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Challenges to the tribunal's jurisdiction at the award enforcement stage[1]

By Bronwyn Lincoln[2]

Abstract

The question of the jurisdiction of an arbitral tribunal in international commercial arbitration is a question of some complexity. It can arise at all stages of the arbitration proceeding. Challenges based on the scope of the arbitration agreement or the existence of an arbitration agreement generally arise shortly after the commencement of the arbitration proceedings. The rules of most of the well-recognised arbitral institutions require challenges to jurisdiction to be raised before the filing of the statement of defence.

There are, however, also opportunities for a party to challenge the jurisdiction of an arbitral tribunal as a consequence of a procedural order (where the party contends, for example, that the order goes beyond the scope of the tribunal's authority). Questions of jurisdiction also arise at the enforcement stage; Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provides that recognition and enforcement of the award may be refused, relevantly and amongst other things, where there was no valid arbitration agreement or where the award deals with a difference which is outside of the scope of the arbitration agreement. This paper considers challenges to jurisdiction arising from a claim that there is no valid arbitration agreement in light of recent Australian authorities.

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The arbitration agreement as the starting point

As Gary Born observes in his treatise on international commercial arbitration[3]:

> *… it is elementary that international commercial arbitration is consensual: unless the parties have validly agreed to arbitrate a dispute, the arbitral tribunal has no authority to resolve that dispute.*

This is reinforced by the statement of French CJ and Gageler J in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*[4] cited by Croft J in *Indian Farmers Fertiliser Cooperative v Gutnick*[5]:

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[1] This paper was presented in the Federal Court of Australia in Melbourne (and via video to other Australian States and Territories) on 27 Feb 2018 at the first in the 2018 series of seminars co-presented by the Federal Court of Australia and the Chartered Institute of Arbitrators Australia.

[2] Partner, Corrs Chambers Westgarth

[3] Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd ed, 2014) 3447, §26.05[C][a].

> *Enforcement of an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration …*

Croft J said further[6]:

> *This means that the role of the courts under the Act [International Arbitration Act] is understood to be limited to the enforcement of contractual obligations – that is, holding the parties to their bargain to finally determine disputes using arbitration.*

Options for challenging an award

There are two options available to a party to 'challenge' an arbitral award. The first is by way of application to set aside at the seat. The second is to wait until enforcement is sought in a local court in a jurisdiction where the award debtor has assets. The *International Arbitration Act 1974 (Cth)* (**IAA**) acknowledges that an application to set aside at the seat might be brought at the same time as an application for enforcement in another jurisdiction.

Section 8(8) provides that:

> *(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.*

These two options have been described as demonstrating a dichotomy between 'active' and 'passive' remedies[7]. In the context of enforcement, proceedings at the seat would constitute an 'active' remedy. The question of whether to engage at the seat or to 'sit and wait' for enforcement proceedings under the New York Convention might be driven by strategic considerations or practical issues.

From a strategic perspective, the recognition given by courts in the Asia Pacific region to the judgment of other courts in the region might discourage a party from applying to set aside an award at the seat. The reason is that if the application to set aside was unsuccessful, the court in another regional jurisdiction, when considering a challenge to enforcement under the New York Convention, may well have regard to the earlier 'set aside' judgment. By adopting the 'sit and wait' approach, the award debtor ensures that the enforcement court is the first court to consider a challenge in respect of the award.

This issue is particularly pertinent where there is increasing regard to the need to avoid what has been described by both courts in Australia and courts in Singapore as the 'temptation of domesticity'. Specifically, in *Robotunits Pty Ltd v Mennel*[8], Croft J observed:

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[4] (2013) 251 CLR 533 [34].
[5] [2015] VSC 725 [17]; this case was the subject of an appeal but the observations of Croft J were undisturbed by the Court of Appeal.
[6] Ibid [18].
[7] *PT First Media TBK v Astro* [2013] SCGA 57 [68].
[8] (2015) 297 FLR 300.

> *This is an important illustration of the need for courts to resist the temptation of domesticity in approaching matters involving Model Law and/or New York Convention based legislation. In other words, courts must resist the temptation to approach such matters through the prism of principles and doctrines not found in the Model Law or the New York Convention, and which may be peculiar to a particular domestic jurisdiction.*

Working with the dichotomy

Whilst much might be made by the award-creditor of an award-debtor's decision not to actively challenge an award by way of an application to set aside at the seat, the fact remains that the court called upon to recognise and enforce the award in a jurisdiction where the award-debtor has assets must still decide the application for enforcement under the applicable law in that jurisdiction. In Australia, this is the IAA. There is seemingly no jurisprudence to suggest that the decision to take the passive rather than the active course might be taken into account in that decision making process. The issue was raised, however, in the *Gutnick* decision.

