including, and of real significance, having a specialist judge who is aware of the developments in arbitration, from both a legal and practical perspective, and who can ensure a more consistent body of arbitration related decisions is developed. It is critical that consistent interpretation and application is given to both the international and the domestic legislative provisions – which are based upon the UNCITRAL Model Law on International Commercial Arbitration (as revised and adopted in 2006) (“the Model Law”) – so that they conform with international thinking and arbitral practice, particularly having regard to the Model Law’s international heritage.

Conclusion

It is no understatement to say that the continued success of international arbitration in this region will depend significantly on the level of assistance and support for arbitration and its

⁴⁸ *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696.

⁴⁹ As defined in the Australian *International Arbitration Act* 1974 (Cth) (“IAA”), as amended in 2010.

⁵⁰ See Practice Note No. SC Eq 9, accessed at <http://www.lawlink.nsw.gov.au/practice_notes> on 3 May 2013. The Practice Note was issued on 15 December 2009 and commenced on 1 February 2010

The Federal Court of Australia has a panel of judges available to hear arbitration matters, but it has not established a separate list.

See The Hon Justice Clyde Croft, *The Supreme Court of Victoria’s Arbitration List and its role within Australia’s arbitration framework*, a paper prepared for the ICC International Court of Arbitration, Paris, 23 May 2011 and accessible at

<<http://www.supremecourt.vic.gov.au/find/publications/the+supreme+court+of+victorias+arbitration+list+and+its+role+within+australias+arbitration+framework>>

processes provided by the courts – together with enforcement of its product: arbitral awards. The judicial approach taken by courts to challenges to and enforcement of international arbitral awards is important in many ways. From an economic point of view, a country where the courts are inconsistent in their approach and unpredictable in their treatment of international arbitral processes and awards does not, and is not likely to, attract any significant arbitration work. As the *2010 Queen Mary Survey* indicates, parties usually select the governing law first, followed by the arbitral seat and then the arbitration institution and rules, in that order.⁵³

Queen Mary, University of London, School of International Arbitration, *2010 International Arbitration Survey: Choices in International Arbitration*, sponsored by White & Case LLP ('2010 QM Survey') accessed at

<http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> on 16 July 2013. Please also note that there has been a further survey and study conducted and released, though it does not touch upon the issue of the choice of seat of arbitration: see Queen Mary, University of London, School of International Arbitration, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*.