FEDERAL COURT OF AUSTRALIA

Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)

[2020] FCA 1116

File number:	NSD 94 of 2020
Judge:	**JAGOT J**
Date of judgment:	5 August 2020
Catchwords:	**ARBITRATION** – application to enforce a foreign award – where respondent contends that it did not receive proper notice – where respondent contends that arbitral procedure was not in accordance with the contract between the parties – where respondent contends that the arbitral award involved a breach of natural justice – application to enforce award granted
Legislation:	*International Arbitration Act 1974* (Cth) ss 2D, 8, 8(3), 8(5), 8(5)(b), 8(5)(c), 8(5)(e), 8(5)(f), 8(7), 8(7A)(b), 39, 39(2)(b) Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law (Qatar) Law No. 13 of 1990 Promulgating the Civil and Commercial Code of Procedure (Qatar) Law No. 22 of 2004 Promulgating the Civil Code (Qatar)
Cases cited:	*Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; 38 VR 303 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; 232 FCR 361 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; 201 FCR 535 *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; 277 ALR 415
Date of hearing:	24 July 2020
Registry:	New South Wales
Division:	General Division

National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Category:	Catchwords
Number of paragraphs:	64
Counsel for the Applicant:	T Castle
Solicitor for the Applicant:	Cowell Clarke
Solicitor for the Respondent:	M Bonnell of Henry William Lawyers

ORDERS

NSD 94 of 2020

BETWEEN:	**ENERGY CITY QATAR HOLDING COMPANY (REGISTERED IN THE CR UNDER NO. 34913)** Applicant
AND:	**HUB STREET EQUIPMENT PTY LTD (ABN 52 109 882 617)** Respondent

JUDGE: **JAGOT J**

DATE OF ORDER: **5 AUGUST 2020**

THE COURT ORDERS THAT:

1. The parties confer and within seven days file agreed or competing orders reflecting the reasons for judgment published today.

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

REASONS FOR JUDGMENT

JAGOT J:

1 These reasons for judgment concern an application to enforce a foreign award under the *International Arbitration Act 1974* (Cth) (the **IAA**).

2 For the reasons which follow I have decided that the Court should enforce the award as if it were a judgment of this Court in accordance with s 8(3) of the IAA as no ground for refusal of such enforcement has been proved as provided for in ss 8(5) or 8(7) of the IAA and otherwise all procedural requirements for enforcement have been satisfied.

3 In these reasons for judgment the applicant is referred to as **ECQ** and the respondent is referred to as **Hub**.

The IAA

4 The objects of the IAA in s 2D include:

> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
>
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce;
>
> …

5 By s 39 of the IAA, where a court is considering exercising a power under s 8 to enforce a foreign award or exercising the power under s 8 to refuse to enforce a foreign award, including a refusal because the enforcement of the award would be contrary to public policy, the court must have regard to the objects of the IAA and the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and awards are intended to provide certainty and finality.

6 In the present case there is no issue about any formal evidentiary or procedural requirement under the IAA. The issues are confined to the operation of s 8 of the IAA which, to the extent relevant, is as follows:

> (3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.
>
> (3A) The court may only refuse to enforce the foreign award in the circumstances

mentioned in subsections (5) and (7).

…

(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

…

(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; or

…

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

…

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

…

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

Facts

7 In 2010 ECQ and Hub entered into a contract entitled "Contract for the supply and installation of street lighting and street furniture in Energy City" (the **Contract**).

8 Relevant contractual provisions include:

(1) Art 44: which provided that any notice to be given by either party under the Contract shall be given by prepaid post or fax to certain addresses, the address for Hub being a street address in Chippendale, Sydney (the **Chippendale Address**);

(2) Art 46: which provided that any dispute about the Contract which is not amicably settled within 28 days shall be referred to arbitration in accordance with the rules of arbitration in Qatar and that an arbitration committee shall consist of three members,

one member being appointed by each party within 45 days of one party receiving a written notice from the other party to start arbitration proceedings. The third member shall be mutually chosen by the first two members and shall chair the arbitration committee and issue the decision of the arbitration committee.

(3) Art 47: which provides that the Contract is made in the State of Qatar and is subject to the laws of the State of Qatar.

(4) Art 50: which provides that the English language shall be the ruling language of the Contract and accordingly all matters relating to the Contract shall be in English.

9 ECQ paid US$820,322.16 to Hub under the Contract as an advance payment. ECQ decided not to proceed with the Contract in 2012 and sought repayment of the money paid under the Contract. Following some email communications and meetings in 2012 in which ECQ continued to seek repayment of the money Hub informed ECQ that it would identify its position after obtaining legal advice. However, Hub never communicated again with ECQ in circumstances where Hub retained the money ECQ had paid to it.

