Supreme Court

New South Wales

Case Name:	ALYK (H.K.) Limited v Caprock Commodities Trading Pty Limited and China Construction Bank Corporation
Medium Neutral Citation:	[2015] NSWSC 1006
Hearing Date(s):	26 June 2015
Decision Date:	24 July 2015
Jurisdiction:	Equity Division
Before:	Black J
Decision:	Order that arbitration award be enforced as a judgment of this Court pursuant to s 8(2) of the International Arbitration Act 1974 (Cth). The sum of US $20,000,000 paid into Court by the Second Defendant be paid to the Plaintiff together with any interest earned on that amount. Order that the sum of AU $1,000,000 paid into Court by or on behalf of the Plaintiff be paid to the Plaintiff together with any interest earned on that amount. The costs of the Plaintiff's application made on 14 December 2012, as reserved on that day, and of the hearing on 26 June 2015, be paid by the First Defendant, as agreed or as assessed. Liberty to restore the issues as to whether, and to what extent, there should be judgment in favour of the Plaintiff against the First Defendant in respect of amounts of USD 2,384,000 and EUR 500,000 or any part of them.
Catchwords:	ARBITRATION – enforcing foreign arbitration awards – where money previously paid into New South Wales Supreme Court as a result of a judgment – whether to enforce foreign award as judgment of the Court under s 8 of the International Arbitration Act 1974 (Cth). ARBITRATION –enforcing foreign arbitration awards – where allegations of bias of arbitral tribunal – whether

	breach of natural justice for the purposes of s 8(7A)(b) of the International Arbitration Act 1974 (Cth) – whether foreign award should not be enforced for reasons of public policy under s 8(7)(b) of the International Arbitration Act 1974 (Cth). EQUITY – trusts and trustees – trust is not a separate legal entity – where First Defendant was party to impugned contract as trustee of a trust – whether First Defendant properly party to the proceedings.
Legislation Cited:	- Civil Procedure Act 2005 (NSW) s 101 - Evidence Act 1995 (NSW) s 136 - International Arbitration Act 1974 (Cth) ss 2D, 3, 8, 8(2), 8(5), 8(7), 8(7A), 39
Cases Cited:	- ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia [2014] NSWCA 402 - ALYK (H.K.) Limited v Caprock Commodities Trading Pty Ltd [2012] NSWSC 1558 - Helvetic Investment Corporation Pty Ltd v Knight (1984) 9 ACLR 773 - Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360 - Sauber Motorsport AG v Giedo Van Der Garde BV [2015] VSCA 37; (2015) 317 ALR 786 - TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83; (2014) 311 ALR 387 - William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403
Texts Cited:	- D Loxton & N D'Angelo, "Trustee's limitation of liability: Myths, mysteries and a model clause" (2013) 41 ABLR 142 J. Allsop, "The Nature of the Trustee's Right of Indemnity and Its Implications for Equitable Principles", 18 July 2012.
Category:	Principal judgment
Parties:	ALYK (H.K.) Limited (Plaintiff) Caprock Commodities Trading Pty Limited (First Defendant) China Construction Bank Corporation (Second

	Defendant)
Representation:	Counsel: J A Hogan-Doran (Plaintiff) P Yassa (Director – First Defendant) Solicitors: K&L Gates (Plaintiff) P. Yassa (Director – First Defendant)
File Number(s):	2012/231519

JUDGMENT

1 By Further Amended Summons filed 4 March 2015, the Plaintiff, ALYK (H.K.) Limited ("ALYK") seeks an order under s 8(2) of the *International Arbitration Act* 1974 (Cth) that an award ("Award") (Ex A1) published on 20 January 2015 be enforced as a judgment of this Court, specified declarations, and an order that judgment be entered in favour of ALYK against the First Defendant, Caprock Commodities Trading Pty Limited ("Caprock") in terms of the Award that it pay ALYK amounts of US $2,384,000 and EUR 500,000, and that interest accrue on those amounts as may from time to time be due under s 101 of the *Civil Procedure Act* 2005 (NSW). (I note, for completeness, the Further Amended Summons referred, by obvious error, to s 101 of the *Supreme Court Act* 1970 (NSW) in this regard). ALYK also seeks orders that amounts of US $20 million paid into Court by the Second Defendant, China Construction Bank Corporation ("CCB") on or about 1 February 2013 and the amount of AU $1 million that an associated company paid into Court on or about 1 February 2013 be paid to it together with any interest earned on those monies. Finally, it seeks an order that the costs of its application on 14 December 2012, as reserved on that day, be paid by Caprock.

2 ALYK relied on the affidavits of the Swiss legal practitioner who represented it in the arbitration, Dr Laurent Killias affirmed 5 February 2015 and 6 May 2015, which exhibited documents relevant to the arbitration. ALYK also relied on affidavits of its solicitor, Daniel St George, sworn 5 and 6 February 2015 and an affidavit of its representatives, Mr Chen Xinquan affirmed 9 March 2015 and Mr Li Zimu affirmed 9 March 2015. ALYK also relied on a further affidavit of Dr

Killias affirmed 6 May 2015, with a further exhibit of documents in two volumes (Ex A5) and a further affidavit of Mr Daniel St George sworn 7 May 2015.

3 Caprock was represented in these proceedings, by leave, by its director, Mr Yassa. Caprock filed extensive written submissions, which in substantial parts appeared to reagitate matters that had been in issue before the arbitral tribunal in the arbitration that gave rise to the Award. Caprock relied on Mr Yassa's affidavit sworn 25 February 2015 and its exhibits (Ex R1); Mr Yassa's affidavits dated 25 March 2015, 23 April 2015 and 3 June 2015; Mr Yassa's affidavit sworn 24 September 2012 and its exhibit (Ex R2); Mr Yassa's affidavit dated 3 June 2015 and its exhibit (Ex R3); and an affidavit of Ms Stojkovic sworn 2 June 2015. Mr Yassa's affidavit dated 24 September 2012 was admitted with a limiting order under s 136 of the *Evidence Act* 2005 (NSW) that it was evidence of material before Slattery J, but not proof of the asserted facts as to the Fund's financial position. CCB did not take an active part in the proceedings.

Background facts

4 I should first set out something of the background to the dispute. ALYK is a company within a Chinese state-owned enterprise, the Yankuang Group. ALYK entered into a contract ("Contract") with Caprock as trustee for the SAFE Fund ("Fund") on 18 August 2011, titled "Contract for of Iron Ore Fines" [sic] (Ex A3, tab 1). Clause 15 of the Contract provided that any dispute would be referred to and finally resolved by arbitration, to be conducted in accordance with the arbitration rules of the International Chamber of Commerce ("ICC"). Article 34 of the ICC arbitration rules in turn provides that:

> "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." (Ex A2, tab 8, 171)

Clause 21 of the Contract provided that:

> "[Caprock] enters into this Contract and acts and incurs liabilities solely in its capacity as trustee of the SAFE Fund ("Trust") under the Trust Deed dated on or about the date of this Contract 2011, and its liability is limited to the assets of the Trust."

