FEDERAL COURT OF AUSTRALIA

Hyundai Engineering & Steel Industries Co Ltd v Two Ways Constructions Pty Ltd (No 2) [2018] FCA 1551

File number(s):	NSD 976 of 2018
Judge(s):	**O'CALLAGHAN J**
Date of judgment:	2 October 2018
Catchwords:	**ARBITRATION** – international arbitration – where award creditor brought proceedings to enforce award obtained in Singapore – where award debtor sought to set aside the award in part in the High Court of the Republic of Singapore – where award debtor applied under s 8(8) of the *International Arbitration Act 1974* (Cth) to adjourn award enforcement – adjournment granted on condition that award debtor provide security for full amount of the award plus interest – where award debtor failed to provide security and then when into voluntary administration – where award creditor granted leave by court under s 440D of the *Corporations Act 2001* (Cth) to proceed with enforcement application notwithstanding voluntary administration – where administrators seek orders for liberty to apply when award enforced – where administrators seek order that award creditor may not enforce judgment without leave of the court – orders sought by administrators not granted
Legislation:	*Corporations Act 2001* (Cth), s 440D *Federal Court of Australia Act 1976* (Cth), ss 22, 23 *International Arbitration Act 1974* (Cth), s 8 *Federal Court Rules 2011* (Cth), r 39.05
Cases cited:	*Australian Competition & Consumer Commission v The Shell Co of Australia Ltd* (1997) 72 FCR 386 *Caboolture Park Shopping Centre Pty Ltd (In Liquidation) v White Industries (Queensland) Pty Ltd* (1993) 45 FCR 224 *Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd* [2018] FCA 1054 *Hyundai Engineering & Steel Industries Co Limited v Two Ways Constructions Proprietary Limited* [2018] FCA 1427 *Remington Products Australia Pty Ltd v Energizer Australia Pty Ltd* (2008) 246 ALR 113; [2008] FCAFC 47

Sebastian v State of Western Australia [2008] FCA 926

Date of hearing:	2 October 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Category:	Catchwords
Number of paragraphs:	24
Counsel for the Applicant:	Mr J A Hogan-Doran
Solicitor for the Applicant:	Webb Henderson
Counsel for the Respondent:	Mr P J Bick QC
Solicitor for the Respondent:	Frenkel Partners

ORDERS

NSD 976 of 2018

BETWEEN:	**HYUNDAI ENGINEERING AND STEEL INDUSTRIES CO LTD** Applicant
AND:	**TWO WAYS CONSTRUCTIONS PTY LTD** Respondent
JUDGE:	**O'CALLAGHAN J**
DATE OF ORDER:	**2 OCTOBER 2018**

THE COURT ORDERS THAT:

1. Under s 8(3) of the *International Arbitration Act 1974* (Cth), the final award dated 9 March 2018 of Mr Alvin Yeo SC (**sole arbitrator**) registered in the Singapore International Arbitration Centre Registry of Awards as award number 024 of 2018 on 13 March 2018 and notified to the parties by the Registrar of the Court of Arbitration of the Singapore International Arbitration Centre on or about that date (the **award**) be enforced as a judgment of this court;

2. Judgment be entered in favour of the applicant against the respondent in terms of the award, namely:

   (a) a declaration that the applicant is entitled to an extension of time to the date of practical completion of the Exhibition Hall (21 October 2015) of 197 days and an extension of time to the date of practical completion of the theatre (18 June 2015) of 167 days;

   (b) an order that the respondent pay the applicant AUD 5,584,148.39 comprising:

      (i) AUD 5,001,026.19 by way of principal sum;

      (ii) AUD 555,993.32 by way of pre-award interest; and

      (iii) AUD 753.58 per day from 1 February 2018 to 9 March 2018, being AUD 27,128.88 by way of further pre-award interest;

   (c) an order that the respondent pay the applicant USD 1,502,958.86 in respect of costs of the arbitration giving rise to the award (the arbitration);

   (d) an order that:

(i) the respondent shall bear 70 per cent of the costs of the arbitration in the sum of SGD 389,463.61 (being 70 per cent of the costs of arbitration of SGD 556,376.58);

(ii) the applicant shall bear 30 per cent of the costs of the arbitration in the sum of SGD 166,912.97 (being 30 per cent of SGD 556,376.58); and

(iii) the applicant shall be entitled to be reimbursed by the respondent of such amount as the applicant has paid in excess of its share of the costs of the arbitration, less any amount that the respondent may receive by way of refund from the Singapore International Arbitration Centre;

(e) an order that the respondent shall pay to the applicant simple interest at a rate of 5.33 per cent per annum on:

(i) the sum of AUD 5,001,026.19 referred to in subparagraph (b)(i) above; and

(ii) the sum of USD 1,502,958.86 referred to in subparagraph (c) above, calculated from 9 March 2018 to the date that until such time full payment is made and received by the respondent;

3. The respondent pay the applicant's costs of the proceedings.

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

REASONS FOR JUDGMENT
(Revised from transcript)

O'CALLAGHAN J:

1 These reasons for judgment were delivered ex tempore at the hearing on 2 October 2018 and accompany the orders set out above.