This decision did not involve a question of the validity of an arbitration agreement – recognition and enforcement was in fact challenged on grounds that the award provided for 'double recovery' and was therefore contrary to public policy. It is relevant, however, because it involved an award which was the subject of enforcement proceedings in both Australia and Singapore.

In this case, the application in Victoria for recognition and enforcement of the award made in Singapore was made some time after an application had been made in Singapore by the award creditor for recognition of the award as a judgment of the Singapore court. In terms of the dichotomy identified by the Singapore Court of Appeal in the *Astro* decision, the award-debtors had not only taken no active step to challenge the award in the seat (by way of an application to set aside), but they had also taken no step to challenge litigation by the award-creditor to enforce the award in the seat.

A consequence of this was that the public policy argument was made for the first time in the Victorian Supreme Court.

Whilst the litigation in Singapore was a matter raised by way of background in the application heard by Croft J (and later on appeal by the Court of Appeal), it did not on the face of the judgments of either the trial judge or the Court of Appeal factor into the question of whether the award ought be recognised and enforced in Victoria.

There may also be practical reasons why a party may choose to challenge jurisdiction at the enforcement stage in that party's home jurisdiction (and not by proactively seeking to set aside in the seat). Litigation in a foreign jurisdiction (even where that jurisdiction has been agreed as the seat for arbitration proceedings) is expensive; there is also an element of the unknown.

In circumstances where, as above in the *Gutnick* matter, the award-debtors did not take up the opportunity to resist recognition and enforcement of the award as a judgment of the Singapore courts, absent the availability of assets in Singapore against which the award might have been enforced, participation in the Singapore litigation would not have prevented the award-debtors facing recognition and enforcement in another jurisdiction (whether by way of an application to enforce the award under the New York Convention or by way of an application to recognise and enforce the judgment of the Singapore court).

Enforcement and the validity of the arbitration agreement

A party's entitlement to challenge an award which is not supported by a valid arbitration agreement is found in Article V(1)(a) of the New York Convention (Schedule 1 of the IAA) and reflected in s 8(5) of the IAA which provides, relevantly, that:

> *(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that*:
>
> …
>
> *(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made.*

As Gary Born observes[9], the question of whether a court might resist enforcement on grounds that there was no valid arbitration agreement is intrinsically connected with the obligation of convention states under Article II of the New York Convention to recognise and enforce arbitration agreements. He observes that:

> *In general, the same substantive analysis that applies in the context of recognition and enforcement of arbitration agreements under Article II is equally applicable to recognition and enforcement of awards under Article V.*

Burden of proof

The question of the burden of proof in cases where the arbitration agreement is challenged also invites commentary and debate. The party seeking enforcement of the award, being the applicant or the plaintiff, has a positive obligation to provide to the court a copy of the arbitration agreement under which the award is made. In Australia, that obligation is found in s 9 of the IAA. However, where an award-debtor challenges an award on grounds that the arbitration agreement was invalid, it is the award-debtor which must prove its case to the court.

In *IMC Aviation Solutions Pty Ltd v Altain Khuder*[10], Warren CJ (as she then was) observed in relation to the burden of proof that:

> *Section 8(5)(a)-(e) require the enforcing court to be satisfied that a foreign award is tainted by either fraud or vitiating error on the part of the arbitral tribunal. Given that the Act declares arbitration to be 'an efficient, impartial, enforceable and timely method by which to resolve commercial disputes', the enforcing court should start with a strong presumption of regularity in respect of the tribunal's decision and the means by which it was arrived at. The enforcing court should treat allegations of vitiating irregularity as serious. A correspondingly heavy onus falls upon the award debtor if it wishes to establish such an allegation on the balance of probabilities. Furthermore, the conduct of the parties to the agreement at each of the various stages prior to an enforcement order being sought in these courts, and its consistency with the defence subsequently asserted, will be a relevant fact to consider when deciding whether that burden has been discharged to the necessary standard.*

[9] Born, above n 3, 3448.
[10] [2011] VSCA 248.

There are two relatively recent decisions of the Federal Court of Australia which consider the question of the validity of an arbitration agreement, including the burden of proof.

Alfield case

Liaoning Zhongwang Group Co Ltd v *Alfield Group Pty Ltd*[11] concerned an application for recognition and enforcement of a foreign arbitral award pursuant to s 8(3) of the IAA. The award in question was made in China by the China International Economic and Trade Arbitration Commission (**CIETAC**).

