FEDERAL COURT OF AUSTRALIA

Beijing Be Green Import & Export Co Ltd v Elders International Australia Pty Ltd [2014] FCA 1375

Citation:	Beijing Be Green Import & Export Co Ltd v Elders International Australia Pty Ltd [2014] FCA 1375
Parties:	**BEIJING BE GREEN IMPORT & EXPORT CO LTD v ELDERS INTERNATIONAL AUSTRALIA PTY LTD (ACN 007 735 168)**
File number:	NSD 1088 of 2014
Judge:	**FOSTER J**
Date of Orders:	24 November 2014
Date of Publication of Reasons:	15 December 2014
Catchwords:	**ARBITRATION** – International arbitration – whether the Court should stay a judgment of the Court ordered by way of recognition and enforcement of a foreign arbitral award which was obtained and entered regularly and without any opposition from the judgment debtor until such time as a tribunal constituted by a foreign arbitral body (CIETAC) has determined an unrelated claim between the judgment creditor and the judgment debtor
Legislation:	*Corporations Act 2001* (Cth), s 459G and s 459H *Federal Court of Australia Act 1976* (Cth), s 23 *International Arbitration Act 1974* (Cth), ss 2D, 3, 8, 9, 10, 10A and 39 *Federal Court Rules 2011*, r 41.03 and r 41.11
Cases cited:	*Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882 *Gujarat NRE Coke Ltd v Coeclerici Asia (PTE) Ltd* [2013] FCA 918 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; [2007] 4 All ER 951; [2007] 2 All ER (Comm) 1053 *State Bank of Victoria v Parry* [1989] WAR 240 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295

	Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2) (2012) 201 FCR 535 *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2)* (2011) 277 ALR 441 Berger B and Kellerhals F, *International and Domestic Arbitration in Switzerland*, 2nd Ed, Thomson Reuters
Date of hearing:	24 November 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	83
Counsel for the Applicant:	Mr C Carter and Ms N Dewan
Solicitor for the Applicant:	King & Wood Mallesons
Solicitor/Advocate for the Respondent:	Mr JGF Harrowell of Hunt & Hunt Lawyers

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1088 of 2014**

BETWEEN:	**BEIJING BE GREEN IMPORT & EXPORT CO LTD** **Applicant**
AND:	**ELDERS INTERNATIONAL AUSTRALIA PTY LTD (ACN 007 735 168)** **Respondent**

JUDGE:	**FOSTER J**
DATE OF ORDER:	**24 NOVEMBER 2014**
WHERE MADE:	**SYDNEY**

THE COURT DECLARES THAT:

1. Pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth), the applicant is entitled to enforce the award dated 7 July 2014 (as corrected on 29 August 2014) (CIETACBJA [2014] No 0543) made by an Arbitral Tribunal constituted under the auspices of the China International Economic and Trade Arbitration Commission (Case File No G20130311) in Beijing, China, against the respondent as if the said award were a judgment of the Court.

THE COURT ORDERS THAT:

2. There be judgment in favour of the applicant against the respondent in the following amounts:
   (a) USD 2,820,902.48; and
   (b) RMB 675,854.31
   which sums include pre-judgment interest up to and including 24 November 2014 and certain costs, expenses and fees of and in relation to the said arbitration and award.
3. The respondent have leave to file an Interlocutory Application returnable *instanter* in which it seeks a stay of execution of the said judgment.
4. Service of the said Interlocutory Application and affidavits in support be dispensed with.

5. The said Interlocutory Application to be filed by the respondent pursuant to the leave granted in par 3 above be dismissed.

6. The respondent pay the applicant's costs of and incidental to this proceeding.

THE COURT NOTES THAT:

7. The respondent undertakes to the Court to file its Interlocutory Application, all affidavits in support and a copy of its Written Submissions dated 21 November 2014 electronically and to do so by 12 noon on 25 November 2014.

8. The applicant undertakes to the Court to file all affidavits relied upon by it in the proceeding and a copy of its Written Submissions dated 23 November 2014 electronically and to do so by 12 noon on 25 November 2014.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1088 of 2014**

BETWEEN:	**BEIJING BE GREEN IMPORT & EXPORT CO LTD** **Applicant**
AND:	**ELDERS INTERNATIONAL AUSTRALIA PTY LTD (ACN 007 735 168)** **Respondent**

JUDGE:	**FOSTER J**
DATE:	**15 DECEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 On 7 July 2014, the China International Economic and Trade Arbitration Commission (**CIETAC**) published a Final Award made by an Arbitral Tribunal appointed by it under its rules (CIETACBJA [2014] No 0543 Award) whereby the Tribunal determined various disputes which had arisen between the applicant, as claimant, and the respondent, as respondent. By correction published on 29 August 2014, the Tribunal made various corrections to the award published on 7 July 2014. Both the 7 July 2014 award and the 29 August 2014 correction were signed by only two of the three arbitrators which constituted the Tribunal. The third arbitrator, Mr Elson Pow, an Australian lawyer, did not sign either document. I shall refer to the 7 July 2014 award and the 29 August 2014 correction together as "**the Award**".

2 By the present proceeding, which was instituted on 24 October 2014, the applicant sought to enforce the Award pursuant to s 8 of the *International Arbitration Act 1974* (Cth) (**IAA**). The respondent did not oppose the making of an appropriate declaration nor did it oppose the entry of a money judgment in order to recognise and enforce and thus to give effect to the Award. However, the respondent applied for an order staying execution on the money judgment and the costs order made against it pending the determination of a separate arbitral proceeding instituted by it in China under the auspices of CIETAC. The respondent argued that, notwithstanding the fact that the subject matter of this separate arbitral proceeding is entirely unconnected with the subject matter of the Award, the claims which it has made in

this separate arbitral proceeding constitute a set-off or counterclaim of sufficient strength which, in all the circumstances, justify the grant of a stay of execution.

3 The hearing of the applicant's recognition and enforcement claims and of the respondent's application for a stay took place on 24 November 2014. On that day, I ordered that the applicant have judgment on its claims and refused to stay execution on that judgment. These are my reasons for making the declaration and orders which I made on 24 November 2014.

THE AWARD

4 The arbitral proceeding which resulted in the making of the Award concerned two contracts for the export and sale of live dairy heifers from Australia to China in order to assist China to increase its milk production. Those contracts were part of a series of contracts entered into between the respondent, as seller, and the applicant, as buyer, which were performed in the period from 2009 to 2013 pursuant to which 40,000 dairy heifers were sent from Australia to China. The value of the cattle sold under these arrangements exceeded USD 100 million. The applicant was not the end purchaser of the cattle. The heifers were ultimately destined for various Chinese dairy companies.

5 The two contracts which were addressed by the Award were Contract No BGL1205N dated 4 February 2012 (**C93**) and Contract No BGL1301N dated 16 January 2013 (**C96**).