2 This is a proceeding brought by way of originating application dated 6 June 2018 by which the applicant seeks an order under s 8(3) of the *International Arbitration Act 1974* (Cth) that an international arbitral award that it obtained in Singapore be enforced as a judgment of this court and that judgment be entered in its favour against the respondent (now named Two Ways Constructions Pty Ltd) in terms of the award.

3 Through no fault of the applicant, the application has had a chequered history. That history can be gleaned from *Hyundai Engineering & Steel Industries Co Limited v Alfasi Steel Constructions (New South Wales) Proprietary Limited* [2018] FCA 1054, and *Hyundai Engineering & Steel Industries Co Limited v Two Ways Constructions Proprietary Limited* [2018] FCA 1427. These reasons should be read in conjunction with those reasons.

4 As those previous reasons show, the respondent's application for an adjournment of the applicant's enforcement action to permit it to pursue an application before the High Court of Singapore for a partial variation of the award was granted on the condition that it provide security in the sum of approximately $7.9 million. The respondent did not provide security in that or any sum. It now seems sufficiently apparent to the recently appointed administrators of the respondent that it was never in a position to provide the security ordered or anything like it.

5 At the last hearing, I granted a further adjournment of the applicant's application to enforce the award and for judgment, on the application of senior counsel for the administrators. The administrators had been appointed by the directors of the respondent only nine days beforehand. The adjournment was granted to enable the administrators to offer assistance to the court in relation to the proceeding. I also ordered that the applicant be granted leave to proceed against the respondent pursuant to s 440D(1) of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

6 Mr J A Hogan-Doran, who again appeared for the applicant on the hearing of this application, read, without objection, an affidavit of Andrew John Christopher sworn 6 June 2018. Exhibit

AJC1 to that affidavit is a certified copy of the relevant award, being the final award dated 9 March 2018 of Mr Alvin Yeo SC, registered in the Singapore Arbitration Centre Registry of Awards as award number 024 of 2018 on 13 March 2018 (the **award**).

7 Mr P Bick QC appeared for the administrators at the hearing today. He, without objection, read an affidavit of Sam Kaso, one of the two administrators, affirmed 1 October 2018, and an affidavit of Rosie Finlayson affirmed 28 September 2018. Ms Finlayson's affidavit exhibited an affidavit of Mr Kaso filed in the Supreme Court of Victoria in support of the administrators' application in that Court for an extension of the convening period for the convening of the second meeting of the respondent's creditors under s 439A(6) of the Corporations Act. That affidavit summarised, among other things, the investigations conducted by the administrators since the date of their appointment.

8 The financial position of the respondent to which Mr Kaso deposes is an unhappy one. The respondent's management accounts, for example, record unsecured creditors in the sum of about $8.5 million and total assets of about $2.2 million. Mr Kaso also deposes that the recoverability of those assets is primarily dependent upon the ability and capacity of a borrower to repay certain moneys to the respondent pursuant to the terms of a written loan agreement and the timing of it.

9 As for the application by the respondent before the High Court in Singapore, the gist of Mr Kaso's evidence and Mr Bick's submissions is that the administrators have not had sufficient time to obtain advice about, and consider the merits of, that application, and arrive at a decision about the best way to deal with it. At the hearing of the applicant's case for final orders this morning, the applicant and the administrators agreed that I should make orders enforcing the award and for judgment in terms of the award.

10 The controversy between the parties which it is necessary to resolve is whether I should, in addition to those agreed orders, also make two orders proposed on behalf of the administrators, as follows:

(1) that there be reserved to the parties liberty to apply on not less than five days written notice, should the final award of Mr Alvin Yeo SC made on 9 March 2018 be varied or set aside in whole or in part by the High Court of the Republic of Singapore to have orders 1 and 2 hereof varied so as to be consistent with any decision of the High Court of the Republic of Singapore; and

(2) that the applicant may not take any step to enforce any judgment or order of this court herein without leave of the court.

11 The reference in the first of those orders proposed on behalf of the administrators to orders 1 and 2 is a reference to the orders which are agreed. Order 1 is an order, in substance, that the award be enforced as a judgment of this court, and order 2 is, in substance, an order that judgment be entered in favour of the applicant against the respondent in the terms of the award.

