FEDERAL COURT OF AUSTRALIA

Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu [2021] FCA 477

File number:	VID 637 of 2020
Judgment of:	**MIDDLETON J**
Date of judgment:	11 May 2021
Catchwords:	**ARBITRATION** – international arbitration – application for summary judgment under s 31A of the *Federal Court of Australia Act 1976* (Cth) in respect of an application for enforcement of a foreign arbitral award under s 8(3) of the *International Arbitration Act 1974* (Cth) – where second respondent contends that she did not receive proper notice of the arbitration or appointment of arbitrators – where second respondent contends that the arbitral award involved a breach of natural justice – application for summary judgment against second respondent refused but granted against other respondents – application to enforce award refused against second respondent but granted against other respondents
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 31A *International Arbitration Act 1974* (Cth) ss 2D, 8, 9, 39 *Federal Court Rules 2011* (Cth) rr 1.34, 28.44
Cases cited:	*CEEG (Shanghai) Solar Science & Tech v LUMOS LLC* 829 F3d 1201 (10th Cir 2016)) *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd* (No 2) [2020] FCA 116 *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 368; [2013] FCAFC 109 *International Relief and Development Inc v Ladu* [2014] FCA 887 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 *Jefferson Ford Pty Ltd v Ford Motor Co of Aust Ltd* (2008) 167 FCR 372 *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820 *Liaoing Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223 *Linley Investments v Jamgotchian* 670 F. App'x 627 (9th

Cir, 2016)
Nanoelectro Research and Production Co v Alphysica Inc (DMass Cir, 2018)
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) FCR 361
Tianjin Huarong Equity Investment Fund Partnership LLP v Xu [2019] ONSC 628
Tianjin Port Free Trade Zone International Trade Service Co Ltd v Tiancheng International Inc (DMass Cir 2018)
Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd [2011] FCA 131
Zavod Ekran OAO v Magneco Metrel UK Ltd [2017] EWHC 2208 (Comm)

Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Number of paragraphs:	162
Date of hearing:	29 and 30 March 2021
Counsel for the Applicant:	Mr S A Lowry
Solicitor for the Applicant:	Madgwicks
Counsel for the First, Third and Fourth Respondents:	The First, Third and Fourth Respondents did not appear
Counsel for the Second Respondent:	Mr T Clarke
Solicitor for the Second Respondent:	Hiways Lawyers

ORDERS

VID 637 of 2020

BETWEEN:	**BEIJING JISHI VENTURE CAPITAL FUND (LIMITED PARTNERSHIP)** Applicant
AND:	**JAMES Z LIU** First Respondent
	ELAINE Y LIU Second Respondent
	GHL ENTERPRISE PTY LTD ACN 068 498 475 Third Respondent
	YE AUSTRALIA PTY LTD ACN 167 359 480 Fourth Respondent

ORDER MADE BY: **MIDDLETON J**

DATE OF ORDER: **11 MAY 2021**

THE COURT ORDERS THAT:

1. The parties confer and within 14 days file an agreed minute of orders or, in default of agreement, written submissions no longer than 5 pages and proposed minutes of orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MIDDLETON J:

INTRODUCTION

1 These reasons for judgment concern an application to enforce a foreign award under the *International Arbitration Act 1974* (Cth) ('**IAA**'). The applicant, Beijing Jishi Venture Capital Fund (Limited Partnership) ('**Jishi Fund**'), has applied pursuant to s 8(3) of the IAA for the enforcement of a foreign arbitral award as if it were a judgment of this Court. For the following reasons, I have declined to make such an order against the second respondent, but will make the order against the other respondents.

2 The dispute between the parties arises out of the purported exercise of a share buyback option and a compensation claim following the failure to complete an initial public offering of Yidi Fur Technology (Shanghai) Co Ltd ('**Yidi Company**') and its affiliated entities (together, '**Yidi Group**') in mainland China.

3 In August 2012, Jishi Fund entered into an agreement with eight other parties, including the first and second respondents, to invest in the Yidi Company in exchange for 20% of its equity ('**Shareholders Agreement**'). Under the Shareholders Agreement, the parties agreed to endeavour to complete an initial public offering in mainland China before 30 June 2017. This did not occur. On 27 December 2017, Jishi Fund applied to the China International Economic and Trade Arbitration Commission ('**CIETAC**') for arbitration ('**Arbitration Application**').

4 On 14 November 2018, the arbitral tribunal appointed by CIETAC determined the Arbitration Application and made an award against the respondents ('**Award**'). Jishi Fund now seeks to enforce the Award in this Court as a judgment against the respondents in the amount of $29,484,377.89, as well as a further $4,821.934.54 against the first, third and fourth respondents.

5 The first respondent in this proceeding, Mr James (Zhihua) Liu, is an Australian citizen. On 20 May 2020, Mr Liu was declared bankrupt. Mr Liu has not filed an appearance in this proceeding and his trustee in bankruptcy has informed the Court that he neither opposes nor consents to enforcement of the Award.

6 The second respondent, Mrs Elaine Y Liu (also known as Yi Ling Zhang), is married to Mr Liu and is also an Australian citizen. Mrs Liu is the only party who opposes the enforcement of the Award, and does so on the basis that she was not afforded proper notice of either the arbitration or the appointment of arbitrators. In light of this alleged failure, which Mrs Liu says amounts to a breach of the rules of natural justice such that enforcement of the Award would be contrary to public policy, Mrs Liu says the Court should refuse to enforce the Award on ground of either s 8(5)(c) or s 8(7)(b) (read with s 8(7A)(b)) of the IAA.

7 The third respondent, GHL Enterprise Pty Ltd ('**GHL**'), is a company registered in Australia and is part of the Yidi Group. GHL did not file an appearance in this proceeding. Mr Liu was a director of GHL from 12 March 1995 to 20 May 2020. Mrs Liu was a director of GHL from 10 March 1995 to 22 January 2019. GHL is a wholly owned subsidiary of the fourth respondent.

8 The fourth respondent, Y E Australia Pty Ltd ('**YE Australia**'), is also registered in Australia. YE Australia did not file an appearance in this proceeding. Mr Liu was a director of YE Australia from 24 December 2013 to 20 May 2020.

9 From the outset, there are four matters to note.

10 *Firstly*, Jishi Fund filed an application for summary judgment on 24 February 2021. At that stage of the proceeding, Mrs Liu had already filed her affidavit of 3 December 2020 in which she attested to not having received any notice of the arbitration or Award, or any communication from the arbitral tribunal, as well as an affidavit of Mr Liu of 17 December 2020 to the same effect. On 2 March 2021, Mrs Liu filed submissions opposing the interlocutory application and objecting to enforcement of the award. It became clear from this material that, in order to reach a view on the interlocutory application, the Court would be required to determine factual issues and potentially novel questions of law. On this basis, I adjourned the interlocutory application to be heard concurrently with the originating application on 29 March 2021. For the reasons set out below in relation to the substantive application, I will dismiss the application for summary judgment against Mrs Liu.

11 I should interpolate that the other respondents did not appear to oppose the enforcement of the Award, and being satisfied that there has been compliance with the requirements of the IAA and as they bear the onus to persuade the Court that the Award should not be enforced,

orders should be made enforcing the Award against Mr Liu, GHL and YE Australia on the summary judgment application (with costs of and in connection with that application).

12 *Secondly*, many of the original documents in evidence, including the Award and the Shareholders Agreement, are in Chinese. The parties have furnished the Court with certified English translations of these documents. In my reasons, I will refer to the translations without specification unless necessary (such as where there has been a dispute about the translation).

13 *Thirdly,* whilst certified English translations were provided to the Court in advance of the hearing, the initial copies of the Award and arbitration agreement (including the Shareholders Agreement and its subsequent variations) that were provided to the Court had not been duly certified as required by s 9(1) of the IAA. On the first day of the hearing, counsel for Mrs Liu objected to the Court's jurisdiction to determine the application on this basis. Given the late stage at which this objection was raised, I granted leave to Jishi Fund to file a further affidavit from its solicitor, Mr Bo Zhou, affirmed on 1 April 2021, annexing certified copies of these documents. I am now satisfied that the Award and the arbitration agreement have been produced to the Court in accordance with s 9 of the IAA and are thus receivable as prima facie evidence of the matters to which each document relates: s 9(5) of the IAA. To the extent that there was any failure to comply with r 28.44(2)(a) of the *Federal Court Rules 2011* (Cth) ('**Rules**'), which provides that the documents mentioned in s 9 of the IAA must accompany the originating application, I dispense with this requirement that the documents accompany the originating application: see r 1.34 of the Rules.

14 *Fourthly*, the foundation of any arbitral award is the agreement of the parties, which gives authority to the arbitrators and sets out agreed arbitral procedures. This is relevant to the consideration of whether proper notice has been given to a party to the arbitration or the appointment of arbitrators and the application of s 8(5)(c) and s 8(7)(b) (read with s 8(7A)(b) of the IAA. Where a party indicates its address for notification in (for instance) an arbitration agreement, that party would normally be taken to accept the risk to receive relevant communications at the address provided. This would allow for due process, as the parties themselves have determined the ambit of one aspect of the duty to effect proper notice — namely, its deemed receipt in the absence of actual notice. The right to receive notification of an arbitration in this way is to fulfil the expectation of the parties to an arbitral agreement as a dispute resolution process.

RELEVANT LEGISLATION

15 The enforcement of a foreign award is governed by Part II of the IAA, which is intended to implement the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('**Convention**'). Articles II, III, IV and V of the Convention relevantly provide:

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

[…]

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

   (a) The duly authenticated original award or a duly certified copy thereof;

   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) The parties to the agreement referred to in article II were, under the

law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

16 I will now turn to the IAA. The important provision is s 8, which substantially reflects art V of the Convention and relevantly provides:

(3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.

(3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).

(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:

(a) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him or her, under some incapacity at the time when the agreement was made; or

(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; or

(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings; or

(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

[…]

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

(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.

17 It is worth paying close attention to the wording of this provision. The language in sub-s (3) is permissive: a foreign award may be enforced. However, sub-s (3A) considerably limits the Court's discretion in respect of refusal to enforce: the court may only refuse to enforce the foreign award in the circumstances mentioned in s 8(5) and s 8(7).

18 It is the party against whom the award has been made who must satisfy the court that it should not enforce the award. This Court cannot refuse to enforce the Award unless Mrs Liu proves that a ground listed in s 8(5) or s 8(7) is established. Even if Mrs Liu establishes that there is ground for refusal under either s 8(5)(c) or s 8(7)(b) of the IAA, the Court may still decide to enforce the award as a matter of discretion.

19 Section 3(1) of the IAA includes the following definitions (the significance of which I will return to later in my reasons):

> ***agreement in writing*** has the same meaning as in the Convention.
>
> […]
>
> ***arbitration agreement*** means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention.
>
> […]
>
> ***Convention*** means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 1.
>
> […]
>
> ***foreign award*** means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

20 It is not disputed that the Award is a "foreign award" within the meaning of s 3(1) of the IAA.

21 It is also important to bear in mind s 39 of the IAA, which prescribes matters to which a court must have regard when exercising a power under s 8 of the IAA to enforce a foreign award. Section 39(2) of the IAA provides:

> The court or authority must, in doing so, have regard to:
>
> (a) the objects of the Act; and
>
> (b) the fact that:
>
> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
>
> (ii) awards are intended to provide certainty and finality.

