FEDERAL COURT OF AUSTRALIA

Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd [2018] FCA 1054

File number(s):	NSD 976 of 2018
Judge(s):	**O'CALLAGHAN J**
Date of judgment:	13 July 2018
Catchwords:	**ARBITRATION** – international arbitration – where award creditor brought proceedings to enforce award obtained in Singapore – whether proceeding brought by award creditor to enforce foreign award should be adjourned – where award debtor seeks to set aside the award in part in the High Court of the Republic of Singapore – application of s 8(8) of the *International Arbitration Act 1974* (Cth) – adjournment granted on condition that award debtor provide security for full amount of the award plus interest
Legislation:	*International Arbitration Act 1974* (Cth), ss 8(1), 8(3), 8(8)
Cases cited:	*Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905 *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] EWHC 726 *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208
Date of hearing:	10 July 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Category:	Catchwords
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Counsel for the Applicant:	Mr J A Hogan-Doran
Solicitor for the Applicant:	Webb Henderson

Counsel for the Respondent:	Dr A P Trichardt
Solicitor for the Respondent:	Colin Biggers & Paisley

ORDERS

NSD 976 of 2018

BETWEEN:	**HYUNDAI ENGINEERING & STEEL INDUSTRIES CO LTD** Applicant
AND:	**ALFASI STEEL CONSTRUCTIONS (NSW) PTY LTD (ACN 162 112 245)** Respondent
JUDGE:	**O'CALLAGHAN J**
DATE OF ORDER:	**13 JULY 2018**

THE COURT ORDERS THAT:

1. The respondent have leave to amend paragraph 2 of its interlocutory application filed on 22 June 2018 by substituting the following: "The proceeding for the enforcement of the Award be adjourned pursuant to either subsection 8(8) of the *International Arbitration Act 1974* (Cth), or, alternatively, pursuant to the Court's general power to control its own process, until such time as the respondent's application to the High Court of the Republic of Singapore is determined".

2. Pursuant to subsection 8(8) of the *International Arbitration Act 1974* (Cth), the proceedings be adjourned to 30 November 2018 before O'Callaghan J for further mention.

3. The adjournment in order 2 is conditional upon the respondent providing security for the Award in the manner and period set out in order 4, in the sum of AUD $7,900,542.41 (the **secured sum**).

4. The security in order 3 shall be provided within 21 days in the form of:

   (a) payment into court of the secured sum, such sum to be invested by the Registrar in an interest bearing account; or

   (b) payment of the secured sum into an interest bearing account under the control of the respondent's solicitors in Melbourne, such monies to be invested until further order on reasonable terms that the parties agree or as the court may further order; or

(c) on-demand bank guarantee payable in the secured sum on the demand of the Registrar of the Federal Court of Australia on such terms as the parties may agree or the court may further order.

5. The parties may agree in writing to vary the secured sum and the form of security provided for in order 4.

6. There be liberty to apply to O'Callaghan J in connection with these orders.

7. The respondent pay the applicant's costs of and incidental to the respondent's interlocutory application filed 22 June 2018.

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

REASONS FOR JUDGMENT

O'CALLAGHAN J:

The proceeding

1 This is an application by the respondent (**Alfasi**) to adjourn the further hearing of this proceeding, in which the applicant (**Hyundai**) seeks to enforce an international arbitral award, so that it may run its case in the High Court of the Republic of Singapore (Singapore being the seat of the arbitration) that significant parts of the award be set aside. Alfasi says that it should be granted the adjournment without having to provide security. Hyundai opposes the application and says that Alfasi's application for an adjournment, if it is to be granted at all, should be granted only if it provides satisfactory security for the amount Alfasi was ordered in the arbitration to pay, plus additional interest.

The facts

2 The following description of the relevant facts is taken largely from the written submissions of counsel for Hyundai, Mr Hogan-Doran. Counsel for Alfasi, Dr Trichardt, accepted their accuracy.

3 Hyundai is a company incorporated in the Republic of Korea.

4 The respondent, Alfasi, is an Australian company and the wholly owned subsidiary of Alfasi Group Investments Pty Ltd (**Alfasi Group**).

5 On 23 December 2013, Hyundai and Alfasi entered into a "Sub-Subcontract" by which Hyundai agreed to fabricate and deliver steel for use by Alfasi in the construction of the Sydney International Convention Exhibition and Entertainment Precinct in Darling Harbour, including an exhibition hall and a theatre (the **Project**).