6 Under C93, as varied, the respondent agreed to ship 4,000 dairy heifers (+/– 10%) to China for the total contract price of USD 10,604,750. Under C96, as varied, the respondent agreed to ship 2,800–3,000 dairy heifers (+/– 10%) to China for the total contract price of USD 6,900,000.

7 Each contract contained an arbitration clause in identical terms. Under that clause, in the event that disputes could not be resolved by negotiation, the parties agreed to submit any disputes arising from the execution of, or in connection with the particular contract, to CIETAC for arbitration according to the CIETSC rules of procedure. The parties also chose the law of China, International Customs and Public International Law, as the applicable substantive law to be applied to the resolution of such disputes.

8 The cattle required to be delivered pursuant to C93 and C96 were delivered. The full purchase price payable under each of those contracts was paid to the respondent.

9 Under the arrangements between the applicant and the respondent, the respondent was obliged to pay to the applicant a commission or facilitation fee in respect of each of the transactions effected pursuant to C93 and C96. Those fees were required to be paid, in effect, out of the purchase price, in each case, once the purchase price was received by the respondent.

10 By the time the respondent became obliged to pay those fees in respect of C93 and C96, a dispute had arisen between the applicant and the respondent under another contract for the sale of dairy heifers (**C90**). That contract had been entered into on 21 September 2011 although it was subsequently varied on at least two occasions, the latest formal variation of which was effected on 15 January 2013. The dispute under C90 involved a difference of opinion between the applicant and the respondent as to the legal effect of certain negotiations which took place in March and April 2013. By that time, the ultimate purchaser of the C90 cattle had withdrawn from its arrangements with the applicant and the applicant and respondent, as parties to C90, were endeavouring to agree a solution in respect of the problems caused by that withdrawal. According to the respondent, no agreed solution was reached. In those circumstances, the respondent held the applicant to the terms of C90 as varied on 15 January 2013. The respondent alleged that the applicant had refused to perform its obligations under C90. The respondent claimed that it had suffered losses amounting to USD 2,660,974.39 as a result of the applicant's breach of C90 and was entitled to set-off the amount of those losses against its obligations to pay facilitation fees under C93 and C96. The respondent claimed the difference after set-off (viz USD 128,672.39). For these reasons, the respondent withheld payment of the facilitation fees due to the applicant under C93 and C96. The respondent claimed that, as at the date of the hearing before me, its damages claim for breach of C90 amounted to USD 2,978,588.81 including interest, costs and fees.

11 On 28 April 2013, the applicant referred to CIETAC its claims for payment of the facilitation fees under C93 and C96 with a request that its claims be arbitrated in accordance with the arbitration clause in each of those contracts. With the consent of the parties, those claims were consolidated into one arbitration proceeding and dealt with accordingly by CIETAC.

12 In the second half of 2013, the parties lodged with CIETAC and exchanged pleadings, written submissions and evidence in relation to the consolidated arbitration proceeding. In late July 2013, the respondent submitted Statements of Defence and Counterclaim in relation to the consolidated arbitration proceeding. In its Counterclaim, the respondent claimed the amount

of USD 128,672.39 being the amount it said was due to it from the applicant after taking into account its claim to be entitled to set-off its losses under C90.

13 On 28 November 2013, CIETAC notified the parties that the Tribunal had determined to hold an oral hearing of the consolidated arbitration proceeding in Beijing on 13 January 2014. An oral hearing took place in Beijing on that date, as intended. After that oral hearing had concluded, further documents were lodged with the Tribunal and exchanged between the parties.

14 In the consolidated arbitration proceeding, the applicant submitted that the Tribunal had no jurisdiction to determine the respondent's Counterclaim (which related entirely to C90) and that the respondent was not entitled to any right of offset.

15 At pp 11–17 of the English translation of the Award published on 7 July 2014, the Tribunal expressed its opinion in relation to the disputes which had been referred to it. At pp 12–15, the Tribunal addressed the respondent's Counterclaim. The Tribunal held that:

(a) The respondent had not complied with the deadline specified by the rules for the filing of its Counterclaim. It was late;

(b) The content of the Counterclaim was unclear and uncertain. For that reason also, the Counterclaim did not comply with the rules governing the consolidated arbitration;

(c) Because the Counterclaim arose from C90, the Counterclaim was wholly unrelated to the consolidated arbitration proceeding with which the Tribunal was dealing. That proceeding was confined to C93 and C96. For this reason, the Tribunal had no jurisdiction over the dispute arising out of C90. That dispute had to be determined under the auspices of CIETAC in accordance with the separate arbitration clause in C90. In the absence of consent from the applicant, the C90 dispute could not be dealt with by the Tribunal charged with dealing with the disputes under C93 and C96; and

(d) The respondent had no right to set-off its claims under C90 against the applicant's claims under C93 and C96. The respondent had relied upon two bases under Chinese law in endeavouring to do so: First, consensual offset; and second, statutory offset. At pp 14–15, the Tribunal rejected all of the respondent's arguments in support of its claimed entitlement to an offset.

16 The Tribunal went on to consider the applicant's claims under C93 and C96 and upheld them. At p 17, the Tribunal said:

III. Award

For all the reasons above, the Arbitral Tribunal has issued the award as follows:

1. The Respondent pay the Claimant the Contract Price of USD 2,532,275;

2. The Respondent pay the Claimant interest for the deferred payment, which is based on the principal of USD 1,323,500, calculated from 2 March 2013 to the actual payment date at an annual interest rate of 5.6% as stipulated by the People's Bank of China for a corresponding 6-month loan; as well as interest on the deferred payment based on the principal of USD 1,208,775, calculated from 6 April 2013 to the actual payment date at an annual interest rate of 5.6% as stipulated by the People's Bank of China for a corresponding 6-month loan;

3. The Respondent pay the Claimant RMB 250,000 to compensate the Claimant for legal fees.

4. The arbitration fee of RMB 201,835 in this Case be entirely borne by the Respondent. Because the Claimant paid RMB 201,835 as an advance payment for the arbitration, which is the exact amount of the arbitration fee, the Respondent pay the Claimant RMB 201,835 in compensation. *[This figure was later corrected.]*

5. The actual fees and expenses incurred by the Australian arbitrator Mr. Elson Pow for assessing this case, which are AUD 24,904.25 in total, be borne by the Respondent.

The advance arbitration fee of USD 5,147 paid by the Respondent for the so-called counterclaim be refunded by CIETAC to the Respondent due to rejection of the so-called counterclaim which failed to constitute a counterclaim under the Arbitration Rules.

Each amount payable by the Respondent above be fully paid within 30 days after this Award is determined. For any late payments, additional charges be paid according to Article 253 of the Civil Procedure Law of the People's Republic of China.

This Award is final and comes into effect as of the date of the decision.

17 The respondent did not challenge the Award in the Courts of China. The respondent did not seek a stay of enforcement of the Award in the Courts of China or before CIETAC. In those circumstances, the respondent must be taken to have accepted the decision of the Tribunal embodied in the Award.