12 In my view, the making of the second order proposed on behalf of the administrators is unnecessary because counsel for the applicant has recognised the obvious position that the effect of the order applies, in any case, by virtue of section 440D of the Corporations Act. It is unnecessary, therefore, to make that order.

13 The question whether the first order should be made turns, in my view, on the question whether the proposed order contemplates the possibility of the court making "supplemental" orders in the event that, at some time in the future after the order for judgment has been entered, the High Court of Singapore varies the terms of the award or whether what is proposed would involve variation or alteration of the initial order. The former may be permissible. The latter is not because it is beyond the court's power.

14 Rule 39.05 of the *Federal Court Rules 2011* (Cth) provides as follows:

> The court may vary or set aside a judgment or order after it has been entered if:
>
> (a) it was made in the absence of a party; or
>
> (b) it was obtained by fraud; or
>
> (c) it is interlocutory; or
>
> (d) it is an injunction or for the appointment of a receiver; or
>
> (e) it does not reflect the intention of the court; or
>
> (f) the party in whose favour it was made consents; or
>
> (g) there is a clerical mistake in a judgment or order; or
>
> (h) there is an error arising in a judgment or order from an accidental slip or omission.

15 The Federal Court's ancillary powers flow from ss 22 and 23 of the *Federal Court of Australia Act 1976* (Cth) to resolve the whole controversy between the parties. In *Caboolture Park Shopping Centre Pty Ltd (In Liquidation) v White Industries (Queensland) Pty Ltd* (1993) 45

FCR 224 (**Caboolture**), the Full Court (Lee, Hill and Cooper JJ) said this at 234-235 about order 35, rule 7 (the predecessor to rule 39.05):

> Order 35, rule 7 of the *Federal Court Rules* sets out the exceptions to the general rule that the court will not vary or set aside judgments. These examples largely reflect the common law position. None is here relevant. However, Caboolture relies upon what is said to be the power of courts to make supplemental orders where circumstances make it necessary so to do. That in an appropriate case a supplemental order may be made after judgment is entered is clear from *Preston Banking Co v William Allsup and Sons* (1895) 1 Ch 141. The true principle was expressed in that case by Lord Lindley (at 143-144) as follows:
>
> > This is not an application to alter an order on the ground of some slip or oversight. Nor is it a case in which the order has not been drawn up. Here the order has been drawn up, and it expresses the real decision of the court; and that being so, the court has no jurisdiction to alter it. If this summons had proceeded on the theory that the order of the 11th of July was right, and that circumstances had since occurred which had rendered a supplemental order necessary, the court might have entertained the application; but this summons proceeds on the theory that the order of the 11th of July is wrong. In my opinion, it is of the utmost importance, in order that there may be some finality in litigation, that when once the order has been completed it should not be liable to review by the judge who made it.

16 In *Caboolture*, the question was whether an additional costs order could be made. In that case, the Full Court had little difficulty resolving the issue in the affirmative. At 45 FCR 235, the Full Court said:

> That the present case involves the making of a supplemental order is made more apparent when the form of the appropriate order is considered. In our view that order would be that the solicitors pay the costs of White Industries (Qld) Pty Ltd on an indemnity basis and that payment by the solicitors operate to discharge the liability of Caboolture. So framed it is clear that the court has no need in any way to vary or alter any order previously made by it.

17 In *Remington Products Australia Pty Ltd v Energizer Australia Pty Ltd* (2008) 246 ALR 113; [2008] FCAFC 47 the Full Court (Tamberlin, Jacobson and Edmonds JJ) dismissed an appeal from a decision of the primary judge making orders additional to the final orders which permanently restrained Energizer Australia from distributing or making particular representations about batteries requiring Energizer Australia to remove certain batteries from public display or to place stickers over representations of those batteries. The Full Court held at [14] that the orders requiring Energizer Australia to remove the batteries from public display or to place stickers over the representations of the batteries were supplemental orders because they were related to the previous orders and were incidental to, or in aid of, the enforcement and working out of those orders. (See also *Australian Competition & Consumer Commission v*

The Shell Co of Australia Ltd (1997) 72 FCR 386 at 395, per Drummond J; and *Sebastian v State of Western Australia* [2008] FCA 926, at [26]-[27], per Gilmour J.)