5 The Contract was subsequently amended by a memorandum dated 3 November 2011 (Ex A3, tab 1, 30) which required ALYK to procure CCB to

issue a standby letter of credit ("SBLC") in the maximum value of US $20 million, which was issued on 11 November 2011 (Ex A3, tab 3). A further addendum to the Contract was made on 21 July 2012 (Ex R3, tab 1) and ALYK paid US $2million to Caprock on 24 July 2012.

6 A notice of default was issued by the Fund (or, more precisely, Caprock as trustee of the Fund) to ALYK on 1 August 2012. The Fund (or, more precisely, Caprock as its trustee) subsequently issued a notice of termination of the Contract on 6 September 2012 and also made demand for payment under the SBLC (Ex R1, tab 6). On 4 October 2012, ALYK gave notice of material breach and default under the Contract (Ex A7), and Caprock accepted an alleged repudiation of the contract by ALYK on 17 October 2012. On 26 October 2012, ALYK gave notice of termination of the Contract (Ex A8). On 9 November 2012, ALYK demanded the repayment of the US $2 million paid in connection with the addendum entered into on 21 July 2012 (Ex A9), which was not repaid by Caprock.

7 The Court made orders in respect of a dispute that arose when Caprock called upon the SBLC in *ALYK (H.K.) Limited v Caprock Commodities Trading Pty Ltd* [2012] NSWSC 1558. Following the delivery of the judgment in respect of that dispute, ALYK brought an interlocutory application, seeking, in effect an order that US $20m to be paid into Court by CCB be frozen. On 14 December 2012, Slattery J ordered that:

> "Under s 16 of the *International Arbitration Act* 1974 (Cth) and Article 17J of the UNCITRAL Model Law on Commercial Arbitration, and under UCPR r 25.11 and in the inherent jurisdiction of the Court, [CCB] pay into Court such amount as may be determined by [ALYK] pursuant to [the SBLC] ("the Proceeds") where it will remain until paid out pursuant to further order of the Court."

Slattery J also ordered that ALYK provide security for the usual undertaking for damages by paying the amount of AU $1 million into Court, which it did. The terms of those orders required that ALYK file a request for arbitration with the ICC by 19 December 2012, pursuant to a submission to arbitration provided by the terms of the Contract, and that ALYK seek declarations and/or orders that:

> "(a) [Caprock] was not entitled to make Demand under the SBLC and/or receive and retain the Proceeds, and/or that [Caprock] must pay to [ALYK] any of the proceeds received by it;

> (b) [Caprock] is required to repay to [ALYK] the sum of US$2 million paid by [ALYK] to [Caprock] on or about 22 July 2012. …"

The Court reserved the costs of that interlocutory application.

8 The timetable for submission of the dispute to arbitration was subsequently extended to permit attempts at settlement of the dispute, which were unsuccessful, and ALYK filed its request or arbitration with the ICC on 30 January 2013. The terms of reference for the arbitration make clear that Caprock was joined to the arbitration twice, once in its own right and once in its capacity as trustee for the SAFE Fund (Ex A5, tab 9).

9 In mid-February 2013, CCB paid the sum of US $20 million into Court pursuant to the demand made by Caprock under the SBLC and a corresponding payment was made to CCB by a related entity of ALYK, Yankuang Aluminium International Trade Co Ltd ("YAIT"). The arrangements for that payment, as between ALYK and YAIT, were documented by an agreement dated 15 November 2012, by which ALYK and YAIT recited the circumstances in which ALYK had caused YAIT to request the issue of the SBLC through the head office of CCB and the circumstances of the claim on the SBLC, and confirmed their agreement that any payment made by YAIT would be reimbursed by ALYK (Xinquan 9.3.15, Ex A3, tab 7).

10 ALYK submitted its Statement of Claim in the arbitration on 16 September 2013 (Ex A5, tab 12) and Caprock submitted its Defence in the arbitration on 15 November 2013 (Ex A5, tab 17). There were a number of subsequent procedural disputes between the parties, which were the subject of submissions by Caprock in this application. The hearing took place in April 2014 and the transcript of that hearing is in evidence (Ex R1, tab 11). The Award was issued on 20 January 2015, and appears to have been sent to the parties by letter from the ICC Secretariat dated 22 January 2015 (Ex A5, tab 79; Ex A10; Ex R1, tab 18). The Award provided, relevantly:

> "[ALYK's] prayer for relief No 1 is granted; [Caprock] – also identified as Caprock Commodities Trading Pty Ltd as trustee for the SAFE Fund – was not entitled to make demand under the [SBLC]; [Caprock] – also identified as Caprock Commodities Pty Limited as trustee for the SAFE fund – is not entitled to receive and retain the proceeds resulting from such demand …

> [ALYK's] prayer for relief No 3 is partially granted; [Caprock] – also identified as Caprock Commodities Trading Pty Limited as trustee for the SAFE Fund – is ordered to pay [ALYK] US$2 million."

That Award also provided that Caprock, also identified in its capacity as trustee for the SAFE Fund, pay US $384,000 to ALYK as partial reimbursement of advances made by ALYK in respect of ICC's costs of arbitration and EUR 500,000 to ALYK as partial reimbursement of its legal fees and other costs.

11 Somewhat confusingly, the ICC Secretariat subsequently sent a letter dated 30 January 2015 notifying the parties that, on 8 January 2015, the ICC Court had extended the time for notification of the decision up to 27 February 2015 (Ex A5, tab 80). Caprock also makes submissions as to that matter in this application.

Claim for enforcement of Award under s 8(2) of the International Arbitration Act

12 As I noted above, ALYK seeks an order under s 8(2) of the *International Arbitration Act* that the Award be enforced as a judgment of this Court. Section 8 of the *International Arbitration Act* provides that:

> (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.
>
> (2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court. …
>
> (3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7). …
>
> (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
>
> (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;
>
> (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
>
> (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;
>
> (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

> (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. …
>
> (7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
>
> (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
>
> (b) to enforce the award would be contrary to public policy.
>
> (7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award.

13 The term "foreign award" is defined in s 3 of the *International Arbitration Act* as 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." ALYK submits, and I accept, that the Award is a "foreign award" within that definition, and Caprock did not contend to the contrary. There seems to be no basis for any suggestion that ss 8(5)(a), 8(5)(d), 8(7)(a) or 8(7A)(a) of the *International Arbitration Act* are applicable in the present facts. Caprock did not seek to identify which, if any, of the other provisions in s 8 of the *International Arbitration Act* it relied upon and, in those circumstances, it is likely to be preferable to address the merit of its complaints since, if they lack factual merit, none of the grounds in that section will be established.