18 As far as the evidence before me goes, the respondent took no steps to challenge the Award or to be relieved of the obligation to pay to the applicant the amounts awarded under the Award (even on a temporary basis) until the applicant applied to this Court in the present proceeding to have the Award recognised and enforced in Australia under s 8 of the IAA. Only then did the respondent take action. All that it did, however, was to concede the applicant's entitlement to have the Award enforced in Australia and to apply for a temporary stay of execution on the judgment giving effect to the Award pending the determination of the C90 arbitral proceeding in China.

19 In the meantime, however, the respondent did not pay the Award debt, or any part of that debt. It did, however, offer to secure the Award debt by means of a bank guarantee provided by National Australia Bank Limited in the amount of AUD 3,500,000 as a condition of the grant of any stay of execution in this Court.

RECOGNITION AND ENFORCEMENT

20 When this proceeding was first returned before the Court on 6 November 2014, the respondent's advocate informed the Court that the respondent did not oppose the making of an appropriate declaration and the entry of an appropriate money judgment in order to give effect to the Award. However, he also informed the Court that the respondent wished to apply for a stay of execution on the judgment that would be entered as a result of his client's non-opposition to the applicant's claims for enforcement.

21 In those circumstances, subject to the Court being satisfied that it ought to recognise and enforce the Award, the only contest which required resolution by the Court was the respondent's application for a stay.

22 At the hearing before me, the applicant proved the following matters:

(a) The Award is a *foreign award* within the meaning of s 8(1) of the IAA (as to which see the definition of *foreign award* in s 3(1) of the IAA);

(b) Exhibit AB7 to the affidavit of Alexander Baykitch sworn on 24 October 2014 comprises a duly authenticated original Award in the Chinese language together with an English translation of that Award. The applicant therefore satisfied s 9(1)(a) of the IAA as explained in s 9(2) to s 9(5) of the IAA;

(c) Exhibits AB2, AB3, AB4 and AB5 to the said affidavit of Alexander Baykitch contain duly certified copies of the documents which comprise contract C93 and contract C96. Each of those contracts contains cl 13 which is the arbitration agreement in each case under which the Award purports to have been made. The applicant therefore satisfied s 9(1)(b) of the IAA;

(d) Exhibit AB17 to the said affidavit of Alexander Baykitch is a certified copy of a certificate from the Department of Foreign Affairs and Trade, Australia, dated 18 September 2014, signed by a delegate of the Secretary of that department, which confirms that China acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 22 January 1987 and continues to be a Convention

country for the purposes of the IAA. The applicant therefore satisfied s 10 and s 10A of the IAA; and

(e) Australia remains a Convention country for the purposes of the IAA.

23 In light of the above matters, I was satisfied that, by reason of the operation of ss 8(1), 8(2), 9, 10 and 10A of the IAA, the applicant was entitled to have the Award recognised and enforced in Australia. As I have already noted, the respondent did not argue to the contrary.

24 For those reasons, on 24 November 2014, I made the declaration set out in par 1 of the Declaration and Orders made by me on 24 November 2014 and ordered that the applicant have judgment in accordance with par 2 of those Orders. That judgment reflected the amounts awarded to the applicant under the Award as at 24 November 2014 and also included pre-judgment interest up to and including that day.

25 The respondent submitted that the whole of the money judgment should be ordered in US dollars and that no component of that judgment should be expressed in any different currency. In particular, it submitted that I should convert the RMB component of the Award into US dollars. The respondent relied upon certain remarks which I made in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2)* (2011) 277 ALR 441 (*Uganda No 2*) at 445 [20] and in *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535 at 563 [113]. But neither of the passages relied upon support the proposition that, in the present case, in the absence of consent from both parties, I should convert the RMB component of the Award into US dollars and then add that amount to the remaining component of the Award which was already expressed in US dollars. In my judgment, there was no principled basis upon which I should accede to the respondent's submissions and I declined to do so.

THE RESPONDENT'S STAY APPLICATION

The Respondent's Arguments in Favour of a Stay

26 The respondent submitted that the Court has power to grant a stay of execution on the judgment. It referred to s 23 of the *Federal Court of Australia Act 1976* (Cth) and r 41.03 and r 41.11 of the *Federal Court Rules 2011* (**FCR**). The respondent then referred to a number of authorities in which the principles governing the grant of a stay of proceedings generally and a stay of execution on a judgment pending appeal were discussed. For example, the respondent referred to *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 at 344 in which the NSW Court of Appeal overturned a decision by the

primary judge to stay certain proceedings at common law because allegations made in those proceedings were inconsistent with findings made between the same parties in workers' compensation proceedings and *Gujarat NRE Coke Ltd v Coeclerici Asia (PTE) Ltd* [2013] FCA 918 which was a decision of Katzmann J granting a temporary stay for a short period of time pending the hearing and determination of an expedited appeal.

27 The respondent also relied upon the decision of Malcolm CJ in *State Bank of Victoria v Parry* [1989] WAR 240 at 246 and the decision of the English Court of Appeal in *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295 at 302.

28 The respondent initially submitted that, in general, once this Court makes a declaration recognising and giving effect to a foreign award under s 8(1) and s 8(3) of the IAA and orders a money judgment in favour of the award creditor under those sections, the relevance of the IAA and the important policy considerations which underpin its provisions are spent. After judgment, the ordinary rules governing execution and stay of execution apply. It was submitted that the Court ought not take into account the fact that the judgment had been entered pursuant to s 8 of the IAA.

29 The respondent submitted that the present case was analogous to the case where summary judgment has been entered on the plaintiff's claim but execution has been stayed pending the determination of the judgment debtor's counterclaim.

30 During the course of oral argument, there was a subtle shift in the respondent's position. The respondent ultimately accepted that, when a stay of execution is sought by a judgment debtor of a judgment entered by way of enforcement of a foreign arbitral award pursuant to s 8(1) and s 8(3) of the IAA, the fact that the award creditor's entitlement to judgment is found in such an award is always going to be a relevant consideration to be taken into account and weighed in the balance by the enforcing Court. Nonetheless, the respondent maintained that, in the present case, there were other relevant factors which, when properly considered and weighed, required the grant of the stay sought by it.

31 I will now briefly describe the grounds relied upon by the respondent.

32 The respondent submitted that its claim for damages against the applicant for breach of C90 was both *bona fide* and strong. It contended that the applicant had never delivered the Letter of Credit or the Import Permit which it was required to deliver to the respondent under C90 and had refused to perform its obligations under that contract. The respondent emphasised

that the only defence likely to be raised by the applicant to the respondent's claim under C90 was that, in negotiations which took place in late March 2013, a fresh arrangement had been entered into. The respondent emphasised that the applicant did not appear to be disputing the quantum of the respondent's claim for damages in the event that the respondent is successful in establishing liability.

