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INTERNATIONAL ARBITRATION: ENFORCING ARBITRAL AWARDS AND INDEMNITY COSTS

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Legal Briefings – By **Leon Chung** and **Phoebe Winch**

Australia is generally regarded as a 'pro-arbitration' jurisdiction. One question that has arisen in this context is whether there should be a default rule providing that indemnity costs should be awarded against a party who unsuccessfully seeks to set aside or resist enforcement of an arbitral award.

Supporters of such a rule contend that it would act as a deterrent to unmeritorious challenges to awards and further entrench Australia as a 'pro-arbitration' jurisdiction. To date, the question of whether there should be a default rule has consistently been answered in the negative. However, Allsop CJ recently considered this issue in the case of *Ye v Zeng (No 5)* and expressly left the question open.[1] This remains an issue to monitor in Australia.

FACTS

The case concerned an application to enforce a foreign arbitral award in the Federal Court of Australia under sections 8 and 9 of the *International Arbitration Act 1974* (Cth) (**the Act**). The relevant award was handed down by the Xiamen Arbitration Commission in the People's Republic of China on 12 August 2015. The Respondents concurrently brought an appeal against the award at the seat.

Prior to this case, the Federal Court had made freezing orders restraining the Respondents from dealing with assets (principally land in Sydney) pending resolution of the matter. The Court had also ordered a stay of the enforcement proceedings pending the determination of the appeal at the seat. Once that appeal was dismissed, the award was enforced in Australia.

ISSUES AND DECISION

The question considered by Allsop CJ in *Ye v Zeng (No 5)* was whether the applicant should receive its costs on a full and complete indemnity basis.[2] His Honour answered this question affirmatively, awarding indemnity costs on a full and complete basis by *"applying entirely conventional and unremarkable authority".*[3] His Honour held that there had *"never been an attempt to agitate any legitimate ground to resist enforcement."*[4] Rather, the Respondents had *"acted in their own perceived commercial interests and without merit and should pay the commercial price of doing so."*[5]

The less 'conventional' aspect of the reasoning was Allsop CJ's response to the additional question namely the proper approach to costs in proceedings to enforce international commercial arbitration awards under the Act and whether indemnity costs should be awarded against a party who unsuccessfully seeks to set aside or resist enforcement of an arbitral award, as a matter of course.

DISCUSSION ON INDEMNITY COSTS

Allsop CJ outlined two competing approaches to costs in applications to enforce international commercial arbitration awards: the approach in Hong Kong and in Australia.

Hong Kong approach

The Hong Kong courts adopt a default rule that when an award is unsuccessfully challenged, indemnity costs will be granted in the absence of special circumstances. This approach was outlined in *A v R* by Reyes J.[6] His Honour concluded that a party who unsuccessfully makes an application to appeal against, or set aside, an award or for an order refusing enforcement, should *"in principle expect to have to pay costs on a higher basis…because a party seeking to enforce an award should not have had to contend with such type of challenge."*[7]

This approach has since been confirmed, providing welcome certainty to the Hong Kong position.[8] The courts of Hong Kong have since applied this principle in other contexts, including to set-aside cases,[9] to an unsuccessful challenge to an arbitration agreement,[10] and most recently, to actions that delay enforcement of arbitral awards.[11]

Australian approach

The Hong Kong approach has not met a positive reception in Australian courts. Allsop CJ cited the decision of the Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v Atlain Khuder LLC*,[12] in which it declined to follow the Hong Kong approach. By doing so, the Court of Appeal disagreed with Croft J at first instance, who awarded indemnity costs against an award debtor who unsuccessfully sought to resist enforcement of a foreign award, even though it was not necessary to do so.

After outlining these two approaches, Allsop CJ declined to decide whether the Hong Kong approach should be preferred and adopted in Australia as it was *"both unnecessary, and, sitting at first instance, inappropriate"* to do so.[13] However, his Honour noted that there can be seen to be *"powerful considerations to that effect"*. In addition, Allsop CJ warned courts to be *"astute to distinguish between conduct that reflects no more than an attempt to delay or impede payment and the reasonable invocation of the proper protections built into the [New York Convention] and the Act."*[14]

The shortcoming of the Australian approach appears to be the premise on which it is founded. A decision to award indemnity costs against an unsuccessful party is dependent upon there being *"circumstances of the case…such as to warrant the Court…departing from the usual course"* of awarding costs on a party and party basis.[15] Such a departure is only warranted in the presence of special circumstances. However, an unsuccessful application to resist enforcement of a foreign arbitral award is not considered to be an established category of special circumstances in Australia.

As seen in *A v R*, the Hong Kong approach starts from the opposite premise. That is, indemnity costs will be granted in the absence of special circumstances. If a losing party only pays costs on a conventional party and party basis, it will never bear the full consequences of its 'abortive application', even though a party seeking to enforce an award should not have had to contend with such type of challenge in the first place. This would encourage the bringing of unmeritorious challenges to an award. It would therefore turn applications to set aside an award, which should be 'exceptional events', into something which is potentially 'worth a go'.[16]

Allsop CJ's comments were not made in isolation. Colman J in *A v B* applied a similar presumption to Reyes J in *A v R* with respect to the unsuccessful resistance to a referral of a dispute to arbitration.[17] Martin CJ in *Pipeline Services* subsequently followed *A v B*, describing this approach as 'impeccable'.[18] However, Colman J's statement of principle has also been subsequently doubted or not followed.[19]

Whether or not the comments of Allsop CJ coupled with these pertinent public policy considerations will be acted upon in Australia remains to be seen. It is certainly worth monitoring in the context of Australia's push to establish itself as a 'pro-arbitration' jurisdiction.

ENDNOTES

1. [2016] FCA 850.
2. Ibid at [1].
3. Ibid.

4. Ibid at [18].
5. Ibid at [19].
6. [2009] 3 HKLRD 389.
7. Ibid at [68].
8. *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)* [2012] 1 HKC 491.
9. *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* 2013 WL 7052 (CFA).
10. *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* (HCA 2416/2014), 3 December 2015.
11. *Peter Cheung & Co v. Perfect Direct Limited & Yu Guolin* (HCMP 2493/2012); and *New Heaven Investments Limited & Rondo Development Limited v. Yu Guolin* (HCA 115/2013).
12. [2011] VSCA 248; 38 VR 303 at [55].
13. Above n 1 at [23].
14. Ibid.
15. *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; 38 VR 303 at [55].
16. *A v R* [2009] 3 HKLRD 389 at [71].
17. *A v B* [2007] EWHC 54 (Comm); [2007] 1 Lloyd's Rep 358 (Colman J).
18. *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10(S), at [18] (Martin CJ).
19. *Ansett Australia Ltd v Malaysian Airline System Berhad (No 2)* [2008] VSC 156 [22]; *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 829, [6].

KEY CONTACTS

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

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