Enforcing Foreign Arbitral Awards in the Federal Court of Australia

Erika Williams
Independent Arbitrator
ACICA Fellow

The recent case of *Hankuk Carbon Co, Ltd v Energy World Corporation Ltd*[1] demonstrates the efficient procedures that the Federal Court of Australia has implemented for the enforcement of foreign arbitral awards

The Arbitration

The applicant, Korean based Hankuk Carbon Co, Ltd ('Hankuk'), obtained two awards – a merits award and a costs award – against Energy World Corporation Ltd ('Energy World'), an Australian company listed on the Australian Stock Exchange ('ASX') in relation to the supply and delivery of goods connected with the construction of an LNG storage tank in the Philippines. A dispute arose regarding Energy World's non-payment for completed shipments and non-acceptance of other goods that the parties had contracted for, which remained in storage in a warehouse in Korea.

The contract included an arbitration clause providing for all disputes to be finally settled by arbitration. According to the merits award, the parties agreed that the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules would apply and that the seat of the arbitration was Hong Kong.

The merits award contained orders for Energy World to pay Hankuk over USD 5 million plus warehousing costs, with costs and interest to be determined. The costs award contained orders for Energy World to pay Hankuk over HKD 2.3 million for costs and expenses of the arbitration, plus interest.

The Ex Parte Application Process for Enforcement of the Arbitral Awards

Hankuk filed its application to enforce the two foreign arbitral awards in the Federal Court of Australia on 12 February 2024. Hankuk followed the procedure as set out in the Federal Court's Commercial Arbitration Practice Note (CA-1) ('Practice Note') which gives effect to the relevant *Federal Court Rules 2011* (Cth) ('Rules') for the enforcement of foreign arbitral awards.[2] In particular, Annexure B to the Practice Note explains the procedure for ex parte applications to enforce arbitral awards which is envisaged by the Rules.[3] Not every enforcement application is intended to proceed ex parte. Only in 'an appropriate case' will an ex parte application be allowed by the Court. An appropriate case is one where:

(a) the award creditor (that is, the party with the award in

1 [2024] FCA 232.

2 See r 28.44 in relation to enforcing a foreign award. The author notes that the judgment refers to r 28.14(4) of the Rules, which appears to relate to domestic arbitral awards (see [2] of the judgment).

3 Rule 28.44(3) states *'The application may be made without notice to any person'*.

its favour) **has not** been formally notified by the award debtor (that is, the party against whom the award is made) that they intend to object to the enforcement of the award and reasons for that objection; and

(b) the award creditor does not know of any other reasonably arguable basis upon which the award debtor may object to the enforcement of the award.

The Practice Note warns that a duty of candour applies to an award creditor who brings an ex parte application.

The Practice Note prescribes that, if the Court is satisfied that the ex parte application to enforce the award should be allowed, the Court should make an order which requires the award debtor be given 28 days notice to oppose the making of the order. The Court should also provide a return date. Finally, the order should include that, upon establishing by way of affidavit that notice of the order has been given to the award debtor and there being no opposing application from the award debtor, the Court will make the order enforcing the award.

It should be noted that the Practice Note provides that, if the Court requires the application to proceed on notice, then the award creditor will need to seek leave to serve the application on the award debtor out of the jurisdiction.

The Hankuk Case

On 12 February 2024, in compliance with s 9 of the *International Arbitration Act 1974* (Cth) ('IAA') and as required pursuant to r 28.44(2)(a) of the Rules, in support of its application for enforcement, Hankuk produced an authenticated copy of the arbitration agreement and authenticated copies of the merits and costs awards. Justice Stewart noted that the copies of the agreement and awards were in any event, receivable by the court as prima facie evidence of the agreement and awards.[4] His Honour also noted that the documents were in English, so no question of translation referred to in s 9(3) of the IAA arose.[5]

