

FEDERAL COURT OF AUSTRALIA

Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company

[2021] FCAFC 110

- Appeal from: *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116; *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 3)* [2020] FCA 1219
- File number: NSD 1045 of 2020
- Judgment of: **ALLSOP CJ, MIDDLETON AND STEWART JJ**
- Date of judgment: 25 June 2021
- Catchwords: **ARBITRATION** – international arbitration – enforcement of award – where supervisory court appointed the arbitral tribunal – whether composition of the arbitral tribunal was in accordance with the agreement of the parties – comity – whether enforcing court should accept that the appointment of the tribunal by the supervisory court was in accordance with the agreement of the parties
- ARBITRATION** – international arbitration – enforcement of award – nature of the burden of proving a ground for non-enforcement – whether discretion to enforce award should nevertheless be exercised – nature of the discretion
- PRACTICE AND PROCEDURE** – settlement – where parties settled “in principle” – where judgment was complete subject to administrative matters prior to settlement – whether Court can hand down judgment notwithstanding settlement “in principle” – Court has a discretion to hand down judgment where it is in the public interest to do so
- Legislation: *Civil Law and Justice Legislation Amendment Act 2018* (Cth) Sch 7 item 2
Federal Court Rules 2011 (Cth) r 36.73(1)(b)(ii)
International Arbitration Act 1974 (Cth) ss 2D, 3, 8, 39, Schs 1-2
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)
UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission

on International Trade Law on 21 June 1985, and as amended on 7 July 2006)

Civil and Commercial Arbitration Law (Qatar) (Law No. 2 of 2017) Art 33

Civil and Commercial Code of Procedure (Qatar) (Law No. 13 of 1990) Art 195

Cases cited:

AKN v ALC [2015] SGCA 18

Barclay's Bank plc v Nylon Capital LLP [2011] EWCA Civ 826; [2012] 1 All ER (Comm) 912

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

Biggin & Co Ltd v Permanite Ltd [1951] 2 KB 314

Blatch v Archer (1774) 1 Cowp 63; 98 ER 969

Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336

British American Tobacco Australia Services Ltd v Laurie [2009] NSWCA 414

Cameron Australasia Pty Ltd v AED Oil Ltd [2015] VSC 163

China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd [1994] HKCFI 215; [1994] 3 HKC 375

Clarke v Great Southern Finance Pty Ltd [2014] VSC 516

CSR Ltd v Cigna Insurance Australia Ltd [1997] HCA 33; 189 CLR 345

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46; [2011] 1 AC 763

Dardana Ltd v Yukos Oil Co [2002] EWCA Civ 543; [2002] 2 Lloyd's Rep 326

Dickenson's Arcade Pty Ltd v Tasmania [1974] HCA 9; 130 CLR 177

Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc, 03 Civ 4363 (SAS) (S.D.N.Y. Dec. 3, 2003)

Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc, 403 F 3d 85 (2nd Cir, 2005)

Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" [2020] UKSC 38; [2020] 1 WLR 4117

F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 1) [2011] EWHC 1851 (Ch); [2012] Bus LR 884

Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV [2007] FCAFC 43; 157 FCR 558

Glaxo Group Ltd v Genentech Inc [2008] EWCA Civ 23; Bus LR 888

Greenwich Inc Ltd (In Administration) v Dowling [2014] EWHC 2451 (Ch); WLR (D) 334

Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd [2013] FCAFC 109; 304 ALR 468

Gurney Consulting Engineers v Gleeds Health & Safety Ltd [2006] EWHC 536 (TCC); 108 Con LR 58

Hebei Import & Export Corp v Polytek Engineering Co Ltd [1999] HKCFA 40; [1999] 2 HKC 205

Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) [1998] FCA 1485; 90 FCR 1

Hilton v Guyot 159 US 113 (1895)

House v The King [1936] HCA 40; 55 CLR 499

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSC 248; 38 VR 303

Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd [2017] FCA 1223

Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No 3) [2001] EWHC 396 (Ch); 4 All ER 950 (Ch D)

Minmetals Germany GmbH v Ferco Steel Ltd [1999] 1 All ER (Comm) 315

Osborne v Auckland Council [2014] NZSC 67; 1 NZLR 766

Paklito Investment Ltd v Klockner (East Asia) Ltd [1993] 2 HKLR 39

Povey v Qantas Airways Ltd [2005] HCA 33; 223 CLR 189

Prudential Assurance Co Ltd v McBains Cooper [2000] EWCA Civ 172; 1 WLR 2000

PT First Media TBK v Astro Nusantara International BV [2014] 1 SLR 372; [2013] SGCA 57

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TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia [2013] HCA 5; 251 CLR 533

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Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: International Commercial Arbitration

Number of paragraphs: 108

Date of hearing: 25 February 2021

Counsel for the Appellant: T Mehigan SC

Solicitor for the Appellant: Henry William Lawyers

Counsel for the Respondent: T D Castle SC

Solicitor for the Respondent: Cowell Clarke Commercial Lawyers

ORDERS

NSD 1045 of 2020

BETWEEN: **HUB STREET EQUIPMENT PTY LTD (ABN 52 109 882 617)**
Appellant

AND: **ENERGY CITY QATAR HOLDING COMPANY**
(REGISTERED IN THE CR UNDER NO. 34913)
Respondent

ORDER MADE BY: **ALLSOP CJ, MIDDLETON AND STEWART JJ**

DATE OF ORDER: **25 JUNE 2021**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders and declaration of the Court on 26 August 2020 in NSD 94 of 2020 be set aside and substituted with an order that the proceeding be dismissed.
3. The parties file and serve written submissions of no more than five pages on the questions of costs of the proceedings below and on appeal, which questions will be decided on the papers unless otherwise ordered, as follows:
 - (a) the appellant within seven days of these orders; and
 - (b) the respondent within seven days thereafter.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

1 I have read the reasons of Stewart J to be published. I agree with his Honour's reasons and I agree with the orders proposed by his Honour. Recent events, however, have necessitated that I make some additional remarks.

2 The appeal was heard on 25 February 2021. On Monday, 21 June 2021, the Court was in full agreement as to the judgment to be handed down and intended to hand down judgment on Wednesday, 23 June 2021, subject to administrative matters. The parties were to be notified on the morning of 21 June 2021. At 10:26am on that same morning (Monday, 21 June) the appellant (with the consent of the respondent) sent an email to the chambers of Middleton and Stewart JJ and me in the following terms:

These proceedings have settled in principle, although the settlement remains subject to its terms being carried out. Should that occur, the parties anticipate that they will seek the leave of the Court to discontinue the appeal within 30 days. We are informing the Court of this development as a courtesy.

At my request, my associate informed the practitioners that the Court had intended to hand down judgment on 23 June 2021, and requested that the parties communicate as soon as possible to the Court their view as to whether the judgment should be handed down. The Court received no response. On 22 June 2021 I informed the parties, through my associate, that the matter would be listed for judgment on 25 June 2021. Again, the Court received no response.

3 This raises an important question as to whether the Court can or should proceed to hand down its judgment notwithstanding that the proceedings have "settled in principle". The parties have not yet sought leave to file a notice of discontinuance pursuant to r 36.73(1)(b)(ii) of the *Federal Court Rules 2011* (Cth); nor have they requested that the Court delay handing down its judgment.

4 The issue has arisen for consideration in a number of English authorities: *Prudential Assurance Co Ltd v McBains Cooper* [2000] EWCA Civ 172; 1 WLR 2000; *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No 3)* [2001] EWHC 396 (Ch); 4 All ER 950 (Ch D); *Gurney Consulting Engineers v Gleeds Health & Safety Ltd* [2006] EWHC 536 (TCC); 108 Con LR 58; *Glaxo Group Ltd v Genentech Inc* [2008] EWCA Civ 23; Bus LR 888; *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 1)* [2011] EWHC 1851 (Ch); [2012] Bus LR 884; *Barclay's Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826; [2012] 1 All

ER (Comm) 912; *Greenwich Inc Ltd (In Administration) v Dowling* [2014] EWHC 2451 (Ch); WLR (D) 334. These authorities have been applied in Australia (*Voss v Davidson* [2003] QCA 252; *Clarke v Great Southern Finance Pty Ltd* [2014] VSC 516) and New Zealand (*Osborne v Auckland Council* [2014] NZSC 67; 1 NZLR 766).