10 ECQ never sent a notice to Hub under Art 46 of the Contract giving Hub 45 days to appoint one member of the arbitration committee. Instead, in June 2016 ECQ filed a statement of claim in the Qatari Plenary Court of First Instance seeking orders that the Court appoint an arbitral tribunal of three arbitrators including an arbitrator nominated by ECQ. In doing so ECQ relied on Art 195 of Law No. 13 of 1990 Promulgating the Civil and Commercial Code of Procedure (Qatar) (the **Qatari CCCP**) which was in force at the relevant time (and until February 2017) and which provides that:

> If a dispute arises between the parties prior to an agreement between them as to the arbitrators…the court which has jurisdiction to consider the dispute shall appoint the necessary number of arbitrators at the request of one of the parties.

11 In November 2016, ECQ sent a notice of the Court proceedings to Hub but this notice was not sent to the Chippendale Address. Rather, it sent the notice to a Post Office Box in Doha which the evidence establishes was the mailing address of a company unrelated to Hub but with which Hub had done business in Qatar known as Elan Urban. On 1 December 2016 Elan Urban emailed the notice to Mr Muraywed who was an employee of a company related to Hub known as Hub Qatar Pty Ltd (**Hub Qatar**). If it were necessary to do so I would find that Mr Muraywed was an agent of Hub for the purposes of receiving any notice to Hub in Qatar. He had been previously employed by Hub. The directors of Hub operated Hub and its related companies on a group basis and in the expectation that employees would represent the

interests of all companies in the group. Mr Muraywed was Hub's representative while he was in Qatar.

12 In any event, whether or not he was Hub's agent in Qatar for the purpose of receiving notices such as the Court notice, Mr Muraywed gave evidence that he translated part of this notice (which was in Arabic not English) and gave it to the directors of Hub later in December 2016 when he returned to Sydney from Qatar. The directors of Hub, Mr Matchett and Mr Williams, denied ever having seen the notice or having been given it by Mr Muraywed.

13 The Qatari Plenary Court of First Instance made orders in January 2017 appointing an arbitral tribunal. The arbitral tribunal sent to the Chippendale Address, six notices in English about the conduct of the arbitration between 18 April 2017 and 12 July 2017 (with the arbitration being adjourned on three occasions due to Hub's failure to attend). The evidence shows that the letters were sent by pre-paid registered mail and receipts show that each of the notices was sent to the Chippendale Address. Under Art 4 of Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law (Qatar) (the **Qatari CCAL**), which was in force from March 2017 onwards, written notices may be served by service to the addressee's place of business that is known to the parties or specified in the arbitration agreement and is deemed to have been received if it is received or sent before 6.00pm in the country where it is received or otherwise receipt will be deemed to have occurred on the following day.

14 Mr Muraywed gave evidence that the receptionist at Hub would give him all correspondence from Qatar or in Arabic. He was shown the bundle of notices from the arbitral tribunal and said that he recognised them as letters that were provided to him at Hub's Sydney office and when he worked for Hub Qatar. He said that after reviewing documents of this kind his practice was to show them to Mr Matchett and briefly discuss them and then leave the documents with either Mr Matchett or his assistant. Mr Matchett and Mr Williams denied ever having seen the notices from the arbitral tribunal. Hub's current receptionist, Ms dePeau, said that when she was first employed in 2018 the former receptionist trained her to keep a record of all mail received and said to her that this process was well established and it was extremely important to ensure it was followed. She said the process she was taught involved logging all mail as it was received in an Excel spreadsheet. Ms dePeau said that she had searched Hub's mail log and found no entry relating to any notice to Hub from the arbitral tribunal.

15 I prefer Mr Muraywed's evidence to that of Mr Matchett and Mr Williams.

16 First, as the person in Hub's office (albeit employed by Hub Qatar at the relevant time and not Hub) who spoke Arabic Mr Muraywed had good reason to recall documents in Arabic which he translated for the Hub directors. As he was also the person in Hub's office who was given all correspondence from Qatar he also had reason to recall such documents and his practice of reviewing them and then giving them to Mr Matchett and briefly discussing them.

17 Second, Mr Muraywed's evidence that he was told by Mr Matchett not to email Court documents from Qatar but to give them to Mr Matchett personally makes sense in the context of other earlier litigation in Qatar involving Hub. Mr Muraywed had emailed one such Court notice to Mr Matchett about the other earlier litigation and said Mr Matchett's instruction came after he had done so, which makes sense. Court notices are important documents and it would not be surprising if Mr Matchett took the view that they should be personally delivered to him rather than be emailed to him. For one thing, an email may be overlooked. For another, an email would leave a documentary trail which Mr Matchett may have wished to avoid in what he perceived to be the best commercial interests of Hub. This is consistent with Mr Matchett's evidence that his instruction to one of his employees who had asked about the earlier Court notice (which was to ignore the notice) was because he was involved in an extra-curial negotiation with a view to settling that proceeding, which occurred.

