MTECC Seminar - 3 June 2015

Arbitration and the Enforcement of International Awards

- How to enforce an Award
- Typical grounds for resisting enforcement including breach of public policy

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Introduction: Recognition and Enforcement

New York Convention 1958

The system for enforcement of foreign Awards in international Arbitrations is the same, whether in Australia, Hong Kong, China, Singapore or Malaysia, and depends entirely on whether the host country of the Award (the seat) and the place of enforcement are both signatories to the **New York Convention 1958**. Presently, there are 144 countries including Australia who signed on to the Convention in 1974. A successful party can seek to enforce its Award in any one of the 143 countries in which the Respondent may have assets.

Function and Scope

The **New York Convention 1958** serves a very important function in International Arbitration. It provides for the recognition and enforcement of Awards in those countries where it has been adopted into domestic law. In Australia, it was enacted as the **International Arbitration Act 1974 (Cth)** (**IAA**). A foreign Award is binding by virtue of the IAA for all purposes on the parties to the Arbitration Agreement.

Foreign Award is defined in Section 3(1) of the IAA as *"an arbitral Award made, in pursuance of an Arbitration Agreement, in a country other than Australia, being an arbitral Award in relation to which the Convention applies."*

Foreign Awards may be enforced in a Court of a State or Territory or the Federal Court of Australia as if the Award was a judgment of that Court.

Recognition and Enforcement of Awards

Recognition of an Award is a reference to a process, whereby an Award is accepted and regarded as the definitive (final) determination of the issues in dispute between the parties so that the parties may not relitigate the matters. It is a judicial decision which recognises the legal validity of an arbitral decision. It generally acts as a *"shield"* against attempts to raise issues that have already been decided in the Arbitration.

Enforcement refers to the process whereby a Court grants the successful party a means for the execution of the orders in the Award in the same way it would for a judgment of the Court by imposing legal sanctions against non compliance with the recognised Award.

Grounds for Refusal to Recognise and Enforce an Award

The exclusive grounds for refusing recognition and enforcement are set out in Sections 8(5) and 8(7) of the IAA. Overall, the purpose of Sections 8(5) and 8(7) is to facilitate the enforcement of Awards. It reflects a *"pro enforcement"* bias.

The key features characterising grounds for refusing enforcement in Section 8 are that:

- ❖ the grounds are exhaustive;
- ❖ the Court may not examine the merits of the Award; and
- ❖ the Respondent bears the burden of proof.

The exclusive grounds upon which a Court may refuse to enforce a foreign Award are:

i) a party to the Arbitration Agreement labours under some incapacity at the time the Agreement was made under the law applicable to them (IAA Section 8(5)(a));

ii) the Arbitration Agreement is not valid under the law governing the Arbitration Agreement, or where no such law is expressed, the law of the country where the Award was made (IAA Section 8(5)(b));

iii) a party was not given proper notice of the appointment of the Arbitrator or of the Arbitration proceedings or was otherwise unable to present its case (IAA Section 8(5)(c);

iv) the Award deals with a difference or matter that is not contemplated by or does not fall within the terms of the submission to Arbitration or it contains decisions on matters beyond the scope of the submission to Arbitration (IAA Section 8(5)(d);

v) the composition of the arbitral tribunal or the procedure of the Arbitration was not in accordance with the agreement of the parties or the law of the country where the Arbitration took place (IAA Section 8(5)(e);

vi) 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 (IAA Section 8(5)(f);

vii) the subject matter of the difference between the parties to the Award is not capable of settlement by Arbitration under the laws in force of the State or Territory in Australia where the Award is sought to be enforced (IAA Section 8(7)(a); or

viii) to enforce the Award would be contrary to public policy (IAA Section 8(7)(b).

Consistent with the terms of Section 8 of the IAA, grounds in (i) to (vi) must be raised by a party opposing enforcement, whereas the Court retains the discretion to refuse enforcement under grounds (vii) to (viii) whether or not the parties raised such grounds.

There has been little judicial consideration as to the meaning of any of the circumstances in which a Court may refuse enforcement, although it is likely Courts will have regard to authorities elsewhere on the interpretation of the equivalent provision in the **New York Convention**.