5 Putting to one side the complexities in the English cases arising from the English practice of circulating the draft judgment to practitioners prior to its delivery (see Practice Direction (Court of Appeal: Handed Down Judgments) [1995] 1 WLR 1055) important considerations of public policy and public interest support the judgment in this case being handed down.

6 First, this appeal raises points of law of general interest pertaining to the nature of the burden and onus of proving grounds for the non-enforcement of arbitral awards, and, where such grounds have been made out, the nature of the discretion which permits enforcement notwithstanding the existence of vitiating irregularity. It is thus in the public interest that these views are made the subject of a published judgment in order to facilitate the development of the law, and the provision of guidance to others, including the reduction of risks as to costs of others: *F&C Alternative Investments* at [9] (Sales J).

7 Secondly, the judgment corrects errors of both law and fact in the judgment below: *Prudential* at [31] (Brooke LJ, with whom Walker and Gibson LJJ concurred); *Barclay's Bank v Nylon* at [74] (Lord Neuberger MR); *Voss* at [6] (Davies JA, with whom Williams and Wilson JJA concurred).

8 Thirdly, the stage at which preparation of judgment had reached is a relevant consideration. It is, as Lord Neuberger MR said, a highly questionable use of judicial time to prepare a judgment on a matter that has been settled: *Barclay's Bank v Nylon* at [75]. Here, the judgment was complete at the time of notification.

9 Finally, whilst nothing in these reasons is intended to derogate from the dictum of Somervell LJ in *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 at 321 that “the law ... encourages reasonable settlements”, the parties had a long time in which they could have settled their dispute. They did not do so. The Court is unaware of the nature of the “in principle” settlement. The Court has a discretion in circumstances such as these to publish judgment where the private interests of the parties to settle the dispute without publication of judgment are outweighed by the countervailing public interest in making the judgment publicly available: *F&C Alternative Investments* at [1], [7]–[8] (Sales J); *Barclay's Bank v Nylon* at [74] (Lord Neuberger MR);

Clarke at [23]–[24] (Croft J); *Osborne* at [40]–[44] (Young J with whom Elias CJ, McGrath, Glazebrook and Tipping JJ concurred); *Voss* at [5]–[7] (Davies JA with whom Williams and Wilson JJA concurred); *Greenwich* at [131]–[137] (Smith J).

- 10 In the light of the lack of clarity of the factual position concerning settlement “in principle” it is unnecessary to say anything about “matter” (in the Constitutional sense).
- 11 Accordingly, I am of the opinion that judgment ought to be handed down and published.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop.

Associate:

Dated: 25 June 2021

REASONS FOR JUDGMENT

MIDDLETON J:

- 12 I agree with Stewart J's reasons and proposed orders. I agree with the additional remarks of the Chief Justice.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Middleton.

Associate:

Dated: 25 June 2021

REASONS FOR JUDGMENT

STEWART J:

Introduction

13 This is an appeal from a judgment enforcing an arbitration award under s 8(3) of the *International Arbitration Act 1974* (Cth) (IAA). The principal ground on which the appellant contends that the award should not be enforced is that the composition of the arbitral tribunal was not in accordance with the agreement of the parties as envisaged by s 8(5)(e) of the IAA notwithstanding that the tribunal was appointed by a court at the seat of the arbitration, namely the Plenary Court of First Instance of the State of Qatar. The respondent's principal contention in response is that the appointment, having been made by the Qatari Court, must be regarded as valid under the law of the seat and that the appellant's remedy was to challenge it there rather than to resist enforcement in Australia. The respondent also contends that even if it is concluded that the ground for non-enforcement in s 8(5)(e), or any other ground, is made out, as a matter of discretion the Court should nevertheless enforce the award. The appeal therefore raises questions as to the nature and exercise of that discretion.

14 For the reasons that follow, I have come to the conclusion that the appeal should be allowed. In essence, the award should not be enforced in Australia because the arbitral tribunal was not composed in accordance with the agreement of the parties and that is a proper basis to resist enforcement, it not being necessary for the award debtor to seek to set the award aside at the seat of the arbitration. Also, because a failure to compose the arbitral tribunal in accordance with the agreement of the parties is fundamental to the jurisdiction of the arbitrators, there is little if any scope to exercise the discretion to enforce in this case and it should not be so exercised.

The statutory provisions

15 It being common ground that the award in question is a "foreign award" as referred to in Pt II of the IAA, relevant provisions of the IAA for present purposes are the following:

2D Objects of this Act

The objects of this Act are:

- (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; and

...

3 Interpretation

- (1) In this Part, unless the contrary intention appears:

...

arbitral award has the same meaning as in the Convention.

...

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.

...

8 Recognition of foreign awards

- (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the award.

...

- (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:

...

- (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

...

- (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

...

- (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:

...

- (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:

...

- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

...

39 Matters to which court must have regard

- (1) This section applies where:

- (a) a court is considering:

- (i) exercising a power under section 8 to enforce a foreign award;
or

- (ii) exercising the power under section 8 to refuse to enforce a foreign award, including a refusal because the enforcement of the award would be contrary to public policy; or

...

- (2) 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.

16 As recognised in s 2D(d), s 8 was enacted following Australia's accession to, and to give effect to, the **New York Convention**, i.e., 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) which is reproduced as Sch 1 to the IAA: *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 (**TCL HCA**) at [47] per Hayne, Crennan, Kiefel and Bell JJ. Section 8 closely mirrors the provisions of Art V of the Convention – Art V(1) is reflected in s 8(5) and Art V(2) in s 8(7). The same grounds for not enforcing an international arbitral award are also found in Art 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, and as amended on 7 July 2006) which is reproduced as Sch 2 to the IAA. The origins of Art 36 of the Model Law are also to be found in the New York Convention: *TCL HCA* at [7] per French CJ and Gageler J. Thus, Art 36(1)(a) of the Model Law mirrors Art V(1) of the New York Convention and Art 36(1)(b) of the Model Law mirrors Art V(2) of the New York Convention.

17 It can thus be observed that the New York Convention and the Model Law represent a uniform framework for the recognition and enforcement of arbitral awards. As explained in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; 232 FCR 361 (*TCL FCAFC*) at [58] per Allsop CJ, Middleton and Foster JJ, the Model Law deals with many aspects of arbitration and arbitral procedure not touched upon by the New York Convention, which is broadly limited to protecting, recognising and enforcing awards in the field of international commercial arbitration. There is overlap between the Model Law and the New York Convention on these matters.

18 Insofar as foreign awards are concerned, it is noteworthy that of the 193 member states of the United Nations, 165 are signatories to the New York Convention (from 168 signatories in total); the regime is not only uniform, it is also remarkably widespread. That underscores the importance of interpreting the provisions of the IAA that implement the New York Convention, and the corresponding provisions of the Model Law, with the aim of achieving international uniformity in their interpretation: *Povey v Qantas Airways Ltd* [2005] HCA 33; 223 CLR 189 at [25] and [32] per Gleeson CJ, Gummow, Hayne and Heydon JJ. Due regard should be paid to the reasoned decisions of the courts of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law; it is of the first importance to attempt to create or maintain, as far as the language employed in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration: *TCL FCAFC* at [75].

19 Section 8(3A) of the IAA, by use of the word “only”, makes it clear that an enforcing court has no residual discretion to refuse enforcement; enforcement can be refused only if one or other of the grounds for refusal in sub-ss (5) and (7) is made out. In that regard, once the party seeking enforcement has established that it relies on a foreign award to which it (leaving aside any assignment for the present) and the respondent are parties, the onus is on the respondent who seeks to resist enforcement to establish one or other of the enumerated grounds. That much is clear from the wording of the chapeau to s 8(5) that the court may refuse to enforce

the award if the party against whom it is invoked “proves to the satisfaction of the court” that a ground for non-enforcement is made out.

20 As will be seen, a question nevertheless arises as to the standard of the burden on the party resisting enforcement. I will return to that question in the context of the first issue to be determined in the appeal. A question also arises as to the court’s discretion to enforce an award even when a ground for non-enforcement is established. I will return to that question in the context of the second issue to be determined in the appeal.

Background

21 The following facts are not in dispute. They are principally drawn from the primary judgment, *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116 at [7]-[26].

