CASE NOTE

***Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584**

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In a recent decision,[1] the Federal Court of Australia granted enforcement of an arbitral award issued by the Beijing Arbitration Commission for over AUD 40 million plus interest, pursuant to section 8(3) if the *International Arbitration Act 1974* (Cth) (the **IAA**). The respondent (one of the award debtors) sought to oppose the enforcement on grounds that enforcement of the award would be contrary to public policy, the essence of the respondent's case was that the award left the award creditor in a position of double recovery. The Court disagreed and granted enforcement.

This decision confirms the narrow scope available to deny enforcement of foreign arbitral awards on the ground that enforcement would be contrary to public policy within the meaning of section 8(7)(b) of the IAA. Specifically, the decision confirms that the public policy exception to enforcement is reserved for circumstances that are contrary to fundamental norms of justice and fairness in Australia within the context of international commercial arbitration.

On the specific issue of public policy and double recovery – which has arisen in other cases, including *Gutnik v Indian Farmers Fertiliser Cooperative Ltd* [2]– the decision of Stewart J confirms that no double recovery will exist where, after the arbitral award is issued, there remain "*processes of the law available to the parties to ensure an equitable outcome*".[3] On this point, the *Guoao* decision provides particularly useful guidance.

1. Background to the decision

The enforcement application in this case concerned an arbitral award issued by the Beijing Arbitration Commission (**BAC**) on 26 January 2021.[4] The background to the case was that Guoao Holding Group (**Guoao**) and Miss Lijuan Xue previously entered into a series of transactions, including a Cooperative Development Agreement (**CDA**) dated 18 April 2014, under which Guoao and Xue would form a joint venture company (**Guoao Village**), and Guoao would have a controlling interest in Guoao Village. [5] Guoao agreed to provide RMB 160 million in shareholder loans to Guoao Village, which were repayable upon certain milestones being reached during the construction of a retirement village.[6]

Subsequently, disputes concerning the project arose, and Miss Xue (and entities affiliated with her) commenced arbitration against Guoao, alleging that Guoao refused to deliver funds under the CDA. Guoao counter-claimed that Miss Xue had breached the CDA by (i) causing Guoao Village to sign

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1 *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 158.
2 [2016] VSCA 5.
3 [2022] FCA 158, [45].
4 [2022] FCA 158, [10].
5 [2022] FCA 158, [12].
6 [2022] FCA 158, [14].

a loan agreement (which had been unilaterally signed by Miss Xue and dated 27 April 2016); and (ii) withdrawing RMB 130 million from Guoao Village pursuant to the loan agreement.[7]

The arbitral tribunal ruled against Miss Xue and upheld Guoao's counterclaim, ordering (*inter alia*) (i) dissolution/rescission ("*jie chu*", in Chinese law) of the CDA, and (ii) that Miss Xue and the other claimants were jointly and severally to pay the principal sum of RMB 140 million plus interest to Guoao.[8]

Following the award, Guoao applied to the Beijing No. 3 Intermediate People's Court for an enforcement ruling on the award. This court granted an execution notice on 22 February 2021, and Guoao recovered RMB 11.8 million from the award debtors. The execution notice was subsequently terminated as the award debtors had no further property available for enforcement in the PRC.[9]

At the same time, Miss Xue and the other award debtors sought to challenge the award in the Chinese courts and before other PRC authorities, including:

1. An application to the Beijing No. 4 Intermediate People's Court – where, among other things, the award debtors claimed the award was contrary to public interest. The Intermediate People's Court held that the award outcome only involved the rights and obligations between the parties to the contract and was therefore not within the scope of social public interest.[10]

2. An application to the Beijing No. 3 Intermediate People's Court for non-enforcement of the award, on various grounds, including that the arbitral tribunal violated the applicable arbitration rules and legal procedures and resulted in an "*obvious imbalance of rights and obligations of all parties*".[11] This court dismissed the award debtors' application.

3. An appeal of the decision of Beijing No. 3 Intermediate People's Court to the Beijing People's Procuratorate No. 4 Branch. The Procuratorate system is outside of the court system and provides for a form of political or civilian supervision of courts. This application was rejected.[12]

As discussed below, these multiple rounds of Chinese proceedings concerning the award clearly influenced the Australian Federal Court's decision to grant enforcement, despite the objections of the award debtor.

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7 [2022] FCA 158, [19].
8 [2022] FCA 158, [22].
9 [2022] FCA 158, [30]-[31].
10 [2022] FCA 158, [24-[25].
11 [2022] FCA 158, [26].
12 [2022] FCA 158, [28].