6 By clause 45.2 of the Sub-Subcontract, the parties agreed that the agreement would be governed by the law of New South Wales and that the parties would submit to the non-exclusive jurisdiction of the courts of New South Wales. By clause 45.3, the parties agreed that "any dispute or difference arising out of or in connection with" the Sub-Subcontract "shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (the **SIAC**) for the time being in force". The relevant rules were the Arbitration Rules, 5th edition dated 1 April 2013 (the **SIAC Rules**).

7 During the course of the Project, a dispute arose between Hyundai and Alfasi in connection with delays in the performance of work by Hyundai in relation to the theatre and the exhibition hall within the Project.

8 On 29 February 2016, in accordance with clause 45.3 of the Sub-Subcontract, Alfasi commenced arbitral proceedings by notice of arbitration issued under the SIAC Rules.

9 On 11 May 2016, Mr. Alvin Yeo SC was appointed sole arbitrator (the **Arbitrator**).

10 After various interlocutory steps, including pleadings and the service of evidence, the hearing of the arbitration took place over eight days in Singapore on 13 to 16 June 2017 and 19 to 22 June 2017.

11 During the course of the arbitral hearing, a principal issue was the question of responsibility for delay in the execution of steel manufacturing works by Hyundai for the Project; whether Hyundai was responsible for over 200 days of delays and, as such, liable for liquidated damages; or whether Alfasi was responsible for delays including by reason of its failure to provide adequate drawings in a timely manner thus disentitling Alfasi to liquidated damages and entitling Hyundai to extensions of time (**EOTs**) and delay-related costs. Alfasi claimed that it was entitled to $19m by way of liquidated damages, as follows:

> As the Respondent [Hyundai] failed to achieve Practical Completion by the Date for Practical Completion in respect of the Exhibition Hall and Telstra Theatre, pursuant to clause 38.1 of the Sub-Subcontract, the Respondent is liable to the Claimant for liquidated damages at the rate stated in item 29 of Schedule 1 for every day after the Date for Practical Completion and including the Date of Practical Completion as follows:-
>
> Exhibition Hall – AUD $40,000 per day
>
> Telstra Theatre – AUD $40,000 per day
>
> The Claimant therefore claims the following as liquidated damages:
>
> (254 + 224) x AUD$40,000 = AUD $19,120,000

12 On 9 March 2018, the Arbitrator issued his final award (the **Award**). The Arbitrator found that:

(1) the main cause of relevant delays was the failure by Alfasi to provide adequate drawings in a timely manner during the analysed time periods (referred to as "Windows");

(2) Hyundai was entitled to an extension of time to the Date of Practical Completion of the Exhibition Hall (21 October 2015) of 197 days and an extension of time to the Date of Practical Completion of the Theatre (18 June 2015) of 167 days; and

(3) within that total, the conduct of Alfasi in the delay in provision of adequate drawings was an act of prevention causing 88 days' delay in respect of the theatre during Window 3 (the **Theatre Finding**) and 86 days in respect of the Exhibition Hall during the same period (the **Exhibition Hall Finding**).

13 The Arbitrator awarded Hyundai A$5,584,148.39 to the date of the Award, comprising:

(1) A$5,001,026.19 (net of payment for the parties' claims and counterclaims);

(2) A$555,993.32 by way of pre-Award interest (to 31 January 2018); and

(3) A$753.58 per day from 1 February 2018 to 9 March 2018, being A$27,882.46.

14 The Arbitrator further awarded Hyundai US$1,502,958.86 in costs of the arbitration.

15 The Arbitrator's declarations on the claims and counterclaims that resulted in the net payment to Hyundai of A$5,001,026.19 were recorded in the Award as follows:

> 521. The Tribunal declares that:
>
> (a) the Respondent [Hyundai] is entitled to an extension of time to the Date of Practical Completion of the Exhibition Hall (21 October 2015) of 197 days and an extension of time to the Date of Practical Completion of the Theatre (18 June 2015) of 167 days;
>
> (b) the Respondent is liable to the Claimant [Alfasi] in the amount of AUD 5,637,147.66 in respect of the Claimant's claims:
>
> (i) AUD 4,160,000.00 in liquidated damages for delay;
>
> (ii) AUD 645,626.16 in damages for the Claimant's Omitted Works Claims; and
>
> (iii) AUD 831,521.50 in damages for the Claimant's Defects Claims;
>
> (c) the Claimant is liable to the Respondent in the amount of AUD 10,638,173.85 in respect of the Respondent's counterclaims:
>
> (i) AUD 4,764,247.00 for unpaid progress payments and the returns of Retention Moneys;
>
> (ii) AUD 1,962,544.79 for the additional costs incurred by the Respondent in complying with the Claimant's Directions;
>
> (iii) AUD 305,223.00 for the unpaid amounts for the Surplus Steel ordered by the Claimant; and
>
> (iv) AUD 3,606,159.06 for the return and/or reimbursement of the

