FEDERAL COURT OF AUSTRALIA

Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd [2017] FCA 1223

File number:	NSD 13 of 2017
Judge:	**GLEESON J**
Date of judgment:	19 October 2017
Catchwords:	**ARBITRATION** – application for summary judgment under s 31A of the *Federal Court of Australia Act 1976* (Cth) in respect of an application for enforcement of a foreign arbitral award under s 8(3) of the *International Arbitration Act 1974* (Cth) – summary judgment and enforcement application resisted on the grounds that arbitration agreement not valid under the law of the country where the award was made, that the respondent was unable to present its case at the arbitration and that enforcement would be contrary to public policy – where law of foreign country not proved – where argued that arbitration agreement was a sham and that threats were made against the person of a director of the respondent preventing it from participating in the arbitration – application for summary judgment granted
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 31A *International Arbitration Act 1974* (Cth) ss 2D, 3, 8, 9, 39 *Federal Court Rules 2011 ,* rr 26.01, 28.44
Cases cited:	*Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 *AJU v AJT* [2011] SGCA 41; [2011] 4 SLR 739 *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 *Application of ARD and RGD; re FGG and Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth)* [2014] NSWSC 1963 *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 *Bakri Navigation Co Ltd v Owners of the Ship 'Golden Glory' Glorious Shipping SA* [1991] FCA 306; (1991) 217 ALR 152 *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR

496; (1980) 47 FLR 317

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; (2006) 157 FCR 45

Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389

Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46; [2011] 1 AC 763

Damberg v Damberg [2001] NSWCA 87; (2001) 52 NSWLR 492

Danthanarayana v Commonwealth of Australia [2016] FCAFC 114

Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'As al-Khaimah National Oil Co [1987] 2 Lloyd's Rep 246; [1990] 1 AC 295

Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH [2008] 3 SLR 871; [2008] SGHC 67

Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd [1918] AC 260

Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [2004] HCA 55; (2004) 218 CLR 471

Florance v Hutchinson (1891) 17 VLR 471

Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd [2013] FCAFC 109; (2013) 304 ALR 468

Hebei Import & Export Corporation v Polytek Engineering Co Ltd [1999] HKC 205

Honeywell International Middle East Ltd v Meydan Group LLC (formerly known as Meydan LLC) [2014] EWHC 1344; [2014] 2 Lloyd's Rep 133

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248; (2011) 38 VR 303

International Relief and Development Inc v Ladu [2014] FCA 887

Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd [2008] FCAFC 60; (2008) 167 FCR 372

Monde Petroleum SA v Westernzagros Ltd [2015] EWHC 67 (Comm); [2015] Bus LR D11; [2015] 1 Lloyd's Rep 330

National Iranian Oil Company v Crescent Petroleum Company International Ltd [2016] EWHC 510 (Comm); [2016] 2 Lloyd's Rep 146

Neilson v Overseas Projects Corporation of Victoria Ltd [2005] HCA 54; (2005) 223 CLR 331

Nichol v Discovery Africa Ltd [2016] FCAFC 182; (2016) 118 ACSR 554

Österreichische Länderbank v S'Elite Ltd [1981] QB 565;

[1980] 3 WLR 356

Polar Aviation Pty Ltd v Civil Aviation Safety Authority [2012] FCAFC 97; (2012) 203 FCR 325

PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV [2014] 1 SLR 372; [2013] SGCA 57

Raftland Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia [2008] HCA 21; (2008) 238 CLR 516

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Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd [2016] HKEC 2128

TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83; 232 FCR 361

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Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd (1994) 2 VR 106

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131; (2011) 277 ALR 441

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Number of paragraphs:	124
Counsel for the Applicant:	Dr A Bell SC with Mr D Meltz
Solicitor for the Applicant:	Rem Zhou Lawyers
Counsel for the Respondent:	Mr MR Scott QC with Ms E Levine
Solicitor for the Respondent:	David Reichenberg Lawyers

ORDERS

NSD 13 of 2017

BETWEEN:	**LIAONING ZHONGWANG GROUP CO LTD** Applicant
AND:	**ALFIELD GROUP PTY LTD (ACN 122 326 729)** Respondent

JUDGE: **GLEESON J**

DATE OF ORDER: **19 OCTOBER 2017**

THE COURT ORDERS THAT:

1. The China International Economic and Trade Arbitration Commission Arbitral Award dated 11 August 2011 be enforced pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth).
2. The respondent pay the applicant the sum of AUD 2,256,533.84.
3. The respondent pay the applicant the sum of USD 463,653.60.
4. The respondent pay the applicant the sum of RMB 278,033.
5. The respondent pay the applicants costs of the proceeding.

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

REASONS FOR JUDGMENT

GLEESON J:

1 The applicant, Liaoning Zhongwang Group Co Ltd ("Zhongwang") sought summary judgment pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) on its application to enforce a foreign arbitral award in this Court under s 8(3) of the *International Arbitration Act 1974* (Cth) ("Act").

2 On 11 August 2011, the China International Economic and Trade Arbitration Commission ("CIETAC") issued a document titled "ARBITRAL AWARD (2011) CIETAC Beijing Award No. 0382" ("Arbitral Award"), in which it resolved a dispute between Zhongwang and the respondent ("Alfield") in Zhongwang's favour. The Arbitral Award upholds Zhongwang's claim to restitution of the price of goods under a contract between the parties. It requires Alfied to pay to Zhongwang sums of USD 463,653.60 and AUD 2,256,533.84, plus the arbitration fee of RMB 278,033. Those sums remain unpaid.

3 Alfield resisted enforcement of the Arbitral Award, relying on ss 8(5)(b), 8(5)(c) and 8(7)(b) of the Act. As set out in its Concise Statement filed 22 February 2017, Alfield contended that the Court should refuse to enforce the Arbitral Award because:

(1) there was no valid arbitration agreement between the parties;

(2) Alfield was unable to present its case in the arbitration; and/or

(3) enforcement of the Arbitral Award would be contrary to public policy because:

  (a) the mercantile agreement containing the arbitration agreement was a sham document; and

  (b) Alfield was unable to participate fully in the arbitration hearing due to a threat made to the liberty of its sole director, Dong Wu ("Mr Wu"), by a representative of Zhongwang and Mr Wu's reasonable fear of detention in China.

4 In its submissions, Alfield also relied upon an alleged lack of proper notice of key procedural steps in the arbitration.

5 Alfield contended the application for summary judgment must fail because it cannot be said that Alfield has no reasonable prospects of success of resisting enforcement of the Arbitral Award.

6 Alfield contended that it is asking the Court to engage in a permissible review of the purported arbitration agreement and the arbitral process preceding the making of the Arbitral Award, and it does not seek impermissibly to "re-open" the arbitration.

SUMMARY JUDGMENT: RELEVANT PRINCIPLES

General

7 Pursuant to s 31A(l) of the *Federal Court of Australia Act 1976* (Cth) and r 26.01(1) of the *Federal Court Rules* ("Rules"), in order to succeed on summary judgment Zhongwang must establish that Alfield has no reasonable prospect of resisting its application for enforcement of the award.

8 In determining whether there is a reasonable prospect of success, the Court must make "a practical judgment ... as to whether [Alfield] has more than a 'fanciful' prospect of success": cf. *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2012] FCAFC 97; (2012) 203 FCR 325 at [47]; *Spencer v Commonwealth* [2010] HCA 28; (2010) 241 CLR 118 at [25].

9 Further, as the Full Court observed in *Danthanarayana v Commonwealth* [2016] FCAFC 114 at [4] (in the context of summary dismissal):

> [T]o summarily dismiss a proceeding, and thereby preclude a person from having their case determined on its merits at a final hearing, is a serious step taken only with great care and if it is possible to conclude with confidence that there is no reasonable prospect of success; this is so despite the fact that under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) ... the power to summarily dismiss a proceeding is not dependent on the case being "hopeless" or "bound to fail" for it to have no reasonable prospect of success.

10 In particular, the existence of a real issue of law does not preclude summary judgment where a disputed point of law can be decided without the need for a trial or evidentiary hearing: cf. *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; (2008) 167 FCR 372 at [74] per Rares J and [131] per Gordon J; *Nichol v Discovery Africa Ltd* [2016] FCAFC 182; (2016) 118 ACSR 554 at [137].

