

CASE NOTE

Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu & Ors [2021] FCA 477

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In this case, Beijing Jishi Venture Capital Fund (Limited Partnership) (**Jishi Fund**), applied for enforcement of a foreign arbitral award under s 8(3) of the *International Arbitration Act 1974 (IAA)* in the Federal Court of Australia. Middleton J declined to order enforcement as against one of the four respondents, Ms Elaine Liu, on the ground that she had not been given proper notice of the arbitration or the appointment of arbitrators. Enforcement was granted against the other respondents (who did not oppose). This decision marks one of the rare instances in which enforcement of a foreign arbitral award has been denied by an Australian court. The Federal Court's judgment serves as a reminder that, in any international arbitration in which enforcement in Australia may be sought, it is essential to ensure that proper notice is given to all parties. The decision also shows the risks that may be involved where parties to an institutional arbitration rely upon the administering institution to notify and serve disputing parties.

1. Background

The award arose out of a dispute that was determined by arbitration before the China International Economic and Trade Arbitration Commission (**CIETAC**).

In August 2012, the parties had entered into a shareholders agreement (**Shareholders Agreement**), for Jishi Fund to invest in a manufacturing company run by a husband and wife: the first respondent, Mr James Liu, and the second respondent, Ms Elaine Liu (together, the **Lius**). The dispute arose when the mainland China public offering of the manufacturing company, agreed under the Shareholders Agreement, did not eventuate. The Shareholders Agreement contained an arbitration clause, and notice provisions of the contract stipulated an Australian business address for both of the Lius (**Australian Business Address**). In 2015, James Liu generally informed Jishi Fund that the manufacturing business had moved to a new location, but the notice details for the Lius under the Shareholders Agreement were not formally amended.

In 2017, a confirmation letter was issued regarding Jishi Fund's rights under the Shareholders Agreement (**Confirmation Letter**). The Confirmation Letter contained a provision which deemed notice by Jishi Fund of one party to be effective as notice to all other parties to the Confirmation Letter, and listed the registered address of the manufacturing company, being a Chinese business factory address (**Chinese Business Address**), for James Liu. It also stipulated that James Liu had full authorisation from Elaine Liu, and the right to sign on her behalf. The Confirmation Letter was not signed by Elaine Liu personally; James Liu did sign but did not purport to do so on her behalf.

In December 2017, Jishi Fund applied for arbitration at CIETAC (**Arbitration Application**) and, as part of its Arbitration Application, provided three addresses for service on the respondents, one of which was the Lius' current residential address (**Residential Address**). The Australian Business Address was not one of the three addresses for service that Jishi Fund provided in the Arbitration Application.

In accordance with the Shareholders Agreement, the 2015 CIETAC Rules applied to the arbitration. Acting pursuant to the CIETAC Rules, CIETAC attempted to serve the Arbitration Application on the respondents at the three addresses provided by Jishi Fund, which were "*returned for wrong address*". Upon being notified of this, Jishi Fund provided CIETAC with the Chinese Business Address (which was the address provided in the Confirmation Letter). The Chinese Business Address was thereafter used exclusively by CIETAC to serve the Lius in relation to the arbitration; this proved to be material in the subsequent enforcement proceedings in Australia.

The members of the CIETAC tribunal were appointed in the absence of any communication from the respondents. The arbitration was heard in September 2018, without appearance from any respondent. In its award, the tribunal accepted that service on the respondents had been deemed effective, despite finding that Elaine Liu was not bound by the Confirmation Letter.

2. The Enforcement Application Before the Federal Court

Before the Federal Court, Elaine Liu attested that she had received no actual notice of the arbitration and was unaware of it until October 2020, when she was served with the enforcement application. She contended that, therefore, the Court should refuse enforcement of the award against her because:

- (1) that meant that proper notice was not given of the arbitration or of the appointment of the arbitrators, for the purposes of s 8(5)(c) of the IAA; and
- (2) failure to give proper notice of these matters would render enforcement of the award contrary to public policy in amounting to a breach of natural justice in connection with the making of the award, for the purposes of s 8(7)(b) of the IAA (read with s 8(7A)(b)) of the IAA.

The Court accepted Elaine Liu's evidence in this respect and each of her contentions, declining enforcement of the award against her. The award was enforced against the remaining respondents in circumstances where they did not oppose enforcement.

(a) The Starting Point

As the party resisting enforcement, the onus lay with Elaine Liu to establish a ground under s 8(5) or s 8(7) of the IAA on the balance of probabilities: [18], [25]. Middleton J noted that what was required to meet this standard depended on the nature and seriousness of that sought to be proved: [25]. The Court considered that the starting point was a "*strong presumption of regularity*" in respect of the arbitral tribunal's decision and the means by which it was arrived at, and that allegations of vitiating irregularity should be treated as serious: [26].

