FEDERAL COURT OF AUSTRALIA

Guoao Holding Group Co Ltd v Xue (No 2) [2022] FCA 1584

File number:	NSD 580 of 2022
Judgment of:	**STEWART J**
Date of judgment:	22 December 2022
Catchwords:	**ARBITRATION** – international commercial arbitration – application to enforce foreign award under s 8(3) of the *International Arbitration Act 1974* (Cth) – opposition to enforcement under s 8(7)(b) – whether to enforce award would produce such manifest unfairness and imbalance of remedy that to do so would be contrary to public policy – whether arbitration agreement and award adequately authenticated or certified – whether translation of award adequate – requirements of s 9
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 52 *International Arbitration Act 1974* (Cth) ss 8, 9
Cases cited:	*Dampskibsselskabet Norden A/S v Beach Building and Civil Group Pty Ltd* [2012] FCA 696 *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; 304 ALR 468 *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5; 49 VR 732 *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110; 290 FCR 298 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; 38 VR 303 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; 232 FCR 361 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767
Division:	General Division

Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Number of paragraphs:	66
Date of hearing:	13 December 2022
Counsel for the Applicant:	S H Hartford Davis and B Yin
Solicitor for the Applicant:	Minter Ellison Lawyers
Counsel for the Respondents:	T J Morahan
Solicitor for the Respondents:	Chen Shan Lawyers

Table of Corrections:

23 December 2022	In order 2(a), "189,715,323.27" has been replaced with "188,597,768.21".
23 December 2022	In paragraph 8, "TredmoreFab Pty Ltd" has been replaced with "Tredmore Pty Ltd".
23 December 2022	In paragraph 28, "civil" has been replaced with "civilian".
23 December 2022	In paragraph 31, "10,685,211.09" has been replaced with "11,802,766.15".

23 December 2022	In paragraph 65, "189,715,323.27" has been replaced with "188,597,768.21".
23 December 2022	In paragraph 65, "$45.26" has been replaced with "$45.14".

ORDERS

NSD 580 of 2022

BETWEEN:	**GUOAO HOLDING GROUP CO LTD** Applicant
AND:	**LIJUAN XUE** First Respondent
	TREDMORE PTY LTD Second Respondent
	JUYING XUE Third Respondent
ORDER MADE BY:	**STEWART J**
DATE OF ORDER:	**22 DECEMBER 2022**

THE COURT ORDERS THAT:

1. Pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth), the award dated 26 January 2021 of the Beijing Arbitration Commission (Award No. 0385) be enforced against the first respondent as if it were a judgment of the Court.
2. Judgment be entered against the first respondent in the amounts of:
   (a) RMB 188,597,768.21 in respect of the principal amount outstanding; and
   (b) RMB 22,344,120.60 for pre-judgment interest to 22 December 2022.
3. Interest be payable on the judgment in order 2 from the date of this order pursuant to s 52 of the *Federal Court of Australia Act 1976* (Cth).
4. The first and second respondents' interlocutory application dated 22 November 2022 be dismissed.
5. The first and second respondents pay the costs of the proceeding.
6. Until further order of the Court, the freezing orders made on 31 August 2022 (as amended from time to time) be continued in aid of execution of the judgment entered in this proceeding.

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

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 This is an application for the enforcement of a foreign arbitral award under s 8(3) of the *International Arbitration Act 1974* (Cth) (**the IAA**). The essential issue in dispute is whether to enforce the award would be contrary to public policy within the meaning of s 8(7)(b) such that the Court should consequently exercise its discretion to not enforce the award. The respondents contend that enforcement of the award would lead to such manifest unfairness and imbalance of remedy to the parties' dispute that was the subject of the arbitration that an Australian court would not enforce it.

2 The respondents also contend that the arbitration agreement and award tendered by the applicant are not adequately certified or authenticated and that the award is not adequately translated, as required by s 9 of the IAA, with the result that the award should not be enforced.