22 The objects of the IAA are set out in s 2D and include:

> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
>
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
>
> (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at

its twenty fourth meeting….

23 I will now set out the legislation that is relevant to the procedure for enforcing a foreign award under Part II of the IAA, which I am now satisfied has been substantially observed. Rule 28.44 of the Rules provides:

> (1) A person who wants to enforce a foreign award under section 8(3) of the International Arbitration Act must file an originating application, in accordance with Form 52.
>
> (2) The originating application must be accompanied by:
>
> (a) the documents mentioned in section 9 of the International Arbitration Act; and
>
> (b) an affidavit stating:
>
> (i) the extent to which the foreign award has not been complied with, at the date the application is made; and
>
> (ii) the usual or last-known place of residence or business of the person against whom it is sought to enforce the foreign award or, if the person is a company, the last-known registered office of the company.
>
> (3) The application may be made without notice to any person.

24 Section 9 of the IAA substantially reflects art IV of the Convention and provides:

> (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:
>
> (a) the duly authenticated original award or a duly certified copy; and
>
> (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.
>
> (2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:
>
> (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
>
> (b) it has been otherwise authenticated or certified to the satisfaction of the court.
>
> (3) If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.
>
> (4) For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.

(5) A document produced to a 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.

RELEVANT LEGAL PRINCIPLES

25 In order to establish a ground for refusal under s 8(5) or s 8(7) of the IAA, the evidentiary standard of proof is the usual standard of the balance of probabilities. What will be required from the award debtor to meet this standard will depend on the nature and seriousness of what is sought to be proved: see *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 ('***IMC Aviation Solutions***') at [192] (Hansen JA and Kyrou AJA); cf [53] (Warren CJ).

26 Arbitration is intended as an efficient, impartial, enforceable and timely method by which to resolve disputes, and awards are intended to provide certainty and finality: s 39(2)(b) of the IAA. The enforcing court should thus start with a strong presumption of regularity in respect of the arbitral tribunal's decision and the means by which it was arrived at, and treat allegations of vitiating irregularity as serious: *IMC Aviation Solutions* at [53] (Warren CJ).

Proper notice: s 8(5)(c) of the IAA

27 At a general level, the proper notice requirement in s 8(5)(c) of the IAA will be satisfied if the party was given a reasonable opportunity, in all the circumstances, to present its case: *Liaoing Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223 ('***Liaoing Zhongwang***') at [98] (Gleeson J); *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 368; [2013] FCAFC 109 at [3] (Allsop CJ, Besanko and Middleton JJ). In determining whether this has been done, the enforcing court should have regard to the adequacy of the form of notice, as well as the method and timing of its delivery.

28 In *International Relief and Development Inc v Ladu* [2014] FCA 887 ('***Ladu***'), Kenny J held that where actual notice is given of the appointment of the arbitration and the appointment of arbitrators, then no question as to the further ambit of proper notice under s 8(5)(c) of the IAA arises: at [172]. I respectfully agree, subject to questions as to the form and timing of the notice.

29 In *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820, McDougall J considered an objection to enforcement of a foreign award. His Honour found that the award debtor had actual notice of the arbitration but did not accept that this necessarily meant that he had received "proper notice" for the purpose of s 8(5)(c) of the IAA. His Honour held:

> [68] Mr Chun's denial of receipt of any of those documents is implausible… I think the probabilities are that those documents were (or a majority of them was) brought to his attention. That does not mean that he had proper notice of the arbitration. But, coupled with my findings in respect of the ICA's letter, it means that Mr Chun, had he taken the trouble to read the documents, must have appreciated that LKT was proceeding with the arbitration of its dispute.
>
> […]
>
> [73] I think it likely, on balance, that at least some of the faxes sent to Mr Chun's Hong Kong residential fax number were received there. I think it likely that at least some of those faxes came to his attention. Again, this does not mean that he had proper notice of the arbitration proceedings. It does however mean, as I have said in para [68] above, that he must have been aware that LKT was prosecuting those proceedings.
>
> […]
>
> [74] I find that Mr Chun was given notice of the arbitration proceedings against him. Although he was misnamed in the letter and notice (and other correspondence) that he received, I find that he would have understood the documents that he received as relating to him, and that they identified him as a party to the arbitration proceedings.
>
> [75] Mr Chun did not seek to make a case that, notwithstanding the notifications to which I have referred, he was unable to present a case in the arbitration proceedings. That is not a criticism: any such evidence would have been entirely inconsistent with his principal ground of defence. It means, however, that since I have found that the principal ground of defence fails, there is no reason for finding that he was unable to present a case in the arbitration proceedings.

30 The enforcing court must look at all the circumstances (with due regard to the bargain that has been struck between the parties) to objectively determine whether proper notice of the arbitration and appointment of arbitrators has been given. It is my view that, in circumstances where businesspersons have entered into an agreement to submit to international commercial arbitration, the question of what is "proper" will take into account what the parties have agreed where such agreement relevantly covers the issue of notification of the arbitration and appointment of arbitrators.

31 In this proceeding, an issue has arisen as to whether the proper notice question should be determined under the law governing the arbitration (or the agreement). In *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd (2011)* 277 ALR 415; [2011] FCA 131 ('***Uganda Telecom***'), Foster J found that the parties' arbitration agreement did not apply as the formal communications concerning the arbitration were not made "under" or "according to" the agreement: at [114]. His Honour then applied Ugandan law, which was both the governing law of the agreement and the domestic arbitration in Uganda, to determine that the award debtor had been given proper notice of the arbitration: at [115]-[118].

32 In *Ladu*, after finding that the award debtor had received actual notice, Kenny J nonetheless considered whether there would have been proper notice in the absence of such actual notice. With reference to *Uganda Telecom*, her Honour accepted that the relevant contractual notice provision was inapplicable to notice of the appointment of the arbitrator or the arbitration proceeding as it was only directed to the provision of notice under the agreement: at [178]. Her Honour thus went on to consider the potential application of the arbitral rules that were made applicable under the arbitration agreement (at [179]):

> Since the notice of the appointment of the arbitrator and of the arbitration proceedings was in the nature of a formal communication concerning the arbitration, I accept that, pursuant to cl 14 of the Employment Agreement…particularly in the absence of actual notice (which was not this case), IRD would have been obliged to give notice of the arbitration proceedings and of the appointment of the arbitrator (and, to the extent relevant, of the arbitration hearing) in accordance with the applicable rules (if any) of the American Arbitration Association. It may be recalled that cl 14 stated that IRD might bring the dispute to arbitration "in accordance with the rules of the American Arbitration Association". Since Mr Ladu bore the civil onus of proof (as he accepted) it was for him to show that IRD had not given notice in accordance with these rules. The rules of the American Arbitration Association were not, however, in evidence before the Court; and Mr Ladu did not seek to elucidate what they relevantly required.

33 In both *Uganda Telecom* and *Ladu*, their Honours looked first to any directly applicable contractual provision, and then to the arbitral rules that applied to the conduct of the arbitration. Their Honours both seemed to accept that these matters were at least highly relevant (if not determinative of) the proper notice question.

34 In *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 116 ('***Energy City Qatar v Hub Street***'), a decision which has since been appealed to the Full Court of this Court, Jagot J considered the issue of proper notice. Her Honour did not engage in any substantive consideration of the issue of "proper notice".

35 In that case, there was a contractual notice provision that applied to notice "under the Contract": see [8(1)]. Justice Jagot did not expressly consider whether the contractual notice provision applied to formal communications concerning the arbitration but appeared to find (at [10]) that the applicant had not complied with the relevant provision. In considering whether the award debtor had received notice of the appointment of arbitrators, her Honour observed (at [13]):

> The Qatari Plenary Court of First Instance made orders in January 2017 appointing an arbitral tribunal. The arbitral tribunal sent to the Chippendale Address, six notices in English about the conduct of the arbitration between 18 April 2017 and 12 July 2017 (with the arbitration being adjourned on three occasions due to Hub's failure to

> attend). The evidence shows that the letters were sent by pre-paid registered mail and receipts show that each of the notices was sent to the Chippendale Address. Under Art 4 of Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law (Qatar)…which was in force from March 2017 onwards, written notices may be served by service to the addressee's place of business that is known to the parties or specified in the arbitration agreement and is deemed to have been received if it is received or sent before 6.00pm in the country where it is received or otherwise receipt will be deemed to have occurred on the following day.

36 Her Honour later referred again to the relevance of Qatari law (at [55]):

> …there was no dispute between the parties that the law of Qatar governs the conduct and validity of the arbitration. Accordingly, the questions whether Hub was given proper notice of the appointment of the arbitrator and whether the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Contract are subject to the operation of Qatari law. Australian law governs the enforcement of the arbitral award in Australia but that law is to be applied having regard to the fact that Qatar law determines the validity of the arbitration and its conduct.

37 Ultimately, Jagot J found that the award debtor had received actual notice of the constitution of the arbitral tribunal between April and July 2017 "in ample time for Hub to take a role in the arbitration had it wished to do so": [61(5)], and so did not apply Qatari law to determine whether the award debtor had received proper notice of the appointment of arbitrators.

38 As I have said, in considering whether proper notice has been given in the application of s 8(5)(c) of the IAA, the Court, in applying Australian law, looks to the arbitration agreement or any applicable rules interpreted in accordance with the appropriate governing law. However, I do not consider that the question of what constitutes proper notice for the purpose of s 8(5)(c) of the IAA is to be determined solely or determinatively under the law governing the validity of the arbitration and its conduct.

39 This Court is being asked to construe an Australian statute in accordance with established principles of Australian statutory interpretation. Section 8(5)(c) of the IAA, unlike most of the other grounds in sub-s (5), makes no reference to any other system of law. I do not consider the plain language of the statute to support a construction of s 8(5)(c) whereby the function of the enforcing court is limited to determining compliance with the governing law, thereby eschewing Australian standards of what is proper notice.

40 It is important that any approach to construction of s 8(5)(c) of the IAA is consistent with the approaches taken in other jurisdictions that have enacted domestic law to implement the terms of the Convention, subject to any relevant difference between the enacting legislation. In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR

361 (‘***TCL Air Conditioner v Castel***’), the Full Court (Allsop CJ, Middleton and Foster JJ) observed (at [75]):

> …Contrary to the submission of the appellant, it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the [Convention] and the Model Law. It is of the first importance to attempt to create or maintain as far as the language employed by Parliament in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration….

41 Similarly, in *IMC Aviation Solutions*, the majority of the Court of Appeal of the Supreme Court of Victoria (Hansen JA and Kyrou AJA) said (at [130]):

> …as the Act gives effect to the Convention, decisions of overseas courts on the meaning of provisions of domestic legislation that adopt the wording of the Convention may be of assistance in the interpretation of the Act. Apart from promoting comity, there are obvious advantages in consistency in the interpretation of legislation that gives effect to an international convention. In that regard, however, it will be important to note any relevant differences in the legislation of another jurisdiction.
>
> (Footnotes omitted.)