Enforcement of arbitral awards

11 In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303 ("*Altain Khuder*") at [3], Warren CJ emphasised that "in all but the most unusual cases, applications to enforce foreign arbitral awards should involve only a summary procedure".

12 At [53], her Honour said, concerning s 8(5) (on which Alfield sought to rely):

> Section 8(5)(a)–(e) require the enforcing court to be satisfied that a foreign award is tainted by either fraud or vitiating error on the part of the arbitral tribunal. Given that the Act declares arbitration to be 'an efficient, impartial, enforceable and timely method by which to resolve commercial disputes', the enforcing court should start with a strong presumption of regularity in respect of the tribunal's decision and the means by which it was arrived at. The enforcing court should treat allegations of vitiating irregularity as serious. A correspondingly heavy onus falls upon the award debtor if it wishes to establish such an allegation on the balance of probabilities. Furthermore, the conduct of the parties to the agreement at each of the various stages prior to an enforcement order being sought in these courts, and its consistency with the defence subsequently asserted, will be a relevant fact to consider when deciding whether that burden has been discharged to the necessary standard.

13 See, also, the observations of Hansen JA and Kyrou AJA at [141].

BACKGROUND

14 Zhongwang is a Chinese foreign corporation with its principal place of business in China.

15 Alfield is an Australian registered company. Mr Wu is Alfield's director and sole shareholder.

16 The claims submitted to arbitration were based on a document expressed to be between the parties and titled "Mercantile Agreement" ("mercantile agreement" or "distribution agreement"). The document "accredits" Alfield to sell "AL extrusions" produced by Zhongwang in Australia and set out terms in relation to the sale of those products by Alfield and the payments due to Zhongwang. The document is expressed to apply from 1 January 2008 to 31 December 2008.

17 Clause 12 of the mercantile agreement contains an arbitration clause which states:

> All disputes in connection with this contract or the execution there of shall be settled through friendly negotiations between two parties. If no settlement can be reached, The case in dispute shall then be submitted for arbitration to china international economic and trade arbitration commission, Beijing in accordance with it's [sic] rules of procedure and the decision made by the arbitration organization shall be taken as final and binding upon both parties. The arbitration expenses shall be borne by the losing party unless otherwise awarded by the arbitration organization.

Arbitration proceeding

18 Zhongwang commenced the arbitration against Alfield on 25 October 2010. Steps taken between the initiation of proceedings and the hearing on 20 June 2011 are set out in the Arbitral Award. Alfield disputed that Zhongwang was entitled to rely on the Arbitral Award's recitation of facts concerning those steps.

19 Section 9(1) of the Act states that:

> (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:
>
> (a) the duly authenticated original award or a duly certified copy; and
>
> (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

20 Sections 9(2) and 9(3) set out requirements for the production of an authenticated original, certified copy, or certified translation of an "award" to the Court. There was no dispute that the Arbitral Award was produced in accordance with s 9(2) and s 9(3).

21 Section 9(5) of the Act states that a document produced to the Court in accordance with s 9 is receivable as *prima facie* evidence of the matters to which it relates.

22 Mr Scott QC, counsel for Alfield, submitted that s 9(5) of the Act should be read in the context of s 8(1) of the Act, which has the purpose and function of enforcing an arbitration award. It follows, he submitted, that the reference to "award" in s 9 of the Act does not include the recitations and findings of fact in the Arbitral Award – it refers only to that part of the Arbitral Award that is proposed to be enforced as a judgment of the Court, being the final dispositive portion of the document, which is analogous to orders of a Court. Mr Scott QC submitted that s 9(5) of the Act only allows that part of the document to be received as *prima facie* evidence.

23 Dr Bell SC, counsel for Zhongwang, submitted that the entirety of the Arbitral Award was the "award" for the purpose of s 9, and accordingly the whole document, including the recitations and findings of fact, was receivable as *prima facie* evidence. He submitted that the entire document was styled "award" and noted that it was admitted into evidence without objection or limitation.

24 CIETAC arbitrations are conducted pursuant to the CIETAC Arbitration Rules. The rules applicable to the arbitration were the CIETAC Arbitration Rules effective as from 1 May

2005. Article 43(2) of the CIETAC Arbitration Rules supports Mr Bell SC's submission. That article states:

> The arbitral tribunal shall state in the award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs and the date on which and the place at which the award is made. The facts of the dispute and the reasons on which the award is based may not be stated in the award if the parties have agreed so, or if the award is made in accordance with the terms of a settlement agreement between the parties. The arbitral tribunal has the power to determine in the arbitral award the specific time period for the parties to execute the award and the liabilities to be borne by a party failing to execute the award within the specified time.

25 Having regard to the form of the Arbitral Award document and art 43(2), I accept that the reference to "award" in s 9 of the Act captures the entire Arbitral Award document, and the entire document is receivable as *prima facie* evidence of the matters to which it relates.

26 Relevantly, the Arbitral Award states:

(1) After being sent a notice of arbitration on 27 October 2010, both Alfield and Mr Wu submitted a certificate of legal representative, power of attorney, certificate of registration of a company and a letter regarding the method of the formation of the arbitral tribunal and arbitrator appointment on 10 November 2010.

(2) After Zhongwang withdrew all arbitral claims against Mr Wu on 13 December 2010, on 14 December 2010 Alfield submitted a new power of attorney and applied for, and was granted, an extension of time to submit its written defence and provide relevant documents.

(3) Alfield appointed one of the three arbitrators, Ms Jin Fengju, to the arbitral tribunal, which was formed on 27 December 2010.

(4) On 27 December 2010, Alfield sought, and was granted, a further extension of the time limit to file its defence and counterclaims.

(5) On 24 January 2011, Alfield submitted written counterclaims to the tribunal seeking compensation from Zhongwang, which were accepted and in response to which Zhongwang submitted a written defence to the counterclaims.

(6) On 28 February 2011, Alfield submitted evidence to the tribunal.

(7) On 7 March 2011, Alfield applied to CIETAC to obtain the business archives of Zhongwang.

(8) After an exchange of submissions (comprising Alfield's application for the business archives and Zhongwang's defence to the counterclaims), the CIETAC secretariat notified both parties of the tribunal's decision to allow the parties to submit supplementary materials.

(9) On 18 March 2011, the CIETAC secretariat notified the parties that the tribunal had decided to hold an oral hearing on 21 April 2011.

(10) On 23 March 2011, Alfield lodged an application for an extension of the time limit for submitting evidence to 25 April 2011 and to postpone the hearing date. This application was refused on about 7 April 2011.

(11) On 30 March 2011, Alfield submitted an "Explanation on the Amendment of Counterclaims" and "Arbitration Evidence (Second Bundle)", but the amended counterclaims were not accepted because Alfield did not pay the requisite arbitration fee.

(12) On 14 April 2011, Alfield submitted supplementary materials.

(13) On 15 April 2011, Zhongwang submitted an application to change the hearing date. After deliberation, the tribunal decided to postpone the hearing date to 8 May 2011. The CIETAC secretariat notified the parties of this decision in writing.

(14) On 4 May 2011, Alfield requested a further postponement of the hearing date to allow the parties time to reach a settlement. With Zhongwang's consent, the tribunal decided to postpone the hearing to 20 June 2011, and the CIETAC secretariat notified the parties of that decision.

(15) On 13 June 2011, Alfield's arbitration agents submitted an "Explanation on Dissolution of the Agency Relationship" notifying the tribunal that the agency relationship between them and Alfield had been revoked.

27 Alfield did not appear at the first oral hearing of the tribunal in Beijing on 20 June 2011.

28 Pursuant to Art 34(2) of the CIETAC Arbitration Rules:

> If the Respondent fails to appear at an oral hearing without showing sufficient cause for such failure, or withdraws from an on-going oral hearing without the permission of the arbitral tribunal, the arbitral tribunal may proceed with the arbitration and make a default award. In such a case, if the Respondent has filed a counterclaim, the Respondent may be deemed to have withdrawn its counterclaim.

29 At the oral hearing, Zhongwang presented its arguments and evidence, and answered questions raised by the tribunal. Subsequently, on 27 June 2011, Zhongwang provided

supplementary materials including an "Opinions on Examining Evidence", a "Statement of Attorney" and "Evidential Materials." The Arbitral Award records that these materials were sent to Alfield by express mail, with a request that if Alfield had any objection or applied for a second oral hearing, it should do so in writing before 15 July 2011.

