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FEDERAL COURT OF AUSTRALIA

Siemens WLL v BIC Contracting LLC [2022] FCA 1029

File number:	NSD 1152 of 2021
Judgment of:	**STEWART J**
Date of judgment:	30 August 2022
Date of publication of reasons:	2 September 2022
Catchwords:	**ARBITRATION** – application for enforcement of foreign arbitral award under s 8(3) of the *International Arbitration Act 1974* (Cth) – where award debtor has not appeared – sufficiency of evidence of duly authenticated original award and original arbitration agreement – where awards transmitted by email only – where awards for sums are in foreign currency – where judgment is sought in Australian dollars – appropriate date for conversion **STATUTORY INTERPRETATION** – *International Arbitration Act 1974* (Cth) – whether enforcement of a foreign award requires that the award was made in a Contracting State to the New York Convention
Legislation:	*International Arbitration Act 1974* (Cth) ss 3(1), 8, 9, Sch 1 Art I *Federal Court Rules 2011* (Cth) r 28.44 *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) Accession by Australia, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 962 UNTS 364 Accession by the United States of America, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 751 UNTS 398
Cases cited:	*ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* [1997] 2 VR 31 *China Sichuan Changhong Electric Co Ltd v CTA International Pty Ltd* [2009] FCA 397 *EBJ21 v EBO21* [2021] FCA 1406; 395 ALR 310 *HongKong Henson Industrial Ltd v Victorian Ferries Pty Ltd* [2021] FCA 1450

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Kingdom of Spain v Infrastructure Services Luxembourg Sàrl (No 3) [2021] FCAFC 112; 392 ALR 443

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

Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang [2020] FCA 767

Transpac Capital Pte Ltd v Buntoro [2008] NSWSC 671

Trina Solar (US) Inc v Jasmin Solar Pty Ltd [2017] FCAFC 6; 247 FCR 1

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Number of paragraphs:	35
Date of hearing:	30 August 2022
Counsel for the Applicants:	C Freeman
Solicitor for the Applicants:	Squire Patton Boggs (AU)
Counsel for the Respondent:	The Respondent did not appear

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ORDERS

NSD 1152 of 2021

BETWEEN:	**SIEMENS WLL** First Applicant
	SIEMENS AG Second Applicant
AND:	**BIC CONTRACTING LLC** Respondent

ORDER MADE BY:	**STEWART J**
DATE OF ORDER:	**30 AUGUST 2022**

THE COURT ORDERS THAT:

1. Judgment be entered for the applicants against the respondent in the amount of $45,452,098.42.
2. Judgment be entered for the first applicant against the respondent in the amount of $2,823,284.32.
3. Judgment be entered for the second applicant against the respondent in the amount of $4,209,761.85.
4. Interest be payable on the amounts owing under paragraphs 1-3 of these orders at the interest rate prescribed by r 39.06 of the *Federal Court Rules 2011* from 31 August 2022.
5. The respondent pay the applicants' costs of the application.
6. The applicants have liberty to apply for their costs to be assessed on a lump sum basis on the papers.

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

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REASONS FOR JUDGMENT

STEWART J:

Introduction

1 This is an application for judgment enforcing two arbitral awards under s 8(3) of the *International Arbitration Act 1974* (Cth) (**IAA**). That section provides that a "foreign award" may be enforced by the Court as if the award were a judgment or order of the Court.

2 The first applicant, Siemens WLL, is a company incorporated with limited liability in Qatar.

3 The second applicant, Siemens AG, is a company incorporated under the laws of the Federal Republic of Germany. I will refer to the applicants together as **Siemens**.

4 The respondent, BIC Contracting LLC (**BICC**), is a company incorporated in the United Arab Emirates. Despite notice of the proceeding, it has not entered an appearance.