3 For the reasons that follow, I do not accept the respondents' contentions. The award must be enforced.

4 By way of procedural background, it is relevant that the applicant first applied ex parte for freezing orders against the first and second respondents. It also sought an order as contemplated by Annexure B of the *Commercial Arbitration Practice Note* (CA-1) that the first respondent be given notice that unless she commenced an application to oppose the making of an enforcement order within 28 days of such notice, the Court would make orders to enforce the arbitral award including giving judgment for the monetary sum of the award less any amount previously recovered. I made such orders on 31 August 2022.

5 The first and second respondents subsequently applied by way of interlocutory application for the applicant's originating application to be dismissed and, consequentially, that the freezing orders be vacated.

The dispute

6 **Guoao** Holding **Group** Co Ltd, the applicant, is a Chinese construction company.

7 Lijuan Xue (**Ms Xue**), the first respondent, is resident in Sydney although she previously had (and perhaps still has) substantial business interests in the People's Republic of China (PRC).

8 The second respondent is Tredmore Pty Ltd, an Australian registered corporation which is the trustee of the Xue Family Trust and is said to have been the repository of significant wealth by Ms Xue. It is cited for the purpose of the freezing orders that were made on 31 August 2022. Enforcement of the arbitration award is not sought against the second respondent so its position need not be considered further.

9 The third respondent was joined to the proceeding by orders dated 23 November 2022 for reasons related to the freezing orders. Her position also need not be considered any further.

10 On 26 January 2021, the Beijing Arbitration Commission published an arbitral award (Award No. 0385) that determined the claims and counterclaims of the parties to the award. The parties were Beijing **Jubaoyang** Asset Management Co Ltd, Ms Xue and Beijing **Shanshuilin** Ecological Farm Co Ltd as claimants, and Guoao Group as the respondent.

11 The transactions which have given rise to the disputes the subject of the award relate to the development of Ligong Manor, an aged care project in Beijing. Shanshuilin, an entity previously 100% owned by Ms Xue, owned the project. Shanshuilin needed funds to develop it, and Guoao Group agreed to provide development funds by way of shareholder loans.

12 By a Cooperative Development Agreement (**CDA**) dated 18 April 2014 between Ms Xue, Shanshuilin and Jubaoyang, on the one hand, and Guoao Group, on the other, it was agreed to establish an entity for the carriage of the project, Beijing **Guoao Village** Industrial Development Co Ltd. Guoao Group would own 51% of the shares and Jubaoyang would own the remaining 49% of the shares in Guoao Village (cl 2.1). Guoao Group would acquire voting control over Guoao Village and an effective approximately 25% interest in the project by requiring Ms Xue to transfer 49% of her equity interest in Shanshuilin to Guoao Village (cl 2.2.1), and 51% of her equity interest in Shanshuilin to Jubaoyang (cl 2.2.2). The result was that Guoao Group controlled the joint venture entity, Guoao Village, and the latter had a minority stake in the project itself which was owned by Shanshuilin.

13 The shareholdings in Shanshuilin referred to in the previous paragraph were to be achieved by the conclusion of Equity Transfer Agreements to be signed by Ms Xue with, in the one case, Guoao Village (cl 2.2.1), and, in the other, Jubaoyang (c 2.2.2). Guoao Group obtained its 51% stake in the newly established Guoao Village pursuant to the CDA and a Shareholder

Cooperation Agreement concluded with Jubaoyang (cl 2.1.1). It was not to be a party to the Equity Transfer Agreements.

14 Guoao Group agreed to provide RMB 160 million of shareholders' loans to Guoao Village to be applied to the project, which was then to be repaid to Guoao Group upon construction reaching certain milestones (cl 2.4). In the event these funds were insufficient to complete the project and Guoao Group "clearly indicates that it will not increase the shareholders loans", Jubaoyang undertook to "raise funds by itself and enjoy the proceeds from its own construction" (cl 4.6).

15 The CDA provided that all disputes arising from or in connection with its performance shall be settled through negotiation, but if no settlement can be reached "either party may submit the dispute to Beijing Arbitration Commission for arbitration" (cl 8).

16 Guoao Village was established and the various equity transfers took place. Guoao Group provided shareholder loans. However, disputes broke out and in June 2019 the claimants commenced arbitration against Guoao Group.