30 The Arbitral Award states that, around the same time, the CIETAC secretariat also notified both parties that the tribunal had not accepted Alfield's amended counterclaims, referred to in [26(11)] above because of formalities that had not been completed and that, if Alfield did not apply for a hearing on its counterclaims, the counterclaims would be deemed to have been withdrawn pursuant to the CIETAC Arbitration Rules.

31 On the hearing before this Court, Mr Wu's evidence was that he did not receive any documents or communication from the tribunal after around 10 June 2011.

32 Alfield did not respond to the CIETAC secretariat's request. Thereafter, the tribunal:

(1) proceeded to render the Arbitral Award in relation to Zhongwang's claims on the basis of the written submissions, the findings at the hearing and the relevant law; and

(2) considered Alfield to have withdrawn its counterclaims.

Argument made before the arbitral tribunal

33 The Arbitral Award sets out Alfield's defence to Zhongwang's claim in the arbitration proceeding. The Arbitral Award quotes Alfield's "Statement of Defense" as saying "the Respondent is treated and managed by the Claimant as a branch. The Respondent does not have the status to make independent business policy".

34 As summarised by the tribunal, Alfield's defence included the following:

> Although the Claimant transferred the shares under its name to Mr. Wu Dong by an anti-dated Equity Transfer Agreement and requested the Respondent to sign the documents including the Independence Confirmation etc., it is for the purpose of getting list in Hong Kong Stock Exchange, and not conform with the facts. In 2008, the Claimant was preparing for listing in Hong Kong. In July 2008, the Clamant and Mr. Wu Dong signed the Equity Transfer Agreement which transferred all shares to Mr. Wu Dong with an anti-dated clearing day of 17 December 2006. The Claimant also requested the Respondent and Mr. Wu Dong to sign the Independence Confirmation. Because in fact, the Respondent was the branch of the Claimant and Mr. Wu Dong was the Branch Manager, therefore, it was the Respondent and Mr. Wu Dong who signed the above Confirmation.

Arbitral tribunal's decision

35 The tribunal held that Chinese law applied to the dispute between the parties.

36 The tribunal noted in particular that Alfield did not, in its "Statement of Defense", object to the authenticity of Zhongwang's evidence. The Arbitral Award contains a detailed recitation of Alfield's defence including relevantly, that:

(1) Alfield is a branch of Zhongwang established in Australia; and

(2) from the beginning of its establishment, Alfield was treated as a branch of Zhongwang.

37 Under the heading "Part 2. The Arbitral Tribunal's Opinion", the tribunal concluded that both parties signed the mercantile agreement in January 2008, and that the agreement was actually performed by the parties. It concluded: "Thereby, the MERCANTILE AGREEMENT shall be the basis of hearing by the Arbitral Tribunal".

38 The tribunal considered and dismissed Alfield's argument that it did not have "independent status of business policy making", stating:

> The Arbitral Tribunal holds that the Respondent is an independent legal entity, the civil rights and obligation [sic] to the other persons shall be undertaken by itself. Therefore, the Respondent shall bear the liability to repay the Claimant the outstanding balance of the price of goods under the Agreement.

Conclusions about Alfield's participation in the arbitration

39 On behalf of Zhongwang, Dr Bell SC submitted that Alfield did not object to the jurisdiction of the tribunal at any stage during the arbitration proceeding. To the contrary, he argued, it is apparent on the face of the Arbitral Award that Alfield submitted to the Tribunal's jurisdiction by participating in the tribunal's formation, making written submissions and providing evidence, and filing its own counterclaims.

40 Alfield contended that it cannot be concluded, on the state of the evidence before the Court, that Alfield raised no jurisdictional objection and engaged in what Zhongwang's submissions characterised as "sustained participation" in the arbitral proceeding. Alfield argued that the Arbitral Award reasons show that Alfield asserted at the arbitration that the mercantile agreement did not govern its relationship with Zhongwang and was only entered into for collateral purposes. According to Alfield, this assertion necessarily entailed a challenge to the legal significance of the arbitration agreement contained in the mercantile agreement because it was a challenge to the whole. The Arbitral Award itself is silent on the issue.

41 Alfield contended that it only took limited steps in the arbitral proceeding and could not continue its participation to an oral hearing because Mr Wu was threatened by Zhongwang's in-house lawyer and had a reasonable fear for his safety in China.

42 Based on the Arbitral Award, and in the absence of any relevant evidence from Mr Wu, I do not accept that there is a real issue of fact as to whether Alfield objected to the jurisdiction of the tribunal at any stage during the arbitration proceeding. Alfield participated in the arbitration proceeding in the ways described in the Arbitral Award. Alfield did not make a challenge to the arbitration agreement in the arbitration proceeding: to the contrary, it invoked the arbitration agreement by its counterclaim. I also find that Alfield ceased to participate in the arbitration proceeding around the time that its agents lodged the "Explanation on Dissolution of the Agency Relationship" with the tribunal.

Alfield's evidence on summary judgment application

43 Alfield's evidence comprised two affidavits sworn by Mr Wu on 22 February 2017 and 30 March 2017, an affidavit of Irving Reichenberg sworn 31 March 2016 and expert translation of Chinese language documents by Lushan Qin.

Sham

44 Alfield contended, and I accept that, Mr Wu's evidence is to the following effect:

(1) on or around 2 October 2006 Zhongwang and Mr Wu entered into an agreement entitled "Contract for the Establishment of a Branch Company in Australia" pursuant to which Mr Wu was to set up a branch company of Zhongwang in Australia and be the branch manager of that company with profits shared;

(2) between around October 2006 and July 2009 Alfield operated as Zhongwang's Australian branch;

(3) in June 2008 a representative from Zhongwang's International Department requested that Alfield sign documents to assist with a listing in Hong Kong and stated that the documents "will only be used for external purposes and internally we run in the same fashion";

(4) this statement is corroborated by an email from another representative of Zhongwang dated 14 June 2008 which attached the mercantile agreement for Alfield's signature and stated: "The Attached is an Merchantile Agreement between ZW and Alfield, which will support ZW's stock to put on the market only";

(5) from the June 2008 conversation and the 14 June 2008 email, Mr Wu understood he was only signing the mercantile agreement on behalf of Alfield to help Zhongwang put its stock on the market, and that it was not meant to affect his relationship with Zhongwang or how Alfield operated; and

(6) after Alfield signed the mercantile agreement, there was no change in the way Zhongwang and Alfield dealt with each other.

45 However, as to (6), Mr Scott QC acknowledged that the execution of the mercantile agreement was followed, fairly shortly afterwards, by the execution of several versions of a document described as a "repayment plan" including versions dated 27 October 2008, 28 October 2008, 5 February 2009 and 19 March 2009.

46 Mr Scott QC submitted that Mr Wu's execution of these documents was consistent with the relationship of head company-branch office. By way of example, the document dated 28 October 2008, is headed "Australian Company ALFIELD's repayment plan" and item 4 is headed "ALFIELD Company Undertaking". However, the undertaking includes the words "I willingly accept legal responsibility for a failure to implement the above stipulations, and whatever penalty may be applied by the legal authority with jurisdiction where Zhongwang Group is located".

47 In oral submissions, Mr Scott QC referred to the statement in the Arbitral Award that the parties signed the mercantile agreement in January 2008, although the agreement is undated. Mr Scott QC submitted that the tribunal was wrongly told by Zhongwang that the agreement was made in January 2008 when the agreement was not conceived of until June 2008.

Replacement agreement

48 Further, Mr Wu gave evidence of a subsequent document signed by the parties which was said by Alfield to have replaced the mercantile agreement, and which lacked an arbitration clause. The relevant evidence was:

(1) on 20 October 2008 Mr Wu received an email from Ms Annie Lee, a representative of Zhongwang, attaching a new Chinese-language agreement entitled "Distribution Agreement" ("replacement agreement");

(2) the email from Ms Lee relevantly stated: "... please peruse the updated distribution agreement. please sign on the updated agreement if you don't have any queries";

(3) clause 10 of the replacement agreement stated that the agreement was for the period from 1 January 2008 to 31 December 2008, that is, the same period as set out in cl 6 of the original mercantile agreement;

(4) the replacement agreement did not contain an arbitration clause. Rather, cl 15 relevantly stated: "Chinese law shall be applied for an adjustments to this agreement and Chinese judicial authorities shall exercise jurisdiction"; and

(5) shortly after receiving the replacement agreement, Mr Wu signed it and emailed it back to Zhongwang.

