Enforcement in Australia of a foreign arbitral award issued in China

→ The Federal Court of Australia held that enforcing the foreign arbitral award against an Australian resident would not be contrary to Australian public policy.

Federal Court of Australia enforces foreign arbitral award of $40 million

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In *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584, the Federal Court of Australia granted enforcement in Australia of a foreign arbitral award issued in China, and dismissed objections that enforcement would be contrary to Australian public policy.

The facts

The parties to the dispute were a Chinese construction Company (**Guoao Group**) and a Chinese national (**Ms Xue**). Ms Xue had significant business interests in China, but resided in Australia. The parties' dispute arose in relation to their joint venture and funding agreements for the development and construction of an aged care village in China. The joint venture was arranged through a new joint venture company with shareholdings allocated to Ms Xue and related entities, as well as a 51% shareholding to Guoao Group. Through a further agreement Guouo Group had an approximate 25% interest in the overall project.

The parties referred their dispute to the Beijing Arbitration Commission. The joint venture company was not a party to the arbitration. The arbitral tribunal found in favour of Guoao Group and ordered Ms Xue to pay Guoao Group over AUD40 million (being payment for the shares in the joint venture entity and shareholder loans by Guoao Group) without transferring back to Ms Xue the shares in the joint venture entitiy.

Ms Xue made a number of unsuccessful challenges to the award in the Chinese courts. Guoao Group successfully enforced and recovered some of the award debt in China against Ms Xue's assets. However, there were insufficient assets for full recovery.

Guoao Group applied to the Federal Court of Australia (**FCA**) to enforce the remainder of the award in Australia pursuant to section 8(3) of the International Arbitration Act 1974 (**IAA**). Ms Xue sought to oppose Guoao's enforcement application by invoking section 8(7)(b) of the IAA – this provides that the court may refuse to enforce a foreign award if it finds that enforcing it would be contrary to Australian public policy.

The issues

The main issue that the FCA had to decide was whether, in respect of the arguments brought forward by Ms Xue, enforcing the foreign tribunal's award would be manifestly unfair and contrary to Australian public policy, with the result that the FCA should exercise its discretion not to enforce it.

Ms Xue argued that enforcement would be contrary to public policy because of procedural unfairness in the tribunal's award.[1] In particular, she argued that the award produced real unfairness because it rescinded (or cancelled) the parties' original disputed contract without an order that the parties were to be restored to their pre-contractual positions, effectively allowing Guoao Group double recovery. This was essentially the same argument that Ms Xue had unsuccessfully raised in the Chinese courts to try to challenge enforcement of the award in China.

The decision

The FCA rejected Ms Xue's arguments and made orders for the enforcement of the award.

The FCA held that:[2]

> *Ms Xue's complaints about the award do not rise to the level of the award being contrary to the fundamental norms of justice and fairness in Australia within the context of international commercial arbitration such as to enliven the public policy ground for resisting enforcement.*

It noted that Ms Xue had unsuccessfully raised the same arguments regarding procedural unfairness in the Chinese courts. There was also an ability in the Chinese courts for Ms Xue to seek re-conveyance (restitution or return) of the shares in the joint venture company in question, so as to prevent double recovery. She had not exercised her rights in this regard. In the FCA, Guoao Group adduced expert evidence on the point.[3] That there was a court of competent jurisdiction to do this in China was a factor in negating Ms Xue's public policy arguments.[4]

The FCA recognised the importance of harmony in the recognition of awards made under a standardised rules-based international system. It found that to circumvent another jurisdiction's decisions, the foreign award would have to be *so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the [New York] Convention, it could not reasonably be expected to overlook the objection*.[5]

In this case, the FCA found that that threshold had not been met and there were no compelling reasons why the award should not be enforced in Australia.

Conclusion

The FCA's decision reinforces the high threshold for refusing to enforce a foreign arbitral award in Australia. Refusal on the basis that enforcement would be contrary to Australian public policy (under section 8(7)(b) of the IAA) is very narrow in scope and limited to breaches of the most basic fundamental principles of morality and justice, recognising the context of international commercial arbitration. In this case there were processes of the law still available to Ms Xue in China to ensure an equitable outcome.

The door is left ajar for a finding that double-recovery will be a basis to refuse enforcement of a foreign arbitral award, (on public policy grounds under the IAA) as this was implicit in the FCA's reasoning in this complex case.

1 Ms Xue also unsuccessfully raised a number of other arguments about the translation, certification and authentication of the foreign award.
2 *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584 at [35].
3 *Guoao,* above n 2, at [41].
4 *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5, 49 VR 732.
5 *Guoao,* above n 2, at [33].