33 The respondent tendered in evidence before me the Statutory Declaration of Mark Jackson and all of the documents referred to therein in support of the above submissions. The respondent also tendered certain emails and other evidence to establish its asserted claim for damages for breach of C90. The evidence tendered before me by the respondent in support of its claim for damages for breach of C90 established that that claim was *bona fide*.

34 The applicant tendered evidence and made submissions directed to establishing that it had a *bona fide* and substantive defence to the respondent's claim in respect of C90. It contended that the respondent had failed on a number of occasions to specify a shipping date for the cattle to be shipped under C90 (including after the variation agreed on 15 January 2013) and that the respondent had ultimately sold the cattle earmarked for shipment under that contract prematurely and in breach of C90.

35 The respondent invited the Court to assess the strength of its case for damages for breach of C90. I declined to do so as I considered that the material tendered before me directed to the strength of the respondent's case in the C90 arbitration was both incomplete and contentious and that it would be inappropriate for me to make any assessment of the strength of that case upon the basis of that limited material. In any event, CIETAC is seized of the dispute under C90. I took the view that it was sufficient for present purposes that I be satisfied that the respondent's claim for damages for breach of C90 is a genuine claim and has some prospects of success. I was so satisfied.

36 The respondent also established that, as early as 18 April 2013, it had formally notified its claim for damages for breach of C90 to the applicant's lawyers and had asserted an entitlement to set off that claim in any arbitral proceedings commenced by the applicant in respect of C93 and C96.

37 When the applicant requested that the disputes which had arisen under C93 and C96 be arbitrated by a CIETAC arbitral tribunal, the respondent took steps at the earliest opportunity (on 31 July 2013) to bring forward in the arbitrations of those disputes its claim for damages

for breach of C90. It did not, however, take any steps to refer its claim for damages for breach of C90 to arbitration at any time in 2013. It ultimately only did so on 16 January 2014. This was after it had become fairly clear that the Tribunal seized of the consolidated arbitration proceeding in respect of C93 and C96 was not prepared to entertain the respondent's claim for damages for breach of C90 in that consolidated arbitration proceeding in the absence of consent on the part of the applicant.

38 On 27 February 2014, CIETAC accepted the respondent's request to constitute an arbitral tribunal to arbitrate the dispute in respect of C90 identified by the respondent in its request of 16 January 2014. On 11 March 2014, the respondent requested CIETAC to appoint as arbitrators for the C90 dispute the same persons whom it had appointed as arbitrators of the C93 and C96 disputes. In May 2014, the pleadings in the C90 arbitral proceeding closed.

39 In a letter to CIETAC dated 16 June 2014, the respondent pressed its *"entitlement to have its set off defence heard and determined"* in the C93 and C96 consolidated arbitral proceeding. It also requested a hearing of its C90 claim *"at the earliest opportunity"*.

40 As I have already mentioned, the Award was first published on 7 July 2014. A correction was published on 29 August 2014.

41 On 28 October 2014, the applicant objected to Mr Pow being appointed as an arbitrator of the C90 dispute.

42 Having referred to the history of the matter which I have summarised above, the respondent then recounted the steps which had been taken up to the date of the hearing before me in relation to the arbitration of its claim for damages for breach of C90. In those submissions, the respondent repeatedly criticised the applicant. It suggested that the applicant was deliberately delaying that arbitration. In particular, the respondent criticised the applicant for refusing to consent to the C90 arbitration being heard at the same time as the C93 and C96 consolidated arbitration and by the same arbitral tribunal. In addition, the respondent criticised the applicant's objection to the appointment of Mr Pow to the tribunal constituted to hear the C90 arbitration, asserting that it was made late and only for tactical reasons.

43 The respondent's advocate repeatedly disavowed any criticism of CIETAC itself in relation to the conduct of the C90 arbitration. He confined his criticism to the applicant and its conduct.

44 The respondent directed particular submissions to the applicant's failure to consent to the C90 arbitration being dealt with at the same time as the consolidated arbitration in relation to C93 and C96. Reliance was placed upon a well-known text (Berger B and Kellerhals F, *International and Domestic Arbitration in Switzerland*, 2nd Ed, Thomson Reuters) and *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; [2007] 4 All ER 951; [2007] 2 All ER (Comm) 1053.

45 The respondent also submitted that, in the event that it is successful in its claim for damages for breach of C90, it will be entitled to set off the quantum of the award in that arbitration against the judgment which I directed be entered against it on 24 November 2014. It also submitted that, for the purposes of having a Statutory Demand set aside under s 459G and s 459H of the *Corporations Act 2001* (Cth), the respondent would be entitled to set off its claim for damages for breach of C90 against that judgment.

46 Finally, the respondent made the following submissions:

(a) The applicant is a Chinese corporation. The respondent is an Australian corporation. If a stay of execution on the judgment entered against the respondent is not granted, the respondent will be required to pay the judgment debt before the determination of its claim for damages for breach of C90.

(b) Australian courts have long recognised, in appropriate circumstances, the right of a party to restrain the removal of assets pending the determination of a dispute.

(c) The respondent should not be required to pay the judgment debt in circumstances where, once it does so, it will be compelled to enforce its award in the C90 arbitration in China in circumstances where recovery of the amount of that award is problematic. There is no evidence as to the financial substance of the applicant or its ownership. It is notoriously difficult to enforce an arbitration award by a foreign party in China against a Chinese corporation. In support of this latter proposition, the respondent led evidence of the difficulties that an Australian company (Castel Electronics Pty Ltd) was having in enforcing in China its arbitral award made in Australia against a Chinese company TCL Air Conditioner (Zhongshan) Co Ltd.

47 Finally, the respondent offered to provide a bank guarantee in the sum of AUD3,500,000 in favour of the applicant to be held by the Court as security for the judgment debt pending the resolution of the C90 arbitration.

The Applicant's Response

48 The applicant made the following submissions:

(a) The respondent has not relied upon and could not rely upon any of the grounds specified in s 8(5), s 8(7) (as explained by s 8(7A) of the IAA) for resisting enforcement of the Award.

(b) The C90 arbitration concerns a different contract and different factual matrix from those involved in the disputes which were determined by the Award. The only common feature is that the parties to all three disputes are the same.

(c) The respondent's stay application runs directly counter to its contractual obligations under all three contracts which require that disputes thereunder be arbitrated by CIETAC according to the substantive law of China, International Customs and Public International Law and the rules and procedures of CIETAC. It is also outside the available grounds for refusing to enforce or delaying or suspending the enforcement of a foreign award under the IAA.

(d) Even if the Court retains a general discretion to order a stay, it should not do so in the circumstances of the present case. There is no reason to deny to the applicant the benefit of its judgment.

Consideration and Decision

49 In *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 (*TCL*), the High Court rejected a constitutional challenge to this Court's jurisdiction to enforce an arbitral award under Art 35 of the UNCITRAL Model Law which is Sch 2 to the IAA. Although the case concerned the Model Law and the enforcement of an award made in an international arbitration conducted in Australia, the reasoning of the High Court has significance for the interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Arbitration at its twenty-fourth meeting (**the Convention**) which is set out in Sch 1 to the IAA. Part II of the IAA is intended to give effect to the Convention.