The Court explained that the proper notice requirement in s 8(5)(c) of the IAA will be satisfied if the party was given a reasonable opportunity, in all the circumstances, to present its case: [27]; the court must look at all the circumstances to objectively determine whether proper notice has been given: [30]. Significantly, the Court held that, although findings of the tribunal in an award may be relevant as *prima facie* evidence of factual matters to which they relate, the tribunal's findings as to the propriety of service do not and cannot bind the court: [49]-[51]. Thus, it will not necessarily be enough that the arbitral tribunal was satisfied as to the efficacy or propriety of service – an Australian court will need to make its own judgement as to whether the notice was proper, including having regard to Australian principles of natural justice.

(i) Relevance of the Parties' Agreement

The Court acknowledged that the foundation of any arbitral award is the agreement of the parties, making that agreement relevant to whether proper notice has been given to a party for the purposes of s 8(5)(c) and s 8(7)(b) (read with s 8(7A)(b)) of the IAA: [14]. Middleton J considered that due regard must be given to the bargain struck between the parties, stating that: [14], [30]

"Where a party indicates its address for notification in (for instance) an arbitration agreement, that party would normally be taken to accept the risk to receive relevant communications at the address provided. This would allow for due process, as the parties themselves have determined the ambit of one aspect of the duty to effect proper notice – namely, its deemed receipt in the absence of actual notice. The right to receive notification of an arbitration in this way is to fulfil the expectation of the parties to an arbitral agreement as a dispute resolution process."

Thus, in the Court's view, the agreement is a record of the parties' conscious choices as to what they will accept as sufficient notice of any dispute that may arise between them.

(ii) The Applicable Law

A question arose as to the applicable law in determining whether proper notice had been given for the purposes of s 8(5)(c) and s 8(7)(b) of the IAA.

The Court explained that, in considering proper notice within s 8(5)(c) of the IAA, the court, in applying Australian law, looks to the arbitration agreement or any applicable rules interpreted in accordance with the appropriate governing law: [38]. The Court rejected an approach of sole or determinative regard to the law governing the validity of the arbitration and its conduct: [38]. Rather, as an exercise in construction of an Australian statute, Australian principles of statutory interpretation and Australian standards of what constitutes proper notice must be taken into account: [39].

In alignment with the internationalist approach taken by Australian courts in other IAA matters, the Court also considered it important to construe s 8(5)(c) consistently with domestic legislation of other jurisdictions implementing the terms of the New York Convention 1958: [40]-[41]. In having regard to United States, Canadian and United Kingdom approaches, the Court concluded that the proper notice ground for objection under s 8(5)(c) is, in essence, a matter of procedural fairness making it, in this regard, no different from the ground in s 8(7)(b) (read with s 8(7A)(b)) of the IAA: [44]. Put another way, the standard is the same regardless of whether the lack of proper notice is framed as a matter of public policy or not.

Turning, then, to s 8(7)(b), the Court considered that whether a breach of the rules of natural justice occurred in connection with the making of an award, such that enforcing the award would be contrary to public policy, is a matter of Australian public policy and Australian principles of natural justice – recognising, of course, that those principles are to be applied in the context of international commercial arbitration: [45]-[48].

(iii) Determination

The Court considered that, in determining whether proper notice was given, it was important to focus on what *had* been done (rather than what had only been attempted, or what a party had failed to do): [90].

The Court accepted Elaine Liu's evidence that she was not aware of the arbitration until she and James Liu were served with the enforcement application at the Residential Address in 2020: [92]. Middleton J seemed to accept that James Liu had some knowledge of the arbitration, though not necessarily that the arbitration was against him and Elaine Liu in their personal capacities. However, the Court declined to infer that, in the circumstances of their business relationship, Elaine Liu had *actual* notice of the arbitration by reason of James Liu's knowledge and their spousal relationship: [109].

The Court held that the notice details in the Shareholders Agreement did apply to formal communications concerning the arbitration: [112]. However, in circumstances where no service was attempted in accordance with those details, the question became whether service at the Chinese Business Address could be proper. The Court found that it could not: where the arbitral tribunal had found that the Confirmation Letter was not binding on Elaine Liu, and it was not signed on her behalf, the Confirmation Letter did not fix Elaine Liu's address for notice and therefore did not make the Chinese Business Address a valid address for service: [113].

The Court accepted that notice could have been given in accordance with the CIETAC Rules but did not ultimately find that it was: [135]. Most significantly, Article 8(3) of the CIETAC Rules provided that "*proper*" service would be deemed where there was either delivery:

- (1) to the party's "*place of business, place of registration, domicile, habitual residence or mailing address*"; or
- (2) if none of those addresses could be found after reasonable inquiries, to the last known of any of those addresses.

The Court did not accept compliance with the "*domicile address*", "*permanent residence*" or "*mailing address*" aspects of limb (1) in circumstances where Elaine Liu had very little (if any) personal connection to the Chinese Business Address: [128]. Even if "*business premises*" was broad enough to capture a physical address where an *individual* conducts business, Elaine Liu was not conducting business at the Chinese Business Address around the time of service there; the facts that she may have been a director of the manufacturing company and the Chinese Business Address was the registered address for that company were not sufficient where the factory at the Chinese Business Address had ceased operation in the year before service and Elaine Liu had had limited involvement on that site or in the company generally prior to that: [129]-[132].