22 The respondent, Energy City Qatar (**ECQ**), the award creditor, is a company incorporated in Qatar. The appellant, Hub Street Equipment Pty Ltd (**Hub**), the award debtor, is a company incorporated in Australia with its principal place of business in Sydney.

23 In 2010, ECQ and Hub entered into a contract for Hub to supply and install street lighting equipment and accessories, and street furniture and accessories, in Doha, Qatar.

24 Relevant contractual provisions include:

(1) Article 46, headed “SETTLEMENT OF DISPUTES – ARBITRATION”:

Any dispute connected with inter alia the formation, performance, interpretation, nullification, termination or invalidation of this Agreement or arising there from [sic] or related thereto in any manner whatsoever which is not amicably settled within 28 days, or such other period as the parties may subsequently agree, shall be referred to arbitration in accordance with the rules of arbitration in Qatar. An Arbitration Committee shall consist of three members, one member being appointed by each party within 45 days of one party receiving a written notice from the other party to start arbitration proceedings. The third member shall be mutually chosen by the first two members and shall chair the Arbitration Committee and issue the decision of the Arbitration Committee which shall be by a majority vote and shall be binding on both parties. If a decision as to the appointment of the third such member cannot be reached within 28 days from the last date of the appointment of the member by the Parties and their appointed Tribunal Members, the matter of appointment of such member shall be referred by either party to the competent Qatari Courts.

(2) Article 47, which provides that the contract was made in the State of Qatar and is subject to the laws of the State of Qatar.

(3) Article 50, which provides that the English language shall be the ruling language of the contract and accordingly all matters relating to the contract shall be in English.

25 In August 2011, ECQ paid US\$820,322.16 to Hub under the contract as an advance payment. However, in 2012 ECQ decided not to proceed with the contract and sought repayment of the money paid under the contract. Following some email communications and meetings in 2012 in which ECQ continued to seek repayment of the money, Hub informed ECQ that it would identify its position after obtaining legal advice. However, Hub never communicated again with ECQ in circumstances where Hub retained the money ECQ had paid to it.

26 Crucially, ECQ never sent a notice to Hub under Art 46 of the contract giving Hub 45 days to appoint one member of the arbitration committee. Instead, in June 2016 ECQ filed a statement of claim in the Plenary Court of First Instance of the State of Qatar seeking orders that the Court appoint an arbitral tribunal of three arbitrators including an arbitrator nominated by ECQ. In doing so, ECQ relied on Art 195 of Law No. 13 of 1990 promulgating the Civil and Commercial Code of Procedure (Qatar) (the **Civil Procedure Code**) which was in force at the relevant time (and until February 2017). The English translation of Art 195 of the Qatari Civil Procedure Code that was available in the proceeding is in the following terms:

If a dispute arises between the parties prior to an agreement between them as to the arbitrators, or if one or more of the arbitrators refuses to act as such, or withdraws, or is dismissed, or is prevented from acting due to an encumbrance, and no agreement exists between the parties in this respect, the court which has jurisdiction to consider the dispute shall appoint the necessary number of arbitrators at the request of one of the parties, filed in accordance with the normal procedure for filing a claim. The court shall hear the application in the presence of the other parties or in their absence after being summoned to appear before the court. The court's decision in respect of the foregoing may not be appealed in any way whatsoever. However, its decision to reject the appointment of arbitrators shall be subject to appeal pursuant to the relevant provisions of Article 205.

27 In November 2016, ECQ sent a notice of the court proceeding to Hub at the office of a related company in Qatar, not to the nominated address in Sydney at which Hub had agreed in the contract to receive notices. The notice was translated from Arabic to English by an employee of the related company and brought to the attention of the directors of Hub in December 2016. Hub did not participate in the Qatari Court proceeding.

28 The Qatari Court made orders in January 2017 appointing an arbitral tribunal. Thereafter, the arbitral tribunal sent to Hub's nominated address six notices in English about the conduct of

the arbitration between April 2017 and July 2017, with the arbitration being adjourned on three occasions due to Hub's failure to attend. Hub did not participate in the arbitration proceeding.

29 The primary judge was satisfied that notice of the court proceeding was given to Hub's directors, and that each of the six letters from the arbitral tribunal were given to Hub and that Hub understood from them that ECQ had commenced an arbitration against Hub for recovery of the US\$820,322.16 which had been paid to Hub. The primary judge inferred that Hub decided not to involve itself in the arbitration because it decided that was what was in its best commercial interests at the time.

30 On 1 August 2017, the arbitral tribunal issued the award obliging Hub to pay ECQ:

- (1) US\$820,322.16, being the full value of the advance payment;
- (2) US\$75,000.00, as compensation against damages incurred by ECQ; and
- (3) US\$150,000.00, as full fees of the arbitration.

31 The award is in Arabic. It is apparent from the English translation of the award that the arbitral tribunal was satisfied that it had notified Hub of the conduct of the arbitration on three occasions, after which it adjourned the arbitration, but that as there was never any appearance by Hub it proceeded to determine the dispute and make the award in Hub's absence.

The primary judgment

32 On the basis of the factual findings made by her Honour, which are not challenged on appeal, the primary judge (at [28]) rejected Hub's grounds for resisting enforcement of the award based on its factual contentions that it had not received proper notice of the arbitration proceeding (s 8(5)(c) of the IAA), that it was unable to present its case in the arbitration proceeding as it never received notice of the proceeding (also s 8(5)(c)), and the arbitral award involved a breach of the rules of natural justice and thus the award should not be enforced as it would be contrary to public policy to do so (ss 8(7) and 8(7A)(b) of the IAA).

33 The primary judge (at [30]) rejected Hub's contention that the award should not be enforced because the arbitral procedure was not in accordance with the agreement of the parties in that contrary to Art 50 of the contract it was not conducted in English and the award was issued in Arabic (relying on s 8(5)(e) of the IAA). That was on the basis that the notices from the arbitral tribunal to Hub about the arbitration were in English, and Hub decided to ignore them and take no part in the arbitration despite knowing that it was being conducted. Having done so, there

was no prejudice to Hub occasioned by the fact that the arbitral proceeding was conducted in and the arbitral award issued in Arabic. For those reasons, the primary judge, as a matter of discretion, would have decided to enforce the award against Hub notwithstanding the fact that the arbitral procedure was not in accordance with the agreement of the parties.

34 The remaining grounds on which Hub resisted enforcement of the award were related, namely that it did not receive proper notice of the appointment of the arbitrators and the composition of the arbitral authority was not in accordance with the agreement of the parties as the Art 46 procedure in the contract had not been followed. These grounds relied on paragraphs (c) and (e) of s 8(5) of the IAA. The primary judge dealt with these grounds together (at [31]-[60]).

35 The primary judge observed (at [34]) that the Qatari Court stated (in the English translation of its judgment):

Whereas the two parties failed to agree upon tribunal of arbitrators, with which the court decides to appoint a tribunal consisted of three arbitrators...

36 With reference to that statement by the Qatari Court and Art 195 of the Qatari Civil Procedure Code, the primary judge (at [59]) reasoned that it must be taken that the Qatari Court was satisfied that a dispute had arisen between ECQ and Hub prior to an agreement between them as to the arbitrators, and, whether that is so or not, Hub had not proved that according to Qatari law Art 195 of the Qatari Civil Procedure Code did not apply to the circumstances of the case. That was because Hub's expert on Qatari law, Dr Al-Adba, did not in his affidavit take into account the judgment of the Qatari Court and did not consider whether Art 195 was engaged by the factual circumstances of the case. Further, the primary judge found that there was a factual foundation in the evidence for the conclusion that a dispute had arisen between the parties prior to an agreement between them as to the arbitrators, being Hub's failure to revert to ECQ once it had obtained legal advice. The primary judge found that refusal to respond to a request for repayment is capable of constituting a dispute within the meaning of Art 195.

37 In essence, the primary judge (at [59]) held that the onus of proof lay on Hub and that Hub had not proved that Art 195 did not operate so as to allow the appointment of arbitrators in the circumstances of the case. As such, it was held that Hub had not proved that the appointment of the arbitrators by the Qatari Court was not in accordance with Art 46 of the contract.

