FEDERAL COURT OF AUSTRALIA

Elders International Australia Pty Ltd v Beijing Be Green Import & Export Co Ltd [2014] FCAFC 185

Citation:	Elders International Australia Pty Ltd v Beijing Be Green Import & Export Co Ltd [2014] FCAFC 185
Appeal from:	Application for Leave to Appeal: Beijing Be Green Import & Export Co Ltd v Elders International Australia Pty Ltd [2014] FCA 1375
Parties:	**ELDERS INTERNATIONAL AUSTRALIA PTY LTD (ACN 007 735 168) v BEIJING BE GREEN IMPORT & EXPORT CO LTD**
File number:	NSD 1282 of 2014
Judges:	**ALLSOP CJ, RARES J & MIDDLETON J**
Date of judgment:	22 December 2014
Catchwords:	**PRACTICE AND PROCEDURE –** Application for leave to appeal a refusal to grant a stay on the enforcement of an international arbitral award – whether the primary judge should have given weight to the existence of a claim for unliquidated damages arising out of an unrelated contract between the parties – whether any injustice is suffered by the applicant in submitting to the award in circumstances where the award was obtained and entered regularly and without any opposition from the judgment debtor **INTERNATIONAL ARBITRATION** – whether claims arising under unrelated contracts with separate arbitration clauses, but between the same parties, can be considered as related claims **INTERNATIONAL ARBITRATION** – whether the recognition of a foreign arbitral award by an Australian Court pursuant to the *International Arbitration Act 1974* (Cth) transforms that award into an instrument with the character of a judgment of the Court – whether it is appropriate to divest a recognised foreign arbitral award of any significance associated with its international character
Legislation:	*International Arbitration Act 1974* (Cth) ss 8(3), 2D(c), 39(2), Sch 1

Cases cited:	*House v The King* (1936) 55 CLR 499
Date of hearing:	22 December 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	32
Counsel for the Applicant:	Mr G Nell SC with Ms J Soars
Solicitor for the Applicant:	Hunt & Hunt Lawyers
Counsel for the Respondent:	Mr A Sullivan QC with Mr C Carter
Solicitor for the Respondent:	King & Wood Mallesons

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1282 of 2014**

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

JUDGES:	**ALLSOP CJ, RARES J & MIDDLETON J**
DATE OF ORDER:	**22 DECEMBER 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application for leave to appeal from the judgment of the Court given on 24 November 2014 be dismissed with costs.
2. Parties have liberty to apply on twelve (12) hours' notice in relation to the bank guarantee.

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 1282 of 2014**

BETWEEN:	**ELDERS INTERNATIONAL AUSTRALIA PTY LTD (ACN 007 735 168)** **Applicant**
AND:	**BEIJING BE GREEN IMPORT & EXPORT CO LTD** **Respondent**
JUDGES:	**ALLSOP CJ, RARES J & MIDDLETON J**
DATE:	**22 DECEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

ALLSOP CJ

1 This is an application for leave to appeal from orders made by the Court on 24 November 2014. Those orders were made by one of the arbitration judges designated in Sydney in which the primary judge declared that pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth) (the Act), the applicant in the proceedings below, Beijing Be Green Import & Export Co Limited (Beijing Be), was entitled to enforce an award dated July 2014 corrected as at August 2014 made by the Arbitral Tribunal constituted under the China International Economic and Trade Arbitration Commission (CIETAC). The primary judge also on that day made orders that there be judgment in favour of Beijing Be in the sums identified of over $3 million when one added together the US dollar and RMB sums, which were the sums due under the award.

2 What his Honour was particularly dealing with on that day was the argument that had been put forward by the applicant for leave to appeal, Elders International Australia Pty Limited (Elders), for a stay of the judgment of the Court pursuant to enforcement of the award. His Honour refused a stay of the judgment. It is the refusal of the stay which leads to this application for leave to appeal. His Honour delivered reasons on the afternoon of 15 December 2014. After the appeal was mentioned before me, I listed the matter today before three judges of the Court, one of them being one of the arbitration judges in Sydney, the arbitration judge in Melbourne, and myself.

3 A little background is appropriate. These reasons, however, should be read with reference to the careful and clear judgment of the primary judge. Beijing Be and Elders entered into a number of contracts for the sale of cattle from Australia to China. The broad background was the building up in China of its dairy herd. The total business under the contracts was substantial. His Honour referred to the cattle sold under these arrangements as exceeding USD 100 million. There were three contracts; relevantly, contracts C93, C96 and C90. Disputes have arisen about the proper enforcement of contract C90. His Honour dealt very broadly with the disputes in that regard at [10] of his reasons. There was apparently a difference of opinion between Beijing Be and Elders as to the legal effect of certain negotiations which took place in March and April 2013. The claim by Elders against Beijing Be in relation to contract C90 is a claim for unliquidated damages.