42 In United States and Canadian courts, the proper notice requirement has been distilled as notice reasonably calculated to inform the respondent of the proceeding and to afford it an opportunity to be heard: see, eg, *CEEG (Shanghai) Solar Science & Tech v LUMOS* 829 F3d 1201 (10th Cir 2016) at 1203 and *Tianjin Huarong Equity Investment Fund Partnership LLP v Xu* [2019] ONSC 628 at [31].

43 Essentially the same test has been applied in the United Kingdom. In *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) at [12]:

> "proper notice"…is an aspect of the wider notion that the party contesting enforcement was unable to present its case (Merkin, *Arbitration Law*, §19.53), so that lack of proper notice suggests some unfairness (*Russell on Arbitration*, 24th edn, §8-040: and see generally, *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 AII ER (Comm) 315 at 327; *Irvani v Irvani* [2000] 1 Lloyd's Rep 412 at 426, *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701 at [23]). In the context of s 103(2)(c) Arbitration Act 1996, "proper notice" is such as is likely to bring the relevant information to the attention of the person notified, taking account of the parties' contractual dispute resolution mechanism, including any applicable institutional arbitration rules. In this sense, notice is treated by the court as a question of fact (as in *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820), the onus of proof being on the party raising it as a ground of refusal of enforcement of the ward, as expressly specified in s 103(2) Arbitration Act 1996.

44 This approach recognises that the proper notice ground for objection under s 8(5)(c) of the IAA is, in essence, a matter of procedural fairness. In this regard, it is no different from the

separate ground in s 8(7)(b) of the IAA, read with sub-s (7A)(b), under which the court may refuse to enforce a foreign award where a breach of the rules of natural justice occurred such that it would be contrary to public policy to do otherwise. There is an obvious link between proper notice and the ability of a party to present its case, involving rules of natural justice and public policy.

Public policy: s 8(7)(b) of the IAA

45 The question of whether a breach of the rules of natural justice occurred in connection with the making of the award such that enforcing the award would be contrary to public policy is a matter of Australian public policy and Australian principles of natural justice — recognising, of course, that those principles are to be applied in the context of international commercial arbitration.

46 In *IMC Aviation Solutions*, the majority observed (at [346] n 203):

> Paragraph 2(b) of art V of the Convention makes it clear that the public policy that is relevant under s 8(7)(b) is the public policy of the country in which an award is sought to be enforced. In the present case, the public policy of Australia is applicable.

47 In *TCL Air Conditioner v Castel*, the Full Court considered the notion of public policy in arts 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985 with amendments adopted on 7 July 2006) ('**Model Law**') and held:

> [109] …..The system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties. The a-national independence of the international arbitral legal order thus created required at least two things from national court systems for its efficacy: first, a recognition that interference by national courts, beyond the matters identified in the Model Law as grounds for setting aside or non-enforcement would undermine the system; and secondly, the swift and efficient judicial enforcement and recognition of contracts and awards. The appropriate balance between swift enforcement and legitimate testing of grounds under Arts 34 and 36 is critical to maintain; essential to its courts acting prudently, sparingly and responsibly, but decisively when grounds under Arts 34 and 36 are revealed. An important part of that balance is the protection by the courts of the fundamental norms of fairness and equality embodies in the rules of natural justice within the concept of public policy.
>
> [110] …Parties in international commerce may choose arbitral dispute resolution for many reasons… that chosen international legal order depends crucially upon reliable curial enforcement and a respect by the courts for the choice and autonomy of the parties and for the delicate balance of the system. A demand for fairness and equality is at the heart of the supervisory balance, as

> is a recognition that this is not reflected in mechanical technical local rules. The real question is whether an international commercial party has been treated unfairly or has suffered real practical injustice in the dispute and litigation context in which it finds itself. Formalism in the application of the so-called rules is not the essence of the matter: fairness and equality are. How unfairness is revealed or demonstrated in any particular case will depend on the circumstances…
>
> [111] …The rules of natural justice are part of Australian public policy. The assessment as to whether those rules have been breached by reference to established principle is not a matter of formal application of rules disembodied from context, or taken from another statutory or human context. The relevant context is international arbitration. No international arbitration award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached… It is likely that real prejudice, actual or potential, would be a consideration in the evaluation of any unfairness or practical injustice.
>
> (Citations omitted.)

48 I consider these observations to be equally relevant to questions of public policy in the context of the Convention and the IAA.

Weight to be given to the findings of the arbitral tribunal

49 Despite s 9(5) of the IAA, it is important to stress that this Court is not bound by the tribunal's findings in relation to any of the grounds to refuse enforcement of the award. The enforcing court has the obligation to decide whether any of the grounds in s 8(5) or s 8(7) of the IAA have been made out.

50 In the context of a proper notice objection, I would add that it would be a strange result if a tribunal's finding that a respondent had been given notice of the arbitral proceeding were binding against a party who asserts that they were not given any opportunity to be heard in the proceeding — including no opportunity to be heard on the question of whether they had indeed been properly served or afforded a reasonable opportunity to present her case. If this were the position then, as counsel for Mrs Liu submits, any arbitral tribunal anywhere would be able to pull itself up by its bootstraps notwithstanding that notification of all respondents may have miscarried.

51 This is not to say that the findings of the arbitral tribunal in the Award may not be relevant as prima facie evidence of factual matters to which they relate: see s 9(5) of the IAA. In fact, some of the findings of the Award that relate to substantive factual matters found by the arbitral tribunal are referred to in these reasons. However, the conclusion in the Award that service has been effective cannot bind this Court to make a finding that proper notice has

been given to Mrs Liu. In any event, the evidence before the Court as to service goes well beyond that available to the arbitral tribunal, and the Court therefore has the advantage of considering, and a duty to consider, that evidence in determining whether to enforce the Award.

WITNESSES

52 Evidence was given by Mrs Liu personally and on her behalf by Mr Liu and her solicitor, Mr Yunfei 'Payne' Wu. Both Mr and Mrs Liu were cross-examined.

53 Jishi Fund adduced evidence from:

(a) Mr Libo Huang, the executive partner of the Jishi Fund;

(b) Mr Xiao Feng 'Barry' Xu, a creditor of Mr Liu;

(c) Ms Ya Nan Zheng, a previous employee of the Yidi Company;

(d) Mr Bo Zhou, Jishi Fund's solicitor; and

(e) Mr Mark Sloan, a process server.

54 Only Messrs Xu and Zhou were cross-examined.

FACTS AND EVIDENCE

55 In 1991, Mr and Mrs Liu started a sheepskin and fabric product business in Australia. The business was a manufacturing enterprise that over time was run through different companies including the Yidi Company, GHL and YE Australia.

56 From 1998, the business operated from a factory at 25-26 Lincoln St, Laverton North, VIC 3026 ('**Laverton North Address**'). This was the business factory location in Australia until the property was sold and the business premises were moved to Mitcham, another suburb in Victoria, in 2015.

57 From around 2011, the business began to attract outside investment, and in August 2012, the Shareholders Agreement was executed. This is the agreement under which the parties (other than GHL and YE Australia) submitted to arbitration.

The Shareholders Agreement

58 The Shareholders Agreement relevantly provides:

17. Application of Law and Dispute Resolution

17.1 This agreement is subject to Chinese laws (for the purpose of this article, excluding Hong Kong Special Administrative Region, Macau Special Administrative Region Laws of other administrative regions and Taiwan), and interpreted in accordance with Chinese laws;

17.2 All parties shall try to amicably resolve all disputes, conflict and differences (disputes) caused by the performance or non-performance of the Agreement obligations (including all matters such as the establishment, validity or termination of this Agreement). If a dispute or claim cannot be resolved amicably within thirty (30) days after a party has issued a written notice of dispute, the party may apply for final resolution at the International Trade Arbitration Commission in Beijing, China, based on the prevailing rules at the time. Tribunal consists of three arbitrators, one appointed by the Investor, one appointed by the Shareholder, and the third arbitrator is jointly appointed by the Investor and the Shareholder who will be the chief arbitrator. Arbitration fee and expenses shall be borne in accordance with the decisions of arbitration.

17.3 The arbitration proceedings shall be conducted in Chinese and all requests shall be written in Chinese. The arbitration decision is final, binding and enforceable against both parties and both parties may apply for enforcement of the arbitration decision in any court with jurisdiction…The service of documents to either party can be made in the manner specified in this Agreement or other ways required by the applicable law or court rules.

[…]

18. Notification

18.1 Unless otherwise stipulated in this Agreement, notices or communication by any party under this Agreement may be personal delivery, approved courier, fax or email to other parties as listed below address, fax number or e-mail address or other address, fax number of email address as stipulated in this Clause. The effective date of service of notice is deemed valid based on the following rules:

(a) Notices delivered by individuals shall be deemed to be effectively service on the day of personal service;

(b) Notice sent by registered airmail (postage prepaid) shall be deemed to be sent on the on the [sic] 7th day (based on postal stamp) and are effectively delivered,

(c) Notice sent by fax or e-mail all [sic] be deemed to be sent on the first business day after the confirmation of the transmission based on machine record and are effectively delivered;

(e) During the effective term of this Agreement, a party shall notify all other parties of any changes of its contact details within 3 days before the effective change otherwise the party making the change shall be responsible for all adverse consequences.

18.2 For notification purposes, the addresses, fax numbers and email addresses of the parties are listed below:

[…]

(f) James Z. liu

Mailing address: 25-26 Lincoln Street, Laverton North, Vic 3026 Australia

Postcode:

Fax: +61-3-93695688

Email: james.liu@yellowearth.com

(g) Elaine Y. Liu

Mailing address: 25-26 Lincoln Street, Laverton North, Vic 3026 Australia

Fax: +61-3-93695688

Email: elaine.yellowearth@gmail.com...

59 The Shareholders Agreement defined the "Controlling Party" as Mr Liu and Mrs Liu, and "Chinese Laws" as "[t]he laws, regulations, rules and judicial interpretations known to public that are formally promulgated by the legislative, administrative and judicial organizations at all levels in China which for the purpose of this Agreement do not include Hong Kong Administrative Region, Macau Special Administrative Region and Taiwan."

60 It is common ground between the parties that the Shareholders Agreement was subject to Chinese law, and that the parties had agreed the conduct of the arbitration would be governed by the CIETAC Arbitration Rules commencing 1 January 2015 ('**CIETAC Rules**').

The CIETAC Rules

61 In the course of the hearing, the Court was provided with two alternative certified English translations of the relevant sections of the CIETAC Rules. The parties have since agreed that the following English translation of arts 8 and 22 of the CIETAC Rules ('**Second CIETAC Translation**') is correct.

