



Resolution
Institute

the

arbitrator



mediator

Case Note
The Saga of Ye v Zeng

Erika Williams¹

Mr Ye, an Australian citizen, lent a large sum of money to Mr Zeng, a Chinese citizen, which was guaranteed by family members and Chinese companies associated with Zeng (collectively referred to as **the Zengs**). The loan agreement was made in December 2013.

The Zengs were due to repay Ye by December 2014, but failed to do so. Pursuant to a clause in the loan agreement, Ye instituted arbitration against the Zengs before the Xiamen Arbitration Commission. In August 2015, the Commission published a final arbitral award in favour of Ye in the amount of approximately AUD\$11 million (the amount of the loan principal).

The Zengs appealed the award to the Xiamen Intermediate People's Court on grounds including a procedural fairness complaint.

Ye v Zeng [2015] FCA 1192

In September 2015, pursuant to section 8(3) *International Arbitration Act 1974* (Cth), Ye applied to the Federal Court for enforcement of the arbitral award in Australia as the Zengs have a number of property development interests in the country. The Zengs sought adjournment of the enforcement action pending the outcome of the appeal underway in China. In the alternative to enforcement of the order, Ye sought full security for the award.

In relation to adjournment pending the appeal, Allsop CJ commented that the award being set aside in the seat country did not necessarily mean that it will not be enforced in other jurisdictions, although he cautioned that an Australian court would require strong persuasion to enforce an award in such circumstances.²

His Honour noted that 'in an era of electronic commerce and fast moving funds' courts cannot stand by idly waiting while another country's court considers a claim, while the party with the binding award (until set aside) is left exposed.³

Chief Justice Allsop could not see a strong case for the Chinese Court to set aside the arbitral award on the material before him. His Honour also observed that the Zengs' properties in China may not be of use in allowing Ye to execute the award in China, because they were highly leveraged to Chinese lenders.

The Chief Justice confirmed the court's approach in relation to international commercial arbitration noting that its 'proper, speedy and unequivocal enforcement is an essential part of international commerce'.⁴ In light of this, his Honour determined that Ye was entitled to be secured properly for at least the full loan principal and some interest. His Honour ordered the Zengs not to dispose of their

¹ Senior Associate, McCullough Robertson Lawyers; Member, Chartered Institute of Arbitrators; Director, ArbitralWomen; BA, LLB (Hons).

² *Ye v Zeng* [2015] FCA 1192 at [10].

³ *Ibid* at [14].

⁴ *Ibid* at [21].

property development interests in Australia (**Freezing Orders**) and adjourned the matter to provide the Zengs with an opportunity to file affidavit evidence in relation to the funds available for security and to provide further evidence regarding their procedural fairness complaint the subject of the appeal in China.

Ye v Zeng (No 2) [2015] FCA 1243

At the second hearing, the Zengs disclosed greater details about their assets. Chief Justice Allsop found that the Australian assets were insufficient for enforcement.⁵

The Zengs failed to provide any further information on the grounds of its appeal in China, and Allsop CJ found that the case would be weak at best.⁶ In such circumstances, his Honour considered it appropriate to proactively take protective steps, considering Ye still held a binding award in his favour.⁷

The Chief Justice noted the competing considerations affecting the justice of the case, including the injustice that would be occasioned to the Zengs if they were rendered insolvent by an order for security only to have the arbitral award set aside in China.⁸ On the other hand, Ye would suffer injustice if he were denied enforcement of the award because the Zengs' assets were improperly secured.⁹

His Honour raised the issue of costs, and in particular, indemnity costs given the delay by the Zengs in disclosing their financial position and no offer of any security.¹⁰ The matter was adjourned for further consideration by his Honour. The Freezing Orders remained in place.

Ye v Zeng (No 3) [2015] FCA 1279

The day before the third hearing, the Zengs offered to Ye an equitable mortgage over their Australian properties. Chief Justice Allsop noted his sympathy for Ye, but also observed that an order for the Zengs to pay the full sum immediately may be catastrophic to the Zengs' business.¹¹

There were considerable efforts by Allsop J to tread carefully when expressing his view on the weakness of the appeal in the Chinese Courts. The Chief Justice expressly stated he did not wish for his view to be communicated to the courts in China.¹² Although he considered the outcome of the hearing in China or timing for such outcome to be important, his Honour emphasised that he was making no demand or requirement for that information from the Chinese Courts.¹³

⁵ *Ye v Zeng (No 2)* [2015] FCA 1243 at [7].

⁶ *Ibid* [12].