17 The claimants claimed in the arbitration that Guoao Group repeatedly demanded repayment of the shareholder loans in violation of the CDA. They claimed that urgent funds were needed for the development and construction of the project but Guoao Group refused to continue to provide shareholder loans to Guoao Village in accordance with the contract which forced construction to be interrupted. The claimants claimed the dissolution of the CDA and that Guoao Group pay the arbitration costs.

18 Guoao Group contended in the arbitration proceeding that it had fulfilled the CDA as agreed and that there was no breach of contract as described by the claimants. By way of a counterclaim, it claimed that the claimants were in breach of contract. It claimed that the claimants jointly and severally repay RMB 240 million (being the RMB 140 million loan and RMB 100 million interest) and the costs of the arbitration.

19 In the award, the arbitral tribunal held that Ms Xue and Jubaoyang had fundamentally breached the CDA by purportedly causing Guoao Village to sign a loan agreement dated 27 April 2016, which the tribunal held had been "unilaterally signed" by Ms Xue, and by withdrawing RMB 130 million from Guoao Village purportedly pursuant to the loan agreement.

20 The tribunal held two hearings. During the second hearing, held on 22 July 2020, the parties agreed that if the tribunal upheld Guoao Group's counterclaim, the appropriate orders would be for the claimants to repay the shareholder loans and for the CDA to be "jie chu" (ie, rescinded or dissolved, although I will return to the meaning of these words). The agreement of the parties in this regard is apparent from the transcript which includes the following:

> Claimants: Included in the RMB 140 million, of which the respondent demands the return, is the RMB 100 million for the transfer of equity, the respondent's demand of the [claimants] is returning the funds while Guoao Village still enjoys shareholding of Shanshuilin Company lacks factual basis.
>
> On the factual and legal bases of the respondent amending its counterclaim in the arbitration proceedings, we hold the view that the respondent also agrees to dissolve/rescind ["jie chu"] the Cooperative Development Agreement.
>
> (Lines 62-66.)
>
> Guoao Group: If the arbitration tribunal rules in favour of our request, we would agree to terminate the contract.
>
> Chief Arbitrator: If the [claimants] can refund your corresponding fees and claimed interest, and the respondent agrees to terminate the contract, essentially the dispute between the two parties would no longer exists, the issues would only concern amounts, payment methods and frequency of payment?
>
> Guoao Group: Yes.
>
> Claimants: Yes.
>
> (Lines 141-149.)

21 Guoao Group also claimed that the CDA be terminated and its loan repaid, and submitted that the dispute involving Shanshuilin's ownership by Guoao Village could not be settled in the arbitration. It asked the tribunal to leave the dispute to the parties to resolve in another proceeding if no settlement could be reached. (Lines 220-227.)

22 Ultimately, the tribunal made the following award on, as mentioned, 26 January 2021 (as written in the certified translation):

> 1. Dissolution [ie, "jie chu"] of the Cooperative Development Agreement;
> 2. The Three Applicants shall jointly and severally pay the principal of RMB 140 million and interest of RMB 58 million to the Respondent;
> 3. The Three Applicants shall jointly and severally pay lawyer fees of RMB 1.2 million to the Respondent;
> 4. The Three Applicants shall jointly and severally pay the notarisation fee of RMB 11,505 and the property preservation fee of 193,417.2 to the

Respondent;

5. The Respondent shall pay lawyer fees of RMB 200,000 to the Three Applicants;

6. Dismissal of the other Arbitration Claims of the Three Applicants;

7. The arbitration claim fee of this case is RMB 735,150 (which has been fully paid in advance by the Three Applicants to the Commission), 80% of which, namely RMB 588,120, shall be borne by the Three Applicants, and 20% of which, namely RMB 147,030, shall be borne by the Respondent. The Respondent shall pay their arbitration claim fee for this case of RMB 147,030 paid by the Three Applicants on its behalf directly to the Three Applicants;

8. The arbitration counterclaim fee of this case is RMB 1,678,302.70 (which has been fully paid in advance by the Respondent to the Commission), 80% of which, namely RMB 1,342,642.16, shall be borne by the Three Applicants and 20% of which, namely RMB 335,660.54, shall be borne by the Respondent. The Three Applicants shall pay their arbitration counterclaim fee for this case of RMB 1,342,642.16 paid by the Respondent on their behalf directly to the Respondent.