Alfield's inability to present its case

49 Mr Wu gave the following evidence in his February 2017 affidavit:

> 101. When I first learnt of the arbitration proceeding in October 2010 I instructed a Chinese law firm to represent me and initially participated in the process through those lawyers. I remained in Australia because I was afraid to go to China for the reasons I have described.
>
> …
>
> 103. I understand the hearing of the arbitration was in June 2011. I was afraid to go because I thought Zhongwang would have me arrested. I remembered what Feng Ying Song had said to me about Cai Dong and the senior executive's warning to leave and not come back. Sometime after that warning but before June 2011 the senior executive called me and said that I should not return to China. Also, sometime in 2010 (I cannot exactly recall) I received a telephone call from someone claiming to be from the police in China. They said they could help me and asked me to send them a photo of myself "with the ears showing", which I understood to mean a request for a passport photo. I thought that I was now of interest to the police in China because Zhongwang claimed I owed it money or that I stole money from it and that if I returned to China I could be detained for a long time.

50 Feng Ying Song is said to be Zhongwang's in-house lawyer. Mr Wu gave evidence that his conversation with Feng Ying Song was in March 2009, and was to the following effect:

> Zhongwang's European branch manager Dong Cai was charged in China with misusing €20,000 of customer produce payments that belonged to Zhongwang. He was sentenced to 12 years in jail in Liaoning City, which was the maximum sentence he could have received. The boss will send someone to go to Australia to conduct an audit of Alfield and Zhongwang will then take it over. Zhongwang expects you to co-operate and to work hard to pursue money that customers owe to Alfield. I have been to visit Cai Dong in jail. His hair is all white, he is much slimmer and in poor shape. Don't be like Cai Dong.

51 In oral submissions, Mr Scott QC submitted that the statement attributed to Feng Ying Song was sensibly interpreted as a threat that Dr Wu would be accused of misusing funds and consequently sent to prison for 12 years.

52 Mr Wu also gave evidence about his state of mind in March 2009 and the following conversation with Tong Wen "Wendy" Li and Annie Lee, two people who worked in the International Department of Zhongwang:

> 82. I believed what Feng Ying Song said was a threat. After meeting with Feng Ying Song I met with a senior executive of Zhonwang who was a friend of mine. I do not want to name the senior executive in this affidavit because I am worried he will be punished. I can name him if his name is not disclosed. During our meeting he said to me in Mandarin words to the effect that *"once you go to Australia you should not return again to China because Zhong Tian is very upset with you."* After hearing this and after my meeting with Feng Ying Song I was afraid I would not be able to leave Chine and return home to Australia. I understood that Zhongwang's boss was very powerful and well connected and could have me put in jail just be [sic] asking.
>
> 83. Later that day I met again with Tong Wen Li and Annie Lee. We had a conversation in Mandarin. I said to them words to the effect that "*I want someone else to take over the Australian branch".* Tong Wen Li then gave me another document called "Repayment Plan". This document Tong Wen Li gave me had different numbers to the "Repayment Plan" I signed in 2008. We then had a conversation to the following effect in Mandarin:
>
> > She said: *You have to sign it. If you do not sign it you will not be able to return to Australia. You will be locked in China. After you have signed it, go back to Australia and wait for the person from the company and co-operate with them on the taking over and wait for the new branch manager to take over the company. You need to co-operate with the account audit process to expedite the taking over by the new branch manager*".
> >
> > I said: "*If I have to sign it and there is no way around it, then I will sign it. Please send your people to Australia as soon as possible. I don't want to do this job anymore.*"

53 Mr Wu also gave evidence that, in June 2009, the nephew of Zhong Tian Liu (the chairman of Zhongwang) said to Mr Wu: "Zhongwang's boss knows many people in the Chinese mafia and they can come to Australia to get you."

54 Mr Wu's second affidavit is to the effect that he only ever directly received the notice of arbitration which states an incorrect residential address for him and an incorrect address for Alfield. The Arbitral Award itself states the same incorrect address for Alfield. Alfield submits that it is open to question whether Zhongwang alerted the tribunal to its error. Alfield

also submits that the Arbitral Award reasons suggest that the replacement agreement was not before the Tribunal.

55 On behalf of Zhongwang, Dr Bell SC made the following observations about Mr Wu's evidence:

(1) there is nothing to suggest that the statement attributed to Feng Ying Song entailed anything more than that Dong Cai had tried to rip off the company and was prosecuted for doing so;

(2) the statement that the Chinese mafia could get Mr Wu in Australia is not a statement about a danger of coming to China but rather, if accepted, suggests that Mr Wu could be in danger in Australia;

(3) the evidence includes a letter dated 11 May 2011 from Mr Wu to Zhong Tian Liu, referring to "an arbitration procedure in China against the branch company" and stating:

> Very often I cannot sleep at night, going over things I might have done better. It is my belief that the situation is due to certain oversights in our work, in our failing to convey certain information fully and in a timely way to the Group company and to you. Hereby I apologise to you for becoming a burden to the Group company and for letting you down.
>
> In order to avoid adding further and unnecessary burdens to the Group company, I myself and the entire *Alfield Group* are willing to work with the Group company in carrying out another review and audit of all accounting books of the branch company. As the financial documents of the branch company and people who know the branch company well are all in Australia, the *Alfield Group* and I invite and welcome the personnel who you trust to be sent over to Australia to work with us in auditing the accounting books of the branch company and to finally settle the whole matter.

Dr Bell SC submitted that the letter was contemporaneous evidence of Mr Wu's knowledge of the arbitration process, and noted that it made no suggestion of inability to present a case in the process, including of any fear.

56 Dr Bell SC also noted that Alfield appointed Chinese lawyers in relation to the arbitration in October 2010, which continued to represent Alfield until June 2011. Dr Bell SC observed that Mr Wu's evidence is silent on the circumstances in which its agents submitted the "Explanation on Dissolution of the Agency Relationship", including why the agency relationship ended. Mr Wu does not say that the relationship ended because of the matters about which he gave evidence.

57 The following facts were admitted by Alfield in a notice of dispute dated 4 April 2017:

(1) Alfield did not send any legal representatives to the tribunal's oral hearing;

(2) Alfield did not apply for the hearing to be postponed, as it had successfully done on two previous occasions;

(3) Alfield did not subsequently explain its absence at the oral hearing to the arbitral tribunal, or communicate with the CIETAL Secretariat in Beijing at all after 13 June 2011;

(4) Alfield did not approach the supervisory courts in China or make any application in relation to any concern that it was unable to present its case to the tribunal; and

(5) Alfield made no application to set aside the Arbitral Award in China or in any jurisdiction prior to the commencement of these proceedings.

58 Dr Bell SC submitted that the Court should make findings based on the admissions above and to the following effect, in the absence of any record to the contrary in the Arbitral Award or evidence to the contrary from Dr Wu (relying on *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419):

(1) the tribunal was not notified that Mr Wu was unable or unwilling to attend the oral hearing;

(2) Alfield did not make any request for the arbitration to proceed on written evidence and submissions;

(3) Alfield did not make any application for arrangements for Mr Wu to give evidence by audio-visual link or by telephone;

(4) Alfield did not respond to the tribunal's request in relation to any objection it had to further materials provided by Zhongwang or an application for a second oral hearing; and

(5) Alfield did not seek to communicate to the tribunal any explanation for ceasing to participate in the arbitration after 13 June 2011.

59 I make each of those findings, noting that the evidence does not demonstrate that Alfield received the further materials provided by Zhongwang or notice of the opportunity for a second oral hearing.

ENFORCEMENT OF THE ARBITRAL AWARD

60 In *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; (2011) 277 ALR 441 ("*Uganda Telecom*") at [126], Foster J said:

> The whole rationale of the Act, and thus the public policy of Australia, is to enforce [foreign] awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.

61 See also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45 at [190]-[194].

62 Pursuant to s 8(3) of the Act, "a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court", subject to the provisions of Part II of the Act. By s 8(3A), the Court may only refuse to enforce the foreign award in the circumstances mentioned in s 8(5) and s 8(7).

