FEDERAL COURT OF AUSTRALIA

Traxys Europe SA v Balaji Coke Industry Pvt Ltd and Another (No 2)

[2012] FCA 276

Foster J

29 September 2011, 23 March 2012

Arbitration — International — Foreign award — Enforcement of in Australia — Statutory power to enforce foreign award in Australia — Where applicant sought enforcement of award and monetary judgment of specified amount against respondent — Whether power of Court to enforce award included power to enter judgment — Must be controversy to be quelled before Court can exercise judicial power of Commonwealth — Can only be met if Court gives effect to decision to enforce award by entering monetary judgment against respondent — International Arbitration Act 1974 (Cth), s 8(3) — Federal Court of Australia Act 1976 (Cth), s 53 — Federal Court Rules 2011 (Cth), r 41.10.

Arbitration — International — Foreign award — Enforcement of in Australia — Statutory power to enforce foreign award in Australia — Where applicant sought enforcement of award and monetary judgment of specified amount against respondent — Whether, to obtain judgment, applicant had to have evidence that respondent had assets in Australia — Whether enforcing award and obtaining judgment where no evidence of Australian assets contrary to public policy — No requirement that respondent has assets in Australia in order to enforce award and obtain judgment — Not contrary to public policy — International Arbitration Act 1974 (Cth), s 8(7)(b).

The applicant sought orders pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth) (the Act) that an award made in England against the respondent by the London Court of International Arbitration be enforced and that judgment be entered against the respondent in the amount specified in the award. Section 8 of the Act provided for the enforcement of foreign arbitral awards in Australia, with s 8(3) providing that foreign awards could be enforced in the Federal Court as if the award were a judgment or order of that Court.

Section 53 of the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act) provided that a person in whose favour a judgment of the Court was given was entitled to the same remedies for enforcement in a State or Territory as those in whose favour a judgment of the Supreme Court of that State or Territory had been given. Rule 41.10 of the *Federal Court Rules 2011* (Cth) provided that in executing a judgment a party could apply to the Court to issue an order of enforcement of a judgment that could be issued or taken in the Supreme Court of the State or Territory where the judgment or order had been made.

The question for the Court was whether the power to enforce an award included the power to enter a judgment. The respondent submitted that the power to enforce an award under s 8(3) was tantamount to execution of the award but did not require or permit a judgment to be entered. The applicant responded that when regard was had to the Federal Court Act and the *Federal Court Rules* it was clear that execution could not be levied without first obtaining a judgment.

The respondent further argued that for enforcement to be ordered and judgment obtained, the applicant had to establish that the respondent had assets in Australia against which a claim could be made and, further, that if there were no assets relief should be refused as a matter of public policy pursuant to s 8(7)(b) of the Act which provided that the Court could refuse to enforce a foreign award if to do so would be contrary to public policy.

Held: (1) There is a Constitutional requirement that there be a controversy to be quelled before the Court can be regarded as exercising the judicial power of the Commonwealth. This can only be met when a party seeks to enforce a foreign award pursuant to s 8(3) of the Act if the Court gives effect to its decision as to the enforcement of the award by directing the entry of an appropriate monetary judgment. [71], [75]

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2) (2011) 277 ALR 441, applied.

(2) There is nothing in the Act that, as a matter of law, prevents an Australian court from directing the entry of judgment or the making of an order in the terms of the relevant foreign award even if there is evidence to prove that there are no assets within Australia against which execution might be levied, and nor is it contrary to the public policy of Australia to do so. [82], [108]

Cases Cited

Altain Khuder LLC v IMC Mining Inc (2011) 246 FLR 47.

Corvetina Technology Ltd v Clough Engineering Ltd (2004) 183 FLR 317.

FG Hemisphere Associates LLC v Democratic Republic of Congo [2010] NSWSC 1394.

Hebei Import and Export Corporation v Polytek Engineering Company Ltd [1999] HKCFA 16.