> amount called by the Claimant under the Respondent's Performance Bond;
>
> (d) the Claimant shall pay the Respondent the net amount of AUD 5,001,026.19, after setting off the sum of AUD 5,637,147.66 payable from the Respondent to the Claimant in respect of the Liquidated Damages, Defects and Omitted Works Claims (see sub-paragraph (b) above) against the sum of AUD 10,638,173.85 payable from the Claimant to the Respondent in respect of CC1, CC2, CC3, CC4 and CC5 (see sub-paragraph (c) above)
>
> …

16 The arbitrator also:

(1) ordered Alfasi to pay interest at 5.33% per annum on the principal amount of A$5,001,026.19 and on the costs of US$1,502,958.86 from the date of the Award until paid in full;

(2) made orders as to who shall bear the costs of the arbitration (i.e. arbitration fees), allocating 70% of the burden on Alfasi and 30% of the burden on Hyundai, entitling the Hyundai to reimbursement; and

(3) declared that Hyundai was entitled to extension of time to the Date of Practical Completion of the Exhibition Hall (21 October 2015) of 197 days and an extension of time to the Date of Practical Completion of the Theatre (18 June 2015) of 167 days.

17 On 29 March 2018, Alfasi made an application to the Arbitrator for correction and further interpretation of the Award under Rule 29 of the SIAC Rules.

18 On 25 April 2018, the Arbitrator refused the application for correction and interpretation.

19 On 6 June 2018, Hyundai filed the originating application in this proceeding, seeking to enforce the award.

20 On 8 June 2018, Alfasi filed an originating application in the High Court of the Republic of Singapore to set aside the Award (the **Singapore proceeding**). (Singapore has implemented the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) which governs the question).

21 In the Singapore proceeding Alfasi seeks to set aside the Award on these grounds:

(1) the Theatre Finding was beyond the scope of the submission to the Arbitrator, i.e. it was the determination of "a difference not contemplated by, or not falling within the terms of, the submission to the Arbitrator, or contains a decision on a matter beyond

the scope of the submission to arbitration": see Art 34(2)(a)(iii) of the Model Law, which corresponds to the same ground in the case of enforcement of the Award to Art 36(1)(a)(iii), which is in the same terms as s.8(5)(d) *International Arbitration Act 1974* (Cth) (the **IAA**) and Art V(1)(c) of the New York Convention.

(2) each of the Theatre Finding and the Exhibition Hall finding was arrived at in breach of the rules of natural justice: see s 24(b) of the *Singapore International Arbitration Act*, which is the same ground in Art 34(2)(b)(ii) of the Model Law, which corresponds to s 8(7)(b) IAA and Article V(2)(b) of the New York Convention.

22 On 22 June 2018, Alfasi filed an application for an adjournment of Hyundai's application to enforce the Award. At the hearing, it sought leave, which was not opposed, to amend paragraph 2 of the application by substituting it with language substantially similar to this: "The proceeding for the enforcement of the Award be adjourned pursuant to either subsection 8(8) of the *International Arbitration Act 1974* (Cth), or, alternatively, pursuant to the Court's general power to control its own process, until such time as the respondent's application to the High Court of the Republic of Singapore is determined".

23 By oral application made in Court on 25 June 2018, Hyundai sought an order for security in the event of an adjournment being granted.

24 The Singapore proceeding will be heard in November 2018.

Relevant provisions/principles

25 Section 8 of the IAA provides for the recognition of foreign awards. Subsections (1) and (3) of s 8 provide:

> **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 arbitration agreement in pursuance of which it was made.
>
> ...
>
> (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.