14 It is at least clear that Caprock seeks to resist enforcement of the Award on the basis that the arbitral tribunal was biased, or acted in breach of the rules of natural justice, such that enforcement of the Award would be contrary to public policy for the purposes of 8(7)(b) of the *International Arbitration Act*. The scope of the relevant provisions, ss 8(7)(b) and 8(7A)(b) of the *International Arbitration Act*, in respect of a claim that the enforcement of an award is contrary to public policy by reason of a breach of natural justice, was considered in detail by the Full Court of the Federal Court of Australia in *TCL*

Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83; (2014) 311 ALR 387. Their Honours referred to the concept of "natural justice" adopted in s 8 of the *International Arbitration Act* (at [73]) as follows:

> "… there was no evident purpose in the introduction of ss 19 and 8(7A) of amending the meaning of public policy to incorporate any idiosyncratic national approach. In Australia, the introduction of a reference to natural justice was expressly for the avoidance of doubt: "to avoid doubt" (s 8(7A)); "for the avoidance of any doubt" (s 19). The rules of natural justice can thus be seen to fall within the conception of a fundamental principle of justice (that is within the conception of public policy), being, as they are, equated with, and based on, the notion of fairness: *Kioa [v West* 159 CLR] at 583; *Wiseman v Borneman* [1971] AC 297 at 308, 309 and 320. … Fairness incorporates the underlying requirement of equality of treatment of the parties. The incorporation of the rules of natural justice into the [the *International Arbitration Act*] embodied a fundamental principle contained within public policy and *ordre public* — fairness and equality of treatment of the parties, which is at the heart of the arbitral process in Art 18. There is nothing technical or domestically particular about the requirement that an arbitration be conducted fairly. The conceptions of fairness and equality are deeply powerful. They lie at the heart of the constitutional conception of due process. They are inhering elements of law and justice that inform and bind any legal system and any legal order …"

15 The Full Court there pointed to the purpose of the *International Arbitration Act* and the Model Law, observing (at [109], [111]) that:

> "… The system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties. The a-national independence of the international arbitral legal order thus created required at least two things from national court systems for its efficacy: first, a recognition that interference by national courts, beyond the matters identified in the Model Law as grounds for setting aside or non-enforcement would undermine the system; and second, the swift and efficient judicial enforcement and recognition of contracts and awards. The appropriate balance between swift enforcement and legitimate testing of grounds under Arts 34 and 36 is critical to maintain; essential to it is courts acting prudently, sparingly and responsibly, but decisively when grounds under Arts 34 and 36 are revealed. An important part of that balance is the protection by the courts of the fundamental norms of fairness and equality embodied in the rules of natural justice within the concept of public policy. …
>
> … Arts 34 and 36 [of the Model Law] should be seen as requiring the demonstration of real practical injustice or real unfairness in the conduct of the reference or in the making of the award. The rules of natural justice are part of Australian public policy. The assessment as to whether those rules have been breached by reference to established principle is not a matter of formal application of rules disembodied from context, or taken from another statutory or human context. The relevant context is international commercial arbitration. No international arbitration award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached. Each of Arts 34 and 36 contains a form of discretion or evaluative decision: "may be set aside" (Art 34), "may be refused only" (Art 36). It is not

> profitable to seek to differentiate between the engagement of public policy under the Articles and a supposedly separate and a later question whether to exercise the discretion; nor is it profitable, but only likely productive of difficulty or error, to read into Arts 34 and 36 any precise notions of required prejudice or other preconditions to the exercise of any discretion. The provisions (ss 8(7A), 19 and Arts 34 and 36) deal with fundamental conceptions of fairness and justice. It suffices to say that no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered by an international commercial party in the conduct and disposition of a dispute in an award. It is likely that real prejudice, actual or potential, would be a consideration in the evaluation of any unfairness or practical injustice."

16 The decision in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* was followed by the Court of Appeal of the Supreme Court of Victoria in *Sauber Motorsport AG v Giedo Van Der Garde BV* [2015] VSCA 37; (2015) 317 ALR 786. The Court of Appeal in turn observed, with reference to authority, at [8] that:

> "In order to establish that the enforcement of an award would be contrary to public policy by reason of a breach of natural justice what must be shown is real unfairness and real practical injustice. Courts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator "dressed up as a complaint about natural justice". Errors of fact or law are not legitimate bases for curial intervention. Unfairness in any particular case will depend upon context, and all the circumstances of that case." [citations omitted]

17 Section 39 of the *International Arbitration Act* in turn requires a Court that is considering the exercise of a power under s 8 of the *Act* to enforce a foreign award, to which I refer below, to have regard to the objects of the *Act* and to the facts that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and awards are intended to provide certainty and finality. The objects of the *Act* are set out in s 2D of the *Act* as follows:

> "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
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> (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
>
> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
>
> (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975."

18 Caprock's opening written submissions had no real regard to the limited circumstances in which the award of an arbitral tribunal will not be enforced, under s 8 of the *International Arbitration Act*. ALYK submits that sections 1–11, 16 and 17 of Caprock's submissions, to which I refer below, seek to reagitate the merits of issues decided by the arbitral tribunal. The *International Arbitration Act* and the case law makes clear, of course, that the Court in determining whether to enforce an arbitration award does not simply redetermine all issues that were before the arbitral tribunal. Although ALYK, presumably for more abundant caution, addressed the substance of the arbitral tribunal's findings, in order to establish that the tribunal had addressed the relevant issues, I do not consider that it is necessary for me to do so.

19 The extent to which Caprock seeks to reagitate the issues before the arbitral tribunal is apparent, as Mr Hogan-Doran who appears for ALYK points out, by a comparison of Caprock's submissions in the arbitral tribunal and its submissions before me. Section 1 of Caprock's opening submissions before me replicates section IIA–E of Caprock's submissions before the arbitral tribunal (Ex A5, tab 57), to the point of identity or virtual identity, and refers in detail to the circumstances surrounding the third amendment of the Contract on 21 July 2012 and to the circumstances of a notice of material breach and default issued by ALYK after commencement of the proceedings in this Court. Caprock also makes submissions as to the parties' contractual obligations as at 21 July 2012 and suggested breaches of contract that took place thereafter, and submits that the issue of a transferable SBLC by ALYK was fundamental to the operation of the agreement. Section 2 of Caprock's opening submissions before me in turn replicates section IIH of Caprock's submissions before the arbitral tribunal and deals with the SAFE Fund's obligations and ALYK's allegations of breach of those obligations. Section 3 of Caprock's opening

submissions before me replicates section IIJ of Caprock's submissions before the arbitral tribunal, although some additional material has been added in the submissions before me, and refers to its issue of a document described as a "Corporate Performance Bond" by which Caprock sought to guarantee its own performance of the contract. Sections 4 and 5 of Caprock's opening submissions before me replicate section IIK and IIL of Caprock's submissions before the arbitral tribunal and refer to the circumstances of a dispute relating to a first shipment of a cargo and to the demand made by the Fund on 6 September 2012 on the SBLC for US $20 million. I do not consider it necessary to canvass these matters, which re-agitate issues that were argued before and determined by the arbitral tribunal. Caprock does not identify, and I cannot see, any basis on which revisiting the arguments previously put in, and determined in, the arbitration could give rise to any basis for the Court not to enforce the Award under s 8 of the *International Arbitration Act*.