50 As I have held in a number of cases, the enforcement provisions set out in Pt II of the IAA should be interpreted by not only paying appropriate regard to s 2D and s 39 of the IAA itself but also by bearing in mind the objects and purposes of Arts 1 to VI of the Convention. In particular, I have repeatedly held that the only grounds upon which an award debtor can resist

enforcement of a foreign arbitral award in Australia are those set out in ss 8(5), 8(7) and 8(7A) of the IAA (see, by way of example, *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882 at [30]). An adjournment of an enforcement proceeding may be granted if the conditions specified in s 8(8) and s 8(11) of the IAA are met. However, such an adjournment is subject to reconsideration under s 8(9) and s 8(10).

51 In *TCL*, at 545–549 [9]–[13], the Chief Justice and Gageler J said:

> 9 In common with the New York Convention, the Model Law nevertheless proceeds on a conception of the nature of an arbitral award, and a conception of the relationship of an arbitral award to an arbitration agreement, identical in substance to the conception that has for centuries underpinned the understanding of an arbitral award at common law as "a satisfaction pursuant to [the parties'] prior accord of the causes of action awarded upon" and as thereby "precluding recourse to the original rights the determination of which had been referred to arbitration" (*Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 653-654). That conception, in short, is that "the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties" (*Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 at 1046 [9]). The English law of arbitration, which has combined statute law with common law since the seventeenth century, has at "every stage" of its development "approached the relationships between the parties and the arbitrator, and between the parties and each other, unequivocally in terms of private law" (Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989), p 4. See also Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th ed (2009), para [1.02]). The same approach has been evident in the historical development of the statute law and the common law governing arbitration in Australia (Law Reform Commission of New South Wales, *Report on Commercial Arbitration*, Report No 27 (1976), paras [1.6], [9.1.1]). That is so notwithstanding the truth of the observation that performance of the arbitral function is not "purely a private matter of contract, in which the parties have given up their rights to engage judicial power" and is not "wholly divorced from the exercise of public authority" (*Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261-262 [20]).
>
> 10 The conception is captured, and its international commercial significance is explained, in the following observation (*Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 94-95 [192]-[193]):
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> > "The New York Convention and the [UNCITRAL] Model Law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute resolution. The chosen arbitral method or forum may or may not be the optimally preferred method or forum for each party; but it is the contractually bargained method or forum, often between parties who come from very different legal systems. An ordered efficient dispute

> resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce …
>
> The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration was reflected in both the New York Convention and the [UNCITRAL] Model Law."

11 The analytical commentary published by the UNCITRAL Secretariat to accompany the 1985 draft of the UNCITRAL Model Law (the UNCITRAL analytical commentary) spelt out that the UNCITRAL Model Law was "designed for consensual arbitration", which the UNCITRAL analytical commentary explained to mean "arbitration based on voluntary agreement of the parties" (UNCITRAL analytical commentary, Art 1 [15]). That design is reflected in the definition in the Model Law of an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes … between them in respect of a defined legal relationship" (Article 7 of the Model Law) and in the freedom that the Model Law gives to the parties both to determine the composition of the arbitral tribunal (Articles 10(1) and 11 of the Model Law) and to determine the procedure to be followed by the arbitral tribunal (Article 19(1) of the Model Law). The design is not inconsistent with default provisions within the Model Law which fill gaps in the agreement between the parties (See, eg, Arts 10(2), 11(3), 13(2), 17, 17B, 19(2), 20(1), 21, 22(1), 23, 24(1), 25, 26, 28(2) and 29 of the Model Law.), and which provide for court assistance to facilitate the process of arbitration (Articles 17J and 27 of the Model Law. See also ss 23 and 23A of the IAA). Nor is the design inconsistent with provisions of the Model Law incapable of derogation by the agreement of the parties, directed primarily to ensuring equality and fairness in the arbitral process (Article 18 of the Model Law) and to the form and correction of an arbitral award (Articles 31 and 33(2) of the Model Law).

12 The design is followed through in Art 36 of the Model Law in providing, in common with Art V of the New York Convention, for recognition or enforcement of an arbitral award to be refused at the request of a party against whom the arbitral award is invoked, if and to the extent that the party can furnish proof to the competent court of one or more specified grounds of refusal. Those grounds include: that the arbitration agreement is not valid under its governing law (Article 36(1)(a)(i) of the Model Law and Art V.1(a) of the New York Convention); that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (Article 36(1)(a)(iii) of the Model Law and Art V.1(c) of the New York Convention); and that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (Article 36(1)(a)(iv) of the Model Law and Art V.1(d) of the New York Convention). Whether one or more of those grounds is established is an objective question to be determined by the competent court on the evidence and submissions before it, unaffected by the competence of an arbitral tribunal to rule on its own jurisdiction under Art 16 of the Model Law (*Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 AC 763 at 808-813 [20]-[30]). Arbitration in this way remains "the manifestation of parties' choice to submit present or future issues between them to arbitration" in that, without "specific authority" to do so, arbitrators "cannot by their own

> decision … create or extend the authority conferred upon them" (*Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 AC 763 at 810 [24]).
>
> 13 The requirement of Art 28 of the Model Law, that the arbitral tribunal "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute", is a further manifestation of the same design. Article 28 was described in the UNCITRAL analytical commentary as a "recognition or guarantee of the parties' autonomy" (UNCITRAL analytical commentary, Art 28[3]) and as allowing the parties to an arbitration agreement "to designate as applicable to their case rules of more than one legal system, including rules of law which have been elaborated on the international level" (UNCITRAL analytical commentary, Art 28[4]). Its dual significance was elaborated in an explanatory note by the UNCITRAL Secretariat on the UNCITRAL Model Law as amended in 2006 (the UNCITRAL Explanatory Note) as follows (UNCITRAL Explanatory Note, para [39]):
>
> > "It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of 'rules of law' instead of 'law', the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention."

52 These passages emphasise the fundamental reason why the Courts have long enforced arbitral awards: An arbitral award represents the end product of the parties' consensual arrangements for resolution of their disputes according to the terms of those arrangements freely and voluntarily entered into.

53 Hayne, Crennan, Kiefel and Bell JJ expressed similar views to those of the Chief Justice and Gageler J. At 557–560 [41]–[50], their Honours said:

> 41 The *International Arbitration Act 1974* (Cth) (the IA Act), and the international conventions and law to which it gives effect (*International Arbitration Act 1974* (Cth), s 2D(d), (e), (f)), facilitate the use of arbitration agreements and the curial recognition and enforcement of arbitral awards made in relation to international trade and commerce (*International Arbitration Act 1974* (Cth), s 2D(b), (c)).
>
> 42 The plaintiff (TCL), a company registered, and having its principal place of business, in the People's Republic of China, entered into a written distribution agreement with the second defendant (Castel), a company registered, and having its principal place of business, in Australia (the agreement). The agreement provided for the submission of disputes to arbitration in Australia. Following a commercial arbitration two awards were

made requiring TCL to pay to Castel $3,369,351 and costs of $732,500. In default of payment, Castel applied under the IA Act to the Federal Court of Australia to enforce the awards. In separate proceedings, TCL applied to set aside those awards.