26 Section 3 of the IAA defines "foreign award" to mean "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".

27 The parties do not dispute that the requirements of s 8 of the IAA are satisfied. An arbitral award was made, in pursuance of an arbitration agreement, (viz clause 45.3 of the Sub-Subcontract) in a country other than Australia (Singapore). The Award is an "arbitral award" (within the meaning of s 3 of the IAA) as defined in the 1958 New York Convention in Sch 1 to the IAA (as defined in Article I of the Convention), being an award that is "made in the territory of a State [Singapore] other than the State [Australia] where the recognition and enforcement of" the award "is sought"; and it arises out of differences between persons, whether physical or legal.

28 It follows that the Award is prima facie liable to be enforced in Australia under the IAA.

29 Alfasi relies upon s 8(8) of the IAA as the source of power for this Court to adjourn this proceeding. It also relies on the court's undoubted general power to control its own processes. Subsection 8(8) provides:

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

30 As Foster J explained in *Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905, [56]-57], subsections (9), (10) and (11) of s 8 of the IAA give to the court significant power to monitor and supervise the enforcement proceeding during any period of adjournment granted under [subsection] (8) and recognise the need for the court "to keep a close and active eye on the progress of the foreign proceedings which will have underpinned any adjournment granted under subsection (8)". Those subsections provide:

> (9) A court may, if satisfied of any of the matters mentioned in subsection (10), make an order for one or more of the following:
>
> (a) for proceedings that have been adjourned, or that part of the proceedings that has been adjourned, under subsection (8) to be resumed;
>
> (b) for costs against the person who made the application for the setting aside or suspension of the foreign award;
>
> (c) for any other order appropriate in the circumstances.
>
> (10) The matters are:

> (a) the application for the setting aside or suspension of the award is not being pursued in good faith; and
>
> (b) the application for the setting aside or suspension of the award is not being pursued with reasonable diligence; and
>
> (c) the application for the setting aside or suspension of the award has been withdrawn or dismissed; and
>
> (d) the continued adjournment of the proceedings is, for any reason, not justified.
>
> (11) An order under subsection (9) may only be made on the application of a party to the proceedings that have, or a part of which has, been adjourned.

31 As Foster J also noted (*Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905, [58]) subsection 8(8) of the IAA reflects the terms of Art VI of the Convention (which was adopted in 1958 by the UN Conference on International Commercial Arbitration). The English text of the Convention is Schedule 1 to the IAA. Article VI provides:

> ARTICLE VI
>
> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

32 After quoting Article V(1)(e), Foster J explained:

> 59. Article V(1)(e) provides that recognition and enforcement of a foreign arbitral award may be refused if the party against whom enforcement is invoked proves to the satisfaction of the authority by which enforcement is sought that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 60. Article VI supports Art V(1)(e). It is designed to preserve the status quo in order to enable an application to set aside or suspend the award to be made in the country where it was made.
>
> 61. Article V(1)(e) is substantially reproduced in s 8(5)(f) of the IAA. Section 8(5) provides that the Court may refuse to enforce a foreign arbitral award if the party against whom the award is sought to be enforced proves to the satisfaction of the Court that the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.
>
> 62. Section 8(8) of the IAA is, therefore, intended to protect the position of a party in Australia against whom enforcement of a foreign arbitral award is invoked under s 8 of the IAA in circumstances [where] a bona fide application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made provided that the Court is satisfied, having taken account of all relevant facts and circumstances in the exercise

of its discretion, that an adjournment of the enforcement proceedings is justified.

33 In this case, it was not disputed that this is a proceeding in which the enforcement of a foreign award is sought and that Alfasi has made an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made within the meaning of subsection 8(8) of the IAA. The Court's discretion under that provision is, therefore, engaged.

34 I turn now to consider the principles that guide the exercise of that discretion, including whether suitable security should be ordered as condition of any adjournment.

35 In *Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905, Foster J made these helpful and apposite observations about how that discretion is to be exercised:

> 70. Section 8(8) gives to the court a wide discretion to adjourn an enforcement proceeding ("... may, if it considers it proper to do so ..."). The court is also given a specific power to order "... suitable security ..." if the party seeking enforcement of the award requests it …
>
> 71. What is "suitable security" in any given case will depend upon all of the circumstances under consideration in that case. The concept covers:
>
> (a) the quantum of the security;
>
> (b) the type of security;
>
> (c) the terms and conditions upon which the security is to be provided, including the circumstances in which it might be called upon by the enforcing party.
>
> 72. Factors to be considered by the court when ordering security would include the subject matter of the award; the history of the parties' dealings (especially with each other) since the making of the award; the enforcing party's prospects of enforcing the award; and the potential for the party against whom enforcement is sought to resist enforcement by, for example, applying to suspend or set aside the award in the jurisdiction where it was made.
>
> 73. "Suitable" is a word which calls into play a wide range of discretionary factors. The discretion to order security, like the discretion to adjourn enforcement proceedings, must be exercised by having regard to the objects of the IAA [in s 2D] and the rationale underlying the convention.