> **Article 8 Service of Document and time limit**
>
> (1) All documents, notices and written materials related to arbitration may be sent in person, by registered mail, express mail, fax or by other means deemed appropriate by the Arbitration Institute of the Arbitration Commission or the arbitral tribunal.
>
> (2) The arbitration documents mentioned in paragraph (a) above shall be sent to the address provided by the parties or their arbitration agents or agreed by the parties; If the parties or their arbitration agents fail to provide an address or if the parties have not agreed on an address, the address provided by the other party or its arbitration agent shall be followed.
>
> (3) If the arbitration documents sent to one party or its arbitration agent are delivered to the addressee in person or sent to the addressee's business premises, registered premises, domicile address, permanent residence or mailing address, or if any of the above places cannot be found after reasonable inquiry by the other party, the Arbitration Institute of the Arbitration Commission shall deliver them to the addressee's last known business premises, registered premises, domicile address, permanent residence or mailing address by registered mail or express mail or any

> other means that can provide delivery records including notarization of service, entrusted service and service by leaving the document at the address.
>
> (4) The commencement day of the time limits stipulated in this article shall be calculated from the day after the parties receive or should have received the documents, notices and materials sent to them by the Arbitration Institute of the Arbitration Commission.
>
> […]
>
> **Article 22 Arbitration agents**
>
> The parties may authorize Chinese and/or foreign arbitration agents to handle relevant arbitration matters. The parties or their arbitration agents shall submit a power of attorney to the Arbitration Institute of the Arbitration Commission.

62 Even though the parties have agreed that the Second CIETAC Translation is correct, for reasons which I will explain below I have also had regard to the following interpretation of art 8(3) of the CIETAC Rules ('**First CIETAC Translation**'):

> **Article 8 Service of Documents and Periods of Time**
>
> […]
>
> 3. Any arbitration correspondence to a party or its representative(s) shall be deemed to have been properly served on the party if delivered to the addressee or sent to the addressee's place of business, place of registration, domicile, habitual residence or mailing address, or where, after reasonable inquiries by the other party, none of the aforesaid addresses can be found, the arbitration correspondence is sent by the Arbitration Court to the addressee's last known place of business, place of registration, domicile, habitual residence or mailing address by registered or express mail, or by any other means that can provide a record of the attempt at delivery, including but not limited to service by public notary, entrustment or retention…

The Supplementary Agreement

63 On 19 January 2015, Jishi Fund, Mr Liu and Mrs Liu entered into a supplementary agreement in relation to, among other things, the payment of valuation adjustment compensation under the Shareholders Agreement ('**Supplementary Agreement**'). The Supplementary Agreement did not include any contractual service or notice provisions.

The Confirmation Letter

64 In September 2017, Jishi Fund and Mr Liu executed a confirmation letter in relation to the rights of Jishi Fund under the Shareholders Agreement ('**Confirmation Letter**'). The parties to the Confirmation Letter were not the same as the parties to the Shareholders Agreement and included GHL and YE Australia. The Confirmation Letter relevantly provides:

> James Z. Liu promises and confirms that he has obtained full authorization from his spouse Elaine Y. Liu. James Z. Liu has the right to sign this confirmation letter on behalf of Elaine Y. Liu…

> […]
>
> 5. … Any disputes caused by or relating to this confirmation letter... [t]o initiating arbitration proceeding to China International Economic and Trade Arbitration Commission (place of arbitration, Beijing).
>
> 6. The parties agree that the following addresses (including email addresses) shall be the notification address for the investor to notify any of the parties and the address for service of relevant legal documents. The investor's written notice, mail or e-mail is deemed to have been delivered to the address, regardless of whether the content of the notice is actually known by the recipient; the parties confirm that if the investor has delivered to one of the parties, it is deemed that all parties have received and are aware of it.
>
> James Z. Liu: Address: No. 9, Xinshui Road, Qingpu Industrial Park, Shanghai. Zip Code: 201707 Email: james.liu@yellowearth.com Phone: 128-1786-9237.
>
> […]
>
> 8. Once this confirmation letter is signed, it will have legal effect on all parties immediately; if any one or several parties have signed this confirmation letter, the confirmation letter will become legally effective between parties that have signed it and between any parties and the Jishi Fund at the same time.
>
> 9. This confirmation letter is in 10 copies, and each party holds one copy, which has the same effect. Once this confirmation letter is signed, it will take legal effect on all parties immediately.

65 Mr Liu signed the letter himself and on behalf of the Yidi Company, GHL, YE Australia and two other Yidi Group companies. Mrs Liu did not sign the letter and Mr Liu did not purport to sign it on her behalf. As I will explain in more detail below, the essence of the present dispute between Mrs Liu and Jishi Fund is the extent to which Jishi Fund can now rely on this document (and the address of No. 9, Qingpu Industrial Park, Shanghai ('**Qingpu Industrial Park Address**')) to enforce the Award against Mrs Liu.

66 I should say something briefly about this address. The Qingpu Industrial Park Address was the business factory location in China until it ceased operation in 2017. I accept the evidence of Mr Huang, Executive Partner of the Jishi Fund, supported by a company search exhibited to his third affidavit affirmed on 3 February 2021, that this address was the registered address for service of the Yidi Company. I also accept Mrs Liu's evidence that her last visit to the Qingpu Industrial Park Address was in late 2016 or early 2017 for a few hours to accompany Mr Liu, and that she had not returned to that address ever since.

67 At the hearing, Mr Liu described the Confirmation Letter as "fake". Mr Liu accepted that he had executed the document on behalf of himself and other companies (including GHL and YE Australia) but took issue with certain features of the document, including the signatures being on a separate page and the statement that 10 copies had been provided to the parties. I

do not consider Mr Liu's evidence to be directly contrary to the arbitral tribunal's finding that the Confirmation Letter was "legal and valid" (Award, 10), and in any event would find his assertions insufficient to disprove the validity of the document.

Service of the arbitration documents on the respondents

68 In the Arbitration Application, which was filed on 27 December 2017, Jishi Fund provided CIETAC with addresses for service of the arbitration documents on the respondents. This relevantly included three addresses for Mr and Mrs Liu:

(a) B-85, 7886 Humin Road, Shanghai ('**Humin Road Address**');

(b) 284-286 Porter St, Templestowe VIC 3106 ('**Templestowe Address**'); and

(c) 9 Conway Ave, Donvale VIC 3111 ('**Donvale Address**').

69 I will say something briefly about these addresses.

(a) Mrs Liu resided at the Humin Road Address between 2004 and 2005. Mr Liu also lived there before returning to Australia in November 2017. I accept that neither Mr Liu nor Mrs Liu resided at the Humin Road Address in early 2018.

(b) The Templestowe Address is Mrs Liu's residential address in Australia. From at least 2007, and at all relevant times, Mrs Liu has resided at this address. This is also the residential address of Mr Liu, who has lived there permanently after he returned to Australia in November 2017.

(c) Mr and Mrs Liu previously resided at the Donvale Address before moving to the Templestowe Address in 2007. The property is owned by Natural Home Textile Pty Ltd, a company of which Mrs Liu was appointed a director on 19 May 2020.

70 The Arbitration Application also provided the Laverton North Address for service on GHL. No address was provided for service on YE Australia.

71 On 9 April 2018, CIETAC advised Jishi Fund by letter ('**9 April letter**') that earlier attempts at service on Mr and Mrs Liu had miscarried. The letter relevantly stated:

> …on the 2/3/2018 this Arbitration Committee sent by express courier Arbitration Notice and the attachments….to the Respondent 2 & 3 at [Humin Road Address] respectively but the mails were returned back after the expiry date. Later on 16/3/2018, based on information provided by [Jishi Fund], this Arbitration Committee sent again by express courier Arbitration Notice and the attachments the Respondent 2 & 3 at 284-286 Porter Street, Templestowe, Vic 3106 9 Conway, Donvale VIc 3111 but returned for wrong address and telephone numbers. Please

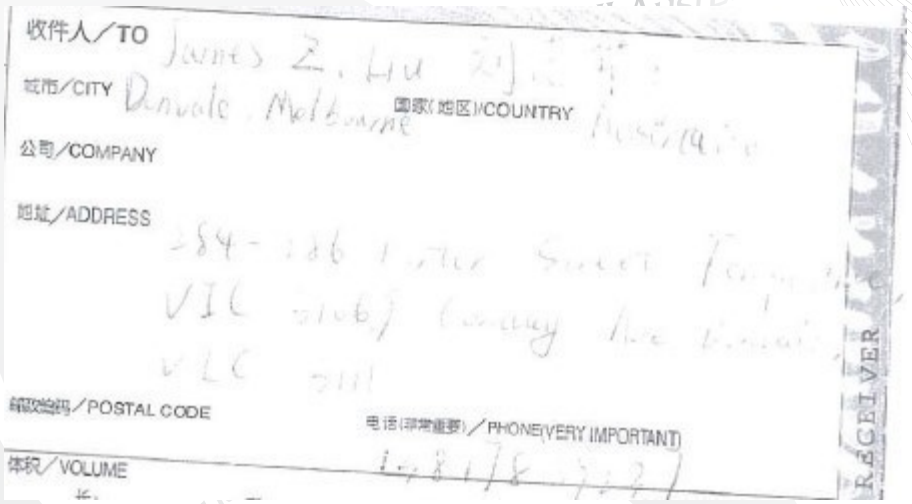
> find attached a copy the post office slips for address diversion, returns and comments.
>
> Base on the above please find out and confirm in writing as soon as reasonable the currently effective addresses or the last known addresses for the Respondent 2 & 3 in accordance with the Provision 8 of the Arbitration Rules. Such addresses should at least include the currently effective addresses with proof. Should you have confirmed the last known addresses for the Respondents, comments in writing should be provided on whether notarized service is allowed to deliver the arbitration documents for this case...
>
> (Errors in original translation.)

72 Jishi Fund appear to accept that these service attempts failed. In his second affidavit affirmed on 21 December 2020, which exhibited the 9 April letter, Mr Huang observed "[t]he Tribunal notified the Applicant of the failure to contact James and Elaine". This is also consistent with the evidence of Mr and Mrs Liu.

73 Mrs Liu deposed that she never received a letter regarding the arbitration at the Templestowe Address or the Laverton North Address, and that she had not received any mail at the Humin Road Address since 2017. Mrs Liu did not expressly say she had not received the documents at the Donvale Address, but I will infer this from her evidence that she was not aware of the arbitration until October 2020.

74 Mr Liu in turn deposed that he had not received correspondence regarding the arbitration at the Templestowe Address, the Laverton North Address or the Donvale Address. Mr Liu also gave evidence that he had not received mail at the Humin Road Address since November 2017, being the date that he moved back to Australia, and that he had never received correspondence regarding the arbitration at the Qingpu Industrial Park Address.

75 Mrs Liu submits that the reason for the failure of the second service attempt on 16 March 2018 is that the international express waybill was incorrectly addressed to a composite of the Templestowe Address and the Donvale Address (rather than each of these addresses separately). I consider it unnecessary for me to reach a view on this point, as I do not consider fault or intention to be relevant to the question of whether a person has received proper notice or procedural fairness. However, even if it were relevant, I do not consider there to be sufficient evidence to find this was the cause of the failure. As the following extract makes clear, the font on the copy of the waybill is extremely faint and I am unable to form a conclusion as to how it was addressed.