Alfield resisted enforcement on three grounds:

(a) First, there was no valid arbitration agreement between the parties;
(b) Secondly, Alfield had been unable to present its case in the arbitration; and
(c) Thirdly, that enforcement would be contrary to public policy.

These three grounds were linked. The public policy arguments were unique to the facts of the case. Alfield claimed that the agreement containing the arbitration agreement was a sham and that Alfield could not fully participate in the arbitration hearing because of a threat made to the liberty of its sole director and that director's reasonable fear of detention in China.

When the matter came before the Court, it came by way of an application for summary judgment. As interesting as the facts might be in relation to the public policy arguments, the relevant aspect of the decision to the topic at hand is the Court's observations in relation to the validity of the arbitration agreement.

It was not in dispute that the arbitration agreement was contained in an agreement called the mercantile agreement. Clause 12 of the mercantile agreement provided that[12]:

> *All disputes in connection with this contract or the execution there of shall be settled through friendly negotiations between two parties. If no settlement can be reached, The [sic] case in dispute shall then be submitted for arbitration to china [sic] international economic and trade arbitration commission, Beijing in accordance with it's [sic] rules of procedure and the decision made by the arbitration organization shall be taken as final and binding upon both parties. The arbitration expenses shall be borne by the losing party unless otherwise awarded by the arbitration organization.*

The arbitral award noted that the parties had signed the mercantile agreement and that the mercantile agreement had been performed. It recorded that[13]:

> *Thereby, the mercantile agreement shall be the basis of hearing by the Arbitral Tribunal.*

On these facts and at first blush, in light of the finding of the arbitral tribunal that the 'container agreement', being the mercantile agreement, was the basis for the arbitration hearing, there is a question whether in considering whether there was a valid arbitration agreement, the court was in fact being asked

[11] [2017] FCA 1223.
[12] At [17].
[13] At [37].

to re-open the merits of the dispute. Alfield submitted that this was not the case and that an examination of the validity of the arbitration agreement was a permissible review.

As to whether there was proof before the Court of an arbitration agreement, s 9(5) of the IAA provides that *a document produced to the court in accordance with this section is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates*[14].

Counsel for Alfield submitted that in deciding an application for recognition and enforcement of the award, the Court ought consider only what might be described as the operative part of the award and not recitations and findings of fact. Counsel for the applicant submitted that the entire document ought stand for the purposes of s 9. The Court's decision on this issue was of significance because the award set out matters which were relevant to Alfield's resistance to enforcement.

In considering these submissions, the Court looked to the CIETAC Arbitration Rules under which the arbitration had taken place – these rules set out, amongst other things, matters to be covered by the award, including (in summary form), the claims, the facts, the tribunal's findings and the result. The Court held that, in light of these requirements, *the reference to award in s 9 of the Act captures the entire Arbitral Award document, and the entire document is receivable as prima facie evidence of the matters to which it relates*[15]. Relying on matters of fact set out in the award, the Court accepted that Alfield had for some time participated in the arbitration proceedings, it had invoked the arbitration agreement for a counterclaim and it had not made a challenge to the arbitration agreement in the course of the proceedings. Additionally, because of the nature of the public policy argument, there were detailed statements before the Court as to the conduct of the arbitration proceedings and in support of the facts underlying the public policy defence.

Relevantly, in relation to the burden of proof, the Court found that:

(a) the applicant had met the evidentiary requirements of s 9(1) of the IAA, that is, provision of the arbitration agreement, by the production to the court of copies of the arbitral award and the mercantile agreement containing the arbitration clause; and
(b) the applicant was therefore prima facie entitled to enforcement[16].

The Court then turned to Alfield's case. As to the proof required to demonstrate the absence of a valid arbitration agreement, the Court again turned to observations of the Court in *Altain Khuder* in relation to the interpretation of s 8(5) [17]:

> *[T]he Act neither expressly nor, in our opinion, by necessary intendment provides that the standard of proof under s 8(5) and (7) is anything other than the balance of probabilities, as one would expect in a civil case. Section 8(5) requires proof 'to the satisfaction of the court' whereas s 8(7) refers to a finding. But in either case, it is on the balance of probabilities. It is thus seen that the legislature has adopted different language in these provisions, which serves to emphasise not only the deliberate use of language but also the absence of language such as 'heavy onus', 'extremely onerous and a heavy burden', and 'clear, cogent and clear proof'. The true position, in our view, is that what may be required, in a particular case, to produce proof on the*

[14] At [21].
[15] At [25].
[16] At [65]-[66].
[17] At [75].

> *balance of probabilities will depend on the nature and seriousness of that sought to be proved.*

The difficulty faced by the Court was that the governing law of the mercantile agreement was Chinese law. Alfield's counsel encouraged the Court, in the absence of evidence of Chinese law, to apply the presumption that Chinese law was the same as Australian law, the lex fori.