After the above-mentioned payments to be made by both parties to the other party have been offset against each other, the remaining amount that the Applicants shall pay to the Respondent shall be paid by the Applicants within 15 days from the date of service of this Award. If payment becomes overdue, the interest on the debt during the overdue performance period shall be doubled in accordance with the provisions of Article 253 of the Civil Procedure Law of the People's Republic of China.

23 The award debtors thereafter made a number of challenges to the award in courts and to authorities in the PRC.

24 First, they applied to the Beijing No. 4 Intermediate People's Court which issued a judgment on 12 May 2021. The Court recorded that the award debtors "agree with the content of Item 1 of the Award Ruling to dissolve the Cooperation Development Agreement" but that they do not agree with "the content of Item 2 of the Award Ruling" on the basis that it "seriously exceeds arbitral authority, is a violation of legal procedures, and should therefore be revoked". The award debtors also claimed that the award violates the public interest. More specifically, and relevant for present purposes, the Court recorded that the award debtors claimed that Item 2 of the award exceeds arbitral authority, "resulting in the imbalance of rights and obligations of all parties" on the following basis:

> According to Item 2 of the arbitration award, the Applicants shall return the total loan of 200 million yuan (including 60 million yuan previously paid) and interest of 58 million yuan to the Respondent. However, as Guoao Village Company was not a party to the arbitration case, the 51% equity of Guoao Village Company held by Guoao Holding Company cannot be handled together.
>
> The arbitration ruling resulted in an unfair outcome: First, as mentioned earlier, the equity consideration held by Guoao Holding Company was 51% of 100 million yuan.

> XUE Lijuan did not recover the 49% equity of Shanshuilin Company transferred to Guoao Holding Company while returning the equity transfer funds to Guoao Holding Company. Second, Guoao Holding Company held 51% equity of Guoao Village Company and Guoao Village Company held 49% equity of Shanshuilin Company. Therefore, Guoao Holding Company can still claim the income of Shanshuilin Company based on the 51% equity of Guoao Village. According to Guoao Holding Company's written notice of equity transfer, the 51% equity was worth 100 million yuan. Therefore, the final result is that Guoao Holding Company would recover all the loans and interest beyond the agreed interest of 58 million yuan, and could also recover the investment of 100 million yuan based on the equity transfer. The root cause of the unfair outcome above is that arbitral authority has been exceeded.

25 The Court rejected the award debtors' contentions that the matters decided by the tribunal did not fall within the scope of the arbitration agreement. In relation to the challenge on the basis that the award is "contrary to the public interest", the Court held that the award outcome only involves the rights and obligations between the parties to the contract, and is not within the scope of social public interest. The application to cancel the award was therefore dismissed.

26 Next, the award debtors applied to the Beijing No. 3 Intermediate People's Court for non-enforcement of the award. That was on the basis that the arbitral tribunal violated the arbitration rules and legal procedures for the arbitration, the loan relationship that was dealt with in the award was not within the scope of the arbitration agreement, and:

> Award No. 0385 should not have heard the equity transfer relationship between outsider Guoao Village Company and XUE Lijuan. While requiring XUE Lijuan to directly return the equity transfer amount of RMB 100 million to Guoao Holding Company, it failed to specify how XUE Lijuan would recover the equity return corresponding to the equity transfer amount awarded. The ruling results in an obvious imbalance of rights and obligations of all parties.

27 The Court rejected the award debtors' application in a judgment or ruling dated 30 December 2021.

28 The award debtors subsequently appealed (by way of a "supervision application") to the Beijing People's Procuratorate No. 4 Branch which considered each of the bases for the challenge to the award that had been advanced in the Beijing No. 3 Intermediate People's Court, and rejected each one. The Procuratorate system is outside of the court system and provides for a form of political or civilian supervision of courts. With regard to the contention that the arbitral award outcome causes an obvious imbalance of rights and obligations of all parties, the Procuratorate held that those issues were within the jurisdiction of the arbitration tribunal and not within the scope of judicial review of arbitration by the people's court. In the result, on 16 June 2022 the supervision application was rejected.