76 On 19 April 2018, Jishi Fund responded by letter to CIETAC provided the Qingpu Industrial Park Address. Jishi Fund relevantly advised:

> Jishi Fund received a Notice from your association on April 10, 2018… informing us that the service of the arbitration documents to the overseas addresses of [Mr and Mrs Liu] was not successful.
>
> Jishi Fund has been actively searching for new addresses…that can enable a delivery, but failed to find any. All the effective delivery addresses of [Mr and Mrs Liu] currently in the hands of Jishi Fund have been provided to your association. To this end, the Jishi Fund provides the following explanation to your association: the applicant agrees to use notarized service to send arbitration documents and other relevant documents to [Mr and Mrs Liu]. The address to be used shall be No. 9, Xinshui Road, Qingpu Industrial Park, Shanghai…

77 There is no evidence that Jishi Fund actually provided proof that the Qingpu Industrial Park Address was the "currently effective" or "last known" address of Mr and Mrs Liu, nor provided any further comments as to whether notarized service was "allowed".

78 On or around 20 April 2018, CIETAC sent the arbitration documents by notarized service to Mr and Mrs Liu at the Qingpu Industrial Park Address. Counsel for Mrs Liu submits there is no evidence that this occurred as the Award does not expressly state what was sent to Mrs Liu, the address that the documents were sent to, or the time at which the documents were sent. I do not accept this submission. The Award relevantly states:

> On March 2, 2018, the [arbitral tribunal] sent the arbitration notice, the "Arbitration Rules" and the "Arbitration Roster" to both parties by express mail. At the same time, the arbitration application submitted by the applicant and the attached evidence and other materials were sent to the respondents. After investigation, the mail addressed to the applicant [and other respondents] were properly submitted. The above-mentioned letter [to Mr Liu and Mrs Liu] were returned due to "no one received it after the deadline". The [arbitral tribunal] notified the applicant of the aforementioned situation on April 9, 2018, and asked them to confirm the legal and valid correspondence addresses of [Mr and Mrs Liu]. The applicant submitted a letter

> on April 20, 2018, confirming that the last known address of [Mr Liu] and [Mrs Liu] was [the Qingpu Industrial Park Address]. The [arbitral tribunal], in accordance with the provisions of Article 8 of the Arbitration Rules "Deemed to be served", sent to [Mr and Mrs Liu] by notarized service the aforementioned arbitration notice and its attachments.

79 From this passage, I consider there to a clear inference that CIETAC sent the arbitration documents (including the arbitration notice, the arbitration rules and the arbitration roster) by notarized service to Mr and Mrs Liu at the Qingpu Industrial Park Address on 20 April 2018 or shortly thereafter. I do not accept Mrs Liu's submission that the Award, being prima facie evidence of matters to which it relates pursuant to s 9(5) of the IAA, does not provide grounds for drawing such an inference.

80 On or around 3 July 2018, CIETAC sent arbitration documents by express mail to GHL and YE Australia. On 13 July 2018, CIETAC notified Jishi Fund that the documents were returned because the addresses that had been provided were incorrect.

81 Also on 3 July 2018, CIETAC sent "notice of the court of this case and its attachments" and "notice of opening of court" to Mr and Mrs Liu by notarized service: Award, 4. Again, I consider there to be a clear inference available from the findings in the Award that notice of the appointment of arbitrators and timing of the arbitration was sent by notarized service to the Qingpu Industrial Park Address.

82 On 24 July 2018, Jishi Fund notified CIETAC by letter that the last known address for GHL and YE Australia was the Qingpu Industrial Park Address. CIETAC subsequently sent the arbitration documents to this address by notarized service.

Arbitration proceedings

83 On 3 July 2018, an arbitral tribunal was formed to hear and determine the dispute. The tribunal accepted that service had been deemed effective and conducted the arbitration in September 2018. The respondents to the arbitration (including Mr Liu, Mrs Liu, GHL and YE Australia) did not appear.

84 On or about 14 November 2018, the tribunal determined the Arbitration Application and issued the Award. The tribunal then sent a copy of the Award by notarized service to the Qingpu Industrial Park Address. The Award set out the procedural history of the arbitration including, in addition to the extract at [78] above, the following outline of service (or attempted service) of the arbitration documents on the respondents to the arbitration applying the CIETAC Rules (at 3-5):

> Since the respondent was multiple parties and did not select or entrust the director of the arbitration committee to appoint an arbitrator within the stipulated period, the director of the arbitration committee appointed…three arbitrators…
>
> On July 3, 2018, the Court of Arbitration sent by express mail to the applicant and [Yidi Company], fourth respondent, fifth respondent, sixth respondent, [GHL] and [YE Australia], and sent by notarization service to [Mr and Mrs Liu], the notice of the court of this case and its attachments and notice of opening of court. After investigation, the above letter sent to the applicant has been properly delivered. The mails sent to [Yidi Company] and the fourth respondent were returned because of "the recipient's new address is unknown." The mail sent to the firth respondent was returned because of "the unit stopped production and no one received it." The mail addressed to the sixth respondent, [GHL] and [YE Australia] were all returned because of "the recipient's name and address are incorrect".
>
> The Arbitration Court of the Arbitration Commission notified the applicant of the foregoing on July 13, 2018, and asked it to confirm the legal and valid correspondence address of [Yidi Company], fourth respondent, fifth respondent, sixth respondent, [GHL] and [YE Australia].
>
> The applicant submitted a letter on July 24, 2018 confirming the last known address of [these respondents] are [the Qingpu Industrial Park Address]. The Arbitration Court of the Arbitration Commission, in accordance with the provisions of Article 8 of the Arbitration Rules, sent by notarized notice to [these respondents] the aforesaid notice of formation of the arbitration tribunal and its attachments and the notice of opening of the hearing.
>
> On September 5, 2018, the case was opened for trial in Beijing as scheduled. The applicant attended the trial. The respondents did not attend court hearings after effective notice, nor did they explain the reasons to the arbitration court. According to the provisions of Article 39 of the Arbitration Rules, the arbitration tribunal tried the case in absentia….

85 The Award also included the following findings in respect of the Confirmation Letter (at 10):

> However, the arbitral tribunal noticed that the third respondent's signature office on the signature page of the "Confirmation letter" showed "Elaine Y. Liu… (blank) (signature: James Z. Liu….on behalf of)." After investigation, the main part of the "Confirmation Letter" on the main body of the contract stated: "(3) James Z Liu, Chinese name…..James Z. Liu promises and confirms that he has obtained his spouse Elaine Y. Liu' consent to sign this confirmation letter on her behalf, and the corresponding clauses in the confirmation letter are regarded as a joint expression of James Z. Liu and Elaine Y. Liu." The arbitral tribunal held that despite the above statement, the applicant did not provide the power of attorney of [Mrs Liu] to [Mr Liu]. Moreover, even if such authorization exists objectively, [Mr Liu] did not sign the "Confirmation Letter" on behalf of the third respondent. Therefore, it cannot be determined that the "Confirmation Letter" is the express meaning of [Mrs Liu], so it should not be binding to [Mrs Liu]. But for other parties who signed and sealed the Letter, the Confirmation Letter was established is legal and valid…

MRS LIU'S SUBMISSIONS

86 Since Mrs Liu, as the party requesting the court to refuse to enforce the Award, bears the onus of persuading the Court that a ground in s 8(5) or s 8(7) is not made out, it is convenient to outline her position first. Mrs Liu submits, in summary:

(a) she was never given notice of the arbitration or the appointment of arbitrators and remained unaware of the arbitration until October 2020 when she was served with the present application;

(b) she was not a party to the Confirmation Letter, nor was it signed on her behalf, and so the Confirmation Letter does not provide any basis to fix the Qingpu Industrial Park Address as her contractual address for service;

(c) her only contractual address for service was the Laverton North Address under the Shareholders Agreement, and Jishi Fund did not even attempt to notify Mrs Liu at this address or provide this address to CIETAC;

(d) Jishi Fund was aware of Mrs Liu's residential address in Australia, being the Templestowe Address, at all relevant times but the notice of arbitration and appointment of arbitrators were not sent to this address;

(e) art 8(2) of the CIETAC Rules was not satisfied as the Qingpu Industrial Park Address was never an address "provided by" Mrs Liu (or any arbitration agent acting on behalf of Mrs Liu) or "agreed by" the parties;

(f) the deemed service provision in art 8(3) of the CIETAC Rules would only have operated if:

(i) the arbitration correspondence had in fact been delivered to Mrs Liu's domicile, habitual residence or mailing address (being the Templestowe Address); or

(ii) after reasonable enquiries, Jishi Fund had been unable to find Mrs Liu's domicile, habitual residence or mailing address, following which CIETAC delivered the documents to Mrs Liu's last known business premises, registered premises, domicile address, permanent residence or mailing address,

none of which occurred;

(g) the failure to give Mrs Liu any notice of the proceeding at all is sufficient to demonstrate real practical injustice; and

(h) Mrs Liu has a personal right under Australian law to be given proper notice, respecting Australian standards of arbitral due process.

87 The only breach of the rules of natural justice that Mrs Liu alleges to have occurred for the purpose of s 8(7)(b) (read with s 8(7A)(b)) arises from the failure to give proper notice of the

arbitration and appointment of arbitrators. It follows that, if Mrs Liu fails to prove to the Court's satisfaction that s 8(5)(c) is made out, then she will also fail to establish her case under s 8(7)(b) of the IAA.

JISHI FUND'S SUBMISSIONS

88 Jishi Fund's submits, in summary:

(a) the Court should seek a construction of the parties' agreement that conforms with the Convention, including art II(1) which provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration…" ;

(b) the parties' "agreement in writing" for the purposes of art II(2) of the Convention includes the Shareholder Agreement, the Supplementary Agreement and the Confirmation Letter;

(c) the Qingpu Industrial Park Address was the appropriate address for service as:

(i) the arbitral tribunal found (Award, 4) that it was the "legal and valid correspondence address" for Mrs Liu; and

(ii) notwithstanding the arbitral tribunal's finding that Mrs Liu was not bound by the Confirmation Letter, the document still clearly identifies the Qingpu Industrial Park Address as the address for service on Mrs Liu;

(d) there was compliance with art 8(3) of the CIETAC Rules because, following reasonable enquiries made by Jishi Fund as to the relevant address, the arbitration correspondence was sent by notarized service to the Qingpu Industrial Park Address;

(e) Mrs Liu failed to notify of any change in details or address as required under cl 18(e) of the Shareholder Agreement and should therefore be responsible for all adverse consequences in respect of that failure;

(f) the close familial and business connection between Mr Liu, Mrs Liu and the other respondents to the arbitration gives rise to the objective inference that notice to one of the respondents is more likely than not to result in notice to the others; and

(g) Mr Liu was an agent of Mrs Liu at a minimum for the purpose of receiving notice in China.

89 In the event that this Court were to find there was no proper notice of the arbitration or the appointment of arbitrators, Jishi Fund submits it should nonetheless exercise its discretion

under s 8(3) of the IAA to enforce the Award. This is put on the basis of an estoppel-like argument arising from Mrs Liu's failure to update her address under the Shareholders Agreement and also on the basis that, even if Jishi Fund had given notice to Mrs Liu at the Laverton North Address, it would not have reached her there.

CONSIDERATION

90 There is one real issue for determination. Has Mrs Liu proved to the satisfaction of the Court that she was not given proper notice of the arbitration or the appointment of arbitrators? In answering this question, it is important to focus on what has been done (rather than what has only been attempted, or what a party has failed to do).