Imperial Ethiopian Government v Baruch-Foster Corporation 535 F (2d) 334 (1976).

IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation [2005] 1 CLC 613.

Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara 364 F (3d) 274 (2004).

MGM Productions Group Inc v Aeroflot Russian Airlines (unreported, Court of Appeal - Second Circuit NY, US, No 03-7561, 9 February 2004).

Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc 473 US 614 (1985).

Moller v Roy (1975) 132 CLR 622.

Norsk Hydro ASA v State Property Fund of Ukraine [2002] EWHC 2120 (Admin).

Parsons & Whittemore Overseas Company Inc v Societe Generale De L'Industrie Du Papier (RAKTA) 508 F (2d) 969 (1974).

Resort Condominiums International v Bolwell [1995] 1 Qd R 406.

Scherk v Alberto-Culver Company 417 US 506 (1974).

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (2011) 277 ALR 415.
Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2) (2011) 277 ALR 441.
Xiaodong Yang v S & L Consulting Pty Ltd [2008] NSWSC 1051.

Application

JRJ Lockhart SC and *JA Watson*, for the applicant.

DL Williams SC and *R Glover*, for the first respondent.

LW Chan, for the second respondent.

Cur adv vult

23 March 2012

Foster J.

1 The applicant (Traxys) is a company whose head office is in the Grand-Duchy of Luxembourg. It has no assets in Australia and no presence here. It provides financial, marketing and distribution services to the mining industry. It has representative offices in more than 20 countries.

2 The first respondent (Balaji) is a company organised under the laws of India. Its head office is in Kolkata, India. It is part of a group of companies which imports coal and coke into India and which manufactures low ash metallurgical coke and coking coal for supply to others. It also trades more generally in coal and coke.

3 Traxys has applied to the Court for orders recognising and enforcing an award dated 22 June 2011 and published on the same day (the Award). The Award was made in England by three arbitrators, Dr Serge Lazareff, Ms Siobán Healy QC and Mr Christopher Newmark (the arbitrators) under the auspices of the London Court of International Arbitration. Under the Award, the arbitrators ordered Balaji to pay forthwith to Traxys the sums of US$2,576,250.38 and €260,668.58, together with interest, the fees and expenses of the arbitration and costs. These latter two amounts total UK£427,576.40. Balaji has not paid any amount to Traxys in satisfaction of the Award.

4 In paras 1 and 2 of its Amended Originating Application, Traxys claims:

> 1. Pursuant to s. 8(3) of the *International Arbitration Act 1974* (Cth) [a declaration] that the Applicant is entitled to have the award dated 22 June 2011 published and notified to the parties by Dr. Serge Lazaref [sic], Ms. Siobán Healy QC and Mr. Christopher Newmark (the *Award*) recognized by this Court and to enforce the Award as if the Award were a judgment or order of this Court.
> 2. Orders that:
>
> (a) There be a judgment against the First Respondent in an amount equal to the total of (i) US$2,576,250.38 and EUR 260,668.58; plus (ii) interest on those amounts at the London Interbank Offered Rate +2% compounded with quarterly rests, from 6 August 2009 to the date of judgment, plus (iii) an amount of £63,665.32 representing costs of the arbitration giving rise to the Award plus (iv); the sum of £363,911.08 as costs of the reference carried out for the purposes of the arbitration.
>
> (b) The Respondent pay post judgment interest on the amounts of US$2,576,250.38 and EUR 260,668.58, calculated from the date of judgment herein to the date of payment in accordance with the manner of calculating interest referred to in (a) above.

5 In addition to the relief sought in paras 1 and 2 extracted at [4] above, Traxys claims orders that Messrs Andrew Cummins and Brian Silvia be appointed as receivers of two shares (the shares) held by Balaji in the second respondent (Booyan), a corporation incorporated in Australia, with powers to inspect the books and records of Booyan and to sell the shares or to wind up Booyan pursuant to s 491 of the *Corporations Act 2001* (Cth). The shares comprise the whole of the issued capital of Booyan. Traxys also seeks orders for costs against both Balaji and Booyan.