43 Of particular relevance is Pt III (ss 15-30A) of the IA Act. Headed "International Commercial Arbitration", it concerns arbitration agreements and the recognition and enforcement of arbitral awards governed by the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) (Adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 and amended by UNCITRAL on 7 July 2006). Section 16(1) of the IA Act gives "the force of law in Australia" to the Model Law, the English text of which is contained in Sch 2 to the IA Act.

44 In the proceedings in this Court's original jurisdiction, TCL submitted that s 16(1) of the IA Act is beyond power because it infringes Ch III of the *Constitution*. What follow are our reasons for rejecting TCL's submissions and refusing to grant the relief sought by TCL.

Arbitration

45 In *The Rule of Law* ((2010), p 86), Lord Bingham of Cornhill described arbitration as involving:

> "the appointment of an independent arbitrator, often chosen by the parties, to rule on their dispute according to the terms of reference they give him. This can only be done by agreement, before or after the dispute arises, but where it is done the arbitrator has authority to make an award which is binding on the parties and enforceable by the process of the courts."

That description of private arbitration (The term "private arbitration" refers to arbitration undertaken in fulfilment of an agreement to submit a dispute to arbitration. Private arbitration is distinguishable from arbitration concerned with the enforcement of public rights derived from statute, such as arbitration to resolve industrial law disputes), and of the relationship between private arbitration and the courts, is as apt for Australia (*Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652-654; *Minister for Works (WA) v Civil & Civic Pty Ltd* (1967) 116 CLR 273 at 284; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission (CFMEU)* (2001) 203 CLR 645 at 658 [31]; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261-262 [19]-[20]) as it is for the United Kingdom (*Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at 956 [5]) and the United States of America (*Stolt-Nielsen SA v AnimalFeeds International Corporation* (2010) 176 Law Ed (2d) 605 at 624). Arbitration has a long history as an alternative method, distinct from litigation, of resolving civil disputes (Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England,* 2nd ed (1989), Ch 29. See also Stephen, "Historical Origins of Arbitration", *The Arbitrator* (August, 1991) 45; Jones, *Commercial Arbitration in Australia* (2011), pp 4-11 [1.150]-[1.200]). The features of private arbitration identified by Lord Bingham underpin the widely shared modern policy of recognising and encouraging private arbitration as a valuable method of "settling disputes arising in international commercial relations" (Stated in the preamble to the Resolution of the General Assembly of the United Nations of 11 December 1985, approving the Model Law adopted by UNCITRAL), a policy reflected in the objects of the IA Act (*International Arbitration Act 1974* (Cth), s 2D(a), (b), (c)). Parties from different legal systems can agree to resolve an

international commercial dispute by arbitration and choose both the law (or laws) to be applied and the processes to be followed.

46 From the 1920s onwards, various international conventions and laws dealing with international commercial arbitration agreements (For present purposes the most important are: the Geneva Protocol on Arbitration Clauses in Commercial Matters (1923) (the Geneva Protocol); the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) (the Geneva Convention); the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (commonly, "the New York Convention"); and the Model Law) have been directed to encouraging a level of uniformity in national statutes covering such matters as the international validity of arbitration agreements, the limits of curial assistance or intervention in the arbitral process and the enforcement of awards (See generally Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th ed (2009), Ch 1; Born, International Commercial Arbitration (2009), vol 2, Ch 25; Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd ed (2009); Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989), pp 1-17). The IA Act gives effect to three of those international instruments, as described below.

47 Part II (ss 3-14) of the IA Act, headed "Enforcement of foreign awards", implements (*International Arbitration Act 1974* (Cth), s 2D(d)) the New York Convention (Adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting (s 2D(d)). The English text is contained in Sch 1 to the IA Act. Article VII(2) of the New York Convention provides that that Convention replaces the Geneva Protocol and the Geneva Convention as between States which are parties to the New York Convention). Section 7 (Implementing Art II of the New York Convention) of the IA Act provides for the recognition of arbitration agreements by mandating a stay of court proceedings brought in breach of an arbitration agreement governed by the New York Convention (An "arbitration agreement" for the purposes of Pt II is defined in s 3(1)). Section 8 provides for the enforcement of "foreign awards" in Australia "as if the award were a judgment or order" of the Federal Court or a State or Territory court (*International Arbitration Act 1974* (Cth), s 8(3), (2)). In implementing Art V of the New York Convention (Which sets out the limited grounds upon which a court may refuse to enforce an award. This provision followed in some respects and expanded the limited grounds for the same purpose set out in the Geneva Convention, Arts 1, 2), s 8 contains limited grounds upon which a court may refuse to enforce a foreign award (*International Arbitration Act 1974* (Cth), s 8(5), (7)).

48 Part III, as noted, concerns arbitral awards governed by the Model Law. Provisions in Art 36(1) limiting the grounds upon which a court may refuse to enforce a foreign award, described in more detail below, are modelled on Art V of the New York Convention. An account of the development of the Model Law, and before it the New York Convention, can be found in the reasons of French CJ and Gageler J (See [7]-[11] above).

49 Part IV (ss 31-38) concerns arbitration agreements and the recognition and enforcement of awards governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (Signed by Australia on 24 March 1975 (ss 2D(f), 31(1)). The English text is contained in Sch 3 to the IA Act).

> 50 Part V (ss 39, 40) is headed "General matters". Section 39 applies in respect of all provisions of the IA Act governing the curial recognition and enforcement of awards. Relevantly, s 39 provides that courts exercising jurisdiction under the IA Act, including courts considering exercising powers under the Model Law (*International Arbitration Act 1974* (Cth), s 39(1)(a)(iii), (iv)), which may include the Federal Court or a State or Territory court, must have regard to the fact that "arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes" and that "awards are intended to provide certainty and finality" (*International Arbitration Act 1974* (Cth), s 39(2)(b)(i), (ii)).