18 Third, although Mr Muraywed's employment with Hub had ended by him resigning on request of the directors he was still in contact with Hub and on good terms with the directors and Mr Williams had agreed to be his reference for future employment. In other words, Mr Muraywed had no reason to say that he had seen documents (the notice from the Court or the notices from the arbitral tribunal) and given them to Mr Matchett if he had not done so. He had nothing to gain and Hub's good favour to lose by giving the evidence he did.

19 Fourth, the notice from the Court shows on it Mr Muraywed's handwritten partial translation of the notice. Mr Muraywed would have had no reason to translate the notice unless he proposed to raise it with Mr Matchett and/or Mr Williams. The fact that he did so leads to the consequential inference that he did as he proposed, namely showed the notice to Mr Matchett and/or Mr Williams.

20 Fifth, it appears unlikely that six separate notices from the arbitral tribunal, properly addressed to Hub at the Chippendale Address and sent by a form of pre-paid registered mail, would all go astray. It is far more likely that because all mail from Qatar or in Arabic was given to Mr Muraywed the receptionist at the time in 2017 did not include the receipt of the

notices in the mail log but simply gave them to Mr Muraywed. This inference is supported by the fact that Hub did not call evidence from its receptionist in 2017 as to her practice of dealing with mail apparently from Qatar or her recollection of these notices and what she did with them.

21 Sixth, unlike Mr Muraywed, Mr Matchett and Mr Williams had good reason to give evidence that they had not previously seen the Court notice or the letters from the arbitral tribunal until this proceeding in that they must have known that such evidence would assist their case to the effect that the award should not be enforced.

22 Seventh, Mr Matchett and Mr Williams had good reason to wish not to receive notice of any Court or arbitral tribunal hearing in Qatar involving ECQ. Mr Matchett and Mr Williams knew that in 2012 ECQ was seeking repayment of the US$820,322.16 which ECQ had paid to Hub. While Hub had informed ECQ that it would respond to ECQ's request for repayment in 2012 after it had obtained legal advice, there is no evidence that Hub in fact obtained any such advice and it is common ground that Hub in fact never responded to ECQ. In circumstances where Hub retained the whole of the US$820,322.16 the last thing that Mr Matchett or Mr Williams would wish to see some four years later, in December 2016 and in 2017, would be evidence of ECQ taking steps in Qatar to try to recover the money. While Mr Matchett gave evidence that had he known of the proceedings in Qatar he would have sought to make counter-claims against ECQ (presumably for breach or repudiation of contract), Hub had never suggested in any communication with ECQ that it had a valid reason to retain the money and the inescapable fact is that Hub had the money and had had it for four years - thus there was good reason for it not to wish to know about proceedings in Qatar attempting to recover the money.

23 Eighth, as noted, Mr Matchett had experience of other legal proceedings in Qatar in which he had managed to secure an extra-curial settlement apparently outside the scope of and without involving Hub in the legal proceedings. It does not take much to infer that this experience might have caused Mr Matchett to take the view that Hub's best interests would be served by ignoring any legal proceedings in Qatar and ensuring that no record of any such proceedings was created by Hub. This would explain a number of things. It would explain Mr Muraywed's evidence that Mr Matchett had told him not to email Qatar Court documents but to personally give them to Mr Matchett. It would explain Mr Muraywed having partially transcribing the Qatar Court notice in English on the notice in preparation for giving it to Mr

Matchett. It would explain Mr Muraywed's evidence that he gave the Court notice to Mr Matchett and Mr Williams and discussed it with them. It would explain why none of the six letters sent by the arbitral tribunal to Hub's correct Chippendale Address were logged into Hub's mail log despite Mr Muraywed saying that he was given those notices and his practice would have been to give them to Mr Matchett or his assistant and briefly discuss them with him. The only thing not explained by this inference is the denials by Mr Matchett and Mr Williams of ever having seen the Court notice or the six letters from the arbitral tribunal.

24 Ninth, I do not accept Hub's submission that Hub's conduct, as I have inferred it to be, would be "deeply irrational". It may be accepted that Hub may have had an action against ECQ for repudiation of the contract. But it had never suggested as much to ECQ as an answer or counter-claim to ECQ's request for repayment. Further, the fact remains that Hub had experience of extra-curial settlement of proceedings in Qatar, had in its possession the US$820,322.16, and had proven by its actions in 2012 that it was willing simply to ignore communications from ECQ trying to claim repayment. In these circumstances there was nothing irrational in Hub preferring to ignore the ECQ Court proceedings and the arbitration in Qatar in the hope or expectation that it may be better placed by so doing to either keep the money or to negotiate a favourable settlement. When compared to the mere possibility of recovering damages for contractual repudiation, retaining the money in hand for as long as possible would have been a persuasive factor in determining Hub's conduct.