6 On 29 September 2011, at the commencement of the final hearing, Senior Counsel for Traxys submitted that I should proceed to determine the claims made by Traxys in paras 1 and 2 of its Amended Originating Application together with the costs of those claims and to defer consideration of the remaining claims made by Traxys, namely, the claims that receivers should be appointed to the shares with the powers specified in Traxys' Amended Originating Application. Senior Counsel submitted that Traxys was at that time unable properly to litigate the receiver claims because Balaji had raised for the first time only very recently an assertion that, on 16 July 2011, the shares had been sold to a third party, Concast Exim Ltd (Concast), pursuant to an agreement for sale and purchase of shares entered into between Balaji and Concast on 16 July 2011 with the consequence that Concast has held the entire beneficial interest in the shares since 16 July 2011. According to Balaji, Concast paid the whole of the purchase price for the shares (INR 50 million) on 16 July 2011 and was, at all times thereafter, entitled to require Balaji to deliver an appropriate transfer of the shares.

7 Initially, Balaji resisted the course proposed by Senior Counsel for Traxys. However, immediately after the parties closed their evidentiary cases and before final submissions, Senior Counsel for Balaji accepted that the appropriate course was to proceed in the manner suggested by Senior Counsel for Traxys.

8 Accordingly, with the consent of all parties, I agreed to defer consideration of the claim made by Traxys for the appointment of receivers to the shares and the question of the powers of such receivers, if appointed. Therefore, these Reasons for Judgment deal only with the claims for relief made by Traxys in paras 1 and 2 of its Amended Originating Application and the claims for costs which it makes consequential upon those claims for relief. When giving effect to these Reasons for Judgment, I will make an order separating the trial of the claims for relief made in paras 1 and 2 of Traxys' Amended Originating Application from the remaining claims for relief made by it.

The Award

9 The arbitrators found that, on 2 July 2009, Traxys and Balaji had entered into a contract for the sale of 30,000 mt (+/- 10% at Traxys' option) of low ash metallurgical coke with a laycan of 25-30 July 2009 at a price of US$237.50 per metric tonne FOB Alexandria + Sea Freight to the Indian port of Kandla. By agreement with Balaji and the original seller of the coke to Balaji (an Egyptian corporation, Al Nasr Company), Traxys had been interposed between Al Nasr Company and Balaji in order to provide to Balaji a more generous time frame within which to pay for the coke. Balaji failed to pay for the coke. Traxys paid Al Nasr Company, took control of the coke shipment and resold that shipment to a third party.

10 In the arbitration, Traxys claimed as damages for breach of its contract with Balaji the difference between the sale price of the coke shipment under that contract and the amount realised under the substitute sale.

11 According to the arbitrators, there was no dispute between Traxys and Balaji in the arbitration as to:

(a) The existence or terms of the contract as alleged by Traxys; and

(b) Balaji's breach of that contract constituted by its failure to pay the contract price.

12 However, in the arbitration, Balaji had contended that Traxys had agreed to act as its financier only and that the contract between Balaji and Traxys was not truly a contract for the sale of goods. Balaji argued that Traxys never obtained title to the coke and had no right to divert the shipment to Europe and to resell the cargo there. Balaji's contentions were rejected by the arbitrators.

13 Balaji participated fully in the arbitration. It was represented by Counsel and solicitors. Its legal representatives cross-examined witnesses called in the arbitration by Traxys. Balaji called evidence in support of its case in the arbitration. One witness called by Balaji was Mr Deepak Sharma. Both Mr Sharma and another Balaji executive, Mr Vineet Argawal, attended each hearing day in the arbitration (viz 28 February 2011, 1 March 2011 and 2 March 2011).

