Chief Justice leaves door open on indemnity costs

- ALBERT MONICHINO

In a recent decision of the Federal Court of Australia, Allsop CJ (sitting at first instance) has left the door open as to whether the Federal Court of Australia will depart from the (obiter) views of the Victorian Court of Appeal and instead adopt a default indemnity costs rule in arbitration related court proceedings, as is the case in Hong Kong.

Whether there should be a default rule in Australia that an award debtor who unsuccessfully seeks to set aside, or resist enforcement of, an arbitration award should pay costs of the court proceedings on an indemnity basis, is a vexed question

This is the position in Hong Kong.[1] In *Altain Khuder LLC v IMC Mining Inc (No 2)* Croft J awarded indemnity costs against an award debtor who unsuccessfully sought to resist enforcement of a foreign award.[2] His Honour's decision enforcing the foreign award was reversed on appeal.[3] Whilst it was not necessary for the Court of Appeal to do so, it disagreed with Croft J on the indemnity costs issue. The Victorian Court of Appeal found that his Honour acted on a wrong principle in embracing the Hong Kong approach.[4]

In a recent decision, Allsop CJ (sitting at first instance) has left the door open as to whether the Federal Court of Australia will depart from the (obiter) views of the Victorian Court of Appeal and instead follow the Hong Kong approach.[5]

Facts

The Applicant lent money to the First Respondent. The loan was guaranteed by the other Respondents. All of the Respondents were domiciled, or carried on business, in the People's Republic of China (PRC). The loan/guarantee agreement contained a dispute resolution clause referring disputes to arbitration before the Xiamen Arbitration Commission in the PRC.[6] The Respondents failed to repay the loan. The dispute was referred to arbitration. The Commission handed down an award in the sum of RMB 37 million (about $A 11 million) in favour of the Applicant, representing outstanding principal and accrued interest.

The Applicant sought to enforce the foreign award in the Federal Court of Australia, pursuant to s 8 of the *International Arbitration Act 1974* (Cth) ('IAA'). Meanwhile, the Respondents applied to the Xiamen Intermediate People's Court to set aside the award, principally on the ground of lack of procedural fairness in the arbitration.

In earlier related judgments, the Federal Court stayed the enforcement application pending the hearing and determination of the setting aside application. It also made freezing orders in respect of several properties in Australia registered in the names of the Respondents.[7]

Decision

Following the dismissal of the setting aside application by the PRC Court, the Federal Court proceeded to enforce the award.

Allsop CJ then turned his attention to the question of costs and, in particular, whether they should be awarded against the Respondents on an indemnity basis.

His Honour held that the Applicant was entitled to indemnity costs, applying conventional authority, because:

- no coherent challenge was made by the Respondents in seeking to resist enforcement;
- notwithstanding that they were given the opportunity to do so, the Respondents failed to adduce any evidence in support of the lack of procedural fairness ground;
- the Respondents advanced other untenable grounds;
- in sum, the inescapable conclusion was that enforcement of the award was resisted in circumstances where the Respondents, properly advised, should have known that there were no reasonable prospects of resisting enforcement.

So far the above is relatively unremarkable. What is of particular interest is Allsop CJ's closing remarks (at 23]):

'It is both unnecessary, and, sitting at first instance, inappropriate, to decide theobiterquestion whether the Hong Kong approach should be preferred and adopted in Australia. There can be seen to be powerful considerations to that effect. See generally the discussion, though without the benefit of argument, in "Public Policy in the New York Convention and the Model Law", Enforcement of International Arbitration Awards and Public Policy: Part III(Paper presented to the AMTAC and Holding Redlich Seminar, Sydney, 10 November 2014) at [56]-[77]. The parties have had their dispute resolved under contract by the tribunal of their choice. The NYC and the [IAA] have limited and constrained bases for resistance to paying an award sum that is the contractually provided outcome of a dispute. It is not merely a debt, it is the resolution of a dispute by a chosen contractual mechanism. Courts should 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 NYC and the *[IAA].*

Comment

In the earlier address referred to by Allsop CJ, his Honour argued that the approach of the Victorian Court of Appeal in *Altain Khuder* operates on the (mistaken) assumption that enforcement proceedings are substantially the same as other proceedings brought in Australian courts. Allsop CJ stated:

'Commencing litigation to resist enforcement (if without foundation) may be viewed first and foremost as an abandonment of that contractual bargain. The United Kingdom is explicit in referring to this as a breach of contractual obligations. It may be said that there is a public policy interest in discouraging parties from abandoning promises made by way of contract. Distinguishing it from other kinds of proceedings, the very act of commencing (unsuccessful) litigation to resist enforcement is itself an attempt to subvert a dispute resolution agreed upon by the parties, a repudiation of a contractual undertaking that causes further, unnecessary damage to the innocent party.'[8]

In contrast, in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No. 2),*[9] Edelman J doubted the legitimacy of a default indemnity costs rule in arbitration-related court proceedings.