38 With regard to the burden of proof, the primary judge (at [60]) cited *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSC 248; 38 VR 303 at [53] per Warren CJ that "the

enforcing court should start with a strong presumption of regularity in respect of the tribunal's decision and the means by which it was arrived at" and "the conduct of the parties to the agreement at each of the various stages prior to an enforcement order being sought in these courts, and its consistency with the defence subsequently asserted, will be a relevant factor to consider when deciding whether that burden has been discharged to the necessary standard."

39 Finally, the primary judge (at [61]) stated that if her Honour's conclusions in rejecting Hub's grounds for resisting enforcement of the award were incorrect, then she would nevertheless have declined to exercise the discretion to refuse enforcement given by s 8(5) of the IAA in Hub's favour. The reasons identified by the primary judge were that Hub had received actual notice of the proceeding by ECQ in the Qatari Court and knew that the notice concerned ECQ seeking repayment of the money yet did nothing to ascertain what the proceeding was about, and Hub received actual notice of the constitution of the arbitral tribunal and the conduct of the arbitration in ample time to take a role in the arbitration but chose not to do so. The primary judge thus concluded (at [62]) that there would be no unfairness to Hub by enforcement of the award against it as it had had adequate opportunity to participate and had chosen not to do so.

40 In the result, the primary judge entered judgment for ECQ against Hub in the amount of US\$1,045,322.16 and ordered that Hub pay the cost of the proceeding.

The grounds of appeal

41 Although the notice of appeal identifies four grounds of appeal, they were grouped together in argument in such a way that there are in effect two principal issues in the appeal.

42 First, Hub contends that the award should not be enforced because Hub was not given proper notice of the arbitration proceeding and the composition of the arbitral tribunal was not in accordance with the agreement of the parties under Art 46 of the contract (in reliance on paragraphs (c) and (e) of s 8(5) of the IAA). Hub submits that Art 195 of the Qatari Civil Procedure Code did not override the parties' agreement as to the mode of commencement and notification of the arbitral proceeding, and the requirement to give notice of the commencement of the arbitral proceeding under Art 46 of the contract could not be cured by giving notice of the proceeding before the Qatari Court to appoint an arbitral tribunal. Hub submits that the existence of a dispute between the parties did not constitute a failure to agree on the composition of the tribunal within Art 195 of the Qatari Civil Procedure Code and the

appointment of arbitrators by the Qatari Court under Art 195 did not cure the failure to constitute the arbitral tribunal in accordance with Art 46 of the contract.

43 Secondly, Hub contends that any residual discretion under s 8(5) of the IAA to enforce the foreign award despite a ground for non-enforcement being established – whether as to the language of the arbitration as found by the primary judge or the composition of the tribunal as contended on issue 1 – was not enlivened or should not be exercised. In that regard, Hub submits that the primary judge ought to have concluded that the failure to conduct the arbitration in English was a fundamental departure from the agreed arbitral procedure with the consequence that the Court’s narrow residual discretion under s 8(5) to enforce an arbitral award was not enlivened. A similar submission is made with regard to the composition of the tribunal.

Issue 1: the appointment of the arbitral tribunal

44 Article 46 of the contract provides in the customary way for each party to a dispute to appoint an arbitrator and for the two arbitrators so appointed to appoint the third member of the tribunal. To an Australian lawyer, Art 195 of the Qatari Civil Procedure Code provides in the customary way for the court at the seat of the arbitration to appointment arbitrators where the parties’ agreed procedure has failed. It does not, on the face of it, provide for the court to appoint arbitrators contrary the parties’ agreed procedure simply because the parties are in a contractual dispute. If that were the case, then the court could always appoint arbitrators whatever the parties had agreed which would be contrary to the fundamental premise underlying arbitration, and the court’s enforcement of arbitration awards, which is that the jurisdiction of the tribunal arises from the agreement or consent of the parties: *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* [1998] FCA 1485; 90 FCR 1 at 14 per Emmett J, Beaumont and Branson JJ agreeing; *TCL HCA* at [9] and [29] per French CJ and Gageler J and [81] and [109] per Hayne, Crennan, Kiefel and Bell JJ. As it was put by Menon CJ in *AKN v ALC* [2015] SGCA 18 at [37], “a critical foundational principle in arbitration is that the parties choose their adjudicators” (cited with approval in *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163 at [21] per Croft J).

45 However, it is not for the court where enforcement is sought, being this Court, to construe Art 46 of the contract or Art 195 of the Qatari Civil Procedure Code with reference to the law of the forum. Those are matters for, respectively, the law governing the agreement to arbitrate

and the law of the seat, which in the present case is in both instances Qatari law. In that regard, it is uncontroversial in the present case that the law governing the substance of the dispute, the agreement to arbitrate and the arbitration process were all the same. On that tripartite distinction, see *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38; [2020] 1 WLR 4117 at [1]-[6] and [170].

46 That appreciation leads to an examination of the evidence before the primary judge of Qatari law. In that regard, it is important to acknowledge at the outset that ECQ does not contend that the Qatari Court judgment that appointed the arbitrators is an authoritative statement of Qatari law or that it creates an issue estoppel or res judicata between the parties, but rather that it is a ministerial act which has force and effect in the State of Qatar, being the place of the seat of the arbitration, and should be given recognition as a matter of comity.

47 It should also be observed that in opening the case before the primary judge, the advocate for Hub said that the Qatari Court had made its decision on the basis that it had power to appoint the tribunal because the process set out in Art 46 had been attempted but had not achieved an outcome. It was said that the Qatari Court was misled, and that it viewed Art 195 in exactly the same way as that provision would be viewed in Australia, namely that it is “a backstop that the Court can use when the agreement between the parties has broken down”.

48 In opening the case before the primary judge, counsel for ECQ accepted that there was no notice under Art 46 prior to the Qatari Court proceeding, and that by saying that the Qatari Court was misled was to in effect ask the primary judge “to sit on appeal from a Qatar court”.

49 In the light of what was said in opening, and contrary to what was at least hinted at on behalf of ECQ on the appeal hearing, I am satisfied that the point under consideration was properly raised before the primary judge. That point is whether Hub can resist enforcement of the award in Australia on the basis that the arbitral tribunal was not appointed in accordance with the parties’ agreement notwithstanding the appointment of the tribunal by the Qatari Court because the Qatari Court misapprehended what had taken place between the parties with regard to the appointment of a tribunal.

50 ECQ’s statement of claim in the Qatari Court by which it sought the appointment of three arbitrators, after citing Art 195 of the Qatari Civil Procedure Code, stated the following:

Whereas and as the Defendant had refrained from execution of its legal and contractual obligations then accepting to recourse to arbitration despite being agreed upon in the

agreement connecting the two parties, against that the Plaintiff instituted this lawsuit with the request to appoint a triple arbitral tribunal by which the Plaintiff nominates the arbitrator Yarub Rayan

51 It is not clear from that translation whether the Qatari Court was being informed that Hub had not observed its legal and contractual obligation to submit to arbitration, or whether it was that Hub had not observed its underlying legal and contractual obligations, i.e., to repay the money paid in advance.

52 The reasons for judgment of the Qatari Court records that the Court had “heard pleading and reviewed the documents and deliberated legally”, the facts were summed up in the statement of claim of which Hub was legally notified, a docket of exhibits was submitted which included a copy of the contract, and ECQ had appeared by an attorney and Hub had not appeared despite being legally notified. The Qatari Court quoted Art 195 of the Civil Procedure Code and referred to Art 46 of the contract. It then stated as follows:

Whereas the Plaintiff had instituted this lawsuit alleging that the Defendant had breached its obligations as per the contract and adhered to the condition of arbitration contained in the contract subject matter of lawsuit. Later, it had contacted it by a letter by its virtue it had nominated Mr. Moneer Abdulaziz Shalabi as an arbitrator for its behalf and asked to appoint an arbitrator by its side and the Defendant failed to appear before the court despite of the legal notification accordingly it had not objected against the submitted arbitration application. Whereas and as Items of the contract in Article (46) thereof provided for on appointment triple arbitral tribunal, each party shall appoint one member and the third member shall be nominated by the first and second members who will chair the committee and issue the decision of the arbitral decision and in case of failure to agree upon appointment of those members it shall be referred by either party to the competent Qatari Courts. **Whereas the two parties failed to agree upon tribunal of arbitrators**, with which the court decides to appoint a tribunal consisted of three arbitrators from the table of court’s experts as arbitrators to decide in the dispute subject matter of lawsuit with which the court adjudicate as will be contained in the pronouncement.