91 There is no question here as to the timing of the notice, or even adequacy of its form. Mrs Liu contends that she never received any notice at all. I will therefore consider: *firstly*, whether to accept Mrs Liu's evidence that she had no actual notice of the arbitration or the appointment of arbitrators; and *secondly*, if it is true that she had no actual notice, then whether, with regard to the objective circumstances (including the bargain that has been struck between the parties), Mrs Liu has been afforded proper notice of the arbitration and the appointment of arbitrators for the purpose of s 8(5)(c) of the IAA.

Did Mrs Liu have actual notice of the arbitration or the appointment of arbitrators?

92 Mrs Liu deposed that she was not aware of the arbitration until Mr and Mrs Liu were served with the originating application for this proceeding at the Templestowe Address on 9 October 2020. I accept her evidence. This evidence was not contradicted by any of the other witnesses. Yet there has been a substantial amount of the evidence in this proceeding directed towards the question of whether Mr Liu (not Mrs Liu) had actual notice of the arbitration. I understand that this is evidence is intended to go to whether I ought to draw an inference that Mrs Liu received actual notice of the arbitration from Mr Liu.

Evidence of Mr Liu

93 Generally, I did not consider Mr Liu to be a reliable witness, although I have accepted some of his evidence where it is corroborated or otherwise consistent with probabilities. I did not regard him as being completely candid, and I found him to be evasive and to take an overly technical approach to answering questions.

94 I will now deal with his evidence, as well as the other witnesses who attested to matters going to Mr Liu's knowledge of the arbitration.

95 Mr Liu initially also gave evidence that he only became aware of the arbitration on 9 October 2020, despite knowing in early 2019 that Jishi Fund had commenced legal action against the group of companies in China. Mr Liu later revised his position to accept that he may have been made aware of the legal proceedings in China between mid-2018 and early 2019, and to acknowledge that he had been provided with a copy of the Award in late 2018 via WeChat message. In cross-examination, Mr Liu rejected the proposition that he knew the Award was against him (or Mrs Liu) personally and said that he considered the Award to have been made only against the company.

Evidence of Ms Zheng and Mr Liu

96 Jishi Fund adduced evidence from Ms Zheng, a former employee of the Yidi Company. There was some dispute about the scope of Ms Zheng's role at the Yidi Company, as Mr Liu repeatedly insisted that she was only an assistant to a more senior employee rather than (as Ms Zheng herself attested) in charge of debt restructuring and legal matters.

97 Ms Zheng deposed that she had discussions with Mr Liu about the arbitration including as to whether external lawyers should be appointed to defend Jishi Fund's claims. Mr Liu did not accept that he had spoken to Ms Zheng about the arbitration, as she was "too young" and he "couldn't be bothered to [have] discussion[s] with her." However, in cross-examination, Mr Liu conceded that there had been an exchange of words where Ms Zheng spoke about defending the arbitration in China. Mr Liu insisted that the relevant exchange had been about proceedings issued by Jishi Fund against the Yidi Company rather than him in a personal capacity.

98 I find that Ms Zheng did inform Mr Liu of the arbitration. From the fact that there was discussion about the appointment of lawyers to defend the arbitration, and Mr Liu's evidence that Ms Zheng commenced her employment with the Yidi Company in early 2018, I will infer that the discussions occurred sometime between early 2018 and the hearing of the arbitration on 5 September 2018. However, there was no evidence to indicate that Ms Zheng informed Mr Liu that the arbitration was against him and Mrs Liu in a personal capacity, or that he was informed about the appointment of arbitrators.

Evidence of Mr Xu and Mr Liu

99 Jishi Fund adduced evidence from Mr Xu, a creditor of Mr Liu and a former employee of Mr Liu from 2000 to 2001 and of Dezhou Industrial Co Ltd, a company within the Yidi Group, from 2012 to December 2015.

100 I also have reservations about Mr Xu's reliability as a witness. It is clear that Mr Xu had a personal interest in giving evidence against Mr and Mrs Liu in these proceedings. In cross-examination, Mr Xu was asked about a heated argument with Mr Liu that was said to have occurred in July 2020 and be the subject of police charges against Mr Xu that have not yet proceeded to trial. The following exchange occurred between Mr Xu and counsel for Mrs Liu:

> And the reason why you're no longer friendly with James is because of that argument and because he made a complaint to the police that has resulted in you being charged. That's the reason why, isn't it?--- I will say that's one of them.
>
> Yes. And you've decided to try and extract some revenge against James and Elaine by giving evidence in this court and saying things that are not true. That's right isn't it? --- Totally wrong.

101 In any event, much of the evidence given by Mr Xu is of very limited relevance to the proceeding.

102 Mr Xu deposed that he had discussions with Mr Liu between October 2017 and March 2018 and that, in the course of these discussions, Mr Liu told him he had been "sued" by many creditors in China (including Jishi Fund), that Jishi Fund was owed significantly more than Mr Xu was owed, and that Jishi Fund's legal team "will definitely follow him in Australia to pursue enforcement". In cross-examination, Mr Xu accepted that these discussions occurred prior to 14 November 2017, being, significantly, prior to the commencement of the arbitral proceedings on 27 December 2017. In the course of cross-examination, even though Mr Xu maintained that Mr Liu had told him he had been "sued" by Jishi Fund, it became apparent that Mr Xu was referring to the issuing of a breach notice rather than the institution of arbitral proceedings.

103 Mr Xu also gave evidence as to a further meeting with Mr Liu on 13 June 2020. By this point in time, the arbitration had concluded and the Award had already been published. Mr Xu deposed that he visited Mr Liu's factory with another person (a Mr Michael Liu) and that Mr Liu told him Jishi Fund was chasing him for payment, that Jishi Fund had obtained a

judgment against him in China, and that Mr and Mrs Liu would be pursued personally for the outstanding debt.

104 In cross-examination, Mr Xu maintained his evidence: "I think vividly he said we will – we will chase up – Beijing's legal teams will… chase us up", although accepted that Mr Liu used the word "us" rather than referring specifically to himself and Mrs Liu.

105 When asked about this meeting, Mr Liu rejected the proposition that he said anything to Mr Xu about Jishi Fund obtaining a judgment against him personally in China or about Jishi Fund pursuing him or Mrs Liu in a personal capacity. In cross-examination, Mr Liu did not accept that he said anything at this meeting about Jishi Fund specifically, and claimed that he would only have mentioned Jishi Fund as being one of a list of creditors. On balance, I prefer the evidence of Mr Liu, although, given the timing of the conversation, I consider this to be a matter that could only ever go to Mr Liu's credit, rather than any relevant factual dispute.

The bankruptcy petition and statement of affairs

106 There is one final matter going to Mr Liu's knowledge of the arbitration. Again, it relates to his state of mind at a time when the arbitration had already concluded. Mr Liu's bankruptcy petition and statement of affairs from 19 May 2020 includes a record of a joint debt of $31,146.978 owed to Jishi Fund described in the form as a personal guarantee of debt for the Yidi Company. At the hearing, counsel for Mrs Liu tendered a screenshot and certified translation of a WeChat message between certain shareholders of the Yidi Company (not including Mrs Liu) on 4 January 2019, where Mr Liu was informed:

> Re the determination on the buyback of Jishi, the arbitration was that the company had a liability of 160 million.

The date of the message on these documents is "1/4/2019" but the parties accept that the relevant date is 4 January 2019. Mr Liu deposed that he included $31,146.978 in the petition as a result of converting 160 million yuan into Australian dollars.

107 Consistently with my earlier finding that Mr Liu was made aware of the arbitration as against the Yidi Company in the course of 2018, this evidence supports a finding that Mr Liu was aware of the arbitration determination against the Yidi Company as at 19 May 2020.

108 Whilst there is evidence to show that Mr Liu was not being truthful when he initially deposed that he had only become aware of the arbitration on 9 October 2020, there is no evidence that

Mr Liu was ever made aware that the arbitration was against him and Mrs Liu in a personal capacity, or that he was made aware of the appointment of arbitrators.

Conclusion

109 I am not prepared to infer that, by reason of Mr Liu's knowledge and the spousal relationship, Mrs Liu had actual notice of the arbitration or the appointment of arbitrators. Even if I were to accept that Mr Liu had the requisite knowledge (in the sense of being aware that the arbitration was against Mrs Liu in a personal capacity or having notice of the appointment of arbitrators), in the circumstances of their business relationship, I do not infer that Mrs Liu personally received notice of these matters as a result of her being married to someone who did. Later in these reasons, I detail the involvement of Mrs Liu in the business, and this involvement (or lack thereof) supports this conclusion.

Did Mrs Liu receive notice of the arbitration or the appointment of arbitrators in accordance with the parties' agreement?

110 I have already found that the arbitration documents (including the arbitration notice, the arbitration rules and the arbitration roster) were sent from CIETAC by notarized service to Mrs Liu at the Qingpu Industrial Park Address on or around 20 April 2018. I will now consider whether this was in accordance with the parties' agreement.

111 The Shareholders Agreement provides that "the service of documents to either party can be made in the manner specified in this Agreement or other ways required by the applicable law or court rules": cl 17.3. It then specifies that "notices or communication by any party under this Agreement" may be sent by "personal delivery, approved courier, fax or email to other parties as listed below": cl 18.1. The address listed for Mrs Liu was the Laverton North Address (as well as the email address elaine.yellowearth@gmail.com).

112 I am satisfied that the Shareholders Agreement applies to formal communications concerning the arbitration: cf *Uganda Telecom* at [14]; *Ladu* at [179]. I also accept the undisputed evidence of Mrs Liu that she never received any communications regarding the arbitration at the Laverton North Address (or the email address elaine.yellowearth@gmail.com), and therefore find that Mrs Liu did not receive notice of the arbitration or the appointment of arbitrators in accordance with cl 18.1 of the Shareholders Agreement.

113 Jishi Fund contend that the relevant contractual notice provision is located not in the Shareholders Agreement but in the Confirmation Letter, which provides "the parties agree

that the following addresses (including email addresses) shall be the notification address for the investor to notify any of the parties and the address for service of relevant legal documents" (at [6]) and specifies the Qingpu Industrial Park Address. However, in circumstances where the arbitral tribunal found that the Confirmation Letter was not binding on Mrs Liu (Award, 10) and it was not signed by her or on her behalf, I do not consider the Confirmation Letter had the effect of fixing Mrs Liu's address for notice.

114 Jishi Fund submits that the Qingpu Industrial Park Address is still the relevant address for service or notification because the Confirmation Letter forms part of the parties' "agreement in writing" within the meaning of art II (2) of the Convention, even if it is not binding on Mrs Liu. Jishi Fund relies heavily on the broad definition of "agreement in writing" in art II (2) of the Convention, which includes clauses "in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". Jishi Fund also refers to the broad definition of "arbitration agreement" in art 7(3) of the Model Law.

115 In my view, in defining the phrase "agreement in writing", all that art II of the Convention is doing is providing for the recognition of international arbitration agreements made in the absence of a formal executed document, such as where parties have entered into a binding agreement by way of written correspondence. This is a very different situation to the present case where there are three formal documents that are said to comprise the agreement and the final document has been executed by or on behalf of all the parties other than Mrs Liu. I therefore consider the potential breadth of art II (2) of the Convention (and art 7(3) of the Model Law) as to the form that an agreement might take to be of little consequence when considering whether an award debtor is bound by — or has had her rights to due process impacted by — a formal agreement that she was not party to.