These documents were sufficient to satisfy the Court 'that the applicant and the respondent were parties to the arbitration agreement, that the arbitration was convened pursuant to that agreement and that the applicant and the respondent [were] the parties to the merits award and the costs award'.[6]

To comply with the duty of candour and to support a contention that there was not any other arguable basis upon which Energy World could oppose the enforcement of the arbitral awards, Hankuk's application must have noted that Energy World brought proceedings to set aside the award at the seat (in Hong Kong), but was unsuccessful.[7] Further, Energy World's application for leave to appeal in Hong Kong was dismissed.[8] Justice Stewart determined that the awards were final and no longer subject to recourse at the seat[9] which ruled out any objection by Energy World on the basis of s 8(5)(f) of the IAA.

Justice Stewart found that, as there was no apparent reason why the awards might not be enforced, it was appropriate for the case to follow the procedure set out at Annexure B of the Practice Note.[10]

Justice Stewart drew a helpful distinction between the orders sought for the enforcement of an arbitral award and the more common form of order made in the Federal Court. The form of order sought (and made) in this case was for an order entering judgment and then staying that judgment for 28 days in order to provide Energy World an opportunity to apply to set it aside.[11] Justice Stewart described the more common form of order as giving the respondent an opportunity to oppose the making of enforcement orders prior to making such enforcement orders.[12]

4 See s 9(5) of the IAA.
5 *Hankuk Carbon Co, Ltd v Energy World Corporation Ltd* [2024] FCA 232 at [4] and [7].
6 Ibid [11].
7 Ibid [13].
8 Ibid.
9 Ibid.
10 Ibid [14].
11 Ibid [16].
12 Ibid.

His Honour canvassed case law from Victoria, England and Wales, and Hong Kong, which provided precedent for the form of order being sought and found there was nothing in the relevant legislation or the Rules which prevented him from making such orders.[13] In his Honour's assessment, the orders sought struck an appropriate balance between the rights and interests of Hankuk and Energy World.[14]

The Court Orders

On 12 March 2024, which was a mere one month after Hankuk's application, the Court ordered that Hankuk had leave to have the merits and costs awards enforced as if they were judgments of the Court. The Court also entered judgment for various amounts, including for damages, warehousing costs and interest, which, by that time, amounted to approximately USD 9.6 million. The Court ordered that warehousing costs and interest were, at the time, still accruing, with the addition of an order for costs of the Federal Court proceeding.

As required by the Practice Note, Justice Stewart listed 12 April 2024 as the return date. He also stayed the orders referred to in the previous paragraph until 5pm on the return date, unless Energy World filed a set aside application by 9 April 2024. Hankuk was required to provide notice of the orders to Energy World and inform Energy World that unless it opposed, or applied to set aside, the orders, the stay would expire on 12 April 2024.

The Final Step

Immediately prior to the return date, Hankuk provided affidavit evidence that notice of the orders was given to Energy World. The Court accepted evidence that Hankuk had served the orders on, or otherwise given notice of the orders to, Energy World in no less than five different ways. The Court had not received any application from Energy World to set aside the orders. Accordingly, on the return date, the Court noted that the stay would expire at 5pm that day and made orders to that effect.

Concluding Remarks

This case is a practical demonstration of the effectiveness of the ex parte procedure available in the Federal Court of Australia to enforce a foreign arbitral award in circumstances where the award creditor is not aware of any actual objection by the award debtor, or of any basis on which the award debtor may be able to object, to the enforcement of the award.

Given that Energy World is an ASX listed company, Hankuk can now look to Energy World's annual reports to seek to identify assets against which it can enforce the relevant arbitral awards as if they are judgments of the Federal Court of Australia.

It is pertinent to note that the total process to obtain orders for the enforcement of a foreign arbitral award in the Federal Court of Australia took exactly two months from application to final enforcement orders.

In anyone's view, that is swift justice.

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13 Ibid [21].
14 Ibid [22].