20 Section 6 of Caprock's opening submissions before me replicates section III of Caprock's submissions before the arbitral tribunal and makes submissions as to the reliability of two witnesses called by ALYK before the arbitral tribunal, which was plainly a matter for the arbitral tribunal and not for the Court. Section 7 of Caprock's opening submissions before me replicates deals with the same subject as section IIF of Caprock's submissions before the arbitral tribunal, although it is, unlike the other submissions to which I have referred, in different terms, and deals with damages that the Fund claims to have suffered arising from breaches of contract by ALYK. Section 8 of Caprock's submissions before me replicates section IC of its submissions in reply before the arbitral tribunal and deals with mitigation of loss. Sections 9 and 10 of Caprock's submissions deal with ALYK's suggested failure to meet its contractual obligations and with its suggested breaches of contract. I also do not address these issues, where , as I noted above, simply reagitating the arguments put in, and determined in, the arbitration cannot give rise to any basis for the Court not to enforce the Award under s 8 of the *International Arbitration Act*.

21 In section 12 of its submissions, Caprock contends that it is not a proper party to the proceeding because it acts only in its capacity as trustee for the Fund and not in its own capacity and that the Fund was created pursuant to the laws

of New South Wales and the trust deed for the Fund dated 18 August 2011 (Ex R1, tab 1). Caprock relies on a provision in the trust deed of the Fund that limits personal liability of the trustee of the Fund, to which I will refer below. It also contends that Caprock has only ever conducted itself as trustee of the Fund and not in its own capacity, and that proposition appears to have been accepted by the arbitral tribunal in its decision. Caprock then submits that, by reason of these matters, it was not itself a party to the Contract or the arbitration agreement contained in the Contract and therefore it is not a proper party to these proceedings and that the only party against which ALYK may commence the action is Caprock in its capacity as trustee for the Fund and that the Fund's liability is expressly limited to the assets of the Fund. ALYK properly accepted, in submissions before me, that Caprock's liability under the Contract may be limited under cl 21 of the Contract to the assets of the Fund, and properly recognised that the arbitral tribunal had held that Caprock's liability was limited in that manner in its Award. ALYK submits, and I accept, that the decisions to which Caprock referred, including *Helvetic Investment Corporation Pty Ltd v Knight* (1984) 9 ACLR 773, go no further than to establish the uncontroversial proposition that liability may be limited in that matter, and do not affect the joinder of Caprock as party to the proceedings.

22 Caprock's submission that it is not a proper party to the proceedings can be dealt with briefly. It is, of course, fundamental that a trust is not a separate legal entity under Australian law and a trustee is party to a contract entered into in respect of the trust. That principle was summarised by Allsop P, as his Honour then was, writing extrajudicially, in a paper "The Nature of the Trustee's Right of Indemnity and Its Implications for Equitable Principles" (2012) as follows:

> "The relevant legal personality capable of entering contractual arrangements, or incurring liabilities, whether delictual or not, for the benefit of or in relation to the trust, is the trustee, not the beneficiary (unless the trustee is constituted as the agent of the beneficiary). The trustee is personally liable for debts or liabilities incurred in the course of transactions concerning the trust.
>
> The liability of the trustee is made out in accordance with ordinary principles of law, whether statute, contract, tort, equity or restitution. The rights of a creditor against the trustee personally are no less and no more than against any other entity. At least in Anglo-Australian law there is no direct access by the creditor to the trust assets."

23 Similarly, Mr Loxton and Dr D'Angelo summarised this principle in their article, "Trustees' limitation of liability: Myths, mysteries and a model clause" (2013) 41 ABLR 142 at 143 as follows:

> "Because a trust is not a juristic entity with separate legal personality, all debts, liabilities and expenses (generally, "liabilities") incurred by a trustee, even for trust purposes, are personal. This is so even if a counterparty engaging with a person knows that the person is doing so as a trustee; the mere identification of a person's trustee status in a contract is not sufficient of itself to limit its personal liability."

I will address the relevance of a contractual limitation on the extent of Caprock's liability in the Contract, which does not affect whether it was party to the Contract, below.

24 In *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367, the plurality in the High Court observed that:

> "It is common ground that a trustee who in discharge of his trust enters into business transactions is personally liable for any debts that are incurred in the course of those transactions: Vacuum Oil Co Pty Ltd v Wiltshire (1945) 72 CLR 319. However, he is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets: Vacuum Oil Co Pty Ltd v Wiltshire, supra."

25 That principle has also recently been noted by the Court of Appeal in rejecting a very similar submission to that put by Caprock, in *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia* [2014] NSWCA 402, in a passage which I cite not because it establishes any new principle, but because it summarises fundamental aspects of trust law that are inconsistent with the position put by Caprock. Leeming JA (with whom Beazley P and Macfarlan JA agreed) observed (at [13]-[18]) that:

> "[The appellant in that case] is of the view that a trust is a legal person, distinct from the trustee. … [The appellant] put it as follows in oral submissions in the appeal:
>
> So what his Honour did was all, with great respect to his Honour, his Honour understood that Ceyser Pty Ltd, in its own capacity, was the trust. It's not. The trust is totally different, which is under Ceyser Hybrid Unit Trust. Ceyser Hybrid Unit Trust was not a party to the loan or the guarantee. His Honour found that all the documentation were executed in the name of Ceyser as trustee for Ceyser Hybrid Unit Trust.
>
> [The appellant's] view is wrong. That is not to say it is not widespread: see for recent examples described in judgments of this court *P & M Quality Smallgoods Pty Ltd v Leap Seng* [2013] NSWCA 167 at [6] and *Lewis v*