14 The contract between Traxys and Balaji contained the following dispute resolution clauses:

> LAWS/ARBITRATION
>
> Any disputes arising out of or in connection with this contract between Balaji and Traxys, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (LCIA), which Rules are deemed to be incorporated by reference to this clause. The seat, or legal place, of arbitration shall be London. The language to be used in the arbitration shall be English.
>
> This contract, including the arbitration clause, shall be governed by, interpreted and construed in accordance with the substantive laws of England and Wales excluding the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (CISG).

15 At [143] of the Award, the arbitrators found that Traxys was entitled to recover from Balaji interest on the damages awarded at the rate of LIBOR + 2%, compounded at quarterly rests, from 6 August 2009 to the date of payment of the amounts awarded under the Award. They also said that, by their reference to "LIBOR", they intended to refer to the three month LIBOR rates for US dollars as published on the website of the British Bankers' Association.

16 As agreed between Traxys and Balaji, the arbitration was conducted under the *Rules of the London Court of International Arbitration 1998* (UK) (the LCIA Rules). Rule 26.9 of those Rules provides:

> All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

17 Thus, according to the LCIA Rules, the Award is final and binding upon the parties.

Post-Award events

18 In early July 2011, Balaji commenced proceedings against Traxys in the Court of the District Judge at Alipore in the South District of India (the Indian District Court proceedings) in which Balaji seeks to have the Award set aside or, alternatively, to have its operation stayed.

19 On 8 July 2011, Balaji applied to the Indian District Court for an interim stay of the operation of the Award. A judge of that Court refused the application for a stay, apparently on the ground that the application was incompetent having regard to ss 34 and 36 of the Indian *Arbitration and Conciliation Act 1996* (the Indian Arbitration Act).

20 On 22 July 2011, Balaji appealed from the decision of the Indian District Court judge to refuse an interim stay.

21 On 29 July 2011, the High Court of Kolkata (Civil Appellate Jurisdiction) (the Indian High Court) granted an injunction in favour of Balaji whereby it restrained Traxys from "putting the Award into execution". That order was made *ex parte*. The terms of that order were not notified to Traxys or to its English lawyers until 30 August 2011.

22 In the meantime, on 26 July 2011, a judge of the High Court of Justice, Queen's Bench Division, Commercial Court, in England (the English Commercial Court) ordered that Traxys have permission to enforce the Award in the same manner as a judgment or order of that Court to the same effect. On the same day, Mr Justice Teare, of the same Court, granted interim freezing injunctions against Balaji and an interim anti-suit injunction against Balaji restraining it from continuing or prosecuting or taking any further steps in the Indian District Court proceedings and from commencing any other proceedings by which it seeks to challenge or set aside the Award or the English Commercial Court proceedings. On 2 August 2011, those orders were continued until further order of the English Commercial Court.

23 Balaji has not taken any steps in England to challenge the Award.

24 Traxys has not taken any steps in the Indian District Court proceedings or in the appeal in the Indian High Court. It has not appeared in either of those proceedings.

25 Balaji has not appeared at all in the proceedings brought by Traxys in the English Commercial Court. Copies of all of the orders made by that Court on 26 July 2011 and on 2 August 2011 have been served on Balaji in India.

26 On 1 September 2011, permission was given to Traxys by the English Commercial Court to make an application in Australia for freezing orders.

27 On 2 September 2011, I made asset freezing orders in these proceedings against Balaji. Those orders were made *ex parte*. Those orders were continued on 29 September 2011 and remain in force.

28 Balaji has no assets in the United Kingdom or Europe. According to the evidence before me at the moment, the only assets which Balaji has in Australia are its shares in Booyan.

29 Traxys complains that Balaji has not complied with asset disclosure orders made by this Court and by the English Commercial Court. It submits that the Court should not proceed upon the basis that the shares in Booyan are Balaji's only assets in Australia.

