

Further limits on limited recourse

Discretion and the enforcement of foreign arbitration awards - *Energy City
Qatar Holding Co.v Hub Street Equipment Pty Ltd (no.2) [2020] FCA 1116*

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 HOLDING REDLICH

Energy City Qatar Holding Co.v Hub Street Equipment Pty Ltd (no.2) [2020] FCA 1116

Lessons on enforcement of awards

- › Under section 8(5) of the *International Arbitration Act 1979* (Cth)(**IAA**) the Court **may** refuse to enforce a foreign arbitral award
- › Cf Art 5 of the *New York Convention* and Arts 34 (setting aside) and 35 of the Model Law
- › Construction and discretion will be influenced by ‘pro-arbitration’ provisions of section 2D and 39 of the IAA
- › ‘Strong presumption of regularity in respect of the tribunal’s decision and the means by which it was arrived at”: *IMC Aviation*
- › When advising clients ask;
 - › Can the procedure be construed in a way that while not perfect, complies with the agreement of the parties?
 - › Would it be unfair to enforce the award (hint: the conduct of the award debtor will be relevant)
- › **A NOTICE OF APPEAL HAS BEEN FILED IN THIS MATTER (18 September 2020)**

The facts

- › In 2010 Energy City (ECQ) contracted with Hub Street Equipment (HSE) for the supply and installation of street lighting and street furniture in Energy City
- › ECQ made US\$820,322.16 advance payment
- › In 2012 ECQ decided not to proceed and claimed repayment. HSE advised that it would consider its position and revert having taken legal advice
- › No further communication



The arbitration agreement

- › Art 44: any notice to be given by either party under the Contract shall be given by prepaid post or fax to certain addresses, the address for Hub being a street address in Chippendale, Sydney.
- › Art 46: any dispute about the Contract which is not amicably settled within 28 days shall be referred to arbitration in accordance with the **rules of arbitration in Qatar** and an arbitration committee shall consist of **three members, one member being appointed by each party** within 45 days of one party **receiving written notice** from the other to start arbitration proceedings.
- › Art 46 (cont) **The third member shall be mutually chosen by the first two members and shall chair the arbitration committee and issue the decision of the arbitration committee.**
- › Art 47: the contract is made in the state of Qatar and is subject to the **laws of the State of Qatar.**
- › Art 50: English language shall be the ruling language of the Contract and accordingly **all matters** relating to the Contract shall be in **English.**

The legislation - *International Arbitration Act 1974 (Cth)* (IAA)

- › Section 2D
- › *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*
- › Section 39
- › Court to have regard to the objects of the IAA and fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and awards are intended to provide certainty and finality.

The legislation - *International Arbitration Act 1974* (Cth) (IAA)

- › Section 8
- › (3) Subject to this Part, a foreign award **may** be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.
- › (3A) The court **may** only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).
- › (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:
 - › (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; or
 - › (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;
- › (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:
 - › (b) a breach of the rules of **natural justice** occurred in connection with making the award

The Issues

- › ECQ didn't send notice under Art 46.
- › Instead, in June 2016, applied to the Qatar court for appointment of a Tribunal (inc an arbitrator nominated by ECQ) pursuant to Qatari arbitration law.
- › November 2016 – ECQ provided notice of application by post to address in Doha (Elan Urban), not Chippendale.
- › December 2016 – Elan Urban sent notice by email to employee of Hub Qatar Pty Ltd, Mr Muraywed.
- › January 2017 – Qatar Court appointed Tribunal.
- › April – July 2017 – Tribunal sent notices (in English) to Chippendale.
- › 1 August 2017 – Tribunal published award, in Arabic.

Enforcement

- › HSE resisted enforcement alleging that
 - › It had no notice of the dispute (under Art 46), of the Court application for appointment of the Tribunal or the arbitration proceedings themselves;
 - › The composition of the Tribunal and procedure were not in accordance with the agreement of the parties;
 - › Award involved a breach of the rules of natural justice.

Enforcement

- › Judge found as a fact that HSE had notice of the application and therefore an opportunity to present its case.
- › In respect of language, judge found that by electing not to participate, there had been 'no prejudice' to HSE in the proceedings being conducted in Arabic.
- › The substantive issue was the failure to send notice under Art 46 and conduct the reference in accordance with the agreement of the parties (which included Qatari law)
- › Just found as fact that the reference had been conducted in accordance with Qatari law, therefore in accordance with the agreement of the parties
- › Even if it hadn't, the judge would have exercised her discretion to enforce the award because **no unfairness** to HSE.

Thank you

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