29 It is common ground that there are no further procedures available for the award debtors to challenge the award in a Chinese court, but there is a theoretical possibility for a further challenge to the Supreme People's Procuratorate. That would require establishing "clear error" by the Beijing People's Procuratorate No. 4 Branch and no such step has been taken by the award debtors.

30 In the meanwhile, Guoao Group applied to the Beijing No. 3 Intermediate People's Court for an enforcement ruling on the award. On 22 February 2021, the court issued an "execution notice" to the award debtors ordering them to perform the obligations under the award. Then, on 8 March 2021 it made freezing orders against the award debtors "to safeguard the legitimate rights and interests" of the award creditor, and on 14 May 2021 it made orders on "restriction of consumption".

31 The enforcement procedures realised RMB11,802,766.15, which Guoao Group has credited to the amount otherwise owing under the award. On 27 December 2021, the Beijing No. 3 Intermediate People's Court issued an enforcement ruling terminating the enforcement procedure on the basis that the award debtors had no further property available for enforcement.

Public policy

32 The conception of public policy in the IAA as adopted from the New York Convention is limited to the fundamental principles of justice and morality conformable with the international nature of the subject matter, namely international commercial arbitration. That is a context very different from the review of public power in administrative law. See *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; 232 FCR 361 (***TCL FCAFC***) at [74] per Allsop CJ, Middleton and Foster JJ. The scope of public policy in this context requires a degree of international harmony and concordance of approach; it is not intended to incorporate any idiosyncratic national approach: *TCL FCAFC* at [73] and [75]. Put another way, public policy in this context is limited to the fundamental principles (or norms) of justice and morality (or fairness) of the state, recognising the international dimension of the context: *TCL FCAFC* at [76] and [111].

33 In *TCL FCAFC* at [79], the Full Court adopted comments of Bokhary PJ and Sir Anthony Mason in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 215-216 and 232-233. They include that before a New York Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award

on public policy grounds, "the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection." Also, there must be "compelling reasons" for enforcement of a Convention award to be refused on public policy grounds.

34 Ms Xue's case is that the arbitral award produced a real unfairness because the CDA was rescinded and the award debtors were ordered to repay the shareholder loans and what had been paid by Guoao Group for the shares, but there was no award for the re-conveyance of the shares from Guoao Group. It is submitted for Ms Xue that there was discussion before the tribunal about the re-conveyance of the shares, but that the tribunal made no award in that regard. The result, it is contended, is that contrary to what the notion of "jie chu", or rescission, in Chinese law contemplates, the parties were not put back in the position that they were in before entering into the contract.

35 In my assessment, Ms Xue's complaints about the award do not rise to the level of the award being contrary to fundamental norms of justice and fairness in Australia within the context of international commercial arbitration such as to enliven the public policy ground for resisting enforcement. There are a number of reasons for that.

36 First, it will generally be inappropriate for the enforcement court of a Convention country to reach a different conclusion on the same question of asserted defects in the award as that reached by the court at the seat of the arbitration: ***Gujarat*** *NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; 304 ALR 468 at [65] per Allsop CJ, Besanko and Middleton JJ; *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110; 290 FCR 298 at [77] per Stewart J, Allsop CJ and Middleton J agreeing. In the present case, the award debtors have applied exhaustively to domestic courts and authorities for the cancelation of the award, and they have been rebuffed.

37 The Court in *Gujarat* endorsed the observations of Coleman J in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 (at 331) that outside an exceptional case such as where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so, any suggestion that procedural defects in the conduct of the arbitration which have already been considered by the supervisory court should be reinvestigated by the enforcing court is to be most strongly deprecated.

38 Ms Xue seeks, in effect, to bring herself within the exception to the general principle as identified by Coleman J. She submits that she was limited in the grounds that she could assert in seeking to set aside the award in the PRC, which grounds did not include the unfairness that she complains of; she says that she was limited to challenging the award as not being within the authority of the tribunal under the arbitration agreement whereas her real complaint is not that the tribunal went too far, but rather that it did not go far enough; she says that it should have made an award that returned the parties to their pre-contractual positions. However, as revealed above, Ms Xue was able to and did contend before the PRC courts that the award should be set aside as being contrary to public policy (or public interest) because of the imbalance of rights and obligations that it creates, but on each occasion her argument was rejected. That is essentially the same argument that she runs before me.