Balaji's interest in Booyan

30 According to official records maintained by the Australian Securities and

Investments Commission (ASIC) in respect of Booyan, as at 25 August 2011 and also as at 21 September 2011, the whole of the issued capital of Booyan (two ordinary fully paid shares of $1.00 each) are registered in the name of Balaji and are said to be beneficially owned by it. It appears that those shares were transferred to Balaji in the first half of 2010.

31 As at 29 August 2011, Booyan was the holder of Exploration Permit No 969 in the District of Rockhampton issued by Queensland Mines and Energy, Department of Employment, Economic Development and Innovation. That permit authorises Booyan to explore for coal in the area covered by the permit, which is an area located approximately 30 km north-west of Bundaberg, Qld.

32 At the hearing before me, Balaji tendered a copy of the Minutes of a Meeting of the Board of Directors of Balaji held in Kolkata on 11 April 2011 and a copy of the Minutes of a Meeting of that Board of Directors held in Kolkata on 15 July 2011. Each of those Minutes is signed by Naresh Sharma.

33 At the 11 April 2011 meeting, the directors of Balaji resolved to sell its entire shareholding in Booyan for a minimum consideration of A$1 million or its equivalent in Indian rupees. Mr Naresh Sharma was authorised to negotiate a sale on those terms on behalf of Balaji and to execute all necessary documents on behalf of Balaji.

34 At the 15 July 2011 meeting, the directors of Balaji resolved immediately to write off all debts due to Balaji from Booyan.

35 Correspondence passing between Concast and Balaji in the period between 20 April 2011 and 18 June 2011 proved the following:

(a) Preliminary discussions concerning a merger or joint venture between Balaji and Concast commenced on 19 April 2011;

(b) On 12 May 2011, Concast offered to buy from Balaji a 50% stake in Booyan for A$300,000;

(c) Further discussions between representatives of Concast and representatives of Balaji ensued in the period 12-24 May 2011. Those discussions culminated in Balaji offering to sell to Concast its entire shareholding in Booyan for A$14 million plus repayment in full of the loans made by Balaji to Booyan;

(d) Negotiations continued into June 2011; and

(e) On or about 18 June 2011, an in-principle agreement for the sale to Concast of the whole of Balaji's shareholding in Booyan was reached at a price of A$1,050,000 (equivalent to approximately INR 50 million), subject to the execution of a formal Share Sale and Purchase Agreement.

36 On 16 July 2011, INR 50 million was deposited into Balaji's bank account held at the Kolkata branch of the Allahabad Bank.

37 The evidence before me showed that the amount which Booyan had invested in EP969 as at 30 June 2011 was $415,971 and that Booyan's only other asset as at that date was its cash at bank ($26,629.86). As at that date, it had liabilities totalling $301,218.38, of which $264,759 was a debt due to Balaji.

38 Naresh Sharma did not give evidence before me. From the evidence that was tendered before me, it is clear that he was the officer of Balaji who had the carriage of all negotiations with Concast. He signed all of the relevant correspondence which came from Balaji and received all of the relevant correspondence from Concast.

The issues for determination in the present application

39 In order to succeed in the present application, Traxys must produce to the Court:

(a) The duly authenticated original Award or a duly certified copy; and

(b) The original arbitration agreement under which the Award purports to have been made or a duly certified copy.

(Section 9(1) of the *International Arbitration Act 1974* (Cth) (the IAA).)

40 It must also satisfy the requirements of r 28.44 of the *Federal Court Rules 2011* (Cth).

41 Traxys has produced to the Court a copy of the Award duly certified by Edward Gardiner, a Notary Public in England. Mr Bennett, who is the solicitor in England retained by Traxys, has produced to the Court copies of the Contract for Sale and Purchase of Metallurgical Coke dated July 2009 between Traxys and Balaji which he has certified as correct. That contract contains the arbitration clause which I have extracted in full at [14] above.