(Emphasis added.)

53 From this it is apparent that the Qatari Court was advised, or in any event understood, that after the institution of the proceeding before the Court, ECQ had notified Hub that it had nominated Mr Shalabi as an arbitrator and it asked Hub to appoint an arbitrator but that Hub had failed to appear before the Court, and presumably had failed to appoint an arbitrator. That was apparently the basis for the conclusion that the parties had failed to agree upon a tribunal of arbitrators which the Qatari Court regarded as enlivening its power to appoint the tribunal under Art 195 of the Civil Procedure Code. On that basis it proceeded to appoint a tribunal of three:

a civil engineer, an electrical engineer and an accountant. Neither Mr Rayan, who had been nominated in the statement of claim, nor Mr Shalabi who was said to have been nominated after the court proceeding had been commenced, was appointed.

54 Since it is an uncontroversial finding of fact of the primary judge that Hub had not been notified of the appointment by ECQ of an arbitrator and invited to appoint an arbitrator, as required by Art 46 of the contract, it is apparent that the Qatari Court proceeded upon a misapprehension as to the facts. The reason for the misapprehension is not apparent, or particularly relevant. It is nevertheless tolerably clear, the imperfections of translation accounted for, that the Qatari Court appointed the tribunal because, as it understood the position, ECQ had invoked the Art 46 procedure but Hub had failed to respond.

55 Only Hub adduced expert evidence on Qatari law. As indicated, its expert was Dr Al-Adba, a practising Qatari lawyer with a Bachelor of Laws (Qatar University), Master of Laws (Institute of International and Development Studies, Geneva), Graduate Diploma in Law (Harvard Law School) and Doctor of Philosophy (Manchester University). Dr Al-Adba's affidavit included the following statements of opinion:

- (1) The most important thing to validly commence an arbitration is legal notification as agreed in the agreement. Without this, the dispute might be premature and the arbitration deed and verdict will be invalid.
- (2) The valid way either party to the contract with the wording of Art 46 may begin an arbitration against the other party is for the claimant to send a written notice by prepaid post to the respondent to the address provided in the contract and, within 45 days of that notice, each party may appoint an arbitrator.
- (3) In the event that the notice under the contract is not responded to, the claimant may apply to the court for a judicial notification to appoint an arbitrator.

56 In cross-examination, Dr Al-Adba gave the following evidence:

- (1) With reference to the judgment of the Qatari Court, of which he was not aware at the time he prepared his affidavit, he said that the court had adjudicated to appoint the arbitral tribunal. He then agreed with the proposition that until a judgment is set aside it represents the law in the State of Qatar.

- (2) In response to the proposition that since the court appointed the arbitrators the award would not be null and void, he said that if the arbitrators are appointed by the court, “for some extent the appointment might be okay, if the notification is delivered”, but the award of the arbitrators might be null and void. Dr Al-Adba would seem to have meant that if notification under Art 46 of the contract had been given and not responded to, then the appointment of the arbitrators would be valid but that whether or not an arbitration award would be valid and enforceable would depend on other considerations.
- (3) He agreed with the proposition that “if you wanted to argue that the court should not have appointed the arbitrators then you have to make an application under article 33 of the Qatari Arbitration Law”. That was a reference to Art 33 of the Civil and Commercial Arbitration Law (Law No. 2 of 2017) which was in force from March 2017, i.e., at the time of the hearing before the primary judge but not at the time of the judgment of the Qatari Court. It provides for recourse against an arbitral award on narrow grounds that mirror those in Art 34 of the Model Law, the State of Qatar having adopted domestic legislation based on the Model Law.
- (4) He did not agree with the proposition that it is a normal part of the procedure in Qatar to give notice of appointment of an arbitrator under the contract in the statement of claim commencing a lawsuit in which the court is asked to appoint arbitrators.

57 It was not put to Dr Al-Adba that Art 195 of the Civil Procedure Code gave the court the power to appoint arbitrators where the procedure agreed by the parties for the appointment of arbitrators had not been followed. The high point of the cross-examination was that if Hub disagreed with the appointment by the Qatari Court it had to apply to set aside the award. That, of course, does not deal with the position in January 2017 when the appointment was made, which was when Art 195 of the Qatari Civil Procedure Code applied which states that the appointment of arbitrators under that provision “may not be appealed in any way whatsoever”. Also, it does not answer whether enforcement of the award can be resisted in Australia under s 8(5)(e) of the IAA. It merely speaks to what could be done in Qatar.

58 In re-examination, Dr Al-Adba said that the statement of claim by which the lawsuit to appoint the arbitrators was commenced would not be considered as a notice of the kind contemplated by the arbitration agreement in Art 46 of the contract.

59 The conclusions to draw from the evidence are that Art 46 required the notice and invitation to appoint an arbitrator procedure to be followed and Art 195 of the Civil Procedure Code gave to the court the power to appoint arbitrators where the parties had failed to agree. That is also apparently what the Qatari Court understood that it was doing. The evidence does not support the proposition that Art 195 empowered the court to override the agreement of the parties as to the appointment of the arbitral tribunal. The Qatari Court apparently acted on the misapprehension that the Art 46 procedure had been followed but had failed to produce the appointment of a tribunal and on that basis it exercised its power of appointment.

60 In those circumstances, under Qatari law as the applicable law, the composition of the arbitral tribunal was not in accordance with the agreement of the parties. The basis to resist enforcement of the award in reliance on s 8(5)(e) of the IAA was accordingly established. In my respectful view, the primary judge was in error in concluding that Hub had not proved that according to Qatari law Art 195 of the Civil Procedure Code did not apply to the circumstances of the case. Although there was a factual foundation to, and evidence to support, the conclusion that a dispute had arisen between the parties, that had not been prior to an agreement between them as to the arbitrators. They agreed on the method and procedure for the appointment of arbitrators in their contract at the outset, long before any dispute arose. There was also no dispute between them with regard to following the procedure required by Art 46 of the contract; ECQ, for whatever reason, had simply not followed that procedure and had gone prematurely to court which resulted in the appointment of a tribunal that was contrary to the parties' agreement.

61 Because the primary judge decided this point on the basis that Hub had not discharged the burden on it to prove that the composition of the arbitral tribunal was not in accordance with the agreement of the parties, it is necessary to consider the question of the standard of the burden of proof. As indicated, the primary judge cited and apparently applied dicta of Warren CJ in *IMC Aviation*. However, differing views were expressed on that question in *IMC Aviation*.

62 The case concerned which party bore the onus on the question of whether the award debtor was a party to the arbitration agreement as referred to in s 8(1) of the IAA as it was then worded. Subsequent amendment of s 8(1) in response to the judgment in *IMC Aviation* (by the *Civil Law and Justice Legislation Amendment Act 2018* (Cth), item 2 of Sch 7) makes it clear that for enforcement the award must be between the parties to the award, rather than the parties to

the agreement. The Court was unanimous in the result, namely that the appeal should be allowed, but there were two judgments with different approaches to the burden of proof, one by Warren CJ and the other by Hansen JA and Kyrou AJA. It is to the joint judgment that one must look to find the rationes decidendi or, if the relevant point is not ratio, the majority dicta: *Dickenson's Arcade Pty Ltd v Tasmania* [1974] HCA 9; 130 CLR 177 at 188 per Barwick CJ.

63 The joint judgment in *IMC Aviation* (at [127]) recognised that s 39(2) of the IAA provides that in interpreting the IAA the court must have regard to its objects set out in s 2D as well as the stated facts that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and that awards are intended to provide certainty and finality.

64 With regard to what has been described as the “pro-enforcement bias” of the New York Convention, the joint judgment (at [128]) reasoned that that means that the IAA, and the Convention, recognising the role and importance of arbitration in international trade and commerce and the certainty and finality of awards, has simplified the procedure for enforcing foreign awards while also limiting the grounds upon which the enforcement of such awards may be resisted and placed the onus of establishing those grounds upon the party resisting enforcement. In support of that statement the judgment cited *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763 at [101] per Lord Collins of Mapesbury JSC; Blackaby N, Partasides C, Redfern A and Hunter M, *Redfern and Hunter on International Arbitration* (5th ed, Oxford University Press, 2009) p 588 [10.09] and *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] HKCFA 40; [1999] 2 HKC 205 at [99] per Sir Anthony Mason NPJ. Those references are all good authority for the proposition for which they were cited, and they reflect the approach with regard to the Convention in two significant common law jurisdictions.