5 By amended short minutes of order the applicants seek orders as follows:

> 1 Judgment in favour of the first applicant and the second applicant against the respondent in the amount of $45,452,098.42.
>
> 2 Judgment in favour of the first applicant against the respondent in the amount of $2,823,284.32.
>
> 3 Judgment in favour of the second applicant against the respondent in the amount of $4,209,761.85.
>
> 4 The respondent pay interest at the interest rate prescribed by rule 39.06 of the Federal Court Rules 2011 (Cth) on each of the amounts in paragraphs 1, 2, 3 above from 31 August 2022.
>
> 5 The respondent pay the applicants' costs of and incidental to the application.
>
> 6 The applicants have liberty to apply for their costs to be assessed on a lump sum basis on the papers.

6 The amended originating application, which served to give notice to BICC of the relief sought against it, sought judgment in various amounts expressed in currencies other than Australian dollars, namely Qatari riyals, euros, pounds sterling, United States dollars and United Arab Emirates dirhams, "or equivalent". For reasons I will come to, it is proper to give judgment in Australian dollars as sought in the short minutes of order. For present purposes, I am satisfied that the notation "or equivalent" was sufficient to give notice to the respondent that the ultimate judgment may not be expressed in the currencies set out in the

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amended originating application but that it may be given in equivalent amounts in some other currency, most obviously Australian dollars.

7 There is also one minor respect in which one of the amounts reflected in euros in the amended originating application is less than the amount which is now relied on and converted to Australian dollars. The difference is €50,000 which arose from a "3" having been typed in error in the amended originating application instead of an "8". Not only is that difference trivial in the scheme of what is claimed as a whole, but by reason of other errors in the way in which the prayers in the amended originating application were formulated, the total amounts for which judgments are now sought are materially less than the total amounts claimed in those prayers. In the circumstances, I am satisfied that the amended originating application gave notice of greater claims than those that are now made with the result that there is no prejudice to the respondent in the error.

8 The dispute that led to the arbitrations arises out of a project for the design, construction, maintenance and operation of a people-mover system at Education City in Qatar. The contractor was a consortium of Siemens and **Leighton** Contracting Qatar WLL under a Consortium Agreement concluded by them in February 2012. Clause 17.2 of the Consortium Agreement required all disputes to be settled by arbitration under the London Court of International Arbitration (**LCIA**) by a panel of three arbitrators. The seat of the arbitration would be London, UK.

9 In September 2018, Siemens, on the one side, and BICC and Leighton, on the other side, entered into a Mutual Agreement to ensure the financial stability of the project. That agreement recorded that Leighton had cash flow problems in relation to the project and that Siemens had entered into payment diversions in favour of Leighton to overcome those problems. It further recorded that BICC would provide a payment guarantee for a further cash diversion to be made by Siemens in favour of Leighton.

10 A payment guarantee was provided by BICC in favour of each of the Siemens companies. The payment guarantee contained an arbitration clause to the effect that any dispute under the guarantee would be finally settled under the Rules of Arbitration of the International Chamber of Commerce (**ICC**) by three arbitrators in accordance with the ICC Rules. The venue of the arbitration would be Dubai, UAE. Further, BICC irrevocably consented to the enforcement of any award or judgment issued pursuant to the guarantee in any court of competent jurisdiction.

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11 I infer that it was sometime in 2019 that Siemens commenced an LCIA arbitration against Leighton, as first respondent, and BICC, as second respondent, under the Consortium Agreement and the Mutual Agreement. On 29 March 2020, Siemens commenced an ICC arbitration against BICC under the payment guarantee. The same three-person arbitral panel was appointed in both arbitrations, namely Professor Doug Jones AO (Siemens nominated), Stephen Furst QC (Leighton and BICC nominated) and Nicholas Dennys QC (presiding).

12 The LCIA arbitral tribunal published a final award on 10 August 2021 at London, UK. The award records that it is based on the arbitration clause in the Consortium Agreement and it records the finding that the arbitration agreement binds BICC on account of BICC's assent to the Mutual Agreement, which incorporated the Consortium Agreement by reference. On that basis, the tribunal found that it had jurisdiction to determine the claims against BICC and to determine disputes arising under the Mutual Agreement.