Australian Courts will give great weight to prior decisions of Courts at the seat of Arbitration dealing with the same issues and 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 (**Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd** (2013) FACFC 109).

Procedural Fairness Grounds (Section 8(5)(c))

The cases that fall into this category are usually in relation to a violation of the requirement for natural justice in the procedure adopted by the arbitral tribunal. For example, lack of notice to a party may result in a failure to afford *"due process"* because the party has not been given a full opportunity to present its case.

Jurisdictional Grounds Based on Scope of Arbitration Agreement (Section 8(5)(d))

A challenge as to the scope of the Arbitration Agreement can be made during the Arbitration itself and if objection has been taken at that stage, albeit unsuccessfully, it can be taken again at the stage of enforcement (see **Giedo Van Der Garde BV v Sauber Motorsport AG** [2015] VSC 80).

Composition of Arbitral Authority not in accordance with the Agreement (Section 8(5)(e))

The first matter to consider is the agreement of the parties on the composition of the arbitral tribunal. Only where there is no agreement on these matters is the Arbitration law of the country where the Arbitration took place to be taken into account.

The Award is not yet binding (Section 8(5)(f))

This provision means that no leave for enforcement in the country of origin is required, and Courts are virtually unanimous in their acceptance of this. It also allows for 3 possibilities:

1. The Award has not yet become binding – refusal on this ground is rare;

2. A Court may adjourn its decision on enforcement if the Respondent has applied for the Award to be set aside in the country of origin (the seat or the one having primary jurisdiction); and

3. As in the case where the Award is subject to an application to have it set aside in the country of its origin, a Court may also adjourn its decision on enforcement if the Respondent has applied for suspension of the Award in the country of origin.

Arbitrability

Section 8(7) of the IAA provides that recognition and enforcement may be refused if the competent authority where the recognition and enforcement is sought finds *"the subject matter of the difference is not capable of settlement by Arbitration under the law of that country."*

Public Policy (Section 8(7)(b))

The public policy exception is the most typical ground for challenging enforcement. The forum State retains the power to deny the validity or enforcement of an Award on the basis that it would violate the forum State's most basic notions of morality and justice. It is generally accepted that *"public policy"* is a variable notion, depending on changing manners, morals and economic conditions.

Identifying precisely what comprises public policy and which matters will be considered to be in conflict with public policy is difficult given the dynamic nature of the concept itself. Section 19 of the IAA provides some guidance on the interpretation of *"public policy."* It states that an Award will considered to conflict with public policy if it:

- was induced or affected by fraud or corruption; or
- involved a breach of the rules of natural justice.

The public policy ground does not confer broad discretion to refuse enforcement (**Traxys Europ SA v Balaji Coke Industry Pty Ltd (No 2)** [2012] FCA 276 at [105].

The scope of the public policy exception was considered in **Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd** [2011] FCA 131. The Applicant, Uganda Telecom Ltd (**UTL**) sought recognition and enforcement of an Award against the Respondent Hi Tech Telecom Pty Ltd (**Hi-Tech**) in respect of claims under a services contract. The Arbitration clause provided for disputes to be resolved by Arbitration under the laws of Uganda. The clause did not specify the seat, the applicable law or procedural rules. The Arbitration was held at the Centre for Arbitration and Dispute Resolution (**CADR**) in Kampala, Uganda. Hi-Tech did not appear before the Arbitrator or participate in any way in the Arbitration submitting that it was not aware of the Arbitration despite UTL's claims that it had provided valid notice.

Hi-Tech sought to resist enforcement of the Award on a number of grounds, including that:

- the underlying contact was void for uncertainty and accordingly, so was the Arbitration Agreement;
- the composition of the arbitral tribunal and the arbitral procedure were not in accordance with the Arbitration Agreement;
- the dispute did not fall within the scope of the Arbitration Agreement and did not allow UTL to prosecute the Arbitration unilaterally;
- the Award was not an *"arbitral Award*" or *"foreign Award"* within the meaning of the IAA;
- proper notice of the Arbitration was not provided;
- Hi-Tech was unable to present its case because the sole director was fearful for his own safety should he travel to Uganda; and
- the Award contained errors of fact and law and in all the circumstances enforcement would be against public policy.