42 I am satisfied that the Award was made as it purports to have been made and that it was made pursuant to the arbitration agreement. I am also satisfied that Traxys has complied with r 28.44 of the *Federal Court Rules*. Balaji did not dispute any of these matters.

43 The United Kingdom is a Convention country within the meaning of that term in the IAA (see the definition in s 3(1) of the IAA). So is the Republic of India.

44 The Award is a foreign award for the purposes of the IAA (as to which see the definitions of *agreement in writing*, *arbitral award*, *arbitration agreement*, *Convention country*, and *foreign award* in s 3(1) of the IAA which are extracted in full at [52] below).

45 Section 8(1) of the IAA provides that a foreign award is binding for all purposes on the parties to the arbitration agreement in pursuance of which it was made. Section 8(3) provides that, subject to Pt II of the IAA, a foreign award may be enforced in this Court "as if the award were a judgment or order of [this] Court". Section 8(3A) provides that the Court may only refuse to enforce a foreign award in the circumstances mentioned in subss (5) and (7) of s 8. In s 8(5) and (7), the legislature has spelt out the specific limited circumstances in which the Court may refuse to enforce a foreign award made in accordance with the Convention. Section 8(7)(b) provides that the Court may do so if it finds that to enforce the award would be contrary to public policy. Section 8(7A) provides that enforcement of a foreign award would be contrary to public policy if the making of the award was induced or affected by fraud or corruption or if a breach of the rules of natural justice occurred in connection with the making of the award.

46 In the present case, Balaji does not rely upon any of the grounds specified in s 8(5) of the IAA. Nor does it allege that the making of the Award was induced or affected by fraud or corruption or that a breach of the rules of natural justice occurred in connection with the making of the Award. Its resistance to the current claims for relief made by Traxys is based upon three broad propositions. These are:

(a) The Court has no power to enter a judgment or to make an order giving effect to the Award as sought by Traxys. The Court only has power to enforce the Award. Enforcing the Award is tantamount to execution of the Award, as if it were a judgment or order of the Court. Enforcement

of the Award does not require or even permit the entry of judgment. Traxys has not yet applied to enforce the Award in the sense in which it is used in s 8(3) of the IAA.

(b) In any event, one of the matters which an applicant for enforcement of a foreign award in Australia must establish is that, at the time enforcement is to be ordered, the party against whom enforcement is sought has assets here. If the applicant fails to prove that matter, enforcement must be denied to it. Alternatively, if there are no assets within Australia at the time enforcement is sought, relief should be refused as a matter of public policy.

(c) In any event, to enforce the Award would be contrary to public policy and the Court should refuse to enforce the Award for that reason.

47 Given that Traxys has proven that the Award is a foreign award within the meaning of that expression in the IAA and otherwise satisfied the requirements of s 9 of the IAA and r 28.44 of the *Federal Court Rules*, the issues for determination at present are those raised by the three contentions advanced by Balaji which I have summarised at [46] above.

The legislative scheme

48 Section 8 of the IAA provides for the recognition and enforcement of foreign arbitral awards in Australia. That section is in the following terms:

> 8 Recognition of foreign awards
>
> (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.
>
> (2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.
>
> (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).
>
> (4) Where:
>
> (a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and
>
> (b) the country in which the award was made is not, at that time, a Convention country;
>
> this section does not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.
>
> (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:
>
> (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;
>
> (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

(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;

(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

(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

(f) the award has not yet become binding on the parties to the arbitration agreement 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.

(6) Where an award to which paragraph (5)(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(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:

(a) the making of the award was induced or affected by fraud or corruption; or

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

(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

(9) A court may, if satisfied of any of the matters mentioned in subsection (10), make an order for one or more of the following:

(a) for proceedings that have been adjourned, or that part of the proceedings that has been adjourned, under subsection (8) to be resumed;

(b) for costs against the person who made the application for the setting aside or suspension of the foreign award;

(c) for any other order appropriate in the circumstances.