⁷ *Ibid* at [12].

⁸ *Ibid* at [15].

⁹ *Ibid* at [15].

¹⁰ *Ibid* at [16]-[17].

¹¹ *Ye v Zeng (No 3)* [2015] FCA 1279 at [3].

¹² *Ibid* at [5].

¹³ *Ibid* at [5].

His Honour ordered that, for the interim, sufficient security would be provided by the Freezing Orders and the delivery of mortgages in registrable form to Ye. The hearing of the Chinese appeal was set down for 4 December 2015. His Honour adjourned the proceeding pending the outcome of the Chinese appeal.

Ye v Zeng (No 4) [2016] FCA 386

On 3 March 2016, the Chinese court handed down its decision dismissing the appeal. The award in his favour having been upheld, Ye applied to the Federal Court for enforcement of the award.

The Zengs did not object to any of the evidence demonstrating adherence with the procedural requirements to have an award recognised and enforced in Australia.¹⁴ Instead, during the hearing, the Zengs sought a stay of enforcement because they had applied for an anti-suit injunction in China on the basis that the Zengs had sufficient assets in China to comply with the award, and because the Australian proceedings would conflict with enforcement proceedings in China.¹⁵ In effect, the grant of the injunction in China would prohibit Ye's enforcement action in Australia.

Given Allsop J had determined that the Zengs' Chinese assets were not sufficient in earlier proceedings,¹⁶ it is unsurprising that the Court refused to adjourn the matter. Rather, his Honour ordered the recognition and enforcement of the award, and entered judgment against the Zengs. Allsop CJ did grant the Zengs leave to apply for a stay of enforcement of the judgment although his Honour did not suggest there was ground for such a stay.¹⁷ The parties agreed to address costs, including indemnity costs, by way of written submissions.

Ye v Zeng (No 5) [2016] FCA 850

Chief Justice Allsop ordered that the Zengs pay Ye's costs, almost entirely on an indemnity basis. His Honour observed that the Zengs had put forward 'no coherent challenge'¹⁸ and that there 'has never been an attempt to agitate any legitimate ground to resist enforcement'.¹⁹

On the issue of the approach to indemnity costs in applications resisting enforcement of international arbitration awards, his Honour commented that such an award 'is not merely a debt, it is the resolution of a dispute by a chosen contractual mechanism' and suggested a distinction should be made.²⁰

¹⁴ *Ye v Zeng (No 4)* [2016] FCA 386 at [17].

¹⁵ *Ibid* at [18].

¹⁶ *Ye v Zeng* [2015] FCA 1192.

¹⁷ *Ye v Zeng (No 4)* [2016] FCA 386 at [21]-[22].

¹⁸ *Ye v Zeng (No 5)* [2016] FCA 850 at [17].

¹⁹ *Ibid* [18].

²⁰ *Ye v Zeng (No 5)* [2016] FCA 850 at [23].

Ye v Zeng (No 6) [2016] FCA 923

It appears there might be light at the end of the very long tunnel for Ye. In July 2016, Allsop CJ made orders appointing a receiver to all of the Zengs' property in Australia. The Zengs resisted this appointment by submitting that Ye should first have recourse to their assets in China or that the Zengs should first be given an opportunity to arrange the sale of their Australian properties.²¹ These submissions were unequivocally rejected.

In a straightforward and, hopefully, final decision, his Honour reiterated that the 'courts should be ready to give speedy and effective enforcement and support to international commercial arbitration awards when no reason can be shown not to enforce such awards under the New York Convention'.²² Chief Justice Allsop found it was just and convenient to appoint the receiver and such action provided the clearest and most effective remedy in circumstances where the Zengs had delayed enforcement of an arbitral award for eight months without any legitimate basis.²³

Conclusion

The saga of *Ye v Zeng* highlights the Australian courts' commercial approach, and commitment to providing 'effective, swift and complete enforcement'²⁴ of international arbitration awards. The cases indicate that the enforcement of arbitral awards is to be distinguished from other enforcement action, because the award is the product of a dispute resolution mechanism by which the parties agreed to be bound, and by reason of the limited grounds on which enforcement can be resisted. The award of indemnity costs should be heeded as a warning to any party contemplating resisting the enforcement of an international arbitral award when there is no legitimate basis for doing so. One can only hope this is the end of a protracted battle for Ye to obtain what is rightfully his.

²¹ *Ye v Zeng (No 6)* [2016] FCA 923 at [6].

²² *Ibid* at [4].

²³ *Ibid* at [3] and [9].

²⁴ *Ibid* at [9].