54 At 568 [81]–[82], their Honours continued:

> 81 It is the consensual foundation of arbitration which underpins the general rule, settled since the middle of the nineteenth century, that an award is final and conclusive and cannot be challenged either at law or in equity on the ground that the arbitrator has committed an error of fact or of law (Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989), p 439).
>
> 82 Since at least the late seventeenth century (and Statute 9 Will III c 15 for "determining Differences by Arbitration") (Commonly, "the first Arbitration Act"), the English law of arbitration provided statutory means for the direct enforcement of arbitral awards. The courts could enforce an arbitral award unless arbitrators "misbehaved themselves" or the award or arbitration "was procured by corruption or other undue means" (9 Will III c 15, s 1). The making of a legal error was not identified as a form of misbehaviour. Furthermore, the sole statutory ground upon which an arbitration (and inferentially an award) could be "set aside" was that the arbitration had been "procured by corruption or undue means" (9 Will III c 15, s 2). The "mischief" (*Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638]) to which the statute was directed was that procedures available for enlisting the court's aid in enforcing arbitration agreements were cumbersome and they did not always provide a complete remedy (Mustill and Boyd, The Law and Practice of Commercial Arbitration in England, 2nd ed (1989), pp 432-435). There was no statutory right to invoke curial process in respect of legal error. But for the statutory exceptions mentioned, an award could be enforced as final and conclusive, regardless of any legal infirmity in the reasoning which underpinned it.

55 At 568–572 [88]–[99], their Honours explained the exception to enforcement developed in England: Error apparent on the face of the award. I need not refer to those paragraphs for present purposes.

56 In *Uganda No 2,* at 443 [12]–[13], I said:

> 12 The 1958 New York Convention is intended to facilitate the recognition and enforcement of foreign arbitral awards in Convention countries. The Act is intended to facilitate the recognition and enforcement of such awards in Australia. Unless the foreign arbitral award is reflected in a judgment or order of the Australian court in which recognition and enforcement is

> claimed, the party seeking to enforce that award will not be able to avail itself of the execution and recovery mechanisms available in that court.
>
> 13 Courts in this country and elsewhere have accepted that the appropriate way of recognising and enforcing a foreign monetary arbitral award is for the enforcing court to enter judgment or make an order for payment which reflects the terms of that award: see for example *Xiadong Yang v S & L Consulting Pty Ltd* [2008] NSWSC 1051; *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] NSWSC 1394; *Altain Khuder LLC v IMC Mining Inc* (2011) 276 ALR 733; [2011] VSC 1; *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm); and *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* (2005) 2 Lloyd's Rep 326; [2005] EWHC 726 (Comm). The words "as if" in s 8(3) of the Act, properly understood, support this approach. In my view, s 8(3) means that, subject to considering and determining such of the statutory grounds for refusing to enforce a foreign arbitral award as may be legitimately raised in any particular case, this court should treat the foreign arbitral award as if it were a judgment or order of this court. That is, once this court has decided to enforce the award, it should give full effect to that decision by directing the entry of an appropriate money judgment or by making an appropriate order for payment.

57 I adhere to those views.

58 In this Court, once a judgment has been ordered, in my opinion, it is susceptible to being stayed in an appropriate case. The source of the Court's power to stay a judgment or execution on a judgment is either or both r 41.03 FCR (stay of a judgment) or r 41.11 FCR (stay of execution of a judgment) or the inherent power of the Court to regulate its own processes. For example, a judgment debtor may seek a temporary stay pending the determination of an appeal from the first instance decision of the Court to order judgment in favour of an award creditor. That was the case in *Gujarat NRE Coke Ltd v Coeclerici Asia (PTE) Ltd*. That is not the case here. The present stay has not been sought pending the determination of an appeal from my decision to order judgment in favour of the applicant. Rather, it is sought pending the determination of an unrelated proceeding between the same parties.

59 Rules 41.03 and 41.11 give a broad discretion to the Court to stay a judgment or to stay execution of a judgment. The inherent power to order a stay is similarly broad.

60 However, the discretion to order a stay must be exercised judicially.

61 Some guidance as to the exercise of that discretion can be found in *TC Trustees Ltd v JS Darwen (Successors) Ltd* and *State Bank of Victoria v Parry*.

62 In *TC Trustees Ltd v JS Darwen (Successors) Ltd*, the English Court of Appeal removed a stay of execution on a judgment which the Master and the primary judge had granted. Judgment had been given for the principal amounts plus interest due under 45 loan notes. The full amount of principal had fallen due because the borrowers had failed to pay one instalment of interest as a result of a genuine mistake.

63 At 301–302, the Master of the Rolls, Lord Denning, said that, if the borrowers were entitled to any relief at all, it could only be by way of relief in equity. His Lordship doubted whether equity would grant relief in a case such as the case before him. His Lordship went on to hold that the particular ground relied upon by the borrowers in that case should have been raised in the action itself before judgment was granted. It could not be used as the basis for granting a stay after judgment.

64 His Lordship accepted that the Courts have an inherent jurisdiction to stay proceedings. He observed that a stay should only be granted on grounds relevant to the stay and not on grounds which could have been and should have been raised by way of defence in the action itself.

65 In *State Bank of Victoria v Parry*, two defendants obtained a partial stay of execution on a judgment entered against them on the ground that they should be allowed time to prosecute a proceeding instituted against a third party in which they claimed indemnification in respect of the judgment in respect of which they sought a stay. A partial stay was granted pursuant to a rule of Court which gave the Court power to stay execution on a judgment debt if satisfied that, by reason of special circumstances, it is inexpedient to enforce the judgment.

66 At 246, Malcolm CJ addressed the meaning of "special circumstances" in the relevant rule of Court. His Honour said:

> Where there is no defence to the plaintiffs claim, but there is a plausible counterclaim for an amount not less than the plaintiff's claim, summary judgment will be ordered with a stay of execution until the trial of the counterclaim or further order: *Sheppards & Co v Wilkinson & Jarvis* [1889] 6 TLR 13. In a proper case the court may order payment into court of part of the claim with a stay of execution pending the counterclaim: *Slater v Cathcart* [1891] 8 TLR 92.

67 These remarks of the Chief Justice were made in relation to a counterclaim which is *bona fide* arising out of the same subject matter as the action but which is not connected to the defence or which cannot be raised by way of defence.

68 His Honour continued (at 246):

> Where the counterclaim arises out of quite a separate and distinct transaction, or there is no connection between the claim and the counterclaim, the proper order is for judgment for the plaintiff with costs without a stay pending the trial of the counterclaim: see the authorities collected in the *Annual Practice* (1988) par 14/3-14/13, p 145. The degree of connection between the claim and counterclaim, the strength of the counterclaim and the ability of the plaintiff to satisfy any judgment on the counterclaim are some of the considerations which the court may take account of in the exercise of its discretion whether or not to order a stay. In general, therefore, a counterclaim which is in effect an unconnected cross-action will not provide a basis for a stay under O 14, r 3. Consistently with this position a stay of execution of a judgment will not ordinarily be granted simply because the defendants bring a cross-claim in another action against the plaintiff, in the absence of special circumstances rendering it inexpedient to enforce the judgment: *Wagner v Laubscher Bros & Co* [1970] 2 QB 313. In that case, which Sachs LJ described (at 317) as "a particularly plain case" the considerations which applied are of no relevance. A judgment obtained in the Federal Republic of Germany, after trial and appeals in that country, was registered under reciprocal enforcement legislation in England. The effect of registration was that it was to be treated as if it was a judgment of the English High Court. There was a cross-action pending in the English Court which had "slept" during the German proceedings. The cross-action raised the same issues as had been litigated in Germany. A stay was refused.