13 Insofar as is relevant to the judgment sought in the present proceeding, the LCIA final award, as corrected by an amending memorandum by the tribunal dated 23 September 2021, makes a final award in the following terms:

> The Tribunal awards and declares as follows:
>
> …
>
> (7) The First Respondent will pay the Claimants the sums of QAR 19,591,228.14 and €5,747,529 for repayment of the cash diversions;
>
> (8) The First and Second Respondents are jointly and severally liable to pay the Claimants the sum of QAR 74,512,517.47 for the Claimants' costs in completing the balance of Leighton's scope of work;
>
> (9) The First Respondent will pay the Claimants the sum of QAR 16,661,079.90 for prolongation costs resulting from delays for which Leighton is responsible, representing 143 days of delay in 2016 and 2017;
>
> (10) The Second Respondent is jointly and severally liable with the First Respondent for payment of QAR 2,031,477.32, representing 49 days of delay to the works in 2019;
>
> (11) The First and Second Respondents are jointly and severally liable to pay the Claimants the sum of QAR 729,514 for Leighton's share of the CAR Insurance premiums;
>
> (12) The Respondents shall pay the Claimants the sum of QAR 7,715,383.30 and €80,373.81 for the damage to the works, purchase of materials, PORR costs and failure to provide warranties;
>
> (13) The First Respondent will pay the Claimants interest at the rate of 8.1% per annum on the amounts awarded for repayment of the cash diversions from 31 December 2018 to 28 days from the date of this Award;

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(14) The First and Second Respondents will pay to the Claimants interest at the rate of 2.5% in respect of the claims for completion costs, prolongation costs, CAR Insurance repayment, damage to the Point Machines, damage to 11kV cables, damage to OCL, and Leighton's subcontractor claims, amounting to QAR 94,508,991.90 and EUR 80,373.81 from 1 January 2019 to 28 days from the date of this Award;

(15) The First and Second Respondents will pay the Claimants' Legal Costs in the following sums: QAR 100.00; AED 3,066,106.50; £12,848.00 and €2,463,239.50,

within 28 days of the date of this award;

(16) The First and Second Respondents will pay the Arbitration Costs in the sum of £292,334.00 within 28 days of the date of this award.

(17) All sums ordered to be paid by the First and/or Second Respondents to the Claimants shall be paid within 28 days of the date of this Award;

(18) The First and Second Respondents will pay to the Claimants interest at 8.1% per annum, on a simple interest basis, on any sums that remain unpaid pursuant to this Award after 28 days of the date of this Award to the date of payment;

(19) All other claims and counterclaims made in these proceedings are dismissed.

14 The ICC arbitral tribunal published a final award on 6 October 2021 at Dubai, UAE. The award records that it is based on the arbitration clause in the payment guarantee. The terms of the award are relevantly as follows:

> The Tribunal directs and awards as follows:
>
> …
>
> (2) The Respondent shall pay the First Claimant, Siemens AG, the sum of €2,701,615 as repayment of its portion of the third cash diversion;
>
> (3) The Respondent shall pay the Second Claimant, Siemens W.L.L., the sum of QAR 6,657,317 as repayment of its portion of the third cash diversion;
>
> (4) The Respondent shall pay the Claimants interest at the rate of 2.5% per annum from 31st July 2019 to the date of payment of the sums awarded above;
>
> (5) The Respondent shall pay the Claimants the sum of:
>
> (i) US$ 320,000 for arbitration costs;
>
> (ii) € 225,000 and AED 16,430 for legal costs;
>
> (6) All other claims for relief made by the Parties in this arbitration are denied.

Service and notice

15 On 28 January 2022, I granted leave to serve the amended originating application and other documents in the proceeding on BICC in the UAE in a number of ways set out in orders of

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that date. One of those ways was by emailing the documents to Ahmed Shaker, Legal Counsel for BICC in Dubai. On 10 February 2022, Mr Shaker responded to the email by asking to be sent the date of the hearing of the matter.

16 After Siemens had filed an affidavit proving service on BICC in accordance with the orders of 28 January 2022, on 22 July 2022 I made orders listing the matter for final hearing on 30 August 2022. Siemens were directed to serve notice of the listing on BICC in various ways including by emailing Mr Shaker at the address to which the originating documents had previously been sent to him, from which he had replied and to which he requested that notification be given.