116 Jishi Fund points to the fact that Mrs Liu has not challenged the validity of the Confirmation Letter. However, I fail to see how this is relevant. It is sufficient for Mrs Liu to rely on the finding of the arbitral tribunal that the Confirmation Letter was not binding on her. In any event, she did not sign the Confirmation Letter and I accept the evidence that Mr Liu did not have her authority to sign it (which is apparent from the fact that he signed everywhere else but under her name).

117 I will now turn to consider whether Mrs Liu was given notice in accordance with "the applicable law or arbitration rules": cl 17.3 of the Shareholders Agreement. The applicable law was Chinese law (see cl 17.1 of the Shareholders Agreement) but neither of the parties

have sought to put on any evidence of the content or effect of that law. This leaves the CIETAC Rules which provide for several alternative methods of service, to which I will now turn.

Article 8(2) of the CIETAC Rules: Service to an address "agreed by the parties"

118 Article 8(2) of the CIETAC Rules provides for a method of service whereby the arbitration documents are sent to the address "agreed by the parties". I do not consider the Qingpu Industrial Park Address to have been an address "agreed by the parties". The relevant address for Mrs Liu was the Laverton North Address but the documents were not sent there.

Article 8(2) of the CIETAC Rules: Service to an address "provided by the parties or their arbitration agents"

119 Article 8(2) provides for a method of service whereby the arbitration documents are sent to the address "provided by the parties or their arbitration agents". The First CIETAC Translation used the term "representatives" instead of "arbitration agents" but the parties have since agreed that the Second CIETAC Translation is correct. There is no suggestion that Mrs Liu ever appointed an arbitration agent under art 22 of the CIETAC Rules, or that she ever provided the Qingpu Industrial Park Address herself.

120 In respect of whether the Qingpu Industrial Park Address was "provided by the parties", on a close reading of art 8(2), I consider the relevant address be provided by Mrs Liu to CIETAC or the arbitral tribunal. Article 8(2) does not give special significance to an address that has simply been provided by one party to another at any point in time. This construction is supported by the fact that the words "agreed by the parties" would otherwise have no work to do: a party could provide an address to another party without any need for agreement. I do not find that the Qingpu Industrial Park Address was ever provided by Mrs Liu to CIETAC or the tribunal.

Article 8(2) of the CIETAC Rules: Service in the event of failure to agree or provide an address

121 Art 8(2) provides that service may be effected at the address provided by the other party (ie Jishi Fund) in the absence of agreement, or if there has been a failure to provide an address. It is common ground that this provision was not enlivened.

Article 8(3) of the CIETAC Rules: Delivery in person or to a specified address

122 Article 8(3) provides that service may occur where the arbitration documents are "delivered to the addressee in person or sent to the addressee's business premises, registered premises, domicile address, permanent residence or mailing address".

123 In the Second CIETAC Translation, art 8(3) commences with "if", which indicates that this is not a standalone method of service and that the subsequent methods of service specified in the paragraph would also need to be undertaken. It provides:

> If the arbitration documents sent to one party or its arbitration agent are delivered to the addressee in person or sent to the addressee's business premises, registered premises, domicile address, permanent residence or mailing address, or if any of the above places cannot be found after reasonable inquiry by the other party, the Arbitration Institute of the Arbitration Commission shall deliver them to the addressee's last known business premises, registered premises, domicile address, permanent residence or mailing address by registered mail or express mail or any other means that can provide delivery records including notarization of service, entrusted service and service by leaving the document at the address.

124 In the First CIETAC Translation, art 8(3) commences with "[a]ny arbitration correspondence to a party or its representative(s) shall be deemed to have been properly served on the party if", which indicates that this is a standalone method of service. It provides:

> Any arbitration correspondence to a party or its representative(s) shall be deemed to have been properly served on the party if delivered to the addressee or sent to the addressee's place of business, place of registration, domicile, habitual residence or mailing address, or where, after reasonable inquiries by the other party, none of the aforesaid addresses can be found, the arbitration correspondence is sent by the Arbitration Court to the addressee's last known place of business, place of registration, domicile, habitual residence or mailing address by registered or express mail, or by any other means that can provide a record of the attempt at delivery, including but not limited to service by public notary, entrustment or retention…

125 The parties have agreed that the Second CIETAC Translation is correct, although this was in the context of considering the difference between "arbitration agent" and "representative" in art 8(2). In my view, any reading of art 8(3) that requires multiple instances of service would be inconsistent with art 8(1)-(2) and so I find that delivery to the addressee or the specified addresses (such as the addressee's place of business) is a standalone method of service.

126 There was no suggestion that the arbitration documents were ever delivered to Mrs Liu in person. I will therefore proceed to consider whether the documents were sent to any of the specified places for service. As I have already observed, the parties appear to accept that the service attempts at the Humin Road Address, the Templestowe Address and the Donvale Address failed. The question is thus whether the Qingpu Industrial Park Address was

Mrs Liu's "business premises, registered premises, domicile address, permanent address or mailing address".

127 Mrs Liu said she has never used the Qingpu Industrial Park Address as her personal correspondence address, as she spends most of her time in Australia and has not travelled to China since a personal trip in October 2017.

128 I find that Mrs Liu had very little (if any) personal connection to the Qingpu Industrial Park Address and it could not be described as her "domicile address", "permanent residence" or "mailing address". As Mrs Liu is an individual, it is clear that the address is not her "registered premises". I have similar concerns as to whether it could properly be described as Mrs Liu's "business premises".

129 Even if I accept that the description of "business premises" is broad enough to capture a physical address where an individual (not only a company) conducts business, I find that Mrs Liu was not conducting business at the Qingpu Industrial Park Address on or around 20 April 2018.

130 Jishi Fund point to the fact that Mrs Liu (together with Mr Liu) was the "controlling party" or "actual controlling party" of the Yidi Company under the Shareholders Agreement. The Qingpu Industrial Park Address was the registered address for service on the Yidi Company. The undated company search for the Yidi Company exhibited to the third affidavit of Mr Huang affirmed on 3 February 2020 also shows that Mrs Liu was a director of the Yidi Company, although does not provide the dates of her appointment.

131 However, as I have already found, the factory at the Qingpu Industrial Park Address ceased operation in 2017. It was also Mrs Liu's evidence (which I accept) that she did not recall ever attending a board meeting for the Yidi Company at the Qingpu Industrial Park Address, and that she did not visit the Qingpu Industrial Park on her last trip to China in October 2017. This was consistent with the oral evidence of Mr Liu, who said that Mrs Liu had not attended any board meetings for the Yidi Company and had limited involvement in the company from at least 2012 onwards.

132 In these circumstances, I do not consider that the Qingpu Industrial Park Address was Mrs Liu's "business address" at the time that CIETAC sent the arbitration documents.

Article 8(3): Deemed service in circumstances where the specified addresses cannot be found

133 Article 8(3) of the CIETAC Rules also provides for deemed service in circumstances where "the addressee's business premises, registered premises, domicile address, permanent residence or mailing address cannot be found after reasonable inquiry by the other party".

134 In the Arbitration Application filed on 27 December 2017, Jishi Fund provided CIETAC with the Templestowe Address, Humin Road Address, and the Donvale Address. It is clear that the Templestowe Address, being the place where Mrs Liu has lived since 2007, is Mrs Liu's "domicile address". It is clear that this address could be found, and indeed was found by Jishi Fund and included in the Arbitration Application, and so the deeming provision in art 8(3) of the CIETAC Rules is not enlivened.

Conclusion

135 I do not consider that Mrs Liu received notice of the arbitration or the appointment of arbitrators in accordance with art 8 of the CIETAC Rules.

Other circumstances

136 Having found that Mrs Liu was not given notice in accordance with the parties' agreement, I will now consider whether there are any other circumstances such that Mrs Liu can be said to have received "proper notice" within the meaning of s 8(5)(c) of the IAA, or whether the discretion should be exercised in favour of enforcement even if proper notice was not given to Mrs Liu.

Mrs Liu's failure to update her contact details

137 Jishi Fund argue that Mrs Liu's failure to notify of any change to her contact details was a breach of cl 18.1(e) of the Shareholders Agreement and she should bear the consequences of her failure to comply with it, relying on the principle that a party may not benefit from its own breach. However, even if I were to accept that this principle is relevant to the present case, there seems to be a missing causal link. Notwithstanding any breach of cl 18.1(e), the fact is that Jishi Fund did have current contact details for Mrs Liu at all relevant times (the Templestowe Address was included in the Arbitration Application and the email address elaine.yellowearth@gmail.com remained in use).

138 There was also some evidence to indicate that Jishi Fund was made aware that the business premises were relocated to Mitcham in 2015. At the hearing, the following exchange occurred between Mr Liu and counsel for Jishi Fund:

> Okay. I want to understand you clearly. I'm sure his Honour does, are you saying there's a document that shows a change of address being noted at some time?--- I'm not – that's what I'm saying, the first time I answer you – I'm not 100 per cent in this way to notify, but in the meeting, we give them notice and then Mr Huang visited the Melbourne – he knows what the change – he knows the new address.
>
> HIS HONOUR: When you say you gave notice, you mean you gave notice about all – yourself and your wife and the company – all globally, is what you're saying?--- No, I say before they have the business address, it's Laverton North. And then we shift out from the Laverton North to Mitcham, we told every shareholder we shift out from the Laverton North.
>
> When you say "We" I want to know who "we" is?---No, it's – yes, putting it – "Me"…
>
> […]
>
> You told them what?--- I told them we moved from Laverton North to the Mitcham and because they need to do the auditing, they need to send the accountant, they send themselves, the come into the city in the Mitcham office to discussion all the figures.
>
> So you said that Laverton North was changing to Mitcham, did you say anything else about the change of address?--- That's change – shift the warehouse from Mitcham to Laverton North to Mitcham. And they are – they – all the corresponding goes to the Mitcham…

139 I accept Mr Liu's evidence that he advised Jishi Fund and the other shareholders of the change in business location. This finding is consistent with the fact that Jishi Fund never sent any correspondence to the Laverton North Address, and lends further support to my conclusion that Jishi Fund was in possession of current contact details for Mrs Liu.

Jishi Fund's subjective belief

140 Mr Huang gave evidence that Jishi Fund believed the proper address for service on Mrs Liu to be the Qingpu Industrial Park Address. I accept that Mr Huang held this belief, and that he was authorised to give evidence on behalf of Jishi Fund. Yet I do not consider Jishi Fund's subjective belief to be relevant to the question of whether Mrs Liu was given proper notice. The prevailing question is whether Mrs Liu was given a reasonable opportunity to present her case. In this regard, Jishi Fund's subjective beliefs about its own conduct are irrelevant.

The attempts at service

141 Similarly, whilst I accept that Jishi Fund provided three alternative addresses to CIETAC, one of them being Mrs Liu's residential address at all relevant times, and that service to these

addresses miscarried through no apparent fault of Jishi Fund, I do not consider these matters are sufficient to show that proper notice was given to Mrs Liu.