4 The assessment of those unliquidated damages approximates the claims under contracts C93 and C96 made by Beijing Be against Elders. The claims under contracts C93 and C96 by Beijing Be against Elders which have been vindicated in an award by the CIETAC Tribunal are for commission in relation to the completed contracts under which purchase moneys have been paid. The only debate which arose, both in China and here, as to the requirement of Elders to pay those commissions, was the asserted setoff by Elders of its claim for unliquidated damages in, and arising out of, the C90 contract.

5 The primary judge dealt with the chronology of the disputes under the three contracts in his reasons. Broadly, the claims for commission under contracts C93 and C96 were consolidated by the CIETAC Tribunal. Once the dispute under contract C90 arose, a decision by Elders was called for as to how it approached that dispute in light of the existence of the claims (otherwise uncontested) for commission under contracts C93 and C96. Elders could begin its arbitration under CIETAC rules for the purposes of recovery of its unliquidated damages for contract C90. If it did so, it could then seek consolidation of that arbitration with any arbitration under contracts C93 and C96. The difficulty for Elders in that regard was that it may have depended upon the consent of Beijing Be, which may or may not have been forthcoming. It was not forthcoming later in circumstances which transpired. Rather than do that, however (and no criticism is intended of Elders in the choice made) Elders sought to bring the claim for unliquidated damages in relation to contract C90 into the arbitration for contracts C93 and C96 by way of cross-claim and setoff.

6 This was the only defence to the claim for commission under contracts C93 and C96. The argument took place before the CIETAC Tribunal, and by majority the CIETAC Tribunal refused to accept that it had jurisdiction without consent and refused to permit the cross-claim and setoff defence to be pursued in the arbitration for contracts C93 and C96. I should say at this point that the arbitration clause in each contract identified the arbitral tribunal as CIETAC and that it would apply the related law of China, international custom and public international law. It seems plain, and it was not put to the contrary, that subject to the operation of international custom and public international law, which itself would be governed by the law of China, that both the *lex causae* and *lex arbitri* were Chinese law.

7 An important consideration in the arguments before the primary judge and this Court was said to be 'the whole business relationship' between the parties. One can see from the reasons of the primary judge that the parties developed an important and commercially valuable relationship in the sale of the cattle from Australia to China. But there was no overarching contract linking the individual sale contracts. The individual sale contracts, the Court was told, were in substantially identical form and the arbitral clauses were in substantially identical form. It was open to the parties, should they have wanted to do so, to link their relationship by any number of means, in order to provide a contractual and thus consensual foundation for the bringing together of all disputes under one arbitration. This was not done.

8 It was not done in a context where the known benefit to Beijing Be was the payment of its commission, when earned, on any particular contract out of moneys received by Elders in relation to that contract. No application was made before any court in China by way of a challenge to the approach of the arbitrators as to the lack of jurisdiction. It is important to understand at this point that this would appear not merely to be a procedural ruling by way of arbitral practice and procedure, but a ruling that without the consent of the parties, the tribunal did not have jurisdiction, as constituted, to hear the dispute in relation to contract C90.

9 Thus, arising under the contract between the parties, the chosen arbitral tribunal has brought down an award for a sum of money concerned with commercial commission on moneys paid in relation to which there is no dispute other than the refusal of the Chinese Tribunal to permit or to recognise a jurisdictional foundation for the cross-claim. It was in that context that Beijing Be came to Australia for the recognition and enforcement of its Chinese award

against Elders. The stay sought by Elders was made on the basis that Elders would provide complete security for the Chinese award, pending the resolution of the arbitration in relation to contract C90.

10 It is to be recognised that this would place Beijing Be in the position of having its arbitral award entirely secured should it win or substantially win the arbitration in relation to contract C90. But to say as much is to recognise that what was being sought in the stay application was functionally, by way of outcome, not dissimilar to what had been sought in the application before the Tribunal in relation to contracts C93 and C96. That is, that Elders did not want to be put in the position of paying the arbitral award for commission on moneys paid before it saw the result, and hopefully the satisfactory result, of the debate about contract C90. I will come to injustice in due course, but it is this matter which Elders identifies as the source of the injustice of the refusal of the stay because it is said that in the totality of the business relationship it was unjust for it to pay out money for commission before it had the opportunity to vindicate its rights in relation to a claim for unliquidated damages which, in a claim which his Honour accepted, was bona fide, substantial and having some grounds for being propounded.

11 I should add at this point two further important matters. No complaint at all is made about the solvency of Beijing Be. No complaint and no argument was put before this Court about procedures for the enforcement of awards in China. Some evidence was placed before his Honour about an entirely unrelated arbitral dispute which has obtained some notoriety in this country by reason of it being the source of a leading High Court authority. At [80] of his Honour's reasons his Honour stated as follows:

> [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.