17 I am satisfied that notice of the hearing has been given to BICC in accordance with the orders of 22 July 2022. Because an un-deliverable message was received in response to the email of notice of the hearing to Mr Shaker, Siemens also gave notice of the hearing by email to other officers at BICC and by delivering written notice to BICC by courier. Although Siemens obtained a proof of delivery of the courier package and no un-deliverable message was received in respect of the emails sent to other officers at BICC, no response to those notices was received. In any event, since BICC received notice of the proceeding and has failed to enter an appearance, or appear at the hearing, the matter may proceed to judgment.

IAA requirements

18 Enforcement of an arbitral award under s 8 of the IAA requires that the award be a "foreign award". In s 3(1), "foreign award" is defined 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". The Convention in question is the New York Convention, being 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 set out in Sch 1 to the IAA.

19 By Art I(1) of the Convention, it applies to the recognition and enforcement of arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". It is to be noted that the reference to the State in which the award is made is not confined to a Contracting State to the Convention. There is similarly no requirement in s 8 that the award in respect of which enforcement is sought was made in a "Convention country" as defined in s 3(1).

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20 Article I(3) provides that when signing, ratifying or acceding to the Convention, "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State". When Australia acceded to the Convention with effect from 24 June 1975 it made no such reservation: see Accession by Australia, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 962 UNTS 364. (That position may be contrasted with the United States where its instrument of accession declared that the US would only recognise awards under the Convention if made in the territory of another Contracting State: see Accession by the United States of America, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 751 UNTS 398.)

21 In the circumstances, an award made in another State is a "foreign award" for the purposes of the IAA even if the State in which the award was made is not a Contracting State to the Convention or (which is the same thing) a Convention country as defined by the IAA. The reference in Greenwood J's concurring judgment in *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6; 247 FCR 1 at [53] to the Convention providing for recognition and enforcement of arbitral awards made in Contracting States should not be understood to say that the Convention provides for recognition and enforcement *only* of awards made in Contracting States.

22 In any event, both the United Kingdom, with effect from 23 December 1975, and the UAE, with effect from 19 November 2006, acceded to the Convention and are therefore Contracting States. The awards in question are thus undoubtedly foreign awards.

23 Section 9 of the IAA relevantly provides:

> **9 Evidence of awards and arbitration agreements**
>
> (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:
>
> (a) the duly authenticated original award or a duly certified copy; and
>
> (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.
>
> (2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:
>
> (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it

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was not in fact so authenticated or certified; or

(b) it has been otherwise authenticated or certified to the satisfaction of the court.

…

(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates.

24 Siemens do not have authenticated or certified hard copy originals of the arbitration awards for the purpose of satisfying the requirement in s 9(1)(a). However, the arbitral awards were provided to Siemens by the secretariats of each of the LCIA and the ICC by email, and each award has apparently been signed by all three members of the arbitral tribunals. The rules of both the LCIA and the ICC permit the transmission of awards by electronic means by officers of their secretariats. I am therefore satisfied that the awards relied on by the applicants fulfil the requirement of authentication in s 9(1)(a) with reference to s 9(2).

25 With reference to the requirement in s 9(1)(b) that Siemens produce to the court the original arbitration agreements under which the awards purports to have been made, or a duly certified copy, Siemens has produced copies of the agreements under cover of an affidavit by Thomas Philip Wilson. Mr Wilson is a partner of the applicant's solicitors in Abu Dhabi, UAE, who was primarily responsible for the conduct of the arbitral proceedings on behalf of Siemens. Mr Wilson deposes to the agreements annexed to his affidavit being true copies of the agreements in question. This is similar to the basis on which the arbitral award in *HongKong Henson Industrial Ltd v Victorian Ferries Pty Ltd* [2021] FCA 1450 at [13] was accepted by Colvin J as certified or authenticated. I am therefore satisfied that the agreements fulfil the requirements of s 9(1)(b), particularly with reference to s 9(5).