65 In *Dallah*, Lord Mance JSC (at [30]) expressed the matter as follows:

The scheme of the New York Convention, ... may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in article V(1) But that is as far as it goes in law. *Dallah* starts with advantage of service, it does not also start 15 or 30 love up.

66 Lord Hope of Craighead DPSC, Lord Saville of Newdigate JSC and Lord Clarke of Stone-cum-Ebony JSC agreed with the reasons of Lord Mance and Lord Collins JJSC.

- 67 The joint judgment in *IMC Aviation* concluded (at [191]-[192]) that the primary judge in that case had been in error in concluding that the party resisting enforcement bears an onus that is “very high” and that “clear, cogent and strict proof” is required. Their Honours concluded that the IAA neither expressly nor by necessary implication provides that the standard of proof under ss 8(5) and (7) is anything other than the balance of probabilities, as one would expect in a civil case. The true position, it was concluded, is that what may be required, in a particular case, to produce proof on the balance of probabilities will depend on the nature and seriousness of that sought to be proved. See also *Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu* [2021] FCA 477 at [25] per Middleton J where this approach was adopted. This includes the elementary maxim that all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted: *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970.
- 68 Warren CJ, in contrast, reasoned (at [52]-[53]) that the enforcing court should start with “a strong presumption of regularity” and that it should treat allegations of vitiating irregularity, which her Honour had identified as being the grounds to resist enforcement in s 8(5)(a)-(e), as “serious”. On that basis, with reference to *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 at 362 per Dixon J, her Honour concluded that a “correspondingly heavy onus falls upon the award debtor if it wishes to establish such an allegation on the balance of probabilities.”
- 69 In my view, the expression of the point in the joint judgment is to be preferred to that of the Chief Justice for the reasons given in the joint judgment referred to above. The nature of the “vitiating irregularity” and hence how “serious” it should be regarded to be may differ. In one case it may involve allegations of or akin to fraud and in another case, such as the present where the issue is in essence whether the agreed commencing procedure was followed, it may be quite bland without any moral taint of “seriousness” although obviously of great importance; the “seriousness” or “gravity” of an allegation of fact on which an award debtor relies in order to establish a ground of non-enforcement is not necessarily of the nature of seriousness contemplated in *Briginshaw* such as by its nature to be more exacting to prove before the court will have “comfortable satisfaction” (Rich J at 350) or “feel an actual persuasion” (Dixon J at 362) of its having been established. See *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [10]-[13] per Allsop P; Bennett H and Broe GA, “The Civil Standard of Proof and the ‘Test’ in *Briginshaw*: Is There a Neurobiological Basis to Being

‘Comfortably Satisfied?’” (2012) 86 ALJ 258; Gageler S, “Evidence and Truth” (2017) 13 TJR 1 at 6-8; Gageler S, “Alternative Facts and the Courts” (2019) 93 ALJ 585 at 590-591.

70 I respectfully agree with the joint judgment that the IAA neither expressly nor by necessary implication provides that the standard of proof under ss 8(5) and (7) is anything other than the balance of probabilities as ordinarily applied in a civil case. The point about the IAA having a pro-enforcement bias is that the grounds upon which enforcement may be resisted are finite and narrow, and not that they must be established to a standard that is higher than the ordinary standard. This is also the approach that better accords with that followed internationally.

71 Finally on *IMC Aviation*, I do not see how, as stated by Warren CJ (at [53]) and cited by the primary judge, the conduct of the parties to the agreement at each of the various stages prior to an enforcement order being sought, and its consistency with the defence subsequently asserted, will be a relevant fact to consider when deciding whether the burden of establishing vitiating irregularity has been discharged to the necessary standard. Such conduct may conceivably be relevant to the question of discretion, to which I will shortly turn. The grounds for non-enforcement are, however, narrow and specific. The conduct of the parties between the points at which the dispute arises and an enforcement order is made in the court cannot be relevant to, for example, the questions of whether a party to the arbitration agreement was under some legal incapacity at the time when the agreement was made, or the arbitration agreement is valid under the law applicable to it, or the award debtor was given proper notice of the appointment of the arbitrator, or the composition of the arbitral authority was in accordance with the agreement of the parties.

72 In the result, Hub proved to the requisite standard that the composition of the arbitral tribunal was not in accordance with the arbitration agreement. It has thus established the ground for non-enforcement expressed in s 8(5)(e) of the IAA and Art V(1)(d) of the New York Convention. The question then turns to the matter of the court’s discretion to nevertheless enforce the award. But before doing so, it is necessary to consider one further submission made by ECQ.

73 ECQ submits that Hub’s remedy was to seek to set aside the appointment of the arbitral tribunal or the award at the seat, i.e., Qatar, rather than to rely on the wrong composition of the tribunal as a ground to resist enforcement. As indicated, that is on the basis that as a ministerial act the

decision of the Qatari Court to appoint the arbitrators exists and is effective in Qatar and as a matter of comity this Court should regard it as effective until set aside.

- 74 It is well established that as a general rule an award debtor does not have to take positive steps at the seat of the arbitration to set aside the award and can wait until the award is sought to be enforced before raising any defences to enforcement. That arises from the text and structure of the New York Convention and the Model Law which provide for the same grounds for recourse against an award and resisting enforcement of any award and do not expressly or by implication require an award debtor to take one course rather than the other; the award debtor has a choice: it can actively seek to set aside the award in the supervisory court at the seat of the arbitration or it can wait and raise defences to the award in the enforcing court when the award is sought to be enforced.
- 75 In *Dallah* (at [23] per Lord Mance JSC) it was said that a person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what they maintain to be an invalid arbitration leading to an invalid award against them. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the award debtor denying the existence of any valid award to resist enforcement. It was also said (at [28]) that there is nothing in the text containing any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made. See also [103] per Lord Collins JSC.
- 76 What Lord Mance JSC had said on this point in *Dallah* was endorsed by Hansen JA and Kyrou AJA in *IMC Aviation* at [320]. The same position has been recognised in Singapore: *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372; [2013] SGCA 57 (***PT First Media SG***) at [71] per Menon CJ for the Court, adopted in *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223 at [117]-[118] per Gleeson J.
- 77 The position is, however, different where the court at the seat of the arbitration has itself rejected a challenge to the award. 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 of the seat of 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. 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.

78 In *Hebei*, the Hong Kong Court of Final Appeal similarly held (at [84]-[85]) that the New York Convention recognises that although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced. Thus, the refusal by a court of supervisory jurisdiction to set aside an award does not debar an unsuccessful applicant from resisting enforcement of the award in the court of enforcement. It is implicit in the reasoning that the circumstances in which opposition to enforcement will be successful in such an event are necessarily constrained.

79 In *PT First Media TBK v Astro Nusantara International BV* [2018] HKCFA 12; [2018] 3 HKC 458 (*PT First Media HK*), awards made in Singapore and subject to the supervision of the courts in Singapore had been denied enforcement in Singapore on the fundamental basis that the arbitrators lacked jurisdiction, but they had not been set aside there (see *PT First Media SG* referred to above). Indeed, there had been no application there to set them aside. When enforcement was sought in Hong Kong, the award debtors resisted enforcement in reliance on the lack of jurisdiction of the arbitrators and the award creditor countered by arguing that since the awards had not been set aside in Singapore they were still a valid source of debt. The Court of Final Appeal (at [75] and [79]) reaffirmed the principle that absent considerations such as waiver an award debtor has a choice whether to actively pursue setting aside the award in the supervisory court or passively resisting enforcement in the enforcing court. Thus the failure to seek to set aside the awards in Singapore was no obstacle to resisting their enforcement in Hong Kong.

80 The present case fits neither the paradigm case of the award debtor having a choice between whether to challenge the award at the seat or resist enforcement nor the case where the award has been endorsed by the supervising court at the seat, by rejecting a challenge to it, and the award debtor seeks to challenge it again at the enforcement stage. In the first case there is no

supervisory court endorsement of the award and in the second there is, whereas in the present case there is involvement of the supervisory court at the stage of appointment of the arbitral tribunal but no endorsement of the award. ECQ consequently relies on comity rather than the structure of the common international regime for the recognition and enforcement of arbitral awards to justify this Court's acceptance of the Qatari Court's appointment of the tribunal notwithstanding the Qatari Court's misapprehension already identified.