63 By s 3 of the Act, *"foreign award"* means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the "Convention" applies. The word "Convention" in s 3 is a reference to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ("Convention"). China is a country to which the Convention applies. An "arbitration agreement" includes a "purported or apparent agreement": cf. *Altain Khuder* at [45]. Alfield did not dispute that the Arbitral Award is a foreign award within the meaning of the Act.

64 Zhongwang has produced copies of the Arbitral Award and the mercantile agreement, which contains the arbitration clause set out in [17] above, certified by its solicitor, Ying Zhang.

65 On that evidence, I am satisfied that Zhongwang has met the requirements of s 9(1) of the Act as to the evidence necessary to be provided for the enforcement of a foreign award (noting that "arbitration agreement" includes an arbitration clause in a contract as defined in s 3 of the Act).

66 Accordingly, Zhongwang has a *prima facie* entitlement to enforcement of the award in this Court. The Court may only refuse to enforce the award if Alfield, being the party resisting enforcement of the award, satisfies the Court of the circumstances provided for in s 8(5) or s 8(7).

Relevant provisions of the Act and the Rules

67 The objects of the Act, set out in s 2D, include to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce.

68 Section 8(5) provides, relevantly:

> Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
>
> …
>
> (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
>
> (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;

69 Section 8(7) provides, relevantly:

> In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
>
> …
>
> (b) to enforce the award would be contrary to public policy.

70 Section 8(7A) provides:

> To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award.

71 Section 39 provides that if a court is considering exercising either its power under s 8 to enforce a foreign award, or its power under s 8 to refuse to enforce an award, including on the grounds of public policy, it must have regard to the objects of the Act and the fact that:

> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
>
> (ii) awards are intended to provide certainty and finality.

72 Rule 28.44 of the Rules provides:

> (1) A person who wants to enforce a foreign award under section 8 (3) of the

> International Arbitration Act must file an originating application, in accordance with Form 52.
>
> (2) The originating application must be accompanied by:
>
> (a) the documents mentioned in section 9 of the International Arbitration Act; and
>
> (b) an affidavit stating:
>
> (i) the extent to which the foreign award has not been complied with, at the date the application is made; and
>
> (ii) the usual or last-known place of residence or business of the person against whom it is sought to enforce the foreign award or, if the person is a company, the last-known registered office of the company.
>
> (3) The application may be made without notice to any person.

73 Zhongwang filed an originating application in the relevant form on 6 January 2017, accompanied by an affidavit of its solicitor, Mr Zhang, annexing a certified copy of the mercantile agreement and a certified copy and certified translation of the Arbitral Award. Mr Zhang set out the last known principal place of business of Alfield and affirmed that "the Applicant", which I take to be a slip and read as a reference to Alfield, had not made any payments pursuant to the Arbitral Award as at the time the affidavit was affirmed. Accordingly, r 28.44 of the Rules has been complied with.

Section 8(5)(b)

74 Alfield submitted that the enforcement court has the power to determine for itself whether there was no valid arbitration agreement between the parties. The tribunal's own view of its jurisdiction has no legal or evidential value at the enforcement stage, although the Court may find it useful to see how the arbitrators dealt with the question: see *Altain Khuder* at [267]-[268], quoting the observations of Lord Mance JSC at [28] and [30] and Lord Saville JSC at [160] in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763.

75 I have set out observations of Warren CJ in *Altain Khuder* concerning the interpretation of s 8(5), above. In that decision, at [195], Hansen JA and Kyrou AJA concluded that "the Act operates according to its terms properly construed in context and having regard to the objects and purposes expressed in s 2D and s 39(2)". At [192], their Honours observed:

> [T]he Act neither expressly nor, in our opinion, by necessary intendment provides that the standard of proof under s 8(5) and (7) is anything other than the balance of probabilities, as one would expect in a civil case. Section 8(5) requires proof 'to the

> satisfaction of the court' whereas s 8(7) refers to a finding. But in either case, it is on the balance of probabilities. It is thus seen that the legislature has adopted different language in these provisions, which serves to emphasise not only the deliberate use of language but also the absence of language such as 'heavy onus', 'extremely onerous and a heavy burden', and 'clear, cogent and clear proof'. The true position, in our view, is that what may be required, in a particular case, to produce proof on the balance of probabilities will depend on the nature and seriousness of that sought to be proved.

Is Alfield required to prove Chinese law?

76 Alfield accepted that, in order to invoke s 8(5)(b), Alfield is required to prove that the arbitration agreement is not valid under the law of China being the law of the country where the award was made.

77 Alfield contended that, for this purpose, the Court should assume that Chinese law is the same as Australian law, unless established otherwise through specific proof of foreign law by a party seeking to take forensic advantage of that foreign law citing, in particular, *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; (2005) 223 CLR 331 ("*Neilson*") at [125]. Accordingly, Alfield argued, it is Zhongwang's burden to prove foreign law if it wishes to contend that law is different from Australian law.

78 In *Neilson* at [125], Gummow and Hayne JJ referred to the "presumption" that foreign law is the same as the law of the forum as a relevant consideration in the proper construction of an article of Chinese law. Their Honours cited Heydon JD, *Cross on Evidence* (7th ed, LexisNexis Butterworths, 2004) at 1358-1360 as authority for the existence of the "presumption". At [36] and [37], McHugh J disagreed that a deficiency in the evidence about how the Chinese courts would construe the relevant article could be overcome by a presumption that a Chinese court would exercise its discretion in the same way that an Australian court would exercise a discretion under a statute. Also referring to *Cross on Evidence,* McHugh J noted that the evidential presumption is "said to operate against, not in favour, of the party whose obligation it is to prove foreign law".

79 The current edition of *Cross on Evidence* (11th ed, LexisNexis Butterworths, 2017) refers to a presumption that foreign and domestic law are the same, stating that "in the absence of satisfactory proof of, or agreement about, foreign law, the *lex fori* will be applied". The presumption is described as "general, but not universal". It states, relevantly, that the presumption has been said to operate against, not in favour, of the party whose obligation it is to prove foreign law", citing *Neilson* at [37], *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 ("*BP v Hunt*") at 503 and other cases. It also states that, if a statute of the

forum creates as a precondition to the recognition of a certain right that a particular legal provision exists in the law of a foreign country, the existence of that legal provision must be proved, citing *Temilkovski v Australian Iron and Steel Pty Ltd* (1966) 67 SR (NSW) 211; [1966] 1 NSWR 279.

80 In *Damberg v Damberg* [2001] NSWCA 87; (2001) 52 NSWLR 492 (*"Damberg")* at [119] and following, Heydon JA (Spigelman CJ and Sheller JA agreeing) considered at length the scope of the proposition, said to be amply supported, that where foreign law is not proved it will be presumed to be the same as the *lex fori*. In that case, the parties had adopted a common assumption that if German law was not proved as a fact, the court had no alternative but to apply Australian law. At [120], his Honour noted that there are numerous instances where the courts have refused to assume that foreign law is the same as the *lex fori*, and some where learned authors have opposed that course. In particular, at [121], his Honour referred to *Florance v Hutchinson* (1891) 17 VLR 471, in which the court declined to assume that the law of New South Wales was the same as the law of Victoria for the purpose of deciding whether a contract was illegal.

81 At [126], Heydon JA set out the following passage from the decision of Hunt J in *BP v Hunt*:

> According to Sykes & Pryles, *Australian Private International Law*, at p 145, in the United States, for example, the application of the lex fori where the foreign law is not proved depends upon whether it is 'in the interests of justice' to do so. In Canada, it seems, the local court will not assume that there has been introduced into the foreign law the statutory variations and additions made to the common law by the lex fori: *Conflict of Laws in Australia*, Nygh, 2nd ed, at p 300.
>
> In my view, the application of the presumption is intended to operate against, not in favour of, the party whose obligation it is to prove the foreign law, so that he is deprived of the benefit of a right or exemption given by that foreign law, but not by New South Wales law, if he does not establish that foreign law in the proper way. It would, in my opinion, be an absurd interpretation of the requirements of Pt 10, r 5 (that non-personal service is to be effected) which enabled a judgment creditor, by mere non-disclosure on the ex parte application for registration, to obtain the benefit of a more advantageous New South Wales provision as to service, which is in fact not available in the foreign jurisdiction in which service is to be effected. Such an interpretation would render the requirement in r 5 otiose.