39 The Beijing No. 4 Intermediate People's Court, in its judgment referred to at [0] above, explained that under Art 58 of the Arbitration Law of the PRC an award can be set aside on a variety of grounds including if "the people's court finds that the ruling violates public interest". There is no basis to conclude that the powers of the PRC supervisory courts are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators.

40 Secondly, it is apparent from the review of the transcript of the arbitration proceedings as discussed above (at [0]) that Ms Xue agreed to the rescission of the CDA. However, she did not seek any orders with regard to the re-conveyance of the shares, and Guoao Group contended that it could not do so because Guoao Village was not a party to the arbitration. The tribunal dealt with what was before it, rejecting Ms Xue's case that Guoao Group had breached the CDA by not continuing to extend loan facilities to it, accepting the parties' agreement that the CDA should be rescinded and upholding Guoao Group's claim for repayment of the moneys paid by it. There is no fundamental unfairness in the tribunal dealing with what was before it.

41 Thirdly, Associate Professor Colin Hawes, an academic expert in Chinese corporate law at the Faculty of Law in the University of Technology Sydney who was called by Guoao Group as an expert witness on Chinese law, explained without contradiction that the award debtors could still apply to the people's court in the relevant Chinese jurisdiction seeking an order or determination as to whether any demand by them for restitution of the shares should be allowed. That is to say, not only was there no prayer by the claimants in the arbitration for

return of the shares, but the arbitration does not have the effect on foreclosing the claimants from still pursuing that remedy under Chinese law.

42 I note that in *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5; 49 VR 732, the tribunal made a declaration that the agreements were rescinded, and ordered that the applicants repay the purchase price for the shares to the respondents, but the award did not include any order for the re-transfer of the purchased shares. The applicants for leave to appeal contended that as the award did not include orders requiring re-transfer of the shares, enforcement of the award would give rise to double recovery, and would therefore be contrary to public policy. That is very similar to the argument advanced by Ms Xue in the present case.

43 The Victorian Court of Appeal (at [19]) adopted the conception of public policy in this context that was stated in *TCL FCAFC*, namely that public policy is to be construed narrowly as referring to the most basic fundamental principles of morality and justice in the jurisdiction. The parties, and the Court of Appeal (at [20]), accepted that the primary judge in that case had correctly identified that the legal effect of the tribunal's declaration of rescission under English law, which governed the parties' dispute, needed to be understood, but that that was an entirely different exercise to considering whether the tribunal correctly applied the doctrine of rescission or not – which would be impermissible.

44 The Court of Appeal held (at [23]-[26]) that the effect of the award was to confirm the act of rescission which was an act of the parties. The rescission had the effect of vesting equitable rights to the shares in the applicants, so there was no basis for saying that the declaration confirming the rescission was a nullity until the applicants had been restored their legal title to the shares. The declaration of rescission in the award necessarily entailed the avoidance of the transactions from the beginning and the restoration of the parties to their previous positions and the execution processes of the court allowed for the prevention of double recovery (at [27] and [29]).

45 Thus, a declaration of rescission without consequential orders restoring the parties to their pre-contractual positions was not only not contrary to public policy but was held (at [30]) to conform with the public policy in Australia because there remained processes of the law available to the parties to ensure an equitable outcome. That is the same in the present case with reference to Chinese law, even though the effect in Chinese law of rescission (or "jie chu") is different to that in English and Australian law.

46 Article 97 of the Contract Law of the People's Republic of China (1999), which although now repealed was applicable at the relevant time, provided that "after a contract is rescinded, … where the obligations have already been performed, the parties may, taking into account the performance status and the nature of the contract, demand restoration to the original status, or that other remedial measures be taken, and have the right to demand compensation for losses". Thus, there is no automatic return to the status quo prior to executing the contract, but rather the parties have the right to "demand" restoration to the original status. Whether the demand will be accepted or approved depends on "the performance status and nature of the contract". That is a matter to be determined by the relevant court or tribunal in which the remedy is sought. The point is that order 1 of the award enlivens the right to make the claim for restitution; it does not extinguish it.