81 In *CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33; 189 CLR 345 at 395-396, per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, citing *Hilton v Guyot* 159 US 113 (1895) at 163-164, it was recognised that “comity”, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, on the other. It is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. See also *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* [2007] FCAFC 43; 157 FCR 558 at [18]-[19] per Black CJ, Allsop and Middleton JJ. Thus, comity is not an uncritical, automatic or unexamined recognition of a foreign court's process or judgment; it is nuanced and depends on the nature of what is sought to be recognised, the purpose for which recognition is sought, domestic rights and the ramifications of recognition. See Allsop JLB, “Comity and commerce” (Address to the 16th Conference of Chief Justices of Asia & the Pacific, Sydney, 8 November 2015) [43].

82 There is no detraction from the principle of comity, so understood, by not enforcing the award in this case on the basis that the Qatari Court acted on a misapprehension of the true position in appointing the arbitral tribunal. There are several considerations that lead to that conclusion. First, there is no disrespect of, or lack of goodwill towards, the Qatari Court to recognise that it acted upon a misapprehension of what we now know the facts to be. Secondly, any exercise of jurisdiction of the Qatari Court to appoint arbitrators to the dispute of the parties rested on the parties' agreement, and since what they agreed was not followed the basis for the exercise of that jurisdiction was lacking; the failure goes to the very heart of the decision that ECQ would have this Court recognise. Thirdly, Hub did not invoke the process of the Qatari Court the result of which it is now seeking to resile from; it agreed a particular procedure for the commencement of arbitral proceedings and the appointment of an arbitral tribunal and when that was not followed it ignored what was subsequently done to appoint the arbitral tribunal,

which it was entitled to do. Fourthly, Hub has the right (subject to the question of discretion which I will come to) under the law of Australia to not have enforced against it here an arbitral award by an arbitral tribunal that was not composed in accordance with what it had agreed. Section 8(5)(e) of the IAA is a law of the Commonwealth of Australia that the Court cannot merely brush aside in the interests of comity; the Court is duty bound to apply it.

83 Support for that approach is to be found in the decision of the United States Court of Appeals for the Second Circuit in *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc*, 403 F 3d 85 (2nd Cir, 2005). The arbitration agreement provided for each party to appoint an arbitrator and for them to jointly appoint the third arbitrator, but in the event of disagreement between them the third arbitrator would be appointed by the President of the Tribunal of Commerce of Luxembourg (apparently a chamber of the Luxembourg District Court) at the request of the arbitrator who was first to make such a request. *Encyclopedia Universalis SA (EUSA)* appointed Danziger and *Encyclopaedia Britannica Inc (EB)* appointed Layton, and they conferred on various matters but not on the identity of the third arbitrator. Then, Danziger wrote to the President of the Tribunal stating that he and Layton had been unable to agree on a third arbitrator. The Presiding Judge of the Tribunal appointed the third arbitrator, Decker. There was then a dispute about the appointment of the third arbitrator which went to a hearing before the Presiding Judge who ordered that Decker proceed with the arbitration. EB and Layton did not participate in the ensuing arbitration proceeding which produced an award in favour of EUSA.

84 EUSA then sued in the Southern District of New York seeking recognition and enforcement of the arbitration award pursuant to the New York Convention. The Second Circuit agreed (at 91) with the District Court that “the Tribunal’s premature appointment of Decker irremediably spoiled the arbitration process” – it was premature because Danziger had sought the appointment before he and Layton had reached disagreement on it. It was held that courts must not overlook agreed-upon arbitral procedures in deference to the strong public policy in favour of international arbitration, and that the New York Convention required that the parties’ commitment to the form of their arbitration be respected. On that basis, the District Court’s refusal to enforce the award was upheld. That conclusion was reached notwithstanding that the arbitral tribunal had been appointed by the Tribunal de Commerce in Luxembourg after a hearing at which both EB and EUSA were represented by counsel. The District Court concluded that the defect in the proceedings was not attributable to any decision made by the

Tribunal, but rather to the premature involvement of the Tribunal as a result of Danziger's actions: *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc*, 03 Civ 4363 (SAS) (S.D.N.Y. Dec. 3, 2003) at 10.

85 The present case is similar. The defect in the proceeding is not attributable to the decision of the Qatari Court to appoint the arbitral tribunal, but to the premature involvement of the Qatari Court at the suit of ECQ.

86 For these reasons, Hub's reliance on s 8(5)(e) of the IAA is not answered by reliance on any regularising effect of the Qatari Court's judgment.

Issue 2: the discretion

87 The essential questions are whether, as a matter of discretion, the award can or should be enforced notwithstanding that, first, the arbitration proceeding was conducted in Arabic, not English, and, second, the arbitral tribunal was prematurely appointed by the Qatari Court, both contrary to the procedure agreed by the parties.

88 As indicated, the primary judge concluded in relation to the arbitral proceeding not being conducted in English, which her Honour found to have been a ground for non-enforcement that was established, that as a matter of discretion the award should nevertheless be enforced. The exercise of that discretion is challenged in the appeal in which *House v The King* [1936] HCA 40; 55 CLR 499 error is required to be established, i.e., that the primary judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect the decision, mistook the facts, or did not take into account some material consideration (at 505 per Dixon, Evatt and McTiernan JJ).

89 The primary judge also said that had she found that the ground of non-enforcement that the arbitral tribunal was not composed in accordance with the agreement of the parties had been established, she would nevertheless have exercised the discretion to enforce the award. Since the primary judge did not, in fact, exercise the discretion, because of the conclusion that the ground for non-enforcement had not been established, this Court, on finding that that ground is established, must exercise the discretion for itself – no question arises as to finding an error with the exercise of the discretion by the primary judge in accordance with the principles expressed in *House v The King*.

90 Article V(1) of the New York Convention provides that recognition and enforcement of the award “may be refused” on one or more of the enumerated grounds. Article V(2) similarly provides that recognition and enforcement of an arbitral award “may also be refused” on one or other of the grounds then set out. Article 36(1) of the Model Law and ss 8(5) and (7) of the IAA use the same permissive language of “may”. It is that language that is the source of the contention that there vests a discretion in the enforcing court to enforce an award even if one of the enumerated grounds for non-enforcement is made out, i.e., the court may, not must, refuse to enforce an award if a ground for non-enforcement is established. In domestic statutory interpretation, a provision which uses the word “may” is prima facie permissive: Herzfeld P and Prince T, *Interpretation* (2nd ed, Lawbook Co, 2020) [4.220] and the authorities there cited.

91 In *TCL FCAFC*, this Court stated (at [55]), relevantly, that an international commercial arbitration award will not be denied recognition or enforcement under Art V of the New York Convention “unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness”. Although referred to by Hub in argument, those statements do not speak generally to the discretion to enforce an award even where a ground for non-enforcement is made out. Rather, they were made in the context of the public policy ground for non-enforcement which, uniquely, takes account of what might otherwise be discretionary factors in its assessment of the ground on non-enforcement. This is apparent from the Court’s statement (at [111]) that it is not profitable to seek to differentiate between the engagement of public policy under the relevant articles and a supposedly separate and a later question whether to exercise the discretion to enforce.

92 Hub is correct in submitting that there is no authoritative statement in Australia of the nature of the discretion to enforce an award that is conveyed by ss 8(5) and (7) of the IAA. It was accepted in *TCL FCAFC* (at [48]) that there is a discretion to enforce, and that is supported by the use of “may” as indicated. For the reasons already explained, it is necessary to look to international authorities in reaching a view on the nature of the discretion.

93 Dr van den Berg in *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International, 1981) p 265, with reference to the permissive language of “may be” in both the first and second paragraphs of Art V of the New York Convention, said that for the first paragraph it means that even if a party against whom the award is invoked proves the existence of one of the grounds for refusal of enforcement, the

court still has a certain discretion to overrule the defence and to grant the enforcement of the award. The learned author reasoned that such overruling would be appropriate, for example, in the case where the respondent can be deemed to be estopped from invoking the ground for refusal. For the second paragraph, it would mean that a court can decide that, although the award would violate domestic public policy of the court's own law, the violation is not such as to prevent enforcement of the award in international relations.