> *Condon* [2013] NSWCA 204; 85 NSWLR 99 at [79]. But the prevalence of an erroneous view does not make it right.
>
> Subject to statute, a trust has no separate legal personality from the trustee. An obligation incurred by a trustee, whether or not it is properly incurred in accordance with the trustee's obligations as trustee, may ordinarily be enforced in the same way as an obligation incurred by a person who is not a trustee. Sir George Jessel MR long ago said that the creditor of a trustee or executor "has a personal right to sue him and to get judgment and make him a bankrupt": *Re Johnson; Shearman v Robinson* (1880) 15 Ch D 548 at 552. That judgment was delivered shortly after the liquidation of the City of Glasgow Bank in 1878, which, as Lord Rodger JSC said, "brought ruin on many people who had merely held shares as trustees" and indicated with "remorseless clarity" that a person entered on a company register in any capacity was a member with all relevant rights and liabilities: *Farstad Supply AS v Enviroco Ltd* [2011] UKSC 16; [2011] 1 WLR 921 at [69].
>
> True it is that a creditor of a trustee may have additional rights by reason of the fact that the trustee has legal title to trust assets. In particular, where the trustee's obligation to the creditor was properly incurred, the trustee will regularly (although it will depend upon the terms of the trust) enjoy a right to be indemnified from the trust assets: *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; 224 CLR 98 at [50]. The creditor may, in an appropriate case, be subrogated to the trustee's rights: *Re Raybould; Raybould v Turner* [1900] 1 Ch 199; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 328 and 335–336.
>
> It is also true that a creditor may contract on terms that limit the prima facie unlimited personal liability of the trustee to the assets held on trust: see J Mowbray QC et al, *Lewin on Trusts*, 18th ed, Sweet & Maxwell, 2008 at pp 678–679. This court's decision in *Helvetic Investment Corporation Pty Ltd v Knight* (1984) 9 ACLR 773 demonstrates that any such limitation must emerge from the words or the surrounding circumstances as the proper construction of the contract. …

26 Accordingly, the proper defendant in the proceedings is Caprock, and nothing turns on whether it is expressly described as acting as trustee for the Fund. Any judgment is properly made against Caprock, albeit that it may be entitled to rely on the terms of limitation of liability in the trust deed in that respect, and it may then exercise any right of exoneration or indemnity against the assets of the Fund in order to meet the judgment against it.

27 In section 13 of its submissions, Caprock deals with the jurisdiction of the arbitral tribunal, apparently repeating a submission that it put to the arbitral tribunal that ALYK was not entitled to submit to the tribunal that the demand on the SBLC was an abuse of process, or at least was not authorised by the Contract, because Slattery J had held in the proceedings in this Court that there was not an express or implied stipulation in the Contract that prevented the making of that demand. Caprock contends that his Honour had rejected

ALYK's claim that the SBLC was an initial payment guarantee and that the arbitral tribunal did not have jurisdiction to revisit those matters and that the Court had determined the validity of the demand pursuant to the SBLC. Caprock also submits that the arbitral tribunal did not have jurisdiction to investigate the role and purpose of the SBLC or to determine whether or not the demand was properly made, and that the question before the tribunal was whether there was a breach of contract by Caprock, not whether the SBLC was capable of being called upon in the circumstances. Caprock's concluding submission, in that respect, is that the demand:

> "was properly considered and determined by a competent Court. The Supreme Court properly and finally determined the SBLC responded to the First Demand and directed the Bank to pay. The referral of the matter by the Supreme Court for Arbitration was not an open invitation to [ALYK] to re-litigate the issue: res judicarta [sic]."

28 ALYK responds, and I accept, that the only issue determined in the proceedings before Slattery J was whether there was a contractual basis for ALYK to prevent a demand being made under the SBLC pending resolution of the underlying contractual dispute between ALYK and Caprock. The limits of the matters before Slattery J and his Honour's findings are made clear in his judgment (at [6]–[7]) as follows:

> "It is important to distinguish what these proceedings decide on a final basis, from what they do not decide. The principal relief ALYK seeks in its Summons is an order that Caprock 'not make any demand or further demand upon [CCB] pursuant to the [SBLC] dated 11 November 2011 or otherwise': Summons, claim 1. The Summons seeks other supplementary relief: that Caprock notify [CCB] that its demand on the [SBLC] is withdrawn (claim 2); and, an order that [CCB] not make any payment to Caprock pursuant to the SBLC (claim 3). These reasons construe the Contract as amended only for the purpose of determining whether this relief should be granted on a final basis. [CCB] appeared through counsel to see that its interest was protected but indicated that it did not otherwise seek to intervene and would co-operate with whichever course the court ordered: to restrain or allow the call on the [SBLC].
>
> But there are other issues between the parties which are yet to be determined by arbitration. Those other underlying contractual disputes between the parties are necessarily elaborated to a degree in these reasons. But they are not decided by this judgment. They only appear in these reasons to give background to the present dispute. Whether or not ALYK or Caprock is in breach of the Contract will be determined by arbitration. These reasons do not determine whether the Contract as amended has been breached. They only determine whether in the circumstances which include mutual allegations of breach of the Contract as amended, Caprock may be enjoined under the Contract from calling on the [SBLC] with [CCB]."

29 Where his Honour made clear that he was only deciding whether Caprock could be enjoined from calling on the SBLC, then his Honour's observations gave rise to no res judicata or estoppel as to other matters as to the contractual position as between ALYK and Caprock or the Fund. That conclusion is all the more apparent where his Honour's orders for payment into Court themselves provided for the referral of those other matters to arbitration. His Honour's reasoning was directed to the "autonomy principle" and to the limited circumstances in which a party could be restrained from making a demand on a guarantee, and he expressly observed (at [105]) that the contractual validity of the demand under the SBLC would be determined by the arbitration.

30 As ALYK points out, Slattery J made no finding as to whether Caprock had any right to retain the US $20 million payable under the SBLC, although his Honour found that ALYK could not prevent the SBLC being called upon. That matter was determined by the arbitral tribunal, and it was within the jurisdiction conferred by the parties on it under the arbitration clause in the Contract in doing so. The arbitral tribunal was itself conscious of the difference between the matters determined by the Court and the matters which it was required to determine, and observed in its decision (Award, [293]) that:

> "The Arbitral Tribunal will determine whether the Demand under the SBLC was valid pursuant to the terms of the contract between ALYK and Caprock. It will not determine disputes already decided by the Supreme Court of New South Wales. The dispute here and the dispute before the Supreme Court of New South Wales are conceptually different even if the contract between ALYK and Caprock comprises the SBLC and even if the Arbitral Tribunal will hence also have to examine the language, the role and purpose of the SBLC in connection with its own analysis of the demand pursuant to the terms of the contract. As [Caprock] put it, that may be a subtle but very fundamental difference."

The arbitral tribunal also held (Award, [296]) that it had jurisdiction to determine whether Caprock was entitled to make a demand under the SBLC and whether such demand was valid or not in light of the Contract. That determination is binding upon the parties by the terms of their submission to arbitration under the Contract and that is sufficient, absent any other defence to the enforcement of the Award under s 8 of the *International Arbitration Act*, to support an order for its enforcement.