25 When considered in the context of the whole of the evidence, the denials of ever having seen the documents by Mr Matchett and Mr Williams lack credibility and are unable to be accepted. On the balance of probabilities I am satisfied that Mr Matchett was given the Court notice by Mr Muraywed and knew enough from Mr Muraywed's partial translation of that notice that ECQ had started a proceeding in Qatar for the recovery of its money. I am also satisfied that Mr Matchett was given each of the six letters from the arbitral tribunal by Mr Muraywed and understood from them that ECQ had commenced an arbitration against Hub for recovery of the US$820,322.16 which had been paid to Hub. I infer that Hub decided not to involve itself in the arbitration because it decided that was what was in its best interests at the time.

26 On 1 August 2017 the arbitral tribunal issued the award. The award is in Arabic. It is apparent from the English translation of the award that the arbitral tribunal was satisfied that it had notified Hub of the conduct of the arbitration on three occasions, after which it

adjourned the arbitration, but that as there was never any appearance by Hub it then proceeded to determine the dispute and make the award.

Discussion

27 Hub contends that the award should not be enforced by the Court on a number of grounds, namely:

(1) Hub did not receive proper notice of the appointment of the arbitrator as proper notice required notice to be given to Hub at its Chippendale Address giving it a period of 45 days in which to appoint an arbitrator: s 8(5)(c) of the IAA.

(2) Hub did not receive proper notice of the arbitration proceedings as it did not in fact receive any notice of those proceedings. The notice given to Elan Urban's post box was not notice to Hub. Mr Muraywed was an employee of Hub Qatar and not Hub so the email to Mr Muraywed from Elan Urban was not notice to Hub. The notices from the arbitral tribunal were not in fact received by Hub: s 8(5)(c) of the IAA.

(3) Hub was unable to present its case in the arbitration proceedings as it never in fact received notice of those proceedings: s 8(5)(c) of the IAA.

(4) The composition of the arbitral authority was not in accordance with the agreement of the parties as the Art 46 procedure in the Contract had not been followed: s 8(5)(e) of the IAA.

(5) The arbitral procedure was not in accordance with the agreement of the parties as Art 50 of the Contract provided for all matters relating to the Contract to be in English and the arbitration was conducted and the award issued in Arabic: s 8(5)(e) of the IAA.

(6) The arbitral award involved a breach of the rules of natural justice and thus the award should not be enforced as it would be contrary to public policy to do so: ss 8(7) and 8(7A)(b) of the IAA.

28 I have rejected some of Hub's factual contentions above. Specifically, I have found that it should be inferred that Hub knew about the existence of legal proceedings by ECQ against Hub in Qatar in December 2016 and knew about the arbitration proceedings involving ECQ against Hub in Qatar by April 2017. In this regard, the evidence is that the arbitration proceedings were adjourned on a number of occasions given Hub's non-attendance but the arbitral tribunal ultimately made a decision to issue the award in Hub's absence and did so on

1 August 2017. In my view, given my factual findings it is not open to Hub to make arguments (2), (3) or (6) above. Hub had actual notice of the arbitration proceedings in April 2017 before any substantive step was taken in the arbitration and thus had been given an adequate opportunity to present its case in the arbitration proceedings but chose not to do so. As such, it cannot be said that Hub was subjected to any practical injustice by reason of the arbitration proceeding as it did. Hub cannot therefore maintain that there was any breach of the rules of natural justice in connection with the making of the award and thus it would not be contrary to public policy to enforce the award on this basis.

29 The arguments in (1), (4) and (5) above remain. In this regard there is no dispute that ECQ never gave Hub any notice in accordance with Art 46 of the Contract and that the composition of the arbitral tribunal was as ordered by the Qatari Plenary Court of First Instance rather than being constituted by each party nominating one arbitrator and the arbitrators nominating a third arbitrator. Nor was there any dispute that the arbitration itself was conducted in Arabic not English and the award was issued in Arabic.

30 I have little difficulty in rejecting Hub's argument (5) as a reason to refuse enforcement of the award. As a matter of construction Hub's interpretation of Art 50 of the Contract is to be preferred. That is, the arbitration was a matter "relating to this Agreement [sic Contract]". As such, the arbitration should have been conducted in English, not Arabic and the award should have been issued in English, not Arabic. However, the notices from the arbitral tribunal to Hub about the arbitration were in English. On my findings, moreover, Hub decided to ignore the notices from the arbitral tribunal and decided to take no part in the arbitration despite knowing that it was being conducted. Having done so, there is and was no prejudice to Hub occasioned by the fact that the arbitral proceedings were conducted in and the arbitral award issued in Arabic (of which there is in evidence a certified English translation). If Hub's only argument were argument (5) I would not be persuaded that I should refuse to enforce the award despite Hub having proved that the arbitral procedure was not in accordance with the Contract because it was conducted in and the award was issued in Arabic rather than in English. As a matter of discretion I would decide to enforce the award against Hub notwithstanding the fact that the arbitral procedure was not in accordance with the agreement of the parties.