Having only partially recovered under the award in China, Guoao turned to Australia to enforce the balance of the sum due under the award. Miss Xue is a resident in Sydney.[13]

3. The Australian enforcement proceedings and the grounds to oppose enforcement

Guoao applied to the Federal Court of Australia to enforce the foreign arbitral award under s 8(3) of the IAA.

Miss Xue opposed the enforcement application on grounds that: (i) enforcement of the award would be contrary to public policy, pursuant to s 8(7)(b) of the IAA; and (ii) the arbitration agreement and arbitral award tendered are not adequately certified or translated, as required by s 9 of the IAA, and therefore the award should not be enforced. Both enforcement opposition grounds ultimately failed. The focus of this case note is on the Court's analysis of the first ground raised by Miss Xue: public policy.

In opposing the enforcement application, Miss Xue alleged that the arbitral award produced a real unfairness because the CDA was rescinded and the award debtors were ordered to repay the shareholder loans and what had been paid by Guoao for the shares, but the award did not unwind the relevant share transfers (such that Guoao was left holding the shares).[14] Miss Xue contended that this result was contrary to the notion of "*jie chu*", or rescission, in Chinese law, because (on Miss Xue's case) the parties were not put back in the position that they were in before entering into the contract.[15]

As Stewart J observed, the essence of Miss Xue's public policy complaint was that the award left Guoao with double recovery.[16] The question for Stewart J was whether to enforce the award would, because of this alleged defect, be contrary to public policy within the meaning of s 8(7)(b), such that the Court should consequently exercise its discretion to not enforce the award.

4. Public policy within the meaning of s 8(7)(b) of the IAA

Stewart J outlined that the concept of public policy in the IAA adopted from the New York Convention is limited to the fundamental principles of justice and morality conformable with the international nature of the subject matter, being international commercial arbitration.[17]

In this context the scope of public policy requires a degree of harmonization and consistency with international norms, and is not intended adopt an idiosyncratic nationalistic approach.[18] Referring to previous authority (including the decision of the Full Court of the Federal Court in the *TCL Air Conditioner* case), Stewart J concluded that "*public policy in this context is limited to the*

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13 [2022] FCA 158, [7].
14 [2022] FCA 158, [34].
15 [2022] FCA 158, [34].
16 [2022] FCA 158, [38].
17 [2022] FCA 158, [32].
18 [2022] FCA 158, [32]; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, [73] & [75].

fundamental principles (or norms) of justice and morality (or fairness) of the state, recognising the international dimension of the context".[19]

His Honour considered that, before the court of a New York Convention jurisdiction can refuse enforcement of a foreign arbitral award on public policy grounds, "*the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection*."[20]

5. The decision to enforce the award

Applying these principles, Stewart J found that Miss Xue's complaints about the award did not rise to the level of the award being contrary to fundamental norms of justice and fairness in Australia within the context of international commercial arbitration, such as to enliven the public policy ground for resisting enforcement.[21]

Stewart J outlined four main reasons for his conclusion:

a. Courts considering enforcement of foreign arbitral awards should generally respect decisions reached by the court at the seat

As a starting position, Stewart J confirmed the principle that *"it will generally be inappropriate for the enforcement court of a Convention country to reach a different conclusion on the same question of asserted defects in the award as that reached by the court at the seat of the arbitration*".[22] As an exception to this general starting position, Stewart J recalled that only exceptional circumstances would justify deviating from the conclusions reached by a supervisory court at the seat of the arbitration (in this case, the Chinese courts), such as "*where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so.*"[23]

In this case, as noted above, Miss Xue had already applied extensively to the domestic courts in China for cancelation of the award, including on grounds concerning public policy, and these proceedings had been unsuccessful.[24] Stewart J found there was no reason to conclude that the powers of the Chinese courts (the courts of the seat) were so limited that they could not intervene

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19 [2022] FCA 158, [32]; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, [76] & [111].

20 [2022] FCA 158, [33]; *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 215-216 and 232-233.

21 [2022] FCA 158, [35].

22 [2022] FCA 158, [36] citing *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; 304 ALR 468 at [65] per Allsop CJ, Besanko and Middleton JJ; Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company [2021] FCAFC 110; 290 FCR 298 at [77] per Stewart J, Allsop CJ and Middleton J agreeing.

23 [2022] FCA 158, [36] citing *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC and *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 (at 331).