In *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd (No 2),*[10] Hammerschlag J noted, in the context of an arbitration under the *Commercial Arbitration Act 2010* (NSW), that one of the reasons for not following the Hong Kong approach is the fact that '...the Legislature could have, but did not, create or recognise any such categories for an award of indemnity costs in the Act'.[11]

The principle of comity requires that intermediate appellate courts and trial judges in Australia should not depart from decisions of other intermediate appellate courts in respect of the interpretation of federal legislation or uniform national legislation, unless they are convinced that the earlier interpretation is plainly wrong.[12] Whether or not comity requires that intermediate appellate courts follow seriously considered dicta, as opposed to the ratio decidendi, of other intermediate appellate courts, is not entirely clear.[13] It is submitted that comity does not so require. The Victorian Court of Appeal's observations constituted seriously considered dicta (expressed after hearing full argument), even though they were not required to decide any live issue before the Court. It is difficult (if not impossible) to characterise the observations as "plainly wrong". Nevertheless, it is submitted that the comity principle is not engaged and the Full Court of the Federal Court is free to depart from the view of the majority of the Victorian Court of Appeal in Altain Khuder.

This is an important debate, which is not closed.

Since this article was first published, Beach J in Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2) [2016] FCA 1169 has lent his voice to the chorus that is opposed to the adoption of the Hong Kong default

---

Endnotes

[1] See, eg, A v R [2009] HKCFI 342. The Hong Kong Court of Appeal confirmed this approach in Gao Haiyan v Keeneye Holdings Ltd (No 2) [2012] HKCA 43, and also in Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd [2012] HKCA 200. Recently, Hong Kong courts have applied the default indemnity costs rule to applications to stay court proceedings where a party unsuccessfully challenges the existence or validity of an arbitration agreement: Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd [2016] 1 HKLRD 582

[2] [2011] VSC 12

[3] IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248

[4] At [335] per Hansen JA and Kyrou AJA (as he then was). Warren CJ observed (at [55]-[58]) that while it was unnecessary to express a view on whether the Hong Kong approach should be followed in Victoria, the fact that an award debtor had been unsuccessful in resisting enforcement of a foreign award did not in itself establish "special circumstances" justifying a costs order other than on the ordinary party-party basis. Rather, in her Honour's view, costs should be assessed in the light of the particular facts of each case, bearing in mind the objects of the International Arbitration Act. The Hong Kong Court of Appeal in Pacific China Holdings was referred to the Victorian Court of Appeal decision in Altain Khuder. Notwithstanding, it adhered to the view that it should give effect to the practice of awarding indemnity costs in arbitration-related court proceedings against unsuccessful award debtors.

[5] Ye v Zeng (No 5) [2016] FCA 850

[6] The PRC is a New York Convention ('NYC') country.

[7] Ye v Zeng [2015] FCA 1192; Ye v Zeng (No 2) [2015] FCA 1243; Ye v Zeng (No 3) [2015] FCA 1279; Ye v Zeng (No 4) [2016] FCA 386

[8] At [74]

[9] [2015] FCA 1046

[10] [2015] NSWSC 564

[11] At [38]

CHIEF JUSTICE LEAVES DOOR OPEN ON INDEMINTY COSTS CONT...

[12] This principle was reaffirmed by the High Court in Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, 151 – 152. The High Court said that intermediate appellate courts (and trial judges) should follow decisions of other intermediate appellate courts, and the seriously considered dicta of the High Court.

[13] Director of Public Prosecutions (Vic) v Patrick Stevedores Holdings Pty Ltd [2012] VSCA 300 at [127] and Waller v Waller [2009] WASCA 61 at [41] suggest that the relevant "decision" of earlier intermediate appellate courts that is required to be followed by later intermediate appellate courts means the ratio decidendi, not merely dicta. But contrast McKern v Minister Administering The Mining Act 1978 (WA) [2010] VSCA 140, [6] and [114].

ABOUT THE AUTHOR

- ALBERT MONICHINO QC

B.Ec, LLB (Hons), LLM, Grad Dip Intell Prop

Albert practises as a barrister, arbitrator and mediator practicing in Australia. He has over 20 years experience. He is a Grade 1 arbitrator and is accredited as an advanced mediator. He was appointed Senior Counsel in 2010.

Albert is a principal arbitrator and mediator with NZDRC. For more on Albert Monichino, click here.

ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND INC
Te Mana Kaiwhakatau, Takawaenga o Aotearoa

Call for Proposals

AMINZ ANNUAL CONFERENCE

Auckland 27-29 July 2017

The Institute warmly invites submissions for proposals for the 2017 AMINZ conference. The 2017 conference will be firmly focussed on future growth with the theme Ready Set Grow. All proposals must reflect the conference theme.

Key dates:

10 February: Closing date for proposals
Early April: Advice of acceptance of proposals
Late April: You advise us of your technical needs
Early May: Registrations open and the programme published
27 June: Early bird registrations close
14 July: Presentations to be received by AMINZ
27 – 29 July: Conference

If you wish to have a proposal considered for inclusion in the 2017 conference programme, please submit it to AMINZ by 10 February 2017. All submissions should be emailed, on the proposal form to office.assistant@aminz.org.nz

Further information: 0800 4AMINZ (0800 426 469) or office.assistant@aminz.org.nz