Foster J rejected the first 3 arguments in relation to the scope and effect of the Arbitration Agreement, finding that the contract was governed by the laws of Uganda, which adequately covered all omissions in the Arbitration clause including the constitution of the arbitral tribunal and the procedure to be followed. Foster J also found that the dispute fell within the scope of the Arbitration Agreement.

Foster J rejected Hi-Tech's submission that UTL did not provide proper notice of the Arbitration. He found that Hi-Tech had, as a finding of fact, received valid notice of the proceedings because the address on which notices were served:

- was shown in ASIC records as the principle place of business;
- was advertised on Hi-Tech's website and no steps were taken to change the address; and
- had a person who signed for delivery of a package on behalf of Hi-Tech that was delivered by DHL registered post.

His Honour also noted that it was significant that emails sent t Hi-Tech did not produce any return communication providing notification that the emails had not reached their intended recipient.

His Honour found that there was no evidence to support Hi-Tech's argument that it was unable to present its case because the sole director was fearful for his own safety should he travel to Uganda and was concerned that he would not receive a fair hearing in Uganda. He noted that the submission contradicted the sole director's claim that he was not aware of the Arbitration and said that *"In those circumstances, it was not open to Mr Yahaya to give evidence of his actual state of mind. He could not tell me how he actually felt because he denied ever knowing about the Arbitration."*

He rejected the argument, pursuant to Section (7)(b) of the IAA, that the Award contained errors of fact and law and in all the circumstances enforcement would be against public policy. He stated that public policy did not require the Court to examine the correctness of the reasoning or the result reflected in the Award prior to enforcement because:

> *"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 Section 2D of the Act."*

He considered the narrow approach taken in United States cases referring to the decision in **Parsons and Whittemore Overseas Co Inc v Societe Generale De L'Industrie Du Papier** (508 F 2d 969 (2d Cir 1974)), and **Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara** (364 F 3d 274 at 306 (2004)).

Het adopted a narrow interpretation of the public policy stating:

> *"Whilst the exception in Section (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 …"*

He also considered the approach taken in the New South Wales decision of McDougall J in **Corvetina Technology Ltd v Clough Engineering Ltd** (2004) NSWSC 700 at [6]-[14] and [18] which in turn considered on the English decisions in **Soleimany v Soleimany** [1999] QB 785 at 800 and **Westacre Investments Inc v Jugoimport SPDR Holding Co** [2000] 1 QB 288 at 316-7.

He adopted a narrow interpretation of the public policy exception stating:

> *"Whilst the exception in Section 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 …*
>
> *The complaint in the present case is that the assessment of damages in the Award is excessive … 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."*

In coming to this conclusion, Foster J noted that the appropriate time for Hi-Tech to address this complaint would have been during the Arbitration, had it chosen to participate. It could not now seek to resist enforcement for erroneous legal reasoning or misapplication of the law as these are not generally recognised as violations of public policy. Accordingly, the application to deny enforcement on this ground was refused.

Formal Requirements for Recognition and Enforcement

The process is set out in Section 9(1) of the IAA and is relatively straightforward:

> *"9(1) In any proceeding in which a person seeks the enforcement of a foreign Award by virtue of this Part, he or she shall produce to the Court:*
>
> *(a) the duly authenticated original Award or a duly certified copy; and*
>
> *(b) the original Arbitration Agreement under which the Award purports to have been made or a duly certified copy."*

Procedure and Enforcement

Thus, the enforcing party needs to produce the Award and the Arbitration Agreement in accordance with the curial procedure of that jurisdiction.

Federal Court

In the Federal Court of Australia, an application is made by filing an Application and supporting Affidavits, seeking an Order under Section 8(2) of the IAA that the Plaintiff be granted leave to enforce the Award (see **Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd** [2012] FCA 21).

Supreme Court

In the Supreme Court the matter is dealt with in Rule 9.04 in the recently published **Supreme Court (Chapter II Arbitration Amendment) Rules 2014** and Form 2-9C.

County Court

The **County Court** (Chapter II Arbitration and Other Amendments) **Rules 2015** provide in Rule 7.01 that Order 9 of Chapter II of the **Supreme Court Rules** apply to relevant proceedings in the County Court.