Further, limb (2) of Article 8(3) could not apply because Elaine Liu's "*domicile address*", being the Residential Address, could be found – it was known to Jishi Fund and included in the Arbitration Application: [134].

Jishi Fund argued that Elaine Liu failed to notify her change of address and that this constituted a breach of the Shareholders Agreement: [137]. However, the Court considered that there was a missing causal link between Elaine Liu's breach and the consequences that Jishi Fund contended she should bear as a result of that breach i.e. failure of service – inclusion of the Residential Address in the Arbitration Application established that Jishi Fund already had current contact details for Elaine Liu at all relevant times: [137].

The Court also rejected Jishi Fund's argument that James Liu was an agent, or had implied authority, for the purposes of receiving notice of the arbitration and appointment of arbitrators on behalf of Elaine Liu: [153]. Despite accepting that there was a mutual expectation between the Lius that James Liu would take care of the manufacturing business on behalf of both of them, the Court emphasised that "*the right to receive proper notice is a personal right to be enjoyed directly and not through one's spouse. It is a matter of fundamental importance and, in circumstances where one is considering whether due process has been afforded to an award debtor, a finding of agency is not to be made lightly.*" [153].

Notwithstanding that no ground for refusal had been made out under s 8(5) or s 8(7) of the IAA, the Court considered whether it should exercise its residual discretion to enforce the award against Elaine Liu. The Court found it difficult to see how it should, given its finding that no proper notice at all was given to her – this was a fundamental requirement to the integrity of the arbitration, and to order enforcement in the circumstances would have been unfair: [155]. The Court considered that any prejudice required, or materiality, could be easily found: [156]. Where no proper notice had been given at all, real practical injustice from Elaine Liu's point of view was apparent, without the need for evidence adduced by her as to how she would have participated in the arbitration to oppose Jishi Fund's claim: [157].

3. Comment

The assessment of what constitutes proper notice of an arbitration (or appointment of an arbitrator) for the purposes of enforcement of a foreign arbitral award in Australia must take account of Australian standards, including of natural justice. However, it is largely influenced by the terms of relevant contractual instruments – expressly in relation to notice but also terms that select governing law and arbitral rules (if any). Therefore, contracting parties should take care to properly document their understanding of what will constitute (deemed) service, to circumvent potential enforcement issues. As notice clauses are generally regarded as "*boilerplate*" provisions, this will require some parties to pay attention to clauses that they have not previously considered to be material. This decision shows that, in circumstances where enforcement is opposed on the ground that notice was lacking, courts will give the notice provisions of the underlying contract significant weight as a record of the parties' intentions regarding proper notice.

This decision also shows that parties need to consider service mechanisms where they make a choice as to arbitration rules. In this case, the parties selected the CIETAC Rules. One consequence of this was that service fell to the tribunal and not the serving party, giving little control over the process and whether it was conducted effectively. The Court's judgment in this case makes clear that Jishi Fund provided three alternative addresses to CIETAC, one of which was the Residential Address, and service to those addresses miscarried through no apparent fault of Jishi Fund. However, these matters were insufficient to show that proper notice was given to Elaine Liu and the Court made it clear that it did not consider fault, intention or Jishi Fund's subjective belief as to the propriety of service to be relevant to whether proper notice was given: [75], [140]-[141]. Thus, Jishi Fund bore the enforcement consequences of failed service by CIETAC, despite having provided a correct, current address for service.

The Court's decision stands out for this reason. However, this same feature may also limit its precedential value. To some extent, this case might be seen to turn on the fact that a correct address was provided but service miscarried in such a fashion as to make CIETAC and the parties believe that that address could not be relied upon for service. For example, the reason limb (2) of Article 8(3) of the CIETAC Rules could not apply was that the correct address was

known to the parties; this was also the reason the Court would not entertain any argument that Elaine Liu should be required to bear the failure of service where she did not update her details under the Shareholders Agreement. In the ordinary course, one might expect parties to attempt re-service at an address they believed current (or request that the tribunal or relevant institution do so). Further, the Court did not decide whether a party may rely on the principle that its counterparty should not benefit from its own breach to resist enforcement (a point argued by Jishi Fund). This leaves open future arguments based on a counterparty's failure to update details under an agreement. Conversely, it appears that parties may, and should, rely on contractually agreed notice details, even if they know those details to be historical. If Jishi Fund had provided the Australian Business Address under the Shareholders Agreement to CIETAC, service on that address presumably would have been effective.

Perhaps the point of greatest general significance in this decision is that proper notice of arbitration is a *personal* right of fundamental importance. This militates against easy conclusions that notice of a wife will be deemed through her husband's knowledge or through some agency mechanism. As spousal relationships are a common feature of business in many cultures, parties should not assume that, in circumstances of a dispute, a husband's knowledge of legal proceedings will be imputed to his wife (or vice versa).

Practitioners interested in the issue of notice should watch for the result of the appeal proceedings in *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 116, which are currently before the Full Federal Court. This case is expected to shed further light on issues of proper notice and natural justice under the IAA.