47 Fourthly, and even aside from the fact that it was not sought, it is not obvious that the tribunal made any error in not providing for the re-conveyance of the shares. That is because such a re-conveyance would involve the interests of a third party (Guoao Village) and possibly the dissolution of the separate Equity Transfer Agreements to which Guoao Group was not a party. It would appear that such relief would in any event have had to have been sought by a different process.

48 In the circumstances, the public policy exception to enforcement of the foreign award under s 8(7)(b) of the IAA is not made out.

Procedural requirements for enforcement

49 There are a number of procedural requirements to enforcement of a foreign award under the IAA. I was satisfied that those requirements had been fulfilled before making the interim orders on 31 August 2022. However, Ms Xue now specifically challenges the fulfilment of the following requirements:

(1) the requirement in s 9(1)(a) that the applicant produce to the court "the duly authenticated original award or a duly certified copy";

(2) the requirement in s 9(1)(b) that the applicant produce to the court "the original arbitration agreement under which the award purports to have been made or a duly certified copy"; and

(3) the requirement in s 9(3) that if a document produced under s 9(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 … certified to be a correct translation".

50 Insofar as the requirements in s 9(1) are concerned with regard to the award and the agreement, s 9(2) provides that 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.

51 Insofar as the requirement in s 9(3) is concerned with regard to translations, s 9(4) provides that 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.

52 Further, relevant to the requirements in ss 9(1) and 9(2) is s 9(5) which provides that a document produced to a court in accordance with s 9 is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates.

53 Although I accept that an award debtor can resist enforcement of the award by arguing that the documents produced by the award creditor do not meet the description set out in s 9(1), as to which see ***IMC Aviation*** *Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; 38 VR 303 at [40] per Warren CJ, where the award debtor does not dispute that the copies of documents that are tendered by the award creditor are proper copies, the court can be satisfied that the documents are what they purport to be. That arises from the presumption in s 9(5) that they are, upon mere production, evidence of the matters to which they relate (ie, they are prima facie the documents that they purport to be) and from the award debtor's acceptance of that reality.

54 In *IMC Aviation* at [46], Warren CJ concluded that "prima facie evidence" in s 9(5) is evidence that, in the absence of contrary evidence, is conclusive proof of a fact. In *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767 at [12], Jagot J took into account s 9(5) of the IAA in accepting that copies of the relevant documents were sufficient evidence to satisfy the requirements of s 9(1). Noting that Foster J in *Dampskibsselskabet Norden A/S v Beach Building and Civil Group Pty Ltd* [2012] FCA 696

at [75] stated that he was not convinced by the approach of Warren CJ, I accept her Honour's reasoning as well as that of Jagot J in *Tianjin*. I have no reason to doubt that the documents are what they purport to be; s 9(5) says that they are prima facie evidence of the matters to which they relate, and Ms Xue does not dispute them. On that basis they become conclusive, or at least sufficient, evidence to satisfy the requirements of s 9(1).

55 It is submitted on behalf of Ms Xue that the court is required to be independently satisfied of the authenticity of the documents under ss 9(1) and 9(2) regardless of whether or not the award debtor accepts that the documents tendered by the award creditor are proper copies of the original documents. That is said to be on the basis that the court is exercising a quasi-administrative function in enforcing an award.

56 I reject those submissions. Enforcement of an arbitral award under the IAA is an exercise of the judicial power of the Commonwealth. It occurs in accordance with judicial process and necessarily involves a determination of questions of legal right or legal obligations resulting in an order that then operates of its own force. See *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 at [32]-[33] per French CJ and Gageler J and [104] per Hayne, Crennan, Kiefel and Bell JJ. As such, enforcement is the exercise of a judicial power; it is not an administrative function.

57 Further, the requirements of s 9 with regard to evidence of awards and arbitration agreements are pertinently relevant and applicable in any ex parte proceeding for the enforcement of an award and in an inter partes proceeding to the extent that some matter is relevantly in contest. But where there is no contest as to the terms of the award or the arbitration agreement, or translations of those documents, then – with the exception of s 9(5) – those provisions have little role to play. It is the absence of contest with regard to those questions together with the presumption in s 9(5) that is sufficient to satisfy the court.