Rule 28.44 requirements

26 Rule 28.44 of the *Federal Court Rules 2011* sets out a number of requirements for the enforcement of a foreign award under s 8(3) of the IAA. I am satisfied that each of those requirements has been met. Relevantly, the affidavit of Evangelos Volidis, a Commercial Project Director at Siemens who has access to the books and records of the Siemens companies, states that those books and records show that no payments have been received in compliance with the arbitral awards. The various schedules, to which I will shortly refer, prepared by David Starkoff, the applicants' Sydney solicitor, also reflect nothing having been paid by BICC.

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Quantum and exchange rates

27 As mentioned, Mr Starkoff has prepared schedules which set out the amounts awarded to the two applicants jointly as well as to each of the applicants separately in different currencies, and which calculate the interest accrued on those amounts in terms of the awards to the date of the hearing. During the course of the hearing, I raised some queries in relation to the schedules, which caused Mr Starkoff to prepare corrected schedules. He has given an explanation of the changes that he has made, which I have spot-checked. I am satisfied that the corrected schedules properly reflect the amounts awarded and interest on those amounts up to the date of the hearing.

28 Also as mentioned, Siemens seeks judgment in Australian dollars. In *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767 at [23], Jagot J accepted that in circumstances where the judgment is sought in an Australian court and the award is sought to be enforced in Australia, judgment should be given in Australian dollars if that is requested by the applicant for enforcement. I respectfully adopt that approach.

29 The question that then arises is at what date should the foreign currency amounts be converted to Australian dollars. In *ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* [1997] 2 VR 31 at 48, Brooking JA (Hayne and Charles JJA agreeing) referred to conflicting English authority on whether the conversion date should be the date of the award or the date that leave to enforce the award is granted. His Honour expressed no opinion as to which approach was correct and invited further argument.

30 In *Transpac Capital Pte Ltd v Buntoro* [2008] NSWSC 671 at [26], Hall J, without explanation, converted to Australian currency as at the date of the award. In contrast, in *China Sichuan Changhong Electric Co Ltd v CTA International Pty Ltd* [2009] FCA 397 at [10], Emmett J, also without explanation, converted to Australian currency as at the date of judgment.

31 In the present case, the awards provide for interest at particular rates up until 28 days after the awards, and then for further interest thereafter until the date of payment. Rule 39.06 of the Rules provides for post-judgment interest at a prescribed rate. In those circumstances, it seems to me that the only appropriate date for the conversion to Australian dollars is the date of judgment. Any earlier date would mean that the interest rates provided for in the awards would no longer be applicable because those rates are or may be peculiar to particular currencies.

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32 That said, there is considerable impracticality in converting to Australian dollars at exchange rates on the date of judgment when, typically, the court sits in the morning when exchange rates are not yet available, particularly in other parts of the world or for currencies in other parts of the world to the west of Australia. On that basis, I accepted the exchange rates from the day before the hearing as sufficiently closely reflecting the rates of exchange as at the date of judgment where, as here, judgment was pronounced and entered on the date of the hearing.

33 Mr Starkoff's schedules use the exchange rates published by the Reserve Bank of Australia for euros, pounds sterling and US dollars. However, the Reserve Bank does not publish exchange rates for Qatari riyals or UAE dirhams. Mr Starkoff accordingly used the exchange rates published by the Qatar Central Bank and the Central Bank of the UAE for those currencies, respectively. I accept those as being the appropriate exchange rates.

Disposition

34 Siemens did not seek an order stating that the awards can or may be enforced as if they are judgments or orders of the Court, although other courts have on previous occasions made such orders. That arises from the wording of ss 8(2) and 8(3) of the IAA. In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 at [24], French CJ and Gageler J explained that "an appropriate order, although not necessarily the only appropriate order" for the court to make "would be an order that the arbitral award be enforced as if the arbitral award were a judgment or order of the Federal Court". In my view, it is unnecessary to make such an order, and nothing said by the High Court is to the contrary. It is sufficient to merely enforce the awards by giving judgment on them. That that is an appropriate order enforcing an award is well-established: *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl (No 3)* [2021] FCAFC 112; 392 ALR 443, and see the discussion in *EBJ21 v EBO21* [2021] FCA 1406; 395 ALR 310 at [40]-[49].

35 For those reasons, I made orders essentially as sought by the applicants.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

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Associate:

Dated: 2 September 2022

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