31 The arbitral tribunal also dealt at length with the contractual case which Caprock seeks to reagitate in the early parts of its submissions before me. In doing so, it reviewed the submissions made by both parties in respect of relevant issues and set out its determination in respect of those issues. The arbitral tribunal held (Award, [392]–[393]) that ALYK was not in breach of cl 3 of the 21 July addendum or of cl 6 of the Contract, and had not committed contractual breaches or material breaches within the meaning of cl 19 of the Contract and concluded (at [397]) that:

> "Caprock is not entitled to receive or retain the proceeds, namely the amount of US $20 million currently held on trust by the Supreme Court of New South Wales. First, Caprock's demand under the SBLC was unjustified. Secondly, Caprock's damage claims fails because [ALYK] did not breach the contract and because [Caprock] have not establish the loss allegedly suffered."

32 That finding also makes clear the lack of overlap between the issues determined by the arbitral tribunal and the issues determined by Slattery J in this Court. His Honour was determining whether ALYK was entitled to restrain the making of a demand under the SBLC, irrespective of whether it was properly based, and held, in substance, that ALYK was not entitled to restrain the making of that demand, as against CCB, even if it was not properly justified under the Contract between Caprock and ALYK. By contrast, the arbitral tribunal was determining matters that had not been determined by Slattery J, whether the demand was properly based under the Contract, and whether Caprock was entitled to retain the proceeds of the demand under the Contract.

33 Caprock then deals, in section 14 of its submissions, with the conduct of the arbitral tribunal. This section of the submissions seems to me to raise matters that are properly raised in opposition to the enforcement of the Award under s 8 of the *International Arbitration Act*, although I am not satisfied that Caprock's claims are justified for the reasons noted below. Caprock submits, variously, that the ICC served the Award on ALYK before it served the Award on Caprock, implicitly by reason of some undisclosed and unexplained animus against Caprock; that the arbitral tribunal was biased toward ALYK from the first day of the hearing; that the arbitral tribunal and ALYK's Counsel used the German language and that Caprock's then Australian solicitor had, on several occasions, made allegations of bias against the arbitral tribunal; that the arbitral

tribunal excluded evidence that would have established that false submissions were made by ALYK or its Counsel to the tribunal; that the arbitral tribunal failed to determine the procedural law of the arbitration and law of the Contract, prior to its substantive decision; that the arbitral tribunal reversed the usual order of witnesses to require Mr Yassa to give evidence first "so as to ensure ALYK was given the advantage of cross-examining [Caprock's] witnesses prior to calling their own"; and the arbitral tribunal permitted ALYK to make references to Australian case law in its closing submissions.

34 Section 14 of Caprock's submissions raises allegations of bias as against the arbitral tribunal. ALYK properly accepts that, if bias were established, that may give rise to reason not to enforce the Award on the public policy ground under s 8(7)(b) of the *International Arbitration Act*. However, it emphasises that, and I accept that, the Court would only decline to enforce the Award on that basis if there was real practical injustice or real unfairness in the conduct of the reference or in the making of the award: *TCL Air Conditioner* above at [111]; *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403 at [43–44]. ALYK in turn makes detailed submissions as to the factual circumstances of each of the matters on which Caprock relies to establish bias. I have had regard to those submissions, and to the evidence referred to in them, as well as to the matters addressed by Mr Yassa in that regard in oral submissions. In oral submissions, Mr Yassa submitted that, just because the Tribunal said that it was not biased, that did not mean that was correct (T42). While that proposition is plainly true, the question whether there was actual or apprehended bias on the part of the arbitral tribunal is to be determined by reference to the conduct of the arbitral hearing. There is nothing in the material to which Mr Yassa has taken me that indicates either actual or apprehended bias, and there is nothing that indicates a denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award.

35 The parties' submissions together provide a comprehensive account of the relevant events which are also generally recorded in correspondence between the parties and the arbitral tribunal. The allegations of bias are weakened, as ALYK points out, by the fact that the tribunal also rejected procedural points taken by ALYK, including its attempt to exclude Mr Yassa's witness statement

which had not been filed within time (Ex A5, tab 37). ALYK also relies on Article 39 of the ICC Rules, which provides that a party which proceeds with an arbitration without raising an objection to various matters shall be deemed to have waived its right to object (Ex A2, tab 8, p172) and points to Mr Yassa's confirmation, at the conclusion of the hearing before the arbitral tribunal, that he did not have any complaint concerning the conduct of the proceedings and the hearing (Ex R1, tab 11, p80; Killias 6.5.15 [21]–[22], Ex A5, tab 85). ALYK also points to the absence of any application to the Swiss Courts in respect of the conduct of the arbitration or to set aside the Award. These matters plainly do not assist Caprock's case. However, I do not consider it necessary to rely on them, because it does not seem to me that the matters complained of support a claim for bias or apprehended bias on any view, or a denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award.

36 First, Caprock refers to the circumstances on which the Award apparently became available to ALYK before it was received by Caprock. Mr Yassa's evidence is that the Award was not served on Caprock until 10 February 2015 (Yassa 25.2.15 [5]). Mr Yassa also seeks to treat the ICC's letter dated 30 January 2015 as evidence that the Award had not been rendered by the Tribunal, notwithstanding all appearances to the contrary (Yassa 25.2.15). That submission seems to me to be wholly unpersuasive. The ICC dispatched the Award to both parties on 22 January 2015, from its offices in France, sending ALYK's copy of the Award to ALYK's legal representatives in Switzerland by federal express and Caprock's copy of the award to Mr Yassa in Sydney also by federal express (Ex A5, tab 79). It appears that that Award was dispatched by the ICC Secretariat, not by the arbitral tribunal which determined the matter, and the delay in Caprock's receipt of the award is in any event readily explicable by the fact that it was apparently sent from France by commercial courier, and it would hardly be surprising if an item sent from France was received by ALYK's legal representatives in Switzerland before it was received by Caprock in Australia.

37 The letter dated 30 January 2015 from the ICC, extending the time for the Award (Ex A5, tab 80) seems to me to be no more than a somewhat belated

notification of an entirely uncontroversial decision to extend the time for the Award, which had been made by the International Court of Arbitration prior to the delivery of the Award, although not, in the event, notified until after the delivery of the Award. It appears to have been the practice of the ICC to advise of extensions for the time for delivery of the Award some time after they were made; that at least occurred in respect of an earlier extension made in November 2012, where advice of the extension was given over three weeks after it was made. It seems that the advice of an extension in January 2013 was issued after the Award had been given. These matters are not indicative of bias, apprehended bias, a denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award.