12 No complaint is made about that paragraph. The reasons of the primary judge are criticised in the helpful and clear outline of submissions for leave to appeal provided by counsel. I do

not propose to set out all aspects of those submissions. The gravamen of them is at least three-fold. The first is that his Honour gave too much weight to the point of legal error in recognising the international arbitral context of the judgment. In particular, criticism is made of what his Honour said at [71] and [82]. For clarity, I will set out paragraphs 70, 71 and 82 in these reasons at this point.

> [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 ss 8(5), 8(7) and 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 bad no basis upon which to engage any of the grounds specified in ss 8(5), 8(7) and 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.
> …
>
> [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 A ward 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.

13 As I understood the submissions of senior counsel, it was not said that once an international arbitral award was enforced by an order under the Act translating it into a judgment of the Court then one should entirely eschew any consideration of its international source.

14 Were that submission put, I would reject it. The question of the stay was, however, one to be dealt with under the rules of Court, as his Honour did. The nature of the judgment and its source were, in my view, clearly available matters to be taken into account. I see no approach in his Honour's reasons different from that. A clear, express and demonstrated public policy of the Australian Parliament is contained within the Act for the facilitation of the enforcement of international arbitral awards. That facilitation means their proper, efficient and timeous facilitation and recognition. To grant a stay would delay enforcement. That is not to say, however, that a stay of a judgment based on an international arbitration

award should never be given, or that there should be some legal rule or consideration binding or affecting the exercise of that discretion.

15 I see nothing of that kind in his Honour's reasons. His Honour did not take into account expressly, as he could have, another consideration which I have adverted to already, in that the vindicated claim by the Tribunal in relation to contracts C93 and C96 is for commission to a commercial counterparty on moneys already paid, and contracts otherwise performed in accordance with the tenor of the agreement between the parties.

16 Thus, I do not see any likely appealable error whatsoever in how his Honour has framed the context in relation to the stay application being the international arbitral context.

17 Secondly, complaint is made about a number of findings of fact in relation to the procedural steps that Elders took in China. In particular, argument took place to the effect that his Honour wrongly criticised Elders for their approach in how they dealt with the dispute under contract C90. In particular, Elders refers to [75] and following of his Honour's reasons. The transcript of today's debate before the Court will reveal any particular aspect of this that may need more detailed elaboration than I think is necessary, however, I do not read anything in his Honour's reasons wherein his Honour criticised Elders for taking any particular course that it took. Rather, I read his Honour's reasons as identifying as a matter of fact the reality that by making the choice that it did (being the choice to which I have earlier referred) Elders did not take steps in 2013 to advance the C90 arbitration, but rather sought to bring the C90 arbitration into the C93 and 96 arbitration.

18 After, as counsel put it, the writing might be seen to be 'on the wall' in relation to the likely success of the application to have the cross-claim treated as a setoff, in 2014 steps have been taken by Elders to advance the C90 arbitration. I do not see anything in [76] and [77] of his Honour's reasons that amount to any relevant factual error. Rather, as I would understand those reasons, the extent to which some delay has occurred, that is in part due to the delay in the institution and advancement by Elders of the claim in the C90 arbitration. An illustration of these aspects is the fact that Elders nominated Mr Elson Pow, a well-known and respected lawyer, to be an arbitrator in the C90 arbitration. Mr Pow was the dissenting arbitrator in the decision of the Tribunal in C93 and C96. At [77] the primary judge identifies the fact that Beijing Be objected to Mr Pow and that Elders have persisted in nominating him, as is their right to do, but that dispute as to the constitution of the Tribunal still being with CIETAC has been a source of some delay. I do not read any criticism of Elders in that regard. Nor do I

make any. Certainly, it can be accepted that Elders was acting on a view of its own rights, which was justified. Nevertheless, what his Honour was saying was that slowed proceedings down. I do not see, and I have not been persuaded by the submissions or the material of, any materially relevant error of fact which may engage *House v The King* (1936) 55 CLR 499, or that would require a re-exercise of the discretion by this Court.

19 The third broad element is the injustice asserted. I have already in part dealt with this. The injustice is said to be the requirement to pay out money to a party not said to be insolvent in a country whose legal system is not the subject of criticism, that sum of money being a liquidated sum otherwise uncontested for commercial commission on moneys paid and contract satisfactorily completed, because in another contract in the overall business relationship, there is a claim for unliquidated damages. In those circumstances, it is sufficient to say that I see no injustice at all in that regard. The parties did not incorporate in their arbitration clauses any linkage. They did not identify, in the arbitration clauses, any capacity to bring about a relationship between disputes under separate contracts.