58 In any event, Guoao Group tendered copies of the arbitration agreement and the award. Further, copies of those documents were produced as exhibits to a sworn affidavit of Mr Nolan, Guoao Group's solicitor. No objection was taken to this aspect of Mr Nolan's evidence. If objection had been taken on the basis that that evidence was hearsay, I would have been prepared to admit it under ss 190(1)(c) and 190(3)(a) of the *Evidence Act 1995* (Cth) on the basis that the matter to which the evidence relates is not genuinely in dispute. Mr Nolan stated that he received the documents and instructions in relation to them from Zhong

Lun Law Firm in Beijing who were Guoao Group's lawyers in the arbitration. They would therefore be expected to be able to identify the agreement and the award.

59 On the face of the copy of the arbitration agreement is a stamp impression in red ink that has been translated by Mr Kirkwood, a NAATI certified Chinese/English translator. The stamp is the stamp of the Beijing Arbitration Commission apparently certifying or recording it as received or as a true copy and applying to it the Commission's case number for the arbitration – the same case number as that recorded in the award. It also has the seals (chops) of each of the corporate parties and the signature of Ms Xue. The copy of the award is bound in a Beijing Arbitration Commission cardboard folder, it is impressed with the seal (chop) of the Beijing Arbitration Commission and it is apparently signed by each member of the arbitral tribunal.

60 In the circumstances, I am amply satisfied that the copies of both the agreement and the award have been duly authenticated and certified by the arbitral tribunal or an officer of the tribunal within the meaning of s 9(2).

61 Insofar as translations are concerned, Guoao Group tendered sworn translations in English by Mr Kirkwood. Ms Xue, through an another NAATI certified expert Chinese/English translator, Mr Wang, took issue with Mr Kirkwood's English interpretation of the Chinese characters for the words "jie chu". There is a debate between the translators as to whether those words are best translated into English in any particular context as dissolution, rescission or termination. It does not really matter because the real question is what legal effect in Chinese law the "jie chu" of a contract has. Associate Professor Hawes, for Guoao Group, and Dr Liu of the China University of Political Science and Law, for Ms Xue, gave evidence directed to that question.

62 There is no need to resolve the question of the most fitting English equivalent of "jie chu", but if I had to do so I would be quite prepared to accept in Ms Xue's favour the evidence of Mr Wang on that question. The point is that I am amply satisfied, within the meaning of s 9(4), with the translations that have been tendered, both individually and together. It is nevertheless submitted on behalf of Ms Xue that a translation other than one that is certified by a diplomatic or consular agent in Australia of the country in which the award was made, as referred to in s 9(4), cannot be accepted by the court under that provision unless it is proved that obtaining such a certification is impossible or impractical, or at least that an attempt to obtain such a certification has been made. I reject that submission. There is no support for it

in the text. The text clearly provides alternatives; the court can either accept a translation that is certified as referred to in that provision or it can accept a translation which is "otherwise" to its satisfaction. I am more than satisfied with reference to the second alternative.

Conclusion

63 In the result, Ms Xue's objections to the enforcement of the award all fail, and the award must be enforced under s 8(3) of the IAA.

64 I am satisfied with the proof of the amounts claimed including the interest, and Ms Xue in any event took no issue with them.

65 With regard to pre-judgment interest, the undisputed evidence is that interest accrues on the net amount owing under the award at the rate of 0.0175% per day from 15 days after service of the award which was on 28 January 2021. Assuming in Ms Xue's favour that the amount recovered is credited before interest begins to run, the result is that there should be interest on the sum of RMB 188,597,768.21 at 0.0175% per day for 677 days to 22 December 2022. That amounts to RMB 22,344,120.60. Together those amounts are the equivalent of about $45.14 million.

66 There is no apparent reason why the costs should not follow the event. Since the first and second respondents applied for the originating application to be dismissed in order to then have orders that the freezing orders be vacated, the first and second respondents should be jointly and severally liable for the costs of the proceeding.

I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 22 December 2022