38 Second, complaint is made as to the use of German language in the arbitration. The totality of that use of the German language is found in two words in the Statement of Claim, once in paragraph 10 and once in paragraph 80, across a Statement of Claim comprising 211 paragraphs over 59 pages. Those two words which were in each case adjacent to the relevant English usage, and were apparently an attempt to identify a comparable concept in Swiss law for the relevant English usage. The arbitral tribunal subsequently heard detailed submissions from the parties, in which Caprock complained vigorously as to the use of those two words, and Caprock was allowed ample opportunity to advance, and did advance, its submissions in that respect. ALYK responded to the complaint, not surprisingly, that the use of those two words was immaterial and caused Caprock no disadvantage, where it was represented by Swiss legal counsel at the relevant time (Ex A5, tab 21). The arbitral tribunal concluded, in respect of the use of those two German words, also not surprisingly, that:

> "The Arbitral Tribunal does not find that adding the original language of the legal terms translated into English can cause any prejudice to the other Party.
>
> Further, it would be clearly disproportionate to request [ALYK] to re-plead at this stage its Statement of Claim." (Ex A5, tab 26)

As ALYK also points out, notwithstanding the use of the German language in the two words in the Statement of Claim, Caprock's Defence provided a substantive response to each of the relevant allegations in the Statement of Claim, and it seems to me that Caprock suffered no disadvantage in that

regard. This complaint seems to me to be without substantive merit, and does not support a finding of bias, apprehended bias, a denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award.

39 Third, Caprock points to the fact that its solicitor had written to the Tribunal alleging bias and, I should add, had done so on several occasions. That, of course, does not establish the correctness of the allegation made, and takes that claim of bias no further.

40 Fourth, Caprock complains that ALYK's counsel in the arbitral hearing misled the arbitral tribunal in relation to the role of two potential witnesses from ALYK, or the Yankuang Group, who Caprock sought to have the tribunal require ALYK to call, and that the arbitral tribunal accepted the approach proposed by ALYK in respect of that issue. There was a dispute between ALYK and Caprock as to the relevance of the evidence of those two potential witnesses and the arbitral tribunal allowed both parties the opportunity to make detailed submissions in respect of that dispute. One of those witnesses was the former chairman of the Yankuang Group and, ALYK contended, was in charge of the overall operation and strategy of the Group and not a relevant witness in respect of the transaction in issue. ALYK accepted that the other was involved in the negotiation of the terms of the Contract, but contended that the fact of the Contract was not disputed and that witness was not involved in detailed technical issues or communication with Caprock, which ALYK contended were addressed by Mr Xinquan and Mr Gia who gave evidence before the tribunal. The arbitral tribunal noted the position that those witnesses occupied and that Caprock had not identified the factual issues for which their testimony was required or the precise scope of that testimony and did not allow that request when it was first made, while expressly reserving Caprock's ability to renew that request depending on the outcome of examinations at the hearing, which it appears that Caprock did not do (Ex A5, tab 51).

41 The dispute as to the relevance of those two witnesses to the arbitration was a matter for the arbitral tribunal, not for me, and the evidence necessary to determine that question is in any event not before me. It seems to me that the

arbitral tribunal gave the parties a proper opportunity to be heard in respect of that dispute, and nothing in the tribunal's approach to that question is indicative of bias or apprehended bias, denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award.

42 Fifth, Caprock submits that the arbitral tribunal failed to rule, in advance, as to the procedural law to be applied in the arbitration. I do not consider it necessary to determine the dispute between the parties as to whether the tribunal had or had not, at one point, contemplated that it might do so, since a change of mind on its part is not a matter that alone, or together with the other matters which Caprock refers, would establish bias, denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award. The arbitral tribunal made clear, at least by 28 March 2014, that it did not consider that it was appropriate to rule at that stage on the applicable substantive law and procedural law of the arbitration (Ex A5, tab 47). Again, it seems to me that that approach was not indicative of bias, apprehended bias, a denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award.

43 Sixth, Caprock complains that Mr Yassa was required to give evidence first, and to be cross-examined, and asserts that the arbitral tribunal took that course so as to advantage ALYK, although Caprock does not seek to explain why the tribunal would have wished to take that course. As ALYK points out, that occurred in circumstances that Mr Yassa was both a material witness in the proceedings for Caprock and sought to represent it in the arbitration. The tribunal approached the question of the order of witnesses, not unreasonably, as involving related questions of whether Mr Yassa should be permitted to be present during the examination of ALYK's witnesses, to the extent that he sought to conduct Caprock's case, and whether he should be heard as the first witness, and determined that matter, again sensibly, by balancing the importance to Caprock of having its party representative present at the hearing, and the inconsistency with usual practice of having Mr Yassa present before he had testified, and observed that:

> "The hearing of Mr Peter Yassa first will allow him to stay in the room as expressly requested by [Caprock]."

44 The arbitral tribunal also noted that Caprock would have the opportunity to express its views on the testimony of ALYK's witnesses in submissions, and that the concept of a witness having the "last word" was not appropriate in relation to the sequencing of witnesses. There would have been an obvious difficulty as to the weight that should be given to Mr Yassa's evidence, had he given it after he had been present throughout the evidence given by ALYK's witnesses, which may have been as much a difficulty for Caprock as it would have been for the arbitral tribunal in determining the proceedings on their merits. It seems to me that the tribunal's decision to seek to manage that difficulty, by hearing Mr Yassa's evidence first, does not indicate bias, apprehended bias, a denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award.

45 Seventh, Caprock relies on the fact that ALYK (and, I should add, Caprock) were permitted to refer to Australian legal authorities in supplementary submissions. There is no obvious reason why that course was in any way inappropriate and, in any event, it is hardly indicative of bias or apprehended bias or a denial of natural justice where both parties were permitted to take it.

46 Eighth, a complaint is made as to submissions which were made by ALYK to the arbitral tribunal in relation to the circumstances in which a witness called by Caprock, Ms Stojkovic, was not available for cross-examination. ALYK points out, and I accept, that this is not a matter that is indicative of bias, apprehended bias or a denial of natural justice and it did not have any practical impact on the outcome of the arbitration, where Ms Stojkovic's credit was not in issue and no adverse finding was made by the arbitral tribunal as to Ms Stojkovic or her evidence.

47 Section 15 of Caprock's submission deals with the question whether ALYK is otherwise known as Yankuang, as distinct from being a separate corporate entity within the Yankuang Group. That question seems to me to both uncontroversial and a distraction. Although Caprock recognises that YAIT paid the US $20 million payable to CCB, after CCB paid that amount into Court, I referred above to the agreement between ALYK and YAIT in respect of the treatment of that amount when recovered by ALYK (Xinquan, 9.3.15, [8]–[14]).

In any event, nothing turns upon that, because the arbitral tribunal's decision was that Caprock is not entitled to retain those funds as against ALYK, and that is sufficient for an order that they be repaid to ALYK, irrespective of any question of the entitlement of its related entities to be repaid those funds by ALYK.