Civil proceedings in China

142 In his third affidavit affirmed on 3 February 2021, Mr Huang exhibited an extract of a civil judgment of the Second Intermediate People's Court of Shanghai dated 13 November 2018. Mr Huang deposed that this was an appeal brought on behalf of Mr and Mrs Liu, and through the Yidi Company, against a previous civil judgment in China. Mr Huang also deposed that the address for service on "the Respondents" in this appeal was the Qingpu Industrial Park Address. The document records:

> Appellant (defendant in the original trial): Yidi Fur Technology (Shanghai) Co,. Ltd.,
>
> Address: Qingpu Industrial Park, Shanghai, People's Republic of China.
>
> Legal representative: Liu Zhihua (LIUJAMESZ), chairman of the company.
>
> Authorized litigation agent: Zhou Guoqi, lawyer of Shanghai Modern Law Firm
>
> […]
>
> Defendant in the original trial: Liu Zhihua (LIUJAMESZ), male, born on October 28, 1957;
>
> Defendant in the original trial: Zhang Yiling, "LIUELAINE Y), female, born on September 1, 1961.

143 From my review of this document on its face, I do not accept that it records the Qingpu Industrial Park Address as the relevant address for service on Mr and Mrs Liu. Even though counsel for Mrs Liu took me to the findings of the original trial judge in respect of joint liability, it is unnecessary for me to consider this point any further. I am not persuaded that an address for the Yidi Company in a foreign civil judgment is any indication of the proper address to send formal communications concerning the arbitration to Mrs Liu.

Was Mr Liu an agent of Mrs Liu for the purpose of receiving notice in China?

144 Jishi Fund contends that Mr Liu was an agent for Mrs Liu, at least for the purpose of receiving notice in China. Jishi Fund rely on the decision of Jagot J in *Energy City Qatar v Hub Street*. In that case, the contractual address for service was in Australia but notice was instead sent by mail to Qatar, and by email to an employee of a company related to the respondent, a Mr Muraywed. Her Honour observed:

> If it were necessary to do so I would find that Mr Muraywed was an agent of Hub for the purposes of receiving any notice to Hub in Qatar. He had been previously employed by Hub. The directors of Hub operated Hub and its related companies on a

> group basis and in the expectation that employees would represent the interests of all companies in the group. Mr Muraywed was Hub's representative while he was in Qatar.

145 Jishi Fund submits this Court should deploy the same path of reasoning to find that Mr Liu was an agent for Mrs Liu while he was in China, at least for the purpose of receiving notice in China.

146 It was Mrs Liu's evidence that she had very limited involvement in the business from 2012 onwards and that her husband was responsible for operations in China, including fulfilling their joint obligations under the Shareholders Agreement. Mr Liu gave evidence to similar effect. In cross-examination, in response to questions about the Yidi Company and the extent of her involvement in the Yidi Group, Mrs Liu was often unable to recall details about the companies in the Yidi Group and her obligations as a director of the Yidi Company and GHL. Mrs Liu did not expressly say that she relied entirely on Mr Liu to run the business in China. However, she repeatedly said that Mr Liu managed the business in China and that she was mainly responsible for looking after their two children. Her responses were often vague, non-committal or quickly dismissed the question as relating to a matter for which Mr Liu was responsible. In my view, this was a direct consequence of Mrs Liu having very little knowledge about the business rather than Mrs Liu being deliberately untruthful or dishonest.

147 In cross-examination, Mrs Liu gave several answers indicating that she expected Mr Liu to take care of business in China.

(a) In response to a question about her intentions when signing the Shareholders Agreement, Mrs Liu answered "I think James is the man – he is the man of running the business…": T30.33-36.

(b) In response to a question from the Court as to whether Mrs Liu relied upon Mr Liu, Mrs Liu answered: "In many – yes…": T30.40-4.

(c) In response to a further question about whether she relied on Mr Liu: "I think James is a man of operation, operator, something like that. From my memory I said James is a – because I have family to look after, two children, and James is the one who manage – look after business…": TT30.45-31.2.

148 This was consistent with evidence given by Mr Liu in cross-examination.

(a) Mr Liu gave evidence that he could only recall Mrs Liu attending a board meeting for the Yidi Company in 2011 and could not recall her attending any further board meetings from 2012 onwards: T61.38-44.

(b) In response to questions about the extent of Mrs Liu's involvement in the business, Mr Liu gave evidence that he only recalled her attending one trade show and having some involvement in consumer products: T91.1-39.

149 It was also clear that Mrs Liu relied on Mr Liu for the purpose of fulfilling her obligations under the Shareholders Agreement and as a director.

(a) In response to a question about whether she ever updated her contact details under the Shareholders Agreement: "I'm not sure – I didn't do it. I'm not sure James do it because normally James would do it" and "I'm not in contact with them directly": T35.13-17.

(b) In response to a question about fulfilment of her obligations as a director of GHL: "I don't know. Here is, like, a small business so many James doing so, I don't know. I'm no businesswoman, you see": T41.13-16.

(c) In response to a question about whether Mrs Liu notified Jishi Fund in relation to a change of address for GHL: "Not myself": T41.30-32.

(d) Mrs Liu was unable to recall that she was a director of GHL (a member of the Yidi Group) from 10 March 1995 to 22 January 2019.

150 In respect of the scope of Mr Liu's authority, Mrs Liu rejected the proposition that he was authorised to sign documents on her behalf.

(a) In response to a question about whether Mr Liu had authority to do business on her behalf: "he do it, but he will ask me normally. Not – not authority. Yes": T43.36-38.

(b) Subsequently, in response to a question about whether Mr Liu normally had to ask Mrs Liu for authority: "Yes, yes. If I sign.": T43.44.

(c) In response to a question about how often this happened: "Not much": T43.46.

(d) Mrs Liu did not accept that Mr Liu had authority to sign documents on her behalf: T43.23-44.

151 Mr Liu also gave the following evidence.

(a) In response to a question about the reason for Mr Liu not signing the Confirmation Letter on behalf of Mrs Liu: "he asked can you sign for Elaine. I said, impossible…": T66.33-35.

(b) Mr Liu later added: "I was saying no. "Can you sign for your wife?" I said, "No": T112.6-8.

(c) In response to a question about the statement in the Confirmation Letter that Mr Liu had authority to sign for Mrs Liu: "…I didn't carefully notice this one is I'm going to represent Elaine to sign for that part. But when they ask sign for Elaine and I said I can't, that's very – obviously, I can't sign for Elaine": T66.44-47.

(d) Later, in response to a similar question, Mr Liu did not accept that this statement in the Confirmation Letter had been brought to his attention: T111.16-20.

(e) Mr Liu did not accept that he was authorised to look after business affairs in China on behalf of Mrs Liu: T107.11-29.

152 In cross-examination, Mr Liu accepted he was authorised on behalf of the Yidi Company and all other shareholders in the Shareholders Agreement to look after business affairs in China, but did not accept that he had authority to act on behalf of his wife. Both Mr and Mrs Liu also gave evidence that Mr Liu was not authorised to sign legal documents on behalf of Mr Liu, which is consistent with the fact that Mr Liu did not sign the Confirmation Letter on her behalf.

153 Jishi Fund submits (and I accept) that there was a mutual expectation between Mr and Mrs Liu that Mr Liu would take care of the business on behalf of himself and his wife. Notwithstanding this expectation, I do not consider Mr Liu had implied authority to receive notice of the arbitration and appointment of arbitrators on behalf of Mrs Liu, or that he had authority to provide an address for the service of arbitration documents on her behalf (which, in truth, alters her rights to due process). As Mrs Liu submits, the right to receive proper notice is a personal right to be enjoyed directly and not through one's spouse. It is a matter of fundamental importance and, in circumstances where one is considering whether due process has been afforded to an award debtor, a finding of agency is not to be made lightly.

154 In conclusion, in circumstances where Jishi Fund have failed to give notice in accordance with the parties' agreement (either in the manner specified in the Shareholders Agreement or under the CIETAC Rules), I find that Mrs Liu did not receive proper notice of the arbitration or the appointment of arbitrators for the purpose of s 8(5)(c) of the IAA. I also find that the

failure to give Mrs Liu proper notice breached the rules of natural justice such that it would be contrary to public policy for me to enforce the Award for the purpose of s 8(7)(b) of the IAA.

155 As to any residual discretion, without the need to consider the possible contexts in which the discretion should be exercised, it is difficult to see how the Court should enforce the Award against Mrs Liu in this proceeding when it has concluded that no proper notice at all was given to Mrs Liu. This is a fundamental requirement to the integrity of the arbitration. Assuming the correctness of the facts the Court has found, there would be an unfairness to Mrs Liu by the enforcement of the Award. Further there is no legally recognisable basis, such as an estoppel or agreement, so as to enliven the exercise of the discretion in favour of enforcement.

156 I should indicate that if prejudice to Mrs Liu needs to be shown, this would be demonstrated here. It is a significant breach of natural justice and the requirement of arbitral due process for no proper notice to have been given to Mrs Liu. This is no technical or inconsequential failure of process. Then, if the failure to give proper notice is material, the focus must be upon Mrs Liu and not the other respondents. The question may arise whether the failure to give notice had any impact on the outcome of the Award, or there was any substantial disadvantage to Mrs Liu. Assuming the onus is on Mrs Liu to prove these matters, I have no hesitation in finding that from her point of view the arbitrators have been denied the benefit of both argument and her evidence (as to her role for instance), and there was a real chance that this would make a difference to the arbitrators' deliberations and conclusions related to her.

157 I do not consider it necessary that Mrs Liu provide evidence to otherwise demonstrate real practical injustice or materiality. Jishi Fund submits that Mrs Liu has failed to give evidence as to how she would have participated in the arbitration if she had received notice (including how she would have objected to the orders sought by Jishi Fund, how she would have challenged the evidence against her, and how she would have explained the basis on which the other respondents to the arbitration failed to participate). Yet in a situation like the present proceeding, where no proper notice has been given at all, the real practical injustice is apparent — again, looking at this from the point of view of Mrs Liu.

DISPOSITION

158 In light of the above reasons, and with Mr Liu, GHL and YE Australia not opposing the enforcement of the Award, the following orders would seem appropriate.

159 In relation to Mrs Liu, I would dismiss the application for summary judgment and the application seeking to enforce the Award and order Jishi Fund to pay Mrs Liu's costs of the applications.

160 I would then order, pursuant to s 8(3) of the IAA, that the Award be enforced against Mr Liu, GHL and YE Australia in the amounts of:

(a) $29,157,326.67 pursuant to cl 3.1 of the Award;

(b) $4,821,934,54 pursuant to cl 3.2 of the Award;

(c) $80,808.08 pursuant to cl 3.4 of the Award;

(d) $34,787.63 pursuant to cl 3.5 of the Award; and

(e) $211,455.51 pursuant to cl 3.7 of the Award.

161 I would also order Mr Liu, GHL and YE Australia to pay Jishi Fund's costs of the summary judgment application.

162 However, I will give the parties an opportunity to consider these proposed orders, and will now order that the parties confer and within 14 days file an agreed minute of orders or, in default of agreement, written submissions no longer than 5 pages and proposed minutes of orders.

I certify that the preceding one hundred and sixty-two (162) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Middleton.

Associate:

Dated: 11 May 2021