82 At [134], Heydon JA referred to the English decision of *Österreichische Länderbank v S'Elite Ltd* [1981] QB 565; [1980] 3 WLR 356, in which Roskill LJ referred to the "so-called presumption, if that be the right word, that in the absence of evidence to the contrary, foreign law is presumed to be the same as English law". His Lordship questioned whether the presumption "has any place in a matter of this kind where an assertion is made of fraud,

based upon a provision of an English statute [the *Bankruptcy Act 1914* (Cth)] which does not have any direct application, at any rate at first sight, to the law of the country of the incorporation of the company whose conduct is complained of – or indeed of the bank, whose conduct is complained of".

83 At [138], his Honour set out a lengthy passage from the judgment of Marceau J (with whom Lacombe J agreed) in the Canadian decision of *The Ship "Mercury Bell" v Amosin* (1986) 27 DLR (4th) 641, including the following extract from Morris JHC (ed), *Dicey and Morris on the Conflict of Laws*, (10th ed, Sweet & Maxwell, 1980), at p 1216:

> The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law. This principle is sometimes expressed in the form that foreign law is presumed to be the same as English law until the contrary is proved. But this mode of expression has given rise to uneasiness in certain cases. Thus in one case the court refused to apply the presumption of similarity where the foreign law was not based on the common law, and in others it has been doubted whether the court was entitled to presume that the foreign law was the same as the statute law of the forum. In view of these difficulties it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law.

84 Marceau J concluded:

> This English jurisprudential rule that, in the absence of proof of the foreign law governing the case, the judge will apply the law of the forum should not and cannot be seen, it seems to me, as a pure abandonment of the rule of conflict, as if a rule of conflict was so unimportant that its application could be left to the whim of the parties. In fact, it is not a genuine rule of conflict; the situation is in no way comparable to that which exists in the case of a renvoi when the foreign law refers back to the law of the forum. It is a rule strictly related to the incidence of evidence. The court does not repudiate the premise that the case is governed by and has to be decided on the basis of the foreign law, but simply says that in so far as it is formally aware the foreign law is similar to its own law. It is… a pure rule of convenience, and one which, it seems to me, can be rationally acceptable only when limited to provisions of the law potentially having some degree of universality.

85 After a further review of international authorities, Heydon JA addressed the problem of when a civil court can or must refuse to be bound by a failure of parties to prove relevant foreign law. At [160], his Honour concluded:

> In short, the courts are averse to pronouncing judgments on hypotheses which are not correct. To do so is tantamount to giving advisory opinions and to encouraging collusive litigation. On the other hand, the courts will act on admissions of or agreements about matters of fact where there is no reason to doubt their correctness. But they are reluctant to do so where there is reason to question the correctness of the facts admitted or agreed. A similar caution appears to apply in relation to an assumption or agreement that foreign law is the same as the lex fori.

86 In oral submissions, Mr Scott QC noted several cases, referred to by Heydon JA at [119] of his Honours reasons, as establishing the proposition that where foreign law is not proved it will be presumed to be the same as the *lex fori*, in relation to the construction of contracts. Mr Scott QC referred, in particular to *Royal Boskalis Westminster NV v Mountain* [1999] QB 674; [1998] 2 WLR 538, concerning a claim under an insurance policy. In that case, the Court of Appeal concluded that the loss under the policy could only be established in so far as the insured could show that the outcome of an arbitration in Paris, provided for as the means of resolving contract disputes, would have been favourable to it. At 689, Stuart-Smith LJ held that, in the absence of any evidence of French law, it was to be taken to be the same as English law, citing *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd* [1918] AC 260 ("*Dynamit*"). Phillips LJ, at 725, considered that the presumption applied to principles of French public policy as well as substantive rules of contract, also applying *Dynamit.*

87 In *Dynamit,* an English company sought declarations that contracts with German companies were abrogated by the existence of a state of war between Great Britain and Germany. The House of Lords held that, apart from a "suspensory" clause, the contracts were abrogated as they involved trading with the enemy; the suspensory clause, to the extent that it applied to a war between the countries of the contracting parties, was void as against public policy. Further, their Lordships held that, in the absence of evidence to the contrary, the presumption was that the law of Germany was the same as the law of England. At 294-295, Lord Dunedin said:

> But, were it necessary so to decide, I am clear that it is for those who say that the German law is different from the English law to aver it as fact and to prove it. This they have not done, and that being so the German law must be presumed to be the same as the English.

88 To similar effect, see also Lord Parker at 301, referring to *The Parchim* [1918] AC 157. In the latter case, Lord Parker (delivering the judgment of the Privy Council) said (at 161):

> But having regard to the presumption that unless the contrary be proved the general law of a foreign country is the same as the English law, the mere fact that the contract was entered into with reference to the law of another country will be immaterial. Having regard to the history of English mercantile law, the presumption referred to is itself quite reasonable. An investigation of the commercial codes of foreign countries would probably show that they differ from English commercial law rather in detail or in the inference to be drawn from particular facts than in substance of principle.

89 In *Damberg* at [144], Heydon JA referred to this passage and concluded that it was assumed to be reasonable to apply English law because it was unlikely to differ greatly from foreign law.

90 Referring to the passage from Dicey & Morris, set out at [83] above, Mr Scott QC submitted that the forum necessarily applies its own law in the absence of evidence of the law of China. Mr Scott QC also contended that the facts of the case would not attract any judicial apprehension that Chinese law on the validity of the arbitration agreement would be any different to Australian law.

91 Mr Scott QC submitted that *BP v Hunt* was decided in a very specific context, namely the requirement for proof of service according to foreign law. In that case, the foreign law could not be treated as the same as New South Wales law because, if it was, the rule would not be required.

92 Finally, Mr Scott QC cited from Davies M, Bell AS and Brereton PLG, *Nygh's Conflict of Laws* (9th ed, LexisNexis Butterworths, 2014), at [17.45]:

> The presumption is most safely made in areas of broad legal principle, especially where the presumption is being made with regard to the position of another common law country such as Canada. It may be inappropriate for the court to assume that the foreign law is the same as the *lex fori* in areas of complex and technical (including procedural) law. In *Damberg* … After an extensive review of authorities from several different countries, as well as academic writings, Heydon JA … said that the presumption is most often made in areas of broad principle, where the application of local principles is unlikely to differ from foreign principles (for example, the principles of contractual construction).
>
> (footnotes omitted)

93 On behalf of Zhongwang, it was submitted that the statutory context in which s 8(5)(b) appears indicates that a Court called upon to refuse to enforce a foreign award on the basis that the arbitration agreement was invalid by the law of the place where the award was made would only do so where that matter was established. That matter would not be established by establishing that the agreement was invalid by reference to Australian law (which, in any event, Zhongwang does not accept). Accordingly, Zhongwang submits that it follows that Alfield's reliance on s 8(5)(b) must fail. The statutory pre-condition for setting aside has not been satisfied.

94 Dr Bell SC argued that, in the context of s 8(5), the presumption has no application because that section identifies, as a particular circumstance in which the court will depart from the

norm of ready enforcement of foreign awards, the circumstance that the arbitration agreement is invalid according to Chinese law on the facts of this case. To put an argument that the agreement is invalid according to Australian law does not establish that it is invalid according to Chinese law.

95 Dr Bell SC referred to *Application of ARD and RGD; Re FGG and Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth)* [2014] NSWSC 1963, in which Robb J considered how the court might be satisfied of the requirement, in reg 15(1)(c) of the *Family Law (Hague Convention on Intercountry Adoption) Regulation 1988*, that arrangements for the adoption are made in accordance with the laws of the Convention country. It is relevant to note that reg 15(1)(b) also requires that arrangements for the adoption are made in accordance with the laws of the Commonwealth and the State of habitual residence of the person or persons proposing to adopt the child. At [132], Robb J said:

> The principle of private international law that the court will presume, in the absence of evidence to the contrary, that foreign law is the same as the law of the forum, will not assist in resolving the present problem, because the general presumption does not apply where the foreign law must be proved affirmatively, such as that service has been effected in accordance with the law of a foreign country: *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 503 [25]-[26] per Hunt J.