48 Section 16 of Caprock's submissions deals with the payment of AU $1 million into Court and the US $2 million advance payment made by an entity within the Yankuang Group. Caprock submits that another entity, rather than ALYK, paid the relevant monies into Court and that a different entity, Yankuang International Trade (Shandong) Co Ltd ("YIT") paid the US $2 million required under the 21 July addendum to the Contract. The arbitral tribunal held that YIT paid the US $2 million due under the 21 July addendum, but nothing turns on that where the tribunal also held that ALYK is liable to YIT in that regard (Award, [410]) and that ALYK is entitled to repayment of the monies as against Caprock. The arbitral tribunal held (Award, [409]) that Caprock was not entitled to keep the amount of US $2 million that had been paid to it, which was to be credited against the first shipment, and that its withholding of that amount of money breached cl 4 of the 21 July addendum and the Corporate Advance Payment Guarantee. It also observed that it was not relevant that that amount was paid by an affiliate of ALYK, where ALYK had a debt to that affiliate and had suffered damage in an amount that was equal to the sum of US $2 million and (Award, [410]) that Caprock must reimburse the amount of US $2 million to ALYK.

49 Section 17 of Caprock's submissions before me replicates section IB of its submissions before the arbitral tribunal. Caprock also points in its submissions to limitation of liability clauses contained in Caprock's "Corporate Performance Bond" and in its "Advanced Payment Guarantee". Caprock in turn seeks various forms of relief in its submissions, none of which were sought by appropriate Originating Process or Interlocutory Process. However, I have addressed several of these matters above in determining the substance of the issues in dispute.

50 I am satisfied that none of these matters indicate, alone or together, any bias, apprehended bias, denial of natural justice or anything that would indicate that it was contrary to public policy to enforce the Award in respect of the arbitral tribunal's ruling. The express statutory policy of the *International Arbitration Act* and the terms of s 8 of the *Act* therefore require the Court to enforce the award.

Orders and costs

51 As I noted above, by paragraph 1 of its Further Amended Summons, ALYK seeks an order under s 8(2) of the *International Arbitration Act* that the Award be enforced as a judgment of this Court. I am satisfied that the Court should make that order, by reasons of ss 8 and 39 of the *International Arbitration Act* and for the reasons noted above.

52 By paragraphs 2 and 3 of its Further Amended Summons, ALYK seeks declaratory relief. Mr Hogan-Doran accepted in submissions that the declarations sought by ALYK in paragraphs 2 and 3 of its Further Amended Summons filed by ALYK were merely precursors to the orders sought in paragraphs 5 and 6 of the Further Amended Summons and it does not seem to me that there is any utility in making them.

53 By paragraphs 4 and 7 of its Further Amended Summons, ALYK also seeks an order that judgment be entered in favour of ALYK against Caprock in terms of the Award that it pay ALYK amounts of US $2,384,000 and EUR 500,000, and that interest accrue on those amounts as may from time to time be due under s 101 of the *Civil Procedure Act*. As the parties accepted in the course of submissions, such orders could not be made unless and until it is established that the Fund has (or, possibly, had) sufficient assets to meet them, having regard to the limitation on Caprock's liability to the assets of the Fund under the Contract. That matter was not addressed at the hearing before me and I will reserve liberty to apply in respect of that issue.

54 By paragraphs 5 and 6 of its Further Amended Summons, ALYK seeks orders that amounts of US $20 million paid into Court by CCB on or about 1 February 2013 and the amount of AU $1 million paid into Court on or about 1 February 2013 be paid to it together with any interest earned on those monies. The order for the payment of US $20 million be paid to ALYK is consequential on the

enforcement of the Award in its favour. The limitation of liability provision in the trust deed of the Fund can have no impact on the payment out of Court of the amount paid by the Fund into Court. If property in that amount has not passed to the Fund, where it was ordered to be paid into the Court, then the limitation of liability clause has no application. If property in that amount has passed to the Fund, then it is now an asset of the Fund that is available to be paid out pursuant to the award in ALYK's favour, where Caprock has led no affirmative evidence to establish other liabilities of the Fund that need be taken into account, and Mr Yassa's evidence in his affidavit dated 24 September 2012, which has not been qualified by subsequent evidence, was that the Fund had substantial assets which well exceeded the amount of US $20 million sought to be paid out of Court. The requirement for payment of AU $1 million into Court secured any loss that might have been suffered by Caprock by reason of the injunctive relief granted, if ALYK had not been successful in the arbitration. There is no occasion to retain such security where ALYK has been successful in obtaining final relief in the arbitration and this judgment. I am satisfied that orders for the payments of those amounts to ALYK should be made.

55 By paragraph 8 of its Further Amended Summons, ALYK seeks an order that the costs of its application for freezing orders made on 14 December 2012, as reserved on that day, be paid by the First Defendant. ALYK was successful in obtaining those orders, which were intended to preserve the amount that was subject of the claims in the arbitration, in which it was also successful. The well-recognised principle that costs follow the event supports an order for costs in ALYK's favour in respect of that application.

56 I also note, for completeness, that, in paragraph 19(h) of Caprock's submissions, it sought a declaration that the Fund's liability is expressly limited to the assets of the Fund. Quite apart from the fact that no Interlocutory Process was filed so as to seek that declaration, it seems to me that it should not be made on substantive grounds. There is no dispute between the parties that the Contract contains a limitation of liability provision to that effect or as to its terms, and the declaration that is sought would not determine any substantive dispute between the parties, which depends not on the existence of that limitation but, possibly, on the date on which its operation is to be

determined, and what relevantly are the assets of the Fund. I also do not propose to address several other issues raised by ALYK, which seemed to me to seek something in the nature of judicial advice as to various issues which may or may not arise between the parties, depending upon the means by which ALYK seeks to enforce a judgment in its favour.

57 ALYK has been successful in respect of the issues heard before me on 26 June 2015 and Caprock should pay its costs of and incidental to that hearing, as agreed or as assessed.

58 Accordingly, I make the following orders:

1. Pursuant to s 8(2) of the *International Arbitration Act* 1974 (Cth), the award ("Award") by Prof Dr Sebastien Besson, Mr Daniel Hochstrasser and Mr David Unterhalter in Geneva, Switzerland published on 20 January 2015 and notified to the Plaintiff and the First Defendant be enforced as a judgment of this Court.

2. Order that the sum of US $20,000,000 paid into court by the Second Defendant on or about 11 February 2013 be paid to the Plaintiff together with any interest earned on that amount.

3. Order that the sum of AU $1,000,000 paid into court by or on behalf of the Plaintiff on or about 1 February 2013 be paid to the Plaintiff together with any interest earned on that amount.

4. The costs of the Plaintiff's application made on 14 December 2012, as reserved on that day, and of the hearing on 26 June 2015, be paid by the First Defendant, as agreed or as assessed.

5. Liberty to restore, on 5 business days' notice specifying the relief sought, the issues whether, and to what extent, there should be judgment in favour of the Plaintiff against the First Defendant in respect of the amounts of USD 2,384,000 and EUR 500,000 or any part of those amounts.

****

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