31 The real arguments in this matter are (1) and (4) which are related – because Hub was never given a notice under Art 46 of the Contract it never got the opportunity to appoint an

arbitrator and the arbitral tribunal was appointed by the Qatari Plenary Court of First Instance rather than by the method specified in Art 46. Art 46 provided for each party to nominate an arbitrator and for those two arbitrators to choose a third arbitrator who should chair the arbitration. According to Art 46 if the decision about the third arbitrator could not be agreed within 28 days then the matter of appointment of such member shall be referred by either party to the competent Qatari Courts. Art 46 also however said that any dispute was to be referred to arbitration "in accordance with the rules of arbitration in Qatar".

32 Evidence of Qatari law was given by Dr Al-Adba. In his affidavit Dr Al-Adba said that:

(1) Since March 2017 the law of Qatar governing arbitration is the Qatari CCAL. This replaced Arts 190-210 of the Qatari CCCP.

(2) Article 171(1) of Law No. 22 of 2004 Promulgating the Civil Code (Qatar) (the **Qatari Civil Code**) provides that:

> A contract is the legislation of the parties to the contract. It may not be set aside or amended without the agreement of the two parties, or for reasons prescribed in the law.

(3) Accordingly, the Contract between the parties is binding including the arbitration agreement.

(4) The most important thing to commence an arbitration validly is legal notification as agreed in the Contract. Without this, the dispute might be premature and the verdict will be invalid.

(5) The valid way a party to the Contract with the wording as per Art 46 may begin an arbitration is as follows:

> (a) The claimant sends a written notice by prepaid post to the respondent to the address provided in the contract-; and
>
> (b) Within 45 days of that notice, a party may appoint an arbitrator.

(6) The notification must be delivered to the proper address of the party and if not delivered properly then any verdict or requests which come after that will be null and void.

(7) If the notice under the Contract is not responded to, the claimant may apply to the court for a judicial notification to appoint an arbitrator.

(8) Under Art 4 of the Qatar CCAL emails are considered a valid way of delivering a legal summons when this was not previously the case.

33 Dr Al-Adba gave oral evidence. He explained that the Qatari Plenary Court of First Instance was the first level of the judicial hierarchy in Qatar. If parties had a dispute about a contract they could file proceedings in the Qatari Plenary Court of First Instance to decide the dispute, assuming the parties had not agreed to resolve any dispute by arbitration. By Art 172 of the Qatari Civil Code the Court would resolve the dispute having regard to questions of law, custom and equity. Further, if parties had a dispute about the arbitration agreement in a contract they could also file proceedings in the Qatari Plenary Court of First Instance to resolve the dispute. Above the Qatari Plenary Court of First Instance in the judicial hierarchy were two levels of appeal courts.

34 Dr Al-Adba was shown the judgment of the Qatari Plenary Court of First Instance appointing the arbitrators. The Qatari Plenary Court of First Instance referred, amongst other things, to Art 195 of the Qatari CCCP (cited in part above) and Art 46 of the Contract. The Court said:

> Whereas the two parties failed to agree upon tribunal of arbitrators, with which the court decides to appoint a tribunal consisted of three arbitrators…

35 The Court then adjudicated to appoint an arbitral tribunal consisting of three arbitrators.

36 Dr Al-Adba agreed that he was unaware that the Qatari Plenary Court of First Instance had issued this judgment. He agreed that the judgment represented the law in Qatar until set aside which could only be done by way of appeal. Until set aside the judgment represented the state of Qatari law. Dr Al-Adba agreed that the arbitrators, having been appointed by the Court, had to conduct the arbitration and make an award. If a party wished to argue that the Court should not have appointed the arbitrators then it was necessary for the party to apply under Art 33 of the Qatari CCAL which provides for appeals against an arbitral award. The grounds of appeal reflect those for refusing to enforce an award in s 8(5) of the IAA but also provide for primacy of the Qatari CCAL in the event of any conflict between it and the terms of the Contract between the parties. Under Art 33(4) the party wishing to appeal the award has one month from the date of the award or the date of receiving notice of the award to do so.

37 Dr Al-Adba's attention was drawn to the statement in the judgment of the Qatari Plenary Court of First Instance that "the Defendant was legally notified thereof with a request to appoint an arbitral tribunal consisted of three arbitrators to decide in the dispute…". He agreed that the Court could determine this issue of proper notice for itself and that such a decision could be challenged by way of appeal.

38 Hub's essential argument was that the arbitration having been commenced other than in accordance with Art 46 of the Contract between the parties, nothing that followed could be valid and binding on Hub. Although Hub's primary case was that it never received actual notice of the arbitration (a case I have rejected on the facts), it was submitted for Hub that even with actual notice of the arbitration Hub was entitled to ignore the process in Qatar which was other than in accordance with the arbitration agreement.