94 In *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543; [2002] 2 Lloyd's Rep 326, Mance LJ (at [8] and [18], with whom Thorpe LJ and Neuberger J agreed) was not impressed with the suggestion that there is no discretion to enforce an award even where one of the grounds for non-enforcement is established, but, citing the passage from van den Berg referred to above, held that it is not "an open discretion":

The use of the word "may" must have been intended to cater for the possibility that, despite the original existence of one or more of the limited circumstances, the right to rely on them had been lost, by for example another agreement or estoppel.

95 In *Hebei* the Hong Kong Court of Final Appeal considered the discretion to enforce an award even where a ground for non-enforcement had been made out. Sir Anthony Mason NPJ, with whom Li CJ and Ching and Bokhary PPJ agreed, agreed (at [93]) with Kaplan J in *China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd* [1994] HKCFI 215; [1994] 3 HKC 375 at [48]-[49] that the New York Convention confers a residual discretion on the court of enforcement to decline to refuse enforcement, even if a ground for refusal might otherwise be made out. That arises from the use of the permissive "may" in Art V of the Convention. In *China Nanhai* the discretion to enforce was exercised on the basis that the established irregularity was not prejudicial, or made no difference, as had been the position in *Paklito Investment Ltd v Klockner (East Asia) Ltd* [1993] 2 HKLR 39, also per Kaplan J.

96 In *Hebei* it was said (at [94]) that whether the respondent's conduct which justified the exercise of the discretion was described as giving rise to an estoppel, or a breach of the bona fide principle, or simply as a breach of the principle that a matter of non-compliance with the governing rules shall be raised promptly in the arbitration, was beside the point. It was said that on any of those bases, the respondent's conduct in failing to raise in the arbitration its objection to unilateral communications having been made to the Chief Arbitrator was such as to justify the court of enforcement in enforcing the award. The factual basis for that (which was described at [104]) was that although the respondent had been aware of the irregularity at

an early stage it had failed to take various steps that might have rectified the irregularity, including applying for the removal of the Chief Arbitrator, and had simply proceeded with the arbitration as if nothing untoward had happened.

97 In *PT First Media HK*, the Court of Final Appeal held (at [42]) that the absence of a valid arbitration agreement between the parties is a fundamentally important factor militating against discretionary enforcement. It was thus concluded (at [44]) that the primary judge had misdirected himself by failing to take into account the fundamental defect that the awards were sought to be enforced against parties who were not parties to the arbitration agreement in respect of whom the awards were made without jurisdiction, and that had he taken this into account he could only have exercised his discretion to refuse enforcement.

98 In *Dallah*, where the issue was whether the award debtor was a party to the arbitration agreement, Lord Mance JSC referred (at [67]) with approval to what he had said in the Court of Appeal in *Dardana* (referred to at [0] above) with regard to the discretion to enforce being restricted and to cover, as possible examples, circumstances of another agreement or estoppel. His Lordship said (at [68]) that absent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs if the word “may” enabled the court to enforce or recognise an award which it found to have been made without jurisdiction. It was also said (at [69]) that general complaints that the respondent did not behave well, unrelated to any known legal principle, were equally unavailing in a context where the respondent had proved that it was not party to the arbitration agreement.

99 In the final sentence of [69] Lord Mance JSC said: “There is here no scope for reliance upon any discretion to refuse enforcement which the word ‘may’ may perhaps in some other contexts provide.” It seems that what must have been meant is that “there is here no scope for reliance upon any discretion to refuse *non-enforcement* which the word ‘may’ may in some other contexts provide.”

100 Lord Collins JSC (at [127]) also referred to what Mance LJ had said in *Dardana* about there being no arbitrary discretion and that the use of the word “may” was designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima face right to have an award set aside. In addition to the example of estoppel that had been given in *Dardana*, Lord Collins JSC gave as another possible example where there had

been no prejudice to the party resisting enforcement, and added that “it is not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement.”

101 It is to be noted that Gary Born in *International Commercial Arbitration* (3rd ed, Kluwer Law International, 2021) vol III p 3746 [§26.03[B][6]] reasons (with reference to *Dallah*) that it would be exceptional to recognise an award in cases where a recognition court (i.e., an enforcing court) concludes that no valid arbitration agreement was concluded or that the dispute exceeds the scope of the arbitration agreement, and also that it is difficult to see how awards that violate applicable public policy could ordinarily be subject to discretionary recognition. This is the point made in *TCL FCAFC* (referred to at [0] above) and is presumably because any discretionary considerations would already have been taken into account in considering whether enforcement would be contrary to public policy. The learned author contrasts such cases with cases involving procedural irregularities where considerations of materiality, prejudice, waiver and estoppel may make recognition appropriate notwithstanding a technical basis for non-recognition.

102 As already identified, the New York Convention has a pro-enforcement bias. That finds expression in the narrow and limited grounds for non-enforcement which the award debtor must establish. There is, however, no justification in the text and structure of the Convention to justify a broad-ranging or unlimited discretion to enforce even when one of the narrow grounds for non-enforcement is made out. There is, equally, no justification in the text and structure to conclude that there is no discretion, or to limit it to such an extent that in cases of irregularity that has caused no material prejudice the court must nevertheless not enforce the award.

103 Relevantly, the parties agreed by Art 50 of their contract that the English language would be the ruling language of the contract and that all matters relating to the contract would be in English, but contrary to that the arbitration was conducted in Arabic. There is no challenge to the primary judge’s conclusion that that was an irregularity within the meaning of s 8(5)(e) of the IAA as the arbitral procedure was not in accordance with the agreement of the parties. Contrary to the submission by Hub, in my view the primary judge was correct to conclude that the irregularity had no prejudice to Hub because it had received notices of the arbitration in English and it had elected not to participate. Such immateriality of the irregularity would fully justify the exercise of the enforcement discretion notwithstanding the irregularity. Hub’s submissions to the contrary, and in particular that the language irregularity affected the

“structural integrity of the arbitration”, are not accepted. No *House v The King* error is established in the exercise of the discretion in relation to the language ground.

104 Insofar as the other ground is concerned, the composition of the arbitral tribunal other than in accordance with the agreement of the parties is fundamental to the structural integrity of the arbitration; it strikes at the very heart of the tribunal’s jurisdiction. That is a fundamental matter, much like in *Dallah* and *PT First Media* where the award debtor was not party to the arbitration agreement, such that the discretion to nevertheless enforce was not available. Equally fundamental was a failure to give notice of the arbitration which precluded the exercise of the discretion to nevertheless enforce the award: *Beijing Jishi* at [155]-[156]. I would accordingly not exercise the discretion to enforce the award. ECQ’s reliance on the conduct of Hub in not responding to the Qatari Court proceeding or the notices from the arbitral tribunal, in divesting itself of its assets (even if established, on which no finding is required to be made) and in falsely contesting in the proceeding before the primary judge that it had received various notices, is to no avail in the circumstances.

Conclusion

105 In the result, the appeal should be allowed. The orders of the primary judge on 26 August 2020 should be set aside and substituted with orders dismissing ECQ’s application to enforce the award. Because most of Hub’s grounds for resisting enforcement, in particular those that were evidence-heavy such as that it received no notice of the arbitration proceeding, failed before the primary judge whose findings thereon were not challenged on appeal, it is not clear that Hub should have the costs of the proceeding at first instance. I would therefore invite the parties to make brief written submissions on these costs.

106 Although there is no immediately apparent reason why the costs of appeal should not follow the event, we did not hear the parties on the costs of the appeal so I would give them the opportunity to make written submissions on these costs as well.

107 I have also read the additional remarks of the Chief Justice with which I agree.

108 In the result, I would make the following orders:

- (1) The appeal be allowed.
- (2) The orders and declaration of the Court on 26 August 2020 in NSD 94 of 2020 be set aside and substituted with an order that the proceeding be dismissed.

- (3) The parties file and serve written submissions of no more than five pages on the questions of costs of the proceedings below and on appeal, which questions will be decided on the papers unless otherwise ordered, as follows:
- (a) the appellant within seven days of these orders; and
 - (b) the respondent within seven days thereafter.

I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 25 June 2021