36 Foster J then turned to consider the relevant decisions in the United Kingdom, in particular the decision of Staughton LJ (with whom Neill LJ and Roch LJ agreed) in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 and the decision of Gross J in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation*

[2005] EWHC 726, each of which sets out factors to be considered in adjournment applications of this sort. His Honour observed:

> 76. In the United Kingdom, the leading authority on the approach to be taken by the courts of that country when dealing with an adjournment application under a provision expressed in very similar terms to s 8(8) of the IAA is *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208. In that case, at 211, Staughton LJ held that the mere existence of proceedings to challenge an award in another jurisdiction did not, of itself, require the UK courts to refuse enforcement for the time being and to adjourn the enforcement proceedings. His Lordship also held that the enforcing court should examine for itself the strength of the arguments in the foreign jurisdiction for setting aside or suspending the award. If those arguments are strong, an adjournment will be granted, probably without security. If those arguments are weak, an adjournment may be refused or, if granted, only granted upon terms that substantial security be provided.
>
> 77. The enforcing court's assessment of the strength of the arguments in support of setting aside or suspending the award would ordinarily be undertaken on incomplete material and in circumstances where only the briefest consideration of the arguments would be appropriate. It would not be sensible or appropriate for the enforcing court to second-guess the judgment of the foreign court or authority called upon to rule on the application to set aside or suspend the award nor would it be sensible or appropriate for the enforcing court to usurp the role of that foreign court or authority.
>
> 78. In *Soleh Boneh*, at 212, Staughton LJ said:
>
> > The other cases show, perhaps, a more general tendency to order security, but no more than that. I certainly cannot accept the opinion of Mr. W. Michael Tupman in Arbitration International [1987] vol. 3, p. 223 that—
> >
> > > "... it is difficult to think of any circumstances in which security would not be warranted."
> >
> > If, for example, the challenge to the validity of an award is manifestly well-founded, it would in my opinion be quite wrong to order security until that is demonstrated in a foreign Court.
> >
> > In my judgment two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.
> >
> > The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.
>
> …

> 80. The observations made by Staughton LJ in *Soleh Boneh* at 212 which I have extracted at [75] above were approved by the UK Court of Appeal in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 at 337 (per Mance LJ with whom Neuberger LJ and Thorpe LJ agreed).
>
> 81. In *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] EWHC 726 at [15], Gross J said:
>
> > In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case. As it seems to me, the right approach is that of a sliding scale, in any event, embodied in the decision of the Court of Appeal in *Soleh Boneh v Uganda Govt*. [1993] 2 Lloyd's Rep. 208 in the context of the question of security …

37 Having summarised the UK authorities to which his Honour referred, Foster J concluded that those authorities "provide useful guidance as to the proper exercise of the discretion reposed in the court once the discretion to adjourn under s 8(8) is engaged. I propose to follow those authorities when considering whether to adjourn the present proceeding". Foster J also said at [85]:

> The discretion to adjourn an enforcement proceeding pursuant to s 8(8) of the IAA is a wide one. But it has to be exercised against the background that a foreign arbitral award is to be enforced in Australia unless one of the grounds in s 8(5) of the IAA is made out by the party against whom the award is sought to be enforced or unless the public policy of Australia requires that the award not be enforced. The pro-enforcement bias of the convention and its domestic surrogate, the IAA, requires that this court weigh very carefully all relevant factors when considering whether to adjourn a proceeding pursuant to s 8(8) of the IAA. The discretion must be exercised against the obligation of the court to pay due regard to the objects of the IAA and the spirit and intendment of the convention.

38 I agree, with respect, with his Honour's reasoning and approach, and I also propose to follow the UK authorities relied upon by his Honour in considering whether to adjourn the further hearing of this proceeding and, if so, on what terms.

The competing contentions of the parties

39 Alfasi relied upon a number of affidavits, including one sworn by Mr Gill Dvir, a director of Alfasi, that was 1,770 pages long.