24 [2022] FCA 158, [38].

even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators.[25] Stewart J therefore found that exceptional circumstances did *not* exist that would warrant the court deviating from conclusions reached by the supervisory court.

b. In principle, there is no fundamental unfairness in a tribunal dealing with the matters before it

In the arbitral award, the tribunal rejected Miss Xue's claim that Guoao had breached the CDA, accepted the parties' agreement that the CDA be rescinded, and ordered that Guoao be repaid the money it had advanced under the shareholder loan. However, in the arbitration, Miss Xue did not seek any orders regarding re-conveyance of the shares. And, it is to be recalled, the fact that the award did *not* unwind the relevant share transfers, and therefore allegedly left Guoao with double recovery, was the essence of Miss Xue's public policy complaint.

Stewart J concluded that "[t]*here is no fundamental unfairness in the tribunal dealing with what was before it*".[26] Thus, because the tribunal was *not asked* to order re-conveyance of the shares, no public policy issue could arise from the absence of such an order in the tribunal's award.

c. There is no fundamental unfairness where other processes are still available to resolve the claimed unfairness

Guoao presented expert evidence (from a Professor of Chinese corporate law) that the award debtors, including Miss Xue, could still apply to the People's Court in the relevant Chinese jurisdiction for restitution of the shares they claim. Not only did the award debtors fail to seek restitution of the shares in the arbitration, but the arbitration did not preclude the award debtors from seeking restitution of the shares under Chinese law.

In considering relevant Chinese contract law principles of rescission, Stewart J determined that Miss Xue had a right under Chinese law to demand restoration of the original status (i.e. re-conveyance of the shares), and this was a matter for the relevant court in which that remedy is sought.[27] Therefore, and on the basis that Miss Xue did have remedies available to resolve the alleged double recovery of Guoao and Miss Xue's rights in this regard had not been extinguished by the award, there was no unfairness for public policy purposes.[28]

d. There was no obvious error made by the tribunal, rendering it contrary to norms of justice

Having accepted that Miss Xue could still apply for re-conveyance (restitution) of the relevant shares, Stewart J considered that the tribunal could not have made a fundamental error by not ordering re-conveyance of those shares in the award. As part of this conclusion, Stewart J appeared to accept that the award's silence on this point was not inappropriate because re-conveyance of the

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25 [2022] FCA 158, [39].
26 [2022] FCA 158, [40].
27 [2022] FCA 158, [46].
28 [2022] FCA 158, [46].

shares would involve a third-party that was not party to the arbitration agreement – meaning it was likely that any re-conveyance of the shares would have required a further and separate legal process in any event.

6. Comment

The *Guoao* decision is the latest addition to the growing body of Australian jurisprudence concerning the enforcement of foreign arbitral awards. At the general level, Stewart J's judgement shows that the general pro-enforcement bias of Australian courts continues to translate into a narrow reading of the grounds upon which enforcement of a foreign arbitral award may be resisted, including public policy, under the IAA/New York Convention framework. As such, the *Guoao* decision reinforces Australia's position as a friendly jurisdiction for enforcement of foreign arbitral awards.

On the specific issue of double recovery, the *Guoao* decision leaves open the possibility that an arbitral award that does, *definitively*, give a party double recovery may be offensive to public policy for the purposes of the IAA. This may be deduced from the reasoning of Stewart J on the question of whether the award debtors could seek orders for the re-conveyance (restitution) of the shares from a competent court: His Honour found that they could, so there was no definitive double recovery in this case. That is consistent with previous Australian jurisprudence concerning enforcement of foreign arbitral awards where a similar issue arose concerning rescission of an agreement, without an order re-conveying the relevant shares.[29]

While definitive double recovery may be clear in cases where (for example) the award clearly grants the same party damages twice for the same loss, *Guoao* shows that the analysis may be far more complex where the award contains non-damages remedies, such as rescission. In such situations, the enforcement court may be asked to go beyond the role it would ordinarily play under the New York Convention regime, as the public policy complaint implicates the merits of the tribunal's ruling. The merits issues may be intricate, involving questions of foreign law and, indeed, equity.

It will be interesting to see how Australian courts handle complex public policy cases such as this in future. Whenever the public policy exception to enforcement is debated, it has become customary to refer to the 1824 case of *Richardson v Mellish*, where Burrough J described public policy as "*a very unruly horse, and when once you get astride it you never know where it will carry you*".[30] One may truly wonder where the horse will take you if you saddle it with a merits question, such as the double recovery question raised by Miss Xue.

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29 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724, [99]-[107].

30 *Richardson v Mellish* (1824), 2 Bing 229 at 252, 130 ER 294 (CP).