69 Malcolm CJ emphasised that, in general, a counterclaim which is, in effect, an unconnected cross-action will not provide a basis for a stay. This observation reflects the Courts' general approach that a judgment creditor should not ordinarily be denied the fruits of his or her judgment. There must be good reason to make an order which prevents recovery of those fruits, even temporarily.

70 In the present case, it must also be borne in mind that the judgment which I ordered on 24 November last was a judgment which gave effect to the Award. It was ordered in circumstances where this Court was required to recognise and enforce the Award unless the respondent could engage one or more of the grounds for refusing enforcement specified in s 8(5), s 8(7) and s 8(7A) of the IAA. The respondent did not make any application under s 8(8)—it could not have done so. The respondent conceded that it had no basis upon which to engage any of the grounds specified in s 8(5), s 8(7) and s 8(7A) and did not oppose the order for judgment.

71 These circumstances constitute powerful factors to be weighed in the balance against the grant of the stay claimed by the respondent. In a very real sense, staying the judgment which I have ordered would undermine the effective enforcement of the Award and disrespect the contractual underpinning of the arbitral processes which led to the making of the Award and

which the High Court made clear in *TCL* should be respected and enforced. It should also be remembered that the respondent has not challenged the Award in China.

72 What factors, then, have been raised by the respondent in favour of the claimed stay and what weight should be given to them in the circumstances of the present case?

73 First, the respondent argued that its claim for damages for breach of C90 was both *bona fide* and meritorious. I have accepted that it is a genuine claim. The merits of the claim are contentious. The applicant is defending the claim in the CIETAC arbitration upon the basis which I have outlined at [10] and [32]–[34] above. The existence and *bona fides* of this claim constitute the starting premise for the respondent's stay argument.

74 Second, the respondent says that, when the applicant first raised its claims under C93 and C96, the respondent immediately countered with its claim for damages for breach of C90 and thereafter diligently pressed that claim in the C93 and C96 arbitrations until it was ultimately rejected by the Tribunal. But it did not commence its C90 arbitration until 16 January 2014. All it did was to assert its claim under C90 and seek to have it determined in the C93 and C96 arbitrations.

75 It was always open to the respondent to refer its claim for damages for breach of C90 to arbitration at all times from April 2013. Its decision not to do so until 16 January 2014 must be seen as a deliberate tactical decision adopted by it in an endeavour to defeat the applicant's claims in respect of C93 and C96 or at least to do so to the extent of its claim for damages for breach of C90. Had the respondent referred its dispute under C90 to arbitration in April 2013, it would have been open to it to apply to have the arbitration proceeding arising out of that referral consolidated with the arbitration proceedings arising out of the disputes under C93 and C96. Rather than adopt that course it continued to press its Counterclaim in the consolidated arbitration relating to C93 and C96.

76 I do not propose to give any weight to these circumstances relied upon by the respondent. In my view, it devised a plan designed to have its C90 claim taken into account in the C93 and C96 arbitrations but that plan was flawed. The respondent's current dissatisfaction with the lack of progress (as it sees matters) in the C90 arbitration is very largely the direct result of its failure to commence that arbitration in 2013 and of its firm adherence to its plan to endeavour to litigate that claim in the C93 and C96 arbitrations right up until the original Award was published on 7 July 2014. In any event, the respondent failed to establish that there has been

any delay in the progress of the C90 arbitration. The evidence of Zhen Qinggui suggests that the C90 arbitration is proceeding normally in accordance with the rules and procedures of CIETAC. The respondent does not, of course, criticise CIETAC itself.

77 Third, the respondent relied upon the conduct of the applicant in not co-operating with its plan to have all three disputes arbitrated at the same time by the same tribunal and in objecting to the appointment of Mr Pow to the C90 arbitral tribunal. But the applicant is entitled to make decisions and to take steps in order to enforce its rights in such manner as it sees fit in its own best interests subject to complying with its obligations under the relevant arbitration clauses and the relevant general law. Here, the respondent chose to raise its C90 claim as a set-off in the C93 and C96 consolidated arbitration and to persist with that approach in the face of obvious difficulties. It did not institute its C90 arbitration promptly. The applicant ought not be criticised for not accepting the respondent's counterclaim in the consolidated arbitration as justiciable in that arbitration. It was entitled to pursue its claims and to resist the respondent's claim. In addition, the evidence before me established that CIETAC constituted the C90 tribunal with Mr Pow as a member on 15 October 2014. The applicant immediately objected to the appointment of Mr Pow. Instead of agreeing to a substitute nominee the respondent sought to continue with Mr Pow and to persuade CIETAC that his appointment was justified. This response on the part of the respondent has, to some extent, delayed the progress of the C90 arbitration.

78 Fourth, I do not consider the matters raised at [45] above to be relevant. The result of the C90 arbitration is not known at the moment and cannot be predicted with certainty. Whether the respondent could set aside a Statutory Demand under s 459G and s 459H of the *Corporations Act 2001* (Cth) is not to the point.

79 Fifth, I do not propose to give any weight to the final group of submissions which I have summarised at [46] above. There is no evidence that the applicant is insolvent nor is there any evidence that it will be unable to meet any award made against it in the C90 arbitration.

80 There is no evidence that a foreign party will generally have difficulty enforcing an arbitral award in China. Proof of such a broad proposition would be extremely difficult if not impossible in any event. The evidence led by the respondent as to the problems allegedly encountered by Castel Electronics Pty Ltd in enforcing in China the Award made in Australia in its favour does not establish or even go any way towards establishing the proposition for which it was tendered. That evidence did not demonstrate insurmountable difficulties for

Castel in seeking to enforce its award in China. Nor can any conclusions of general application be drawn from that evidence. In any event, it is important to remember that the C90 arbitration is being conducted in China under the auspices of CIETAC by a tribunal appointed by CIETAC. Any award made in that arbitration will be a CIETAC award. There is no proper basis for suggesting that such an award will not be enforced in China.

81 Finally, I give no weight to the respondent's offer to put up security as a condition upon which any stay should be granted. Were the grant of a stay otherwise justified, such a condition would be imposed. It is a given. But the offer of security should not be taken into account as a factor in favour of the grant of a stay.

CONCLUSION

82 For all of the above reasons, I came to the conclusion that there was no reason for the Court to deny to the applicant the benefit of the Award or the benefit of this Court's judgment by which the Award has been recognised and enforced. The grounds and arguments advanced by the respondent did not warrant the grant of a stay. When appropriate weight is given to the circumstance that the Award was the result of an arbitral process into which the parties had freely and voluntarily entered through their commercial agreements, the refusal of the stay became inevitable.

83 The respondent lost its application. It should pay the applicant's costs of that application and of the proceeding generally.

I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster.

Associate:

Dated: 15 December 2014