40 Hyundai opposes the application for an adjournment of this proceeding, and says that, if any adjournment is to be granted, it should be on terms that Alfasi provide suitable security, for

the whole of the Award sum, including interest calculated up until the time when it is likely that the Singapore proceeding will be heard. In summary, it submits:

(1) The application in Singapore is "demonstrably wrong, or at least very weak, and is most unlikely to succeed even if … made bona fide".

(2) The Exhibition Hall finding is only worth $400,000.

(3) The Theatre finding is worth around A$1.64m.

(4) Even allowing these claims in full, around $3m in principal net of liquidated damages would still be payable, plus interest at 5.33% to the date of the Award (and thereafter). As Hyundai would still largely be successful, even an award of 50% of costs (and not the 70% it was awarded) would see Alfasi required to pay A$1,456,616.91 of costs payable (in addition to cost of the arbitration, i.e. SIAC fees).

(5) The security in favour of Hyundai should be "in a form which can be readily accessed … should it become entitled to the benefit of the security": *Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905 at [90](a).

41 Hyundai filed lengthy written submissions on the merits of Alfasi's case in Singapore. It did so because (as counsel who appeared for Hyundai explained) Hyundai had rather thought that Alfasi intended to run a case before me that its case in Singapore was bound to succeed, or something along those lines.

42 As it happened, counsel who appeared for Alfasi did not seek to persuade me of more than the proposition that its case in Singapore is at least arguable.

43 In the end, and if I may say so quite properly, given the volume and nature of material filed, which included Alfasi's submissions filed with the High Court of the Republic of Singapore, Mr Hogan-Doran accepted, for the purposes of this application only, that Alfasi had established that its case was, at least, arguable.

Evidence/submissions about security

44 Alfasi relied on an affidavit from Mr Dvir sworn 10 July 2018, which relevantly stated:

> 9. At the time the Sub-subcontract was entered into, neither Hyundai nor Alfasi owned any real property in Australia. Those positions remain unchanged.
>
> 10. Alfasi, being a special purpose vehicle incorporated for sole purpose of the Sydney International Convention, Exhibition and Entertainment Precinct Project, raised operating capital from time to time to meet the cash flow requirements of the Project.

> 11. There has been no material difference in Alfasi's financial position since it engaged Hyundai, other than in the ordinary and proper conduct of its business and these legal proceedings in Australia and Singapore.
>
> 12. Hyundai never sought any security under the Sub-subcontract during the Project, nor during the arbitration proceedings or the Singapore Proceedings.
>
> 13. The giving of any security to Hyundai now would have the effect of re-balancing the parties' risks and commercial positions which were been agreed in the Sub-subcontract.
>
> 14. My fellow director, Avri Alfasi, and I are prepared to provide undertakings that Alfasi will not deal with or use any of its assets other than to pay its legal fees in these proceedings and those in Singapore

45 Counsel for Hyundai submitted that this evidence is opaque in its representation of Alfasi's financial position, and that to the extent Staughton LJ's observations in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 (see [34] above) are relevant (that is, that the enforcing court must consider the ease or difficulty of enforcement of the award, including whether the award debtor has assets within the jurisdiction), the court is effectively none the wiser.

46 For those reasons, counsel for Hyundai submitted that the only way to secure Hyundai's position is to require Alfasi, as a condition of the adjournment, to provide security in the full amount of the Award (being "a form which can be readily accessed" per *Esco Corporation v Bradken Resources Pty Ltd* [2011] FCA 905, (2011) 282 ALR 282 at [90(a)]) and for that security to be in the form of cash, to be invested at interest; or to be in a form that includes interest on the Award at the rate specified in the Award. In this way, it was submitted, "those with a real interest in the financial outcome of the Singapore proceedings cannot prosecute those proceedings in the face of a Final Award without running the necessary risk that they will have to pay the full amount of the Final Award".

Consideration

47 It is undoubted that this court's assessment of the strength of the arguments in support of setting aside an award "would ordinarily be undertaken on incomplete material and in circumstances where only the briefest consideration of the arguments would be appropriate": *Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905 at [77]. And nor is it this court's role as the enforcing court "to second-guess" the judgment of the foreign court, here the High Court of the Republic of Singapore: *Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905 at [77].

48 It is not possible, nor is it desirable, for this court to embark upon a detailed review of the competing cases that the parties will make upon the hearing of the application in Singapore. The materials filed on this application run into the thousands of pages. I cannot possibly form a meaningful and considered view about the merits of the matter, even if it were otherwise appropriate to do so.