18 In my view, once the court makes the orders to which the administrators consent, enforcing the award and giving judgment in terms of the award, the court has no jurisdiction to vary those orders, under r 39.05 or otherwise, in the event that the Singapore High Court later were to vary the award, by reducing any amount payable pursuant to the award. If the Singapore High Court reduces the amount of principal payable, or it alters the costs component of the award, it would, as Mr Hogan-Doran submitted, inevitably mean that the liberty to apply contemplated by the order proposed by the administrators would involve an application to vary or alter the initial order. As the Full Court made clear in *Caboolture*, that is beyond the power of the court, for reasons to do with the need for finality, to which the Full Court referred and which are obvious.

19 In my view, any change to the form of the order consented to in this case could not possibly be described as one which is supplemental to the order that is proposed to be made. On the contrary, it seems to me that such changes could only be described as varying or altering it.

20 Mr Bick submitted that I was not required to decide the question at this hearing, and that no prejudice would be caused by allowing the liberty to apply proposed in order that the issue could be debated at some subsequent time, if and when it was ever necessary to do so. With great respect, I disagree. In my view, I should not make an order that contemplates the doing of something that is, in my view, clearly beyond the power of the court to do, for reasons which I have endeavoured to explain.

21 Mr Hogan-Doran made a number of other submissions as to why the court should not make orders beyond those he propounded. He submitted, for example, that nothing in the *Federal Court Rules 2011* (Cth) the *Federal Court of Australia Act 1976* (Cth) or the *International Arbitration Act 1974* (Cth) permits a party to seek an order of the type contemplated by the provision of liberty to apply. He submitted that the scheme of the 1958 New York Convention, and s 8 of the *International Arbitration Act 1974* (Cth), and the Model Law, is intended to bring certainty and finality to the award rights of the parties; that those provisions strike a balance between the rights of the award creditor to seek enforcement, and, through the adjournment and security provisions only, the award debtor to seek to set aside the award.

22 Detailed written submissions were made in support of those propositions. Detailed written submissions were also made in support of the proposition that the entry of final judgment, and the right to it, is based on the applicant's contractual right at common law to payment of the award. It was submitted that this conclusively determines the applicant's rights in Australia, which are merged into the judgment, and that what happens in Singapore thereafter is irrelevant.

23 Mr Bick also made submissions in response about those additional submissions. However, having taken the view that I do take about the question of whether the court would have the power to do that which the provision of the liberty to apply contemplates, it is unnecessary for me to deal with those additional submissions, as interesting as they are.

24 Accordingly, the court will order that:

(1) Under s 8(3) of the *International Arbitration Act 1974* (Cth), the final award dated 9 March 2018 of Mr Alvin Yeo SC (**sole arbitrator**) registered in the Singapore International Arbitration Centre Registry of Awards as award number 024 of 2018 on 13 March 2018 and notified to the parties by the Registrar of the Court of Arbitration of the Singapore International Arbitration Centre on or about that date be enforced as a judgment of this court;

(2) Judgment be entered in favour of the applicant against the respondent in terms of the award, namely:

  (a) a declaration that the applicant is entitled to an extension of time to the date of practical completion of the Exhibition Hall (21 October 2015) of 197 days and an extension of time to the date of practical completion of the theatre (18 June 2015) of 167 days;

  (b) an order that the respondent pay the applicant AUD 5,584,148.39 comprising:

    (i) AUD 5,001,026.19 by way of principal sum;

    (ii) AUD 555,993.32 by way of pre-award interest; and

    (iii) AUD 753.58 per day from 1 February 2018 to 9 March 2018, being AUD 27,128.88 by way of further pre-award interest;

  (c) an order that the respondent pay the applicant USD 1,502,958.86 in respect of costs of the arbitration giving rise to the award (the **arbitration**);

  (d) an order that:

(i) the respondent shall bear 70 per cent of the costs of the arbitration in the sum of SGD 389,463.61 (being 70 per cent of the costs of arbitration of SGD 556,376.58);

(ii) the applicant shall bear 30 per cent of the costs of the arbitration in the sum of SGD 166,912.97 (being 30 per cent of SGD 556,376.58); and

(iii) the applicant shall be entitled to be reimbursed by the respondent of such amount as the applicant has paid in excess of its share of the costs of the arbitration, less any amount that the respondent may receive by way of refund from the Singapore International Arbitration Centre;

(e) an order that the respondent shall pay to the applicant simple interest at a rate of 5.33 per cent per annum on:

(i) the sum of AUD 5,001,026.19 referred to in subparagraph (b)(i) above; and

(ii) the sum of USD 1,502,958.86 referred to in subparagraph (c) above, calculated from 9 March 2018 to the date that until such time full payment is made and received by the respondent;

(3) The respondent pay the applicant's costs of the proceedings.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan.

Associate:

Dated: 15 October 2018