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ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN AUSTRALIA (TIANJIN JISHENGTAI INVESTMENT V HUANG)

10 June 2020 | Australia
Legal Briefings – By **Leon Chung and Cassidy O'Sullivan**

Arbitration analysis: This judgment involved a contested application to enforce in Australia a foreign arbitral award made in the People's Republic of China. Having regard to the objects of the International Arbitration Act 1974 (IAA 1974), the court considered that the award should be enforced. This judgment underscores the robustness of Australia's international arbitration framework, together with the supportive approach of Australian courts to the enforcement of foreign awards, and provides helpful guidance on practical matters associated with enforcing an award in an Australian court (including whether the award can be enforced in Australian dollars, whether there can be an order for post-award interest where the award makes no provision for interest and on the question of indemnity costs in an enforcement proceeding).

WHAT ARE THE PRACTICAL IMPLICATIONS OF THIS JUDGMENT?

This judgment highlights the significant weight Australian courts place on upholding the rationale and objects of the IAA 1974 when considering a contested application to enforce an arbitral award made in a New York Convention country (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), as set out in IAA 1974, sch 1). In determining that the award in this case should be enforced, the court also emphasised that arbitration is an efficient and enforceable method to resolve commercial disputes, and that awards are intended to provide certainty and finality.

It also provides useful practical guidance for arbitration practitioners on ancillary matters associated with enforcing a foreign award in an Australian court. The key lessons are as follows:

- an award can be enforced notwithstanding the fact that it partially provides for what is in effect an order for specific performance. The court can make a declaration to give effect to the monetary aspect of the award, and make a consequential order to give effect to the non-monetary balance of the award (in this case, providing for the transfer of shares)
- Australian courts can enforce a foreign award in Australian dollars (converted at the official exchange rate on the basis of evidence provided to the court)
- where an award does not provide for any post-judgment interest, no interest should be awarded (so as to avoid materially departing from the award)
- the court declined to resolve the unsettled issue of whether indemnity costs should be ordered as a matter of course in the event of a failed attempt to challenge enforcement of a foreign award, and considered that it would be inappropriate to resolve this issue at a first-instance level

WHAT WAS THE BACKGROUND? WHAT WERE THE RELEVANT FACTS?

This judgment concerned an application by Tianjin Jishengtai Investment Consulting Partnership Enterprise (Tianjin Jishengtai) under IAA 1974, s 8(3) to enforce in Australia an award made against Huazhao Huang (Huang) in the People's Republic of China (PRC) by the China International Economic and Trade Arbitration Commission (CIETAC).

The award was in the following terms:

> 'The first respondent is liable for and shall pay to the claimant RMB 78753425 to acquire from the claimant a 32.43836 per cent stake in the second respondent.
>
> Other requests in the statement of claim are denied.

> The respondent shall pay the costs for the arbitration totalling [RMB] 689475. As the claimant has paid an advance on costs to cover such amount, the respondent shall pay RMB 689475 to the claimant.'

WHAT ISSUES WERE BEFORE THE COURT?

There were two primary issues on which Huang relied to oppose enforcement of the award:

- first, relying on the IAA 1974, s 9(1)(a) and (b), Huang disputed that there were duly certified copies of the award and the original arbitration agreements under which the award was purportedly made (Issue 1).
- second, Huang contended that the form of the orders which Tianjin Jishengtai sought did not reflect the form of the award (Issue 2).

The parties also disagreed in relation to whether the award should be enforced in Australian dollars or in the award currency, as well as whether post-award interest should be ordered (given that interest was not part of the award). The issue of indemnity costs was also briefly considered.

WHAT DID THE COURT DECIDE?

The judge held that the award should be enforced, and that the appropriate form of the order for enforcement would be a declaration pursuant to IAA 1974, s 8(3) that Tianjin Jishengtai was entitled to enforce the award against Huang as if the award were a judgment of the court.

The judge first considered the framework of the IAA Act and noted that, pursuant to IAA 1974, s 39, the court is obliged to consider IAA 1974's objects when considering whether to enforce a foreign award. The judge also referred to *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; (2011) 277 ALR 415, at para [126], which held that the rationale of the IAA 1974, and thus the public policy of Australia, is enforcing foreign awards 'wherever possible' to uphold contractual arrangements in the course of international trade.

As to Issue 1, the judge rejected Huang's contention that the formal requirements of the IAA 1974 had not been met. Her Honour accepted that Tianjin Jishengtai had provided properly certified copies of both the award and the underlying agreements (certified by a PRC notary). Pursuant to IAA 1974, s 9(5) the exhibits in and of themselves could be received by the court as sufficient evidence of the matters to which they related. Additionally, her Honour noted that the notary had provided a supporting witness statement in the form of an (unsworn) affidavit. The judge adopted a pragmatic approach in admitting this statement under the 'waiver' provision in section 190(3) of the *Evidence Act 1995* (Cth), considering that the evidence related to a matter which was not genuinely in dispute, and noting that the coronavirus (COVID-19) pandemic meant that the application of hearsay provisions (requiring the notary to travel to Australia for cross-examination) would involve unnecessary expense and delay.

As to Issue 2, the judge accepted Huang's submission that the form of orders sought by Tianjin Jishengtai did not reflect the form of the award. Her Honour directed the parties to confer regarding the appropriate form of the order in the form of a declaration as to the enforceability of the award, and specified that a consequential order should be formulated which provided for the transfer of shares in accordance with the award.

In relation to judgment currency and interest, the judge held that the award should be converted into Australian dollars calculated at the official exchange rate per Tianjin Jishengtai's evidence, being about AUD$17.4m (relying on *Ye v Zeng (No 4)* [2016] FCA 386, at para [16]).

The judge also determined that there should not be any order for post-award interest, in light of the fundamental principle that the judgment should reflect the terms of the award (see *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; [2012] 201 FCR 535, at para [72], and compare to *Suzlon Energy Ltd v Bangad (No 2)* [2014] FCA 1173, at paras [6]–[9]).

On the question of indemnity costs, the judge referred to Tianjin Jishengtai's reliance upon the observations of Allsop P in *Ye v Zeng (No 5)* [2016] FCA 850 as to whether the approach in Hong Kong should be adopted in Australia—namely, that in the absence of special circumstances, when an award is unsuccessfully challenged, the court will award indemnity costs. Like Allsop P in *Ye v Zeng (No 5),* the judge considered that it would be inappropriate to resolve this important matter of principle at the level of a first instance decision. The judge was not satisfied that indemnity costs should be ordered in this case and made the usual order as to costs.

CASE DETAILS

- Court: Federal Court of Australia
- Judge: Justice Jagot

- Date of judgment: 14 May 2020

Citation: *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767

This article was first published on Lexis Advance® *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767 (subscription to Lexis Advance® required)

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

LEON CHUNG
PARTNER, SYDNEY

+61 2 9225 5716
Leon.Chung@hsf.com

CASSIDY O'SULLIVAN
SOLICITOR, SYDNEY

+61 2 9225 5736
cassidy.osullivan@hsf.com

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