49 As I have indicated, although Hyundai insists that Alfasi's case will fail, it agrees, for the purposes of this application only, that it is made bona fide and that it is arguable. And, as I have also said above, counsel for Alfasi did not seek to persuade the court of any proposition beyond that its case was bona fide brought and was arguable.

50 I will accordingly proceed on that basis.

51 In my view, for the reasons I now give, the adjournment that Alfasi seeks should be granted only if Alfasi provides security, and does so in a form which can be readily accessed for the full amount of the Award, plus interest until a date by which it may reasonably be thought that the Singapore proceeding will be heard.

52 The case for security here is overwhelming. Alfasi's counsel accepted that even if it succeeded in obtaining all of the substantive relief it seeks in the Singapore proceeding, that outcome would reduce the total amount payable in principal net of liquidated damages plus pre-award interest under an "amended" award only to about $3.3m.

53 Counsel for Hyundai proffered, and counsel for Alfasi did not substantively dispute, this table which reflects the possible outcomes of the Singapore proceeding:

	Full Amount	**Less Theatre Claim ($1.64m)**	**And Less Exhibition Hall ($400,000)**
Principal	$5,001,026.19	$3,361,026.19	$2,961,026.19
Pre-Award Interest (pro rata reduction)	$555,993.32	$373,664.93	$329,194.59
	$27,882.46	$18,738.89	$16,508.75
Costs (USD)	**$1,502,958.86**		
In AUD (0.7467) (70% / 60% / 50%)	$2,042,063.67	$1,750,340.29	$1,458,616.91

Subtotal	**$7,626,965.64**	**$5,503,770.30**	**$4,657,392.77**
Interest from date of Award to 30 November (pro rata reduction)	$273,576.77	$183,862.00	$161,980.35
Total (AUD)	**$7,900,542.41**	**$5,687,632.30**	**$4,927,326.79**

54 The costs have been converted to Australian dollars at the current Reserve Bank rate. The Arbitrator awarded Hyundai 70% of its costs. The figures in the table assume that if the Theatre Claim succeeds only, then it is fair enough to predict that Hyundai may then receive 60% of its costs instead – and 50% if both claims succeed. Therefore, Hyundai submits, in effect, that even if Alfasi's prospects of success in the Singapore proceeding were certain, it is bound to provide security for an amount that it would be bound to be liable for in any event (viz, on "worst case scenario", $4,927,326.79).

55 In such circumstances, as Hyundai submits, and I agree, it would still be largely successful. So it would be difficult to see why it should not get a significant portion of its costs, plus the costs of the arbitration and the SIAC fees. This is all the more so when, as is apparent from the face of the Award, Hyundai (in addition to succeeding on most of its counterclaim) also successfully resisted most of the $19m claim brought against it by Alfasi: see [11] and [15] above.

56 However, in my view, in circumstances where I have not been asked to accept more than that Alfasi's case in Singapore is arguable, the amount of security should, in fairness to Hyundai, be the full amount of the Award, plus interest to November 2019.

57 I have considered whether to limit the amount of security to be ordered to an amount that approximates only that which is indisputably owed. In my view, that would not be "suitable security" within the meaning of s 8(8) of the IAA. The effect of what Staughton LJ said in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 in the passage approved by Foster J in *Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905 at [78] is that a notional sliding scale is of help in determining where the justice of the matter lies. If, on a brief consideration by the enforcing court, the court forms the view that the award is manifestly invalid, as his Lordship observed, there should be an adjournment and no order for security made. At the other end of the scale,

if it is manifestly valid, then if the award is not to be immediately enforced, and an adjournment granted, then all other things being equal, an order for substantial security should be made. Here, of the "various degrees of plausibility in the argument for invalidity" that his Lordship referred to, I can do no more, because I was asked to do no more, than assume that the appeal in Singapore is arguable. In those circumstances, the notional sliding scale favours provision of full security.