96 I am not persuaded that the question of the validity of an arbitration agreement is an area of broad legal principle upon which it is reasonable to assume that the laws of Australia and the laws of China are broadly the same. Tweeddale A and Tweeddale K, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, 2007), para [7.01], express the view that perhaps no other area of arbitration law has received as much academic interest as the issue of which law or laws govern the arbitration agreement and the arbitration procedure. Application of the presumption in this context may undermine the legislative framework which is expressed, in several places, to apply by reference to the law of the country in which the arbitration took place, or the law of the country in which the award was made. It would be potentially at odds with the importance of attempting to "create or maintain, as far as the language employed by Parliament in the [Act] permits, a degree of international harmony and concordance of approach to international commercial arbitration": cf *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; (2014) 232 FCR 361 ("*TCL*") at [75].

97 Further, in my view, the proper interpretation of s 8(5)(b) is that the requirement for proof of the circumstance that the arbitration agreement is not valid under the law of the country where the award was made is a requirement for affirmative proof of the foreign law by the party seeking to invoke s 8(5)(b). That requirement is not met by applying Australian law in the absence of proof of the foreign law. This interpretation is based primarily on the language which requires that the party resisting enforcement "proves to the satisfaction of the court" invalidity "under the law of the country where the award was made" without reference to any presumption about the content of that law. A contrary interpretation would place the burden upon the party seeking to enforce the award that the laws of the country in which the award was made was different from the laws of Australia, which is inconsistent with the general scheme of facilitating enforcement of foreign awards subject to limited circumstances which may be demonstrated by a party resisting enforcement.

Section 8(5)(c)

98 Section 8(5)(c) requires each party to the arbitration to have been given a reasonable opportunity, in all the circumstances, to present its case: cf *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; (2013) 304 ALR 468 at [3] and *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326.

99 Zhongwang relied on the following statement of the High Court of Singapore: "Whether a party was or was not able to present its case at the arbitration is very much a question of fact and degree, and it necessarily focuses on the overall conduct of the tribunal and the parties themselves": *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR 871; [2008] SGHC 67 at [55].

100 In *International Relief and Development Inc v Ladu* [2014] FCA 887 at [183], Kenny J expressed the view, based on reference to leading texts, including Verbist H, *Challenges on Grounds of Due Process Pursuant to Article V(1)(b) of the New York Convention* in Gaillard E and Di Pietro D (eds); Leleu-Knobil N (reference ed), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008) at 686-687, 688-689, 702-704, that Art V(1)(b) of the Convention (to which s 8(5)(c) of the Act gives effect), is to be construed narrowly and a pragmatic approach is to be taken to "proper notice" noting that arbitration is intended as an efficient, impartial, enforceable and timely method by which to resolve disputes and that awards are intended to provide certainty and finality.

Section 8(7)(b)

101 The test whether enforcement of an award would be contrary to public policy has been described in terms of the "fundamental principles of justice and morality of the state, recognising the international dimension of the context" (*TCL* at [76]).

102 The concept of public policy cannot be exhaustively defined and is capable of extending to circumstances where enforcement "would be clearly injurious to the public good" or "wholly offensive to the ordinary and fully informed member of the public on whose behalf the powers of the state are exercised": *DTS v Rakoi* [1987] 2 Lloyd's Rep 246 at 254. As observed by Bokhary PJ in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 215-216 (cited with approval in *TCL* at [79]) "there must be compelling reasons before enforcement of a Convention award can be refused on public policy ground"' but "[t]his is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle". Bokhary PJ concluded:

> Before a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection.

103 Alfield identified *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] HKCFI 1611 as an apposite illustration of these principles in operation. In that case, the High Court of the Hong Kong Special Administrative Region set aside an award on the ground that its enforcement would be contrary to the public policy of Hong Kong. The facts that led to this decision were that Mr Sun was unable to present his case in the arbitration by reason of his incarceration and detention throughout the duration of the arbitration. The Court also noted that the tribunal had decided to deal with the arbitration on the papers in Mr Sun's absence in the belief that he had been served with the papers and the witness statements.

104 Zhongwang acknowledged that public policy grounds may lead a court to refuse to enforce an illegal contract (and accordingly an award in relation to an illegal contract), but submitted that English public policy does not require a court to refuse to enforce a contract, even where lies, fraud or threats precede the formation of the contract, unless the contract itself was illegal and unenforceable or voidable, citing *National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 510 (Comm); [2016] 2 Lloyd's Rep 146 ("*National Iranian Oil Company*") at [49].

105 Zhongwang submitted that it is not open to an award debtor to challenge an award on public policy grounds if to do so would reopen allegations of improper or illegal conduct that were unsuccessfully raised before the arbitral tribunal, in the absence of any collusion or bad faith on the part of the arbitral tribunal citing, in particular, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] 1 QB 288; [1998] 2 WLR 770 ("*Westacre*") at 316-317. In *Westacre,* Mantell LJ (Sir David Hirst agreeing) said, relevantly:

> From the [Swiss] award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the [Swiss] award.
>
> However, in the obiter passage cited by Waller LJ from the judgment in *Soleimany v. Soleimany* [1999] QB 785, 800, it seems to have been suggested that some kind of preliminary inquiry short of a full scale trial should be embarked upon whenever 'there is prima facie evidence from one side that the award is based on an illegal contract …' For my part I have some difficulty with the concept and even greater concerns about its application in practice, but, for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that the attempt to reopen the facts should be rebuffed. I so conclude by reference to the criteria given by way of example in *Soleimany v. Soleimany* itself. First, there was evidence before the tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the [Swiss] award. The seriousness of the alleged illegality to which Waller L.J. gives weight is not, in my judgment, a factor to be considered at the stage of deciding whether or not to mount a full-scale inquiry. It is something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely, should the [Swiss] award be enforced.

106 In *TCL* at [78], a Full Court noted that there was a debate, reflected in the English Court of Appeal in *Soleimany v Soleimany* [1999] QB 785 at 800 and in *Westacre* and discussed by the Court of Appeal of Singapore in *AJU v AJT* [2011] SGCA 41; [2011] 4 SLR 739 ("*AJU*") at 759-770 [41]-[61]. In *AJU,* the Singaporean Court of Appeal preferred the majority approach in *Westacre.* At [62], the Court accepted that it was entitled to decide for itself whether the relevant agreement was illegal but, at [63], reasoned that this conclusion does not mean that in every case where illegality in the underlying contract is invoked, the court is entitled to reopen the arbitral tribunal's finding that the underlying contract is not illegal. At [64], the Court said:

> In short, this case is not a *Soleimany*-type case involving an underlying contract clearly tainted by illegality, but a *Westacre (CA)* or *OTV*-type case, where the respective arbitral tribunals found that the underlying contracts in question did not involve the giving of bribes to, but merely the lobbying of, government officials, which lobbying was not contrary to English public policy (*ie*, the public policy of the Enforcing State.

107 In *National Iranian Oil Company* at [48], and *Honeywell International Middle East Ltd v Meydan Group LLC (formerly known as Meydan LLC)* [2014] EWHC 1344; [2014] 2 Lloyd's Rep 133at [89], the Courts noted that fresh evidence is a factor in deciding whether to reopen unsuccessful allegations of improper or illegal conduct.

GROUNDS FOR RESISTING SUMMARY JUDGMENT

Basis 1: the allegation that the mercantile agreement is a "sham"

Alleged sham

108 Alfield put its argument as follows:

(1) There was no valid arbitration agreement between the parties because the purported arbitration agreement, contained in cl 12 of the mercantile agreement, was part of a sham arrangement set up by Zhongwang for its own purposes years after the parties' commercial arrangements commenced. Whether it was part of an illegal scheme devised by Zhongwang or even used is beside the point and evidently unknown to Alfield.

(2) As the High Court said in *Equuscorp Pty Ltd v Glengallan Investments Pry Ltd* [2004] HCA 55; (2004) 218 CLR 471 at [46]:

> "Sham" is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.

(3) There was no mutual intention to create legal relations in executing the mercantile agreement and the agreement therefore never came into existence: *Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty Ltd* (1994) 2 VR 106 at 132-133 per Brooking J, 183. per JD Phillips J. Alfield contended that, on the only evidence before the Court on this application, that must be accepted.