Substantive Law on Enforcement

Enforcement proceedings under the IAA and its predecessor, the **Arbitration (Foreign Awards and Agreements) Act 1974 (Cth)** have, by and large, been uncontested and up until recently judicial development of enforcement of Arbitration Awards under the IAA was scant.

The IAA covers the field in relation to the enforcement of foreign Awards, and Sections 8(5) and (7) stipulate the exclusive grounds upon which a Court may refuse enforcement of a foreign Award. They are mentioned the only grounds upon which a Court may refuse to enforce an Award. There is no residual discretion.

Discussion of recognition and enforcement was undertaken in the recent case of **IMC Aviation Solutions Pty Ltd v Altain Khuder LLC** [2011] VSCA 248, where the Victorian Court of Appeal refused to grant enforcement of an Award against a non party to the Arbitration. The dispute arose in relation to the contract between a British Virgin Isles company, IMC Mining Inc (**IMC**) and a Mongolian company Altain Khuder LLC (**Altain**) for mining operations. The underlying contract contained an Arbitration clause, which required that disputes be referred to Arbitration in Mongolia. A dispute arose which was referred to Arbitration resulting in an Award against IMC. However, the Award provided that another company within IMC's group of company, IMC Aviation Solutions Pty Ltd (**IMC Solutions**), pay damages to Altain on behalf of IMC. The District Court of Mongolia verified the Award despite the fact that IMC Solutions had not been a party to the contract, the Arbitration Agreement or the Arbitration itself.

Altain obtained an Order for recognition and enforcement against IMC and IMC Solutions in *ex parte* proceedings (see **Altain Khuder LLC v IMC Mining Inc** (2011) VSCI). IMC Solutions applied to set aside the Orders insofar as they applied to it. The Court held that an Award creditor was not required to prove, as a threshold issue, the existence of a binding foreign Award and that the onus or proving the defences rests on the party resisting enforcement.

IMC Solutions then appealed to the Victorian Court of Appeal and the decision was overturned. The Court of Appeal held that an Award creditor must prove on a prima facie basis that:

- an Award has been made by a foreign arbitral tribunal granting relief to the Award creditor against the

Award debtor;

- ❖ the Award was made pursuant to an Arbitration Agreement; and
- ❖ the Award creditor and the Award debtor are parties to the Arbitration Agreement.

The Court also stated that where an Award expressly states that it has been made in favour of the Award creditor against the Award debtor pursuant to an Arbitration Agreement between them, the onus of proof will be discharged.

The Award debtor then has the onus of proving that the Award should not be enforced under one of the exceptions in the IAA. This is consistent with the decision in **Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan** [2011] 1 AC 763, in which the Court said that the scheme of the **New York Convention** gives *"limited prima facie credit to apparently valid arbitration Awards based on apparently valid and applicable Arbitration Agreements"* ([2011] VSCA 248 at [136]).

If an Award is sought to be enforced against a party not expressly referred to in the Award and Arbitration Agreement, then the Award creditor would have to provide further evidence in order to discharge the onus.

The Court of Appeal determined that IMC Solutions was not a proper party to the Arbitration and the Arbitration Agreement and as such, the enforcement order should not have been made.

Note that the decision has been criticised by Dr S Harder *"Enforcing Foreign Arbitral Awards in Australia Against Non Signatories of the Arbitration Agreement"* (2012) 8 **Asian International Arbitration Journal** 131-160; and Albert Monichino QC *"International Arbitration in Australia: The Need to Centralise Judicial Power"* (2012) 86 **ALJ** 118-133.

Further, it has not been followed by Foster J in **Dampskibsselskabet Norden A/s v Beach Building and Civil Group Pty Ltd** [2012] FCA 696.

Note: See generally -

A. **International Commercial Arbitration**, Rashda Rana, Michelle Sanson (Thomson Reuters, 2011) Chapter 12: Awards – Enforcement and Challenges.

B. **Arbitration Law of Australia: Practice and Procedure**, Alex Baykitch (Juris Net, 2013) Chapter 8: Enforcement of Foreign Awards