39 ECQ's essential argument was that the decision of the Qatari Plenary Court of First Instance represented the state of the law in Qatar, which was the relevant law. It necessarily followed that Hub had been properly notified of the arbitration as the Qatari Plenary Court of First Instance found and that the arbitral tribunal, having been constituted by that Court, was properly constituted. Further, Hub had actual notice of the appointment of the arbitrators by the Court and of the arbitration proceedings and was wilfully blind to the conduct of the arbitration with the consequence that it cannot now resist enforcement of the arbitral award against it. The proper way for Hub to resist enforcement was to appeal against the arbitral award in Qatar within one month of having received notice of it, which Hub had not done.

40 The parties referred to some cases in support of their competing submissions.

41 In *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; 277 ALR 415Foster J considered a case in which a party had actual notice of an arbitration but deliberately chose not to participate in it: [109]. Foster J said at [126]:

> The whole rationale of the Act, and thus the public policy of Australia, is to enforce such 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.

42 His Honour decided to enforce the award.

43 In *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (***Dallah***) the issue was the absence of any agreement between the parties as to arbitration. An argument was put that only the courts in the seat of the arbitration had power to determine the validity of the award: [20]. At [23] Lord Mance said:

> A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it

> can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.

44 At [30] Lord Mance said that:

> The scheme of the New York Convention, reflected in ss.101-103 of the 1996 Act may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s.103. But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start fifteen or thirty love up.

45 At [103] Lord Collins rejected an argument that the courts of the seat of the arbitration had exclusive jurisdiction to determine the existence of a valid arbitration agreement, saying:

> There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.

46 At [160] Lord Hope said:

> The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself.

47 In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; 38 VR 303 (***IMC Aviation***) reference was made to *Dallah* at [319]. At [321] Hansen JA and Krou AJA said that:

> In the present case, IMCS, which denied that it was a party to the Arbitration Agreement, was not obliged to participate in the arbitration proceeding or to apply to the Mongolian courts to set aside the Award. In the circumstances of this case, IMCS's failure to take these steps cannot give rise to an estoppel precluding it from denying that it was a party to the Arbitration Agreement or from challenging the validity of that agreement in this Court.

48 Further at [53] in *IMC Aviation* Warren CJ said:

> Section 8(5)(a) to (e) requires 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.

49 And at [169] in *IMC Aviation* Hansen JA and Kyrou AJA said:

> To interpret the Act in a manner that treated the issue of whether a person was a party to an arbitration agreement as standing outside the legislative scheme that applies to all other grounds of impugning an award, would fly in the face of the express language in s 8(3A) that the Court may only refuse to enforce a foreign award in the circumstances mentioned in s 8(5) and (7).

50 In *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; 201 FCR 535 at [88] Foster J said:

> The grounds for refusing enforcement specified in s 8(5) of the IAA reflect commonly accepted notions of fairness. Those grounds must be raised by the party against whom enforcement is sought and the onus of establishing one or more of those grounds is on that party. Section 8(7) specifies two bases for refusing to enforce a foreign award which are not, in terms, required to be raised by the party against whom enforcement is sought. In practice, of course, it will almost always be that party who raises one or other or both of those matters. In order to engage s 8(7), the Court must make a finding either that the subject matter of the foreign award is not capable of settlement by arbitration under the laws of the State or Territory in which the Court is sitting and/or that to enforce the award would be contrary to public policy. Once one or other or both such findings are made, the Court has a discretion to refuse to enforce the award. The proper exercise of that discretion would require the Court to pay due regard to the terms of s 39(2) of the IAA and the objects of the IAA as stated in s 2D.

51 Hub relied on *Dallah* and *IMC Aviation* to support the following propositions (leaving aside its contentions about actual knowledge of the arbitration which I have rejected above):

(1) It is apparent from the inclusion of s 8(5)(f) of the IAA ("the award has not yet become binding on the parties to the award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made") that there is no obligation on a party resisting the enforcement of an award to apply to set aside the award in the seat of the arbitration. The party may resist enforcement in the country in which the award is sought to be enforced relying on any of the grounds in s 8(5) and 8(7).

(2) There is no material difference between the argument put in *Dallah* and *IMC Aviation* that there was no valid arbitration agreement and the argument put in this case where there was a valid arbitration agreement but the arbitration was commenced other than in accordance with the Contract: *IMC Aviation* at [169]. The arbitration not having been properly commenced in accordance with the arbitration agreement, the arbitration is invalid and the other party (Hub in this case) was under no obligation to

participate in the arbitration. Nor could it be under any obligation to have sought to set aside the arbitral award in Qatar. Rather, Hub is entitled to resist enforcement of the award on the grounds it does in Australia under ss 8(5) and 8(7).

(3) Further, it follows from the reasoning in *Dallah* and *IMC Aviation* that this Court is not involved in reviewing the judgment of the Qatari Plenary Court of First Instance. This Court must decide for itself if the grounds for resisting enforcement of the award are made out.

(4) The evidence of Dr Al-Adba confirms that the proper way to have commenced this arbitration was in accordance with Art 46 of the Contract, that is, for ECQ to send by pre-paid post to Hub at its Chippendale Address notice giving Hub 45 days to appoint an arbitrator. This evidence of the law of Qatar is unchallenged. Such notice was never given.