Having regard to the detailed submissions before it (which are set out in the judgment), the Court observed that[18]:

> *I am not persuaded that the question of the validity of an arbitration agreement is an area of broad legal principle upon which it is reasonable to assume that the laws of Australia and the laws of China are broadly the same. Tweeddale A and Tweeddale K, Arbitration of Commercial Disputes: International and English Law and Practice (Oxford University Press, 2007), para [7.01], express the view that perhaps no other area of arbitration law has received as much academic interest as the issue of which law or laws govern the arbitration agreement and the arbitration procedure. Application of the presumption in this context may undermine the legislative framework which is expressed, in several places, to apply by reference to the law of the country in which the arbitration took place, or the law of the country in which the award was made. It would be potentially at odds with the importance of attempting to "create or maintain, as far as the language employed by Parliament in the [Act] permits, a degree of international harmony and concordance of approach to international commercial arbitration": cf TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83; (2014) 232 FCR 361 ("TCL") at [75].*
>
> *Further, in my view, the proper interpretation of s 8(5)(b) is that the requirement for proof of the circumstance that the arbitration agreement is not valid under the law of the country where the award was made is a requirement for affirmative proof of the foreign law by the party seeking to invoke s 8(5)(b). That requirement is not met by applying Australian law in the absence of proof of the foreign law. This interpretation is based primarily on the language which requires that the party resisting enforcement "proves to the satisfaction of the court" invalidity "under the law of the country where the award was made" without reference to any presumption about the content of that law. A contrary interpretation would place the burden upon the party seeking to enforce the award that the laws of the country in which the award was made was different from the laws of Australia, which is inconsistent with the general scheme of facilitating enforcement of foreign awards subject to limited circumstances which may be demonstrated by a party resisting enforcement.*

These observations were made after the Court had acknowledged and cited the objectives of the IAA.

The judgment considers the further two grounds relied on by Alfield in resisting recognition and enforcement, but in relation to the question of the validity of the arbitration agreement (which is the subject of this paper), the Court concluded that[19]:

> *… Alfield has no reasonable prospect of resisting the application for enforcement of the award pursuant to s 8(7) on the basis of its evidence that there was a lack of mutual*

[18] At [95]-[96].
[19] At [111].

> *intention between the parties to enter into the arbitration agreement or that the agreement was part of a sham arrangement. That evidence must be considered in the context of Alfield's affirmation of the arbitration agreement by its participation in the arbitration process including, most significantly, appointing Ms Jin Fengju as a member of the arbitral tribunal, submitting a "Statement of Defense", submitting counterclaims for determination by the arbitral tribunal and seeking an adjournment of the oral hearing of the tribunal for the purposes of trying to reach a settlement with Zhongwang. In that context, there is no evident basis upon which it could be said that enforcement of the award would be contrary to public policy.*

Trina Solar case

The second (and earlier) decision of the Federal Court which provides guidance where there is a question as to the validity of an arbitration agreement is *Trina Solar (US), Inc* v *Jasmin Solar Pty Ltd*[20]. *Trina Solar* involved an application by a plaintiff to civil proceedings in Australia for leave to serve those proceedings out of the jurisdiction. The primary judge granted leave. Specifically, his Honour found that Jasmin Solar *had established a prima facie case in respect of the causes of action framed by the statement of claim and that 'jurisdiction' was engaged*[21]. There was no challenge to his Honour's findings in this regard.

Trina Solar, however, appealed on grounds that the primary judge ought to have looked beyond the mandatory requirements of the Federal Court Rules and had erred in refusing to exercise a residual discretion to dismiss the application because an order granting leave to serve in the US would be of no use where the civil proceedings in Australia would be stayed on application by Trina under s 7(2) of the IAA.

The Full Court judgment includes a detailed discussion as to the availability and exercise of the residual discretion, however it is the Court's analysis on choice of law rules (both in determining the existence of an agreement and in the context of the IAA,) which is of particular interest. Trina submitted that the question of the validity of and parties to the arbitration agreement ought be determined according to New York law. Greenwood J examined the jurisprudence, principally in Australia and in the United Kingdom, where the courts had been called upon to determine the *existence, construction and validity* of a pleaded contract (including where an application to stay proceedings was founded on the parties' contractual arrangements). Having undertaken the analysis, his Honour was persuaded by the obiter of Brennan J and Gaudron J of the High Court of Australia in *Oceanic Sun Line Special Shipping Company Inc v Fay*[22] and by the English cases, concluding that[23]:

> *Having regard to Oceanic and the discussion in these reasons, it seems to me that the lex fori ought to be applied when determining [whether an agreement was reached].*

Beach J and Dowsett J agreed with Greenwood J, with Beach J observing that the *appropriate choice of law [to determine whether there is consensus ad idem between the parties] is the law of the forum*[24], and noting, amongst other things, that *it is counter-intuitive to suggest that the choice of law to assess consensus ad idem should be that set out in an agreement that an entity says it is not a party to because*

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[20] [2017] FCAFC 6.
[21] At [5].
[22] (1988) 165 CLR 197.
[23] At [46].
[24] At [128].

there was no consensus ad idem[25]. Beach J also relied in his finding on obiter of the High Court in *Oceanic*.

Whilst the Court noted that it was not necessary for the primary judge to finally determine whether a stay would be granted under the IAA (and that the primary judge did not in fact do so), each of Greenwood J and Beach J looked at the operation of ss 7 and 8 of the IAA. Section 7(2) of the IAA provides that the court *shall* on application of a party to an arbitration agreement *stay the proceedings or so much of the proceedings as involves the determination of the matter, as the case may be, and refer the parties to arbitration in respect of that matter*. Section 8(5) of the IAA (which concerns enforcement of a foreign arbitral award and was referred to earlier in this paper) provides, inter alia, that the court may refuse enforcement where *the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it, or where no law is so expressed to be applicable, under the law of the country where the award was made* or where *a party to the arbitration agreement […] was, under the law applicable to him or her, under some incapacity at the time when the agreement was made.*

These provisions require the Court for the purposes of the IAA, to look not to the *lexi fori* to determine the validity of the arbitration agreement which underpins a foreign arbitral award, but to the proper law of the agreement itself (or, where there is no proper law expressed in the agreement, to the law of the place where the award was made). The question for the Court in those circumstances is therefore, as Greenwood J observed, *whether there is an arbitration agreement, so defined, between the parties said to be parties to it* whether or not there is a contract according to the law of the forum[26]. In answering this question, his Honour had regard to the seminal cases of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [27] and *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [28], to the New York

Convention and the UNCITRAL Model Law and the leading academic studies. His Honour concluded that[29]:

> *[a]lthough the [IAA] does not select, for the purposes of recognition of an arbitration agreement […], the same choice of law rule selected at s 8(5)(b), the question of whether a party to a proceeding contemplated by s 7(2) is a "party to an arbitration agreement" for the purposes of the [IAA], ought be governed by the same choice of law rules that govern the very same question when it arises in the context of whether the court will refuse to enforce a foreign award on the proven ground of invalidity due to the relevant party never having been a "party to the arbitration agreement".*

Beach J, on the other hand, accepted that the New York Convention is to encourage uniformity of international standards, but observed that *[t]he fact that s 8(5)(b) provides for a choice of law different to the law of the forum in relation to whether an "arbitration agreement" exists to which a party is bound, does not entail that the same choice of law needs to be made for s 7(2)*[30]. A factor in his Honour's reasoning was that policy considerations which apply to the recognition and enforcement of foreign arbitral awards do not exist in relation to the enforcement of arbitration agreements. Dowsett J agreed,

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[25] At [130].
[26] At [52].
[27] (2006) 157 FCR 45.
[28] (2013) 251 CLR 533.
[29] At [82].
[30] At [182].

noting that *I see no support for the proposition (if it be advanced) that the references to proper law in s 8 should be imported into s 7 [of the IAA]*[31].

Whilst the judgment contains different analyses in relation to the choice of law issue, the Court unanimously dismissed the appeal.

Conclusion

International commercial arbitration, by its nature, involves consideration of international jurisprudence. In a recent address for the opening of the 2018 legal year in Singapore[32], Chief Justice Sundaresh Menon referred to the *growing internationalisation of legal practice.* Practitioners the world over will continue to look for novel and innovative arguments to assist their clients in challenging jurisdiction of tribunals and the enforcement of foreign arbitral awards. At the same time, national courts will move forward in their support of arbitration as a legitimate and effective option for the resolution of international disputes. And in the midst of this growth and support, tribunals will continue in reliance on the jurisprudential doctrine of competence-competence to do as they have always done which is to determine their own jurisdiction to the best of their ability in each case that is entrusted to them.

[31] At [3].

[32] Supreme Court of Singapore, '*Response by Chief Justice Sundaresh Menon, opening of the legal year 2018'* (Jan 2018) <https://www.supremecourt.gov.sg/Data/Editor/Documents/Response%20by%20Chief%20Justice%20%20(Checked%20against%20Delivery%20version%20-%20080118).pdf>.

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