58 I should also deal with the two other submissions made by Alfasi's counsel. The first is founded on Mr Dvir's evidence, which provided that Hyundai never sought any security under the Sub-Subcontract during the Project, nor during the arbitration proceedings or the Singapore proceedings; that the giving of any security to Hyundai now would have the effect of re-balancing the parties' risks and commercial positions which were been agreed in the Sub-Subcontract; and that Alfasi will not deal with or use any of its assets other than to pay its legal fees in these proceedings and those in Singapore. In my view, the first two of those submissions are irrelevant and they ignore the fact that the onus is on Alfasi to justify the adjournment, including on the basis that it should be given one without providing any security. Whatever arrangements were, or were not, made during the course of the project, it seems to me, have nothing to do with the position that now subsists, namely that Hyundai has a prima facie right to enforce the Award. As to the third submission, in circumstances where the court is left to speculate about the financial state of Alfasi, it offers little comfort to Hyundai, and I do not think that it should weigh in the balance.

59 Dr Trichardt also advanced a submission, relying on a judgment of the House of Lords in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] EWHC 726 (per Lord Mance, with whom Lord Clarke, Lord Sumption, Lord Hodge and Lord Toulson agreed), to the effect that the High Court of the Republic of Singapore has no power to order security pending the hearing of an application to set aside an award, and that, because that is so, and that it is a matter of procedural happenstance that Hyundai seeks to enforce the Award in this court (where a power to award security exists under s 8(8) of the IAA), I should exercise my discretion not to award security. That is, in any event, how I understood the submission. It is sufficient, without intending any disrespect, to say that the submission misapprehends what Lord Mance said in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] EWHC 726. The passages which counsel took me to (especially at [24], [26], [28] and [29]) are directed to a case, having no similarity to the present one, where what is proposed, tacitly or otherwise, is that an order be made for security, failing which the

award would without more be enforced. As I say, that is not proposed here. For those reasons, I do not accept the submission to the contrary.

60 As to the interest competent of the amount of security that Hyundai seeks, Dr Trichardt submitted as follows:

> I would submit to your Honour that the amount for interest from date of the award to 30 November … [the date by which the hearing of the Singapore proceeding will be complete] should not be part of any security because that is a sum that is not, or cannot be, attributable to the adjournment of the enforcement application. It is just part and parcel of what is happening in Singapore, where there has been a delay, three weeks agreed for Hyundai's counsel to look at it, and then for the Singapore court to allocate two half … days to hear the matter. Now, that is something which is not caused by Alfasi and should not be laid at the door of Alfasi.

61 I do not accept that submission. It seems to me that the delay in the enforcement of the Award is directly attributable to Alfasi, because it seeks an adjournment of Hyundai's application in this court.

62 Alfasi seeks an order that the adjournment be granted until the determination of the proceeding in Singapore. That is, in my view, too indeterminate. I shall grant the adjournment until 30 November 2018.

63 As to costs, Hyundai has succeeded in its case that, if an adjournment is to be granted, it should be on the basis of "full" security. It should, therefore, have its costs of the application, especially when, in all the circumstances, Alfasi's insistence that it was entitled to an adjournment without proffering any security at all, was, in my view, unreasonable.

64 Accordingly, the court will order as follows:

(1) The respondent have leave to amend paragraph 2 of its interlocutory application filed on 22 June 2018 by substituting the following: "The proceeding for the enforcement of the Award be adjourned pursuant to either subsection 8(8) of the *International Arbitration Act 1974* (Cth), or, alternatively, pursuant to the Court's general power to control its own process, until such time as the respondent's application to the High Court of the Republic of Singapore is determined".

(2) Pursuant to subsection 8(8) of the *International Arbitration Act 1974* (Cth), the proceedings be adjourned to 30 November 2018 for further mention.

(3) The adjournment in order 2 is conditional upon the respondent providing security for the Award in the manner and period set out in order 4, in the sum of AUD $7,900,542.41 (the **secured sum**).

(4) The security in order 3 shall be provided within 21 days in the form of:

(a) payment into court of the secured sum, such sum to be invested by the Registrar in an interest bearing account; or

(b) payment of the secured sum into an interest bearing account under the control of the respondent's solicitors in Melbourne, such monies to be invested until further order on reasonable terms that the parties agree or as the court may further order; or

(c) on-demand bank guarantee payable in the secured sum on the demand of the Registrar of the Federal Court of Australia on such terms as the parties may agree or the court may further order.

(5) The parties may agree in writing to vary the secured sum and the form of security provided for in order 4.

(6) There be liberty to apply in connection with these orders.

(7) The respondent pay the applicant’s costs of and incidental to the respondent’s interlocutory application filed 22 June 2018.

I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan.

Associate:

Dated: 13 July 2018