20 The parties did not apparently create an overarching contractual relationship which would bind or see consent for the consolidation of different contractual disputes. They chose CIETAC as their tribunal; they chose Chinese law as the substantive law to govern the contract, with the qualifications I have identified, and as the law of arbitration. I see no injustice in the result. I see no error in the learned primary judge's reasons likely to persuade an appeal court of a different result. Indeed, in the circumstances, were this Court obliged to re-exercise the discretion, I see no real prospect of exercising a discretion in any different way.

21 For those reasons, subject to the parties requiring any further order about interim security, the order that I would make would be that the application for leave to appeal be dismissed with costs.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate:

Dated: 28 January 2015

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1282 of 2014**

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

JUDGES:	**ALLSOP CJ, RARES J & MIDDLETON J**
DATE:	**22 DECEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

RARES J

22 I agree with the reasons that the Chief Justice has delivered. I would only add this. The primary judge referred to the necessity to pay appropriate regard to the objects of the *International Arbitration Act 1974* (Cth) in s 2D, the requirements of s 39 of the Act and the objects and purposes of Articles 1-6 of the *New York Convention* set out in Schedule 1 of the Act. Critically, s 2D(c) identified that an object of the Act was "to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce".

23 Section 8(3) provided that, subject to Pt 2 of the Act, this Court has jurisdiction to enforce a foreign award "as if the award were a judgment or order of [the] court".

24 Where the Court is considering exercising a power to enforce a foreign award under s 8, s 39(2) requires it to have regard to the objects of the Act and the fact that arbitration awards are intended to provide certainty and finality.

25 A stay of a judgment or order is an order that suspends or defers both the judgment and order's immediate effect and immediate enforceability. That is, a stay of an order relates to its enforcement. Section 8 confers a jurisdiction to enforce the award *as if it were a judgment or order* of this Court.

26 Elders argued that the translation of the monetary sums awarded by the CIETAC Arbitration Tribunal to Beijing Be changed the nature of the award into an ordinary judgment of the Court. But that is to mistake the effect, not only of the express words of s 8(3), but also the requirements of ss 2D(c) and 39(2) to enable enforcement of the award having regard to its intention to provide certainty and finality.

27 That is not to say that, in particular circumstances, were an appropriate basis made out, the Court does not have available to it the power to stay its orders, including giving a foreign award the effect it would have as if it were such an order. The discretion to grant a stay is available to prevent injustice and in circumstances where it is called for having regard to all of the facts.

28 The primary judge was right to have had regard to the origin of the declaration and order for payment of money that he made as deriving from a foreign award when he exercised his discretion to refuse a stay of enforcement of the award under s 8(3).

I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 28 January 2015

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1282 of 2014**

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

JUDGES:	**ALLSOP CJ, RARES J & MIDDLETON J**
DATE:	**22 DECEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

MIDDLETON J

29 I agree with the reasons of the Chief Justice and Justice Rares. I make one further observation consistent with the reasons of the Chief Justice and Justice Rares.

30 Once a court has decided to enforce an award, it should normally give full effect to that decision by directing the entry of an appropriate money judgment or making an appropriate order for payment. It must be recognised that any stay, particularly one for an indefinite period of time, would not give full effect to the timely enforcement of an arbitral award made in relation to international trade and commerce.

31 Everything will depend on the circumstances pertaining to any particular stay application. However, as the trial judge observed, a stay in the circumstances of this case would undermine the effective enforcement of the award, which award is for a liquidated sum in the nature of commercial commission and remains otherwise unchallenged.

I certify that the preceding three (3)
numbered paragraphs are a true copy

of the Reasons for Judgment herein of the Honourable Justice Middleton.

Associate:

Dated: 28 January 2015

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1282 of 2014**

BETWEEN:	**ELDERS INTERNATIONAL AUSTRALIA PTY LTD (ACN 007 735 168)** **Applicant**
AND:	**BEIJING BE GREEN IMPORT & EXPORT CO LTD** **Respondent**
JUDGES:	**ALLSOP CJ, RARES J & MIDDLETON J**
DATE:	**22 DECEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

ALLSOP CJ

32 The respondent to the application for leave to appeal, Beijing Be, has asked that the bank guarantee that has been provided to hold the position be released to it, in effect called upon, for the sum of A$3,620,368.86. Mr Nell objects to that course, though not because of the identification of a sum of money; he submits, and understandably so, that the calling up of a bank guarantee of a commercial party may have ramifications beyond mere payment of a debt, and has indicated that his client will pay the sum promptly within the next 24 hours. The Court will not be able to be constituted as three judges, but two of us will be here on Wednesday, 24 December 2014. I will give liberty to apply in relation to the bank guarantee on 12 hours' notice. If payment is not made tomorrow then the parties should contact my chambers to have the matter relisted on Wednesday.

I certify that the preceding one (1) numbered paragraphs are a true copy

of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate:

Dated: 28 January 2015