(5) Dr Al-Adba also gave evidence that the constitution of the arbitral tribunal should be in accordance with Art 46 of the Contract. The arbitral tribunal was not so constituted in this case.

(6) ECQ's argument, that the judgment of the Qatari Plenary Court of First Instance represents Qatari law and cannot be reviewed by this Court, is inconsistent with the reasoning in *Dallah* and *IMC Aviation.* This Court must decide for itself whether the composition of the arbitral tribunal was in accordance with the Contract between the parties having regard to what Qatar law says about the Contract and what the terms of that contract were and the events that transpired.

(7) The first time that Hub could have become aware of the arbitration was in December 2016, six months after ECQ had approached the Qatari Plenary Court of First Instance, by which time the "process was irretrievably flawed". As such, no valid arbitration or award could spring from that source.

52 ECQ contended as follows:

(1) *Dallah* and *IMC Aviation* are cases in which it was contended that there was no valid arbitration agreement in existence. They do not establish a more general principle that a party can ignore a process of arbitration merely because the party believes (rightly or wrongly) that the process is not being carried out in accordance with an arbitration agreement that does exist. In this regard I should note that I do not consider that Hub ignored the notice it had of the arbitration process because it

believed it had not been properly commenced. As stated above, I Infer that it ignored the notice of the arbitration process because it considered it was in its best commercial interests to do so.

(2) The parties in the present case did not agree to an arbitration in a vacuum. They agreed in Art 46 to an arbitration "in accordance with the rules of arbitration in Qatar". Dr Al-Adba's evidence in his affidavit about the effect of Qatari law was given without knowledge of the judgment of the Qatari Plenary Court of First Instance which considered Art 46 of the Contract and decided to appoint three arbitrators to conduct the arbitration. Dr Al-Adba confirmed that this judgment was valid and binding until set aside.

(3) Accordingly, the facts of the present case bear no relationship to those in *Dallah* and *IMC Aviation*. In the present case there was a valid arbitration agreement and a court of competent jurisdiction applied the law of Qatar to that agreement and decided to appoint three arbitrators to conduct the arbitration. Hub received actual notice of the Court proceedings in December 2016 and actual notice of the arbitration proceedings through April to July 2017 but for its own reasons decided not to participate in that process.

(4) Hub has the onus of proof. In s 8(5)(c) what is required is proper notice of the appointment of the arbitrator. This is the arbitrator which made the award. Hub received such notice from the arbitrators of their appointment to its registered address in accordance with the notice provisions in both the Contract and Qatari law. As a result, Hub's argument in relation to s 8(5)(c) falls away.

(5) As to s 8(5)(e), about the composition of the arbitral authority, the agreement of the parties included arbitration "in accordance with the rules of arbitration in Qatar". The Qatari Plenary Court of First Instance applied those rules, including Art 195 of the Qatari CCCP, and decided that it should appoint three arbitrators to conduct the arbitration. It follows that the composition of the arbitral authority accorded with Art 46 of the arbitration agreement.

(6) When regard is had to the objects of the IAA and the considerations in s 39(2)(b) of the IAA (as required), in the circumstances of this case the Court would not accede to Hub's request not to enforce the award against it. Hub deliberately sat on the sidelines of the arbitration and cannot now invoke any discretionary factors to support its case that the Court should refuse to enforce the award against it. Considerations of

comity with the decision of the Qatari Plenary Court of First Instance are critical: *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; 232 FCR 361at [75].

53 I do not doubt Hub's contention that I am bound to decide for myself whether it has proved any of the grounds in ss 8(5) and 8(7) of the IAA. As I have rejected Hub's arguments about s 8(7) above on the facts, the focus of further consideration is s 8(5). In that regard it is apparent that s 8(5)(b) contemplates a circumstance in which there is no arbitration agreement at all. That is, the lack of any arbitration agreement is a ground upon which a party may resist enforcement of an award under s 8(5). This suggests that the principles expressed in *Dallah* and *IMC Aviation* are not confined to the circumstance where there is no arbitration agreement. The same proposition underlies the observation in *IMC Aviation* at [169]. Those principles, however, do not resolve the current case. *If* Hub was not given proper notice of the appointment of the arbitrator and *if* the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Contract Hub was entitled to ignore the arbitration process in Qatar and is entitled to request that this Court refuse to enforce the award against it on these grounds. However, those questions remain unanswered by any authority to which the parties have referred.

54 In my view, the key facts are as follows.

55 First, there was no dispute between the parties that the law of Qatar governs the conduct and validity of the arbitration. Accordingly, the questions whether Hub was given proper notice of the appointment of the arbitrator and whether the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Contract are subject to the operation of Qatari law. Australian law governs the enforcement of the arbitral award in Australia but that law is to be applied having regard to the fact that Qatar law determines the validity of the arbitration and its conduct.