(4) Cases involving an allegation that the contract was a sham are an exceptional category where the Court may have regard to the actual or subjective intention of the parties in determining the true nature and effect of the document at issue: *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 318-319 per Hope JA and 336-337 per McHugh JA; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 550 per Gleeson CJ; *Raftland Pty Ltd v Commissioner of Taxation* [2008] HCA 516; (2008) 238 CLR 516 at [148]); *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* [2015] WASCA 21; (2015) 47 WAR 547 at [106]-[107].

(5) On the basis of Alfield's uncontroverted evidence, it cannot be said that Alfield has no reasonable prospects of establishing that the parties did not have a mutual intention to enter into the arbitration agreement or that the arbitration agreement was part of a sham arrangement.

109 On behalf of Zhongwang, Dr Bell SC submitted that this submission should not be accepted in the light of Alfield's extensive participation in the arbitration process. In particular, Dr Bell SC referred to Alfield's appointment of one of the three arbitrators and its submission of a counterclaim to the arbitration. Dr Bell SC argued that those matters plainly entailed a submission to the jurisdiction of the arbitrators, whose authority was derived solely from the arbitration agreement.

110 Alfield's argument is based upon the premise that the Australian law on sham applies in the absence of evidence of the law of China. As explained above, I do not accept that premise for the purposes of applying s 8(5)(b). In the absence of evidence of the law of China, Alfield has no reasonable prospects of establishing that the arbitration agreement is not valid under the law of China.

111 Further, in my view, Alfield has no reasonable prospect of resisting the application for enforcement of the award pursuant to s 8(7) on the basis of its evidence that there was a lack of mutual intention between the parties to enter into the arbitration agreement or that the

agreement was part of a sham arrangement. That evidence must be considered in the context of Alfield's affirmation of the arbitration agreement by its participation in the arbitration process including, most significantly, appointing Ms Jin Fengju as a member of the arbitral tribunal, submitting a "Statement of Defense", submitting counterclaims for determination by the arbitral tribunal and seeking an adjournment of the oral hearing of the tribunal for the purposes of trying to reach a settlement with Zhongwang. In that context, there is no evident basis upon which it could be said that enforcement of the award would be contrary to public policy.

112 Dr Bell SC also contended that the submission that Alfield was really just a branch office and the mercantile agreement was just entered into for the purposes of the Hong Kong listing was dealt with in the Arbitral Award. Dr Bell SC contended that Alfield's submission impermissibly seeks to undermine the reasoning in the Arbitral Award. In the light of my conclusions above, it is unnecessary to deal with this submission.

Alternative argument that arbitration agreement superseded by a different dispute resolution clause

113 Further or alternatively, Alfield contends that even if the arbitration agreement was not a sham, then the arbitration clause was nevertheless invalid at the time of the arbitration because it had been superseded by a subsequent agreement between the parties for the resolution of disputes by Chinese judicial authorities. Alfield contends that the repayment plan relied on by Zhongwang in the arbitration is only consistent with this later agreement being the operative agreement.

114 This argument must be rejected for the same reasons as for the argument based on sham. That is, for the purposes of s 8(5)(b), Alfield does not have reasonable prospects of establishing, under the law of China, that the arbitration agreement is invalid by reason of the facts concerning the subsequent agreement. In the absence of evidence of the law of China, Alfield has no reasonable prospects of establishing that the arbitration agreement is not valid under the law of China by reason of a principle that a dispute resolution provision in a subsequent agreement raises a presumption that the parties intended to impeach the separate arbitration agreement within an earlier agreement: cf *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 at [69], quoting with approval from *Monde Petroleum SA v Westernzagros Ltd* [2015] EWHC 67 (Comm); *Bakri Navigation Co*

Ltd v Owners of the Ship 'Golden Glory' Glorious Shipping SA [1991] FCA 306; (1991) 217 ALR 152.

115 For the purposes of s 8(7), Alfield does not have reasonable prospects of establishing that enforcement of the award would be contrary to public policy by reason of the existence of a subsequent operative agreement, in the face of its affirmation of the arbitration agreement through its participation in the arbitration process.

Basis 2: the allegation that Alfield was unable to present its case

116 As Dr Bell SC observed, in direct conflict with this allegation, the Arbitral Award records a substantial history of Alfield's participation in the arbitration before it withdrew. Dr Bell SC contended that the reasons for Alfield ceasing to participate in the arbitration are not made at all clear. Dr Bell SC contended that Zhongwang's case on this point is overwhelming: Alfield was not only given the opportunity to present its case, but it took that opportunity.

117 Alfield makes the following points about Zhongwang's submission on this issue:

(1) The evidence of Mr Wu about Alfield's inability to present its case was not before the tribunal. There is no evidence that the tribunal was aware of any inability on Alfield's part to present its case.

(2) The decision in *Uganda Telecom* relied on by Zhongwang is of little relevance. The contention in that case that Hi-Tech was unable to present its case was rejected by the enforcement court in the usual course of judicial determination and not on a summary judgment application. The key basis for the contention being rejected was that Hi-Tech's sole director denied knowing about the arbitration and therefore could not give evidence of his state of mind at the time: see *Uganda Telecom* at [120]. That is not the case here.

(3) A party in Alfield's position is not required to move to set aside the award at the seat of the arbitration as a precondition for resisting enforcement under s 8(5)(c) of the Act or generally. Even if it knew of the Arbitral Award, Alfield was entitled to passively rely on available defences at the enforcement stage: *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372; [2013] SGCA 57at [71]. Indeed, on the evidence it was rational for it to do so.

118 I accept each of these points. Even so, I am satisfied that Alfield does not have reasonable prospects of demonstrating that it was unable to present its case in the arbitration proceeding. There is no evidence that Mr Wu's attendance at the oral hearing was necessary to enable Alfield to present its case in defence of Zhongwang's claims. Further, there is no evidence that Alfield ceased to participate in the arbitration proceeding because of an inability to present its case in the proceeding. Nor is there any evidence of any suggestion by Alfield to the tribunal that it was or would be unable to present its case in the arbitration proceeding. Even taken at its highest, Mr Wu's evidence does not support a conclusion that Alfield was not given a reasonable opportunity, in all the circumstances, to present its case. To the contrary, there is ample evidence that Alfield was able to present its case until it chose to cease its participation in the arbitration. Mr Wu's evidence does not support a conclusion that Alfield was unable to attend the oral hearing: at the most, it may support a conclusion that Mr Wu was unable to attend the oral hearing because of his genuine fear of travelling to China.

119 Even accepting that Alfield did not receive the tribunal's communications after mid-June 2011, that proposition does not provide a basis for a conclusion that Alfield was unable to present its case, where there is no explanation of the circumstances in which Alfield ceased to participate in the arbitration and its agents submitted the "Explanation on Dissolution of the Agency Relationship".

120 Accordingly, Alfield has no reasonable prospect of resisting the application for enforcement of the award pursuant to s 8(5)(c).

121 Alfield contends it is contrary to principles of morality and justice to enforce an award that was made: (a) in circumstances where Alfield was unable to attend the oral hearing during the arbitration; (b) where this was the result of a threat made against Mr Wu by a lawyer for the other party to the proceeding, that is, Zhongwang; and (c) where Alfield's non-participation after mid-June 2011 was plainly fatal to its position because the tribunal automatically treated Alfield's counterclaims as having been withdrawn and wholly accepted Zhongwang's case on the basis that there was no contrary evidence.

122 As appears above, I do not accept that Alfield has reasonable prospects of success on its contention that it was unable to attend the oral hearing. Further, putting aside the oral hearing, there is no evidence that Alfield's non-participation in the arbitration was connected with Mr Wu's fears about visiting China or that Mr Wu had any fear about Alfield participating in

the arbitration. Even accepting that a threat was made against Mr Wu by Zhongwang's lawyer, that threat was not expressed to relate to the arbitration and it predated the commencement of the arbitration by over one year. Without more, it provides no foundation for a conclusion that enforcement of the award would be contrary to public policy.

123 Finally, I reject the submission that Alfield has reasonable prospects of demonstrating that, had it been afforded an opportunity to be heard after June 2011, that opportunity would have allowed Alfield to rely on the replacement agreement which provided for Chinese court jurisdiction. Mr Scott QC acknowledged that the replacement agreement was provided to Alfield long before the arbitration.

CONCLUSION

124 I will make the orders sought by Zhongwang.

I certify that the preceding one hundred and twenty-four (124) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:

Dated: 19 October 2017