

# Enforcement of foreign arbitration awards in Australia – lessons from the Hub Street appeal

By Melissa Perkin

## Introduction

The decision of the Full Court of the Federal Court of Australia in **Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company**<sup>1</sup> provides valuable guidance on the enforcement of foreign awards in Australia, including on the nature of the discretion available<sup>2</sup> for an Australian court to enforce a foreign award, notwithstanding any defects in the proceeding. Prior to this decision, there was no authoritative statement in Australia on the nature of that discretion.

The decision affirms the paramountcy of the terms of the arbitration agreement when determining the validity or enforceability of an arbitral award. It also reinforces the certainty and predictability of international arbitration as a method of resolving international commercial disputes.

## Background

Energy City Qatar Holding Company (**EC**) and Hub Street Equipment Pty Ltd (**Hub**) entered into a contract by which Hub agreed to supply and install street light equipment and accessories in Qatar. EC made an advance payment to Hub but later determined not to proceed with the contract and sought to recover the advance payment, which Hub failed to repay.

The arbitration agreement in the contract required:

1. the arbitration proceedings to be conducted in English;
2. EC to give Hub 45-days' notice to appoint an arbitrator; and
3. Qatari law to apply.

EC did not give the 45-day notice but instead made an application to the court in Qatar for the appointment of an arbitral tribunal according to the Qatari arbitration law. Notice of the court

<sup>1</sup> Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company [2021] FCAFC 110.

<sup>2</sup> Under section 8 of the International Arbitration Act 1974 (Cth).





proceeding was given to Hub, which did not respond. The arbitration proceedings were then conducted in Arabic.

Hub did not participate in the arbitration proceedings, and EC obtained an award in its favour, which it sought to enforce in Australia.

Hub resisted enforcement, on grounds set out in the International Arbitration Act 1974 (Cth) (**IAA**), including:

- the giving of inadequate notice of the arbitration so it could not present its case;
- the composition of the arbitral tribunal was not in accordance with the contract; and
- the failure to conduct the arbitration in English was a fundamental departure from the agreed arbitral procedure, with the consequence that the Court's narrow residual discretion under section 8 of the IAA to enforce a foreign award was not enlivened.

Despite the procedural irregularities of which Hub complained, the Federal Court at first instance made orders for enforcement, entering judgment against Hub for the full amount of the award. Hub appealed.

## The appeal

Essentially, two issues were considered by the Full Court on appeal:

- whether Hub could resist enforcement of the award on the basis that the Qatari arbitral tribunal was appointed in a manner that was inconsistent with the parties' agreement; and
- whether, notwithstanding any defect in the proceedings, the award could still be enforced by the exercise of the Court's residual discretion to enforce arbitral awards.

## Findings

The Full Court refused to enforce the award on the basis of international comity, in circumstances where:

- the Qatari court had operated on a misapprehension as to the nature of the authority it was exercising (being that EC had sought to follow the arbitral procedure, when it had made no such attempt);
- Hub was entitled to ignore the arbitration conducted by the Qatari tribunal as the tribunal had not been appointed in the manner agreed in the arbitration agreement, which was fundamental to the tribunal's jurisdiction; and

- the grounds under which Hub could resist enforcement under the IAA were made out.

Although the Full Court agreed with the first instance Court's conclusion that the IAA has a bias toward the enforcement of arbitral awards, it characterised this bias as a consequence of the finite and narrow grounds upon which enforcement may be resisted. The Full Court found that this does not extend to imposing a standard of proof on a party resisting enforcement which was any higher than the balance of probabilities.

## Observations

1. Australian courts will take a strict approach to the parties' agreement about the manner in which the arbitral tribunal will be constituted. A defect

will be viewed as fundamental to the arbitration, and cannot be overcome by the courts' overriding discretion to enforce arbitral awards or international comity, even in circumstances where the tribunal has been appointed by a court of the arbitral seat.

2. The fundamental procedural requirements of the parties' arbitration agreement which relate to the commencement of proceedings or the appointment of the tribunal should be strictly adhered to, otherwise there is a risk that an award will not be enforced.
3. Claimants should carefully record all of the steps that they take to ensure that they follow procedures prescribed in the arbitration agreement.

## About the author



Melissa Perkin is an Executive Director at the New Zealand Dispute Resolution Centre. She has previously worked as a barrister in general civil, family and criminal litigation, in regulatory work and also as the Executive Director of an association of barristers.



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