56 Second, there was no dispute that the Contract between the parties is governed by Qatar law: Art 47 of the Contract.

57 Third, Art 46 of the Contract provides that any dispute connected with the Contract which is not amicably settled within 28 days "shall be referred to arbitration in accordance with the rules of arbitration in Qatar".

58 Fourth, the rules of arbitration in Qatar included, at the time the Qatari Plenary Court of First Instance constituted the arbitral tribunal, Art 195 of the Qatari CCCP which (as noted) provides that:

> If a dispute arises between the parties prior to an agreement between them as to the arbitrators…the court which has jurisdiction to consider the dispute shall appoint the necessary number of arbitrators at the request of one of the parties.

59 It is clear from its judgment that the Qatari Plenary Court of First Instance applied Art 195 in deciding to appoint the arbitral tribunal. It must be taken therefore that the Qatari Plenary Court of First Instance was satisfied that a dispute had arisen between ECQ and Hub prior to an agreement between them as to the arbitrators. Whether that is so or not, Hub has not proved that according to Qatari law Art 195 of the Qatari CCCP did not apply to the circumstances of this case. This is because Dr Al-Adba's affidavit evidence did not take into account the judgment of the Qatari Plenary Court of First Instance and did not consider whether Art 195 of the Qatari CCCP was engaged by the factual circumstances in this case. Further, there is a factual foundation in the evidence for the conclusion that a dispute had arisen between the parties prior to an agreement between them as to the arbitrators. ECQ had sought repayment of the money paid to Hub in 2012. Hub had indicated it would revert to ECQ once it had obtained legal advice. Instead of so doing, Hub remained silent. In my view, refusal to respond to a request for repayment is capable of constituting a dispute within the meaning of Art 195 of the Qatari CCCP. In any event, as I have said the onus of proof lies on Hub and Hub has not proved that Art 195 does not operate in this way. As such, Hub has not proved that the appointment of the arbitrators by the Qatari Plenary Court of First Instance was not in accordance with Art 46 of the Contract which provided for the referral to arbitration to be in accordance with the rules of arbitration in Qatar.

60 In these circumstances, and given that:

(1) the onus of proof is on Hub;

(2) "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": *IMC Aviation* at [53]; and

(3) "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": *IMC Aviation* at [53],

I am not satisfied on the balance of probabilities that Hub was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, save and except that the arbitral procedure must be inferred to have been conducted in Arabic rather than in English. As I have said, however, the conduct of Hub after I infer that it became aware of the arbitration proceedings (in December 2016 or, at the latest, by April 2017) is inconsistent with a decision to refuse to enforce the award merely because the agreement in Art 50 requires all matters relating to the Contract to be in English and the arbitration must be inferred to have been conducted in Arabic. This is because there was no unfairness to Hub as a result in circumstances where I have inferred that Hub decided not to involve itself in the arbitration despite being on notice that it was proceeding in Qatar.

61 If my conclusions above are incorrect then I would nevertheless decline to exercise the discretion given by s 8(5) of the IAA in Hub's favour. Relevantly:

(1) ECQ and Hub entered into the Contract, governed by Qatari law, and agreed that any dispute should be referred to arbitration in accordance with the rules of arbitration in Qatar;

(2) ECQ had sought repayment of the money paid to Hub and Hub had effectively ignored ECQ's request;

(3) Hub received actual notice of the proceedings by ECQ against Hub in the Qatari Plenary Court of First Instance in December 2016;

(4) it must be inferred that Hub knew this notice concerned ECQ seeking repayment of the money, yet Hub did nothing to ascertain what the proceedings were about;

(5) Hub received actual notice of the constitution of the arbitral tribunal and the conduct of the arbitration between April and July 2017 in ample time for Hub to take a role in the arbitration had it wished to do so; and

(6) it must be inferred that despite knowing about the arbitration Hub had no wish to involve itself in the arbitration.

62 In these circumstances the evidence that Hub, had it known about the arbitration, may have wished to counter-claim in some way cannot be accepted. Hub had years in which to make a claim and yet never did so. Nor did it ever suggest to ECQ any basis on which it was entitled to retain the money paid to it. It must be inferred, for the reasons given above, that Hub knew about the arbitration but chose not to involve itself or make any counter-claim against ECQ in

the arbitration. For these reasons I consider that there would be no unfairness to Hub by enforcement of the award against it. Hub had an adequate opportunity to participate in an arbitration which was constituted and carried out in accordance with the laws of Qatar which governed its contract with ECQ. Even if there was some procedural default within the scope of s 8(5)(c) or (e) of the IAA, the considerations in s 39(2) of the IAA, would support rejection of Hub's case that the Court should refuse to enforce the award against it.

63 For these reasons ECQ should be granted the relief it seeks, being enforcement of the award as if it were a judgment of this Court.

64 I propose to give the parties a period of seven days in which to confer and to file agreed or competing orders reflecting these reasons for judgment.

I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 5 August 2020