

Enforcement of international arbitral awards in Australia



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Daisy Mallett

Overview

- International Arbitration Act 1974 (**IAA**) Framework
- *Altain Khuder*
- *Uganda Telecom*
- *ESCO Corp v Bradken Resources*

Policy Background

- New York Convention requires national courts to:
 - ⇒ enforce arbitration agreements
 - ⇒ enforce arbitral awards (subject to narrow exceptions)
- Encourage investment in Australia by committing to the enforceability of contracts entered into with Australian parties
- Enable Australian parties to enforce contracts with their commercial counterparties globally

Policy Background (cont'd)

- IAA amendments intended to facilitate enforcement of awards
- IAA, section 8(7A) clarifies public policy exception to enforcement:

(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.*

Altain Khuder LLC v IMC Mining Solutions Pty Ltd [2011] VSC 1

- Mongolian National Arbitration Centre award, ordering IMC Mining Solutions Pty Ltd to pay Altain Khuder LLC US\$5.9 million
- Ex parte enforcement proceedings brought in Victorian Supreme Court

Altain Khuder LLC v IMC Mining Solutions Pty Ltd (cont'd)

- IMC Mining Solutions resisted enforcement on basis it was not a party to the arbitration agreement, and had not participated in the arbitration proceedings
- IMC Mining Solutions asserted s8(1) and s9(1) IAA required a threshold issue to be established: that there is a foreign award made pursuant to an arbitration agreement to which each award debtor was a party
- s 9(1) IAA: Applicant must provide: (i) certified copy of the original award; and (ii) certified copy of the original arbitration agreement
- s8(1) IAA:

8(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

Altain Khuder LLC v IMC Mining Solutions Pty Ltd (cont'd)

- IMC Mining Solutions was unsuccessful (Croft J)
- Plaintiff is not required to establish a foreign award exists which is binding on the parties to the arbitration agreement
- Award debtor required to establish grounds under s8(5) or s8(7) IAA in order to make an application to set aside the award, no such grounds established
- Waiting on judgment from Court of Appeal

Uganda Telecom v Hi Tech Telecom Pty Ltd (2011) FCA 131

- Uganda Telecom contracted to provide telecom services to Hi Tech
- Uganda Telecom commenced arbitration, and obtained an award in its favour
- Enforcement proceedings in Federal Court of Australia (**FCA**)

Uganda Telecom v Hi Tech Telecom Pty Ltd (2011) FCA 131

- Hi Tech asserted submitted FCA should analyse award to determine if contrary to Australian public policy
- FCA held that Australian public policy is not a ground for merits review of an arbitral decision, s8(7) IAA should be narrowly interpreted (Foster J)
- Amendments to IAA abolish any general discretion of an Australian court to refuse enforcement of foreign awards which may have existed

ESCO Corp v Bradken Resources Pty Ltd [2011] FCA 905 (9 August 2011)

- ICC award seated in Oregon regarding a dispute pursuant to a license agreement
- Award issued declarations and a costs order against Bradken
- ESCO applied to US District Court in Oregon for confirmation of the award, plus interest Oregon state rate of 9%
- US District court confirmed the award, plus post-award interest at US Federal interest rate (0.19%)
- Bradken appealed US District Court confirmation decision

ESCO Corp v Bradken Resources Pty Ltd [2011] FCA 905 (9 August 2011) (cont'd)

- ESCO commenced proceedings in Federal Court of Australia for enforcement of the award under s8(3) IAA
- Bradken sought adjournment of enforcement until final determination of US court proceedings pursuant to s 8(8) IAA
- FCA (Foster J) adjourned proceedings and ordered Bradken provide “substantial” security:
 - ⇒ Appeal is an “*application for setting aside of the award*”
 - ⇒ Appeal is bona fide, has real prospects of success
 - ⇒ Parties chose Oregon as seat of arbitration and as governing law
 - ⇒ ESCO chose Oregon as the first forum to enforce the award
 - ⇒ Delay/ prejudice as a result of adjournment

Summary

- Amendments to IAA reinforce Australia as a pro-enforcement and pro-arbitration jurisdiction
- Federal Court and Victorian Supreme Court taking an informed and supportive approach as reflected in *Altain Khuder* and *Uganda Telecom*
- Will judges in other Australian jurisdictions follow suit?