(10) The matters are:

(a) the application for the setting aside or suspension of the award is not being pursued in good faith; and

(b) the application for the setting aside or suspension of the award is not being pursued with reasonable diligence; and

(c) the application for the setting aside or suspension of the award has been withdrawn or dismissed; and

(d) the continued adjournment of the proceedings is, for any reason, not justified.

(11) An order under subsection (9) may only be made on the application of a party to the proceedings that have, or a part of which has, been adjourned.

49 Section 39(1) of the IAA provides that this Court must have regard to the matters specified in s 39(2) of the IAA when interpreting the IAA, when considering exercising a power under s 8 of the IAA to enforce a foreign award or when considering 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.

50 Section 39(2) of the IAA is in the following terms:

(2) The court or authority must, in doing so, have regard to:

(a) the objects of the Act; and

(b) the fact that:

(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and

(ii) awards are intended to provide certainty and finality.

51 The objects of the IAA are set out in s 2D. Section 2D provides:

2D Objects of this Act

The objects of this Act are:

(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; and

(d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and

(e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and

(f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

52 Various terms are defined in s 3(1) of the IAA for the purposes of "Part II — Enforcement of foreign awards". Relevantly, those expressions and definitions are:

agreement in writing has the same meaning as in the Convention.

arbitral award has the same meaning as in the Convention.

arbitration agreement means an agreement in writing of the kind referred to in sub article 1 of Article II of the Convention.

Convention country means a country (other than Australia) that is a Contracting State within the meaning of the Convention.

foreign award means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

53 Section 3(2) of the IAA provides:

3 Interpretation

…

(2) In this Part, where the context so admits, *enforcement*, in relation to a foreign award, includes the recognition of the award as binding for any purpose, and *enforce* and *enforced* have corresponding meanings.

54 Section 3 is in "Part II — Enforcement of foreign awards", as are ss 8 and 9.

55 The Convention referred to in s 3(1) and in Pt II of the Act is:

… the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 1.

56 Articles II, III, IV and V of the Convention provide:

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
   (a) The duly authenticated original award or a duly certified copy thereof;
   (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
   (d) 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
   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

57 The IAA is intended to give effect to the Convention. The IAA (including s 8) must be interpreted in light of the Convention.

Consideration

Issue 1 — Is the entry of a judgment or the making of an order of the Court authorised by the IAA and, if so, is either of those steps a necessary step in the enforcement process contemplated by the IAA?

Balaji's submissions

58 Balaji submitted that:

(a) Pursuant to s 8(1) of the IAA, the foreign award is binding "by virtue of [the IAA] for all purposes". Pursuant to s 8(2) and (3), the foreign award may be enforced "as if [it] were a judgment or order of [the relevant] court". Section 8(2) and (3) provide for a form of statutory deeming of the award as being a judgment or order of the Court. The IAA requires no judicial act for a foreign award to become binding and to be a judgment of this Court. The words "as if" signify the automatic effect which s 8(2) and (3) have upon a foreign award which is sought to be enforced in Australia. A foreign award becomes a judgment of the Court the moment any attempt to enforce that award is made.

(b) Neither the making of a declaration nor the entry of a judgment or order is a necessary step in the enforcement of a foreign award in this Court or in the appropriate courts of the States and Territories.

(c) There is a real difference between the "recognition" of a foreign award and the "enforcement" of such an award. The IAA distinguishes between the two concepts. An award may be "recognised" without being "enforced". "Recognition" is generally a defensive process. "Enforcement" goes one step further and usually involves using the award as a sword, not just as a shield. In this context, the concept of "enforcement" is the same as "execution".

(d) There is no controversy at the moment between the parties as to whether or not the Award is binding and no controversy at the moment as to the enforceability of the Award. The first time that such a controversy will arise is when Traxys presses its claim that receivers be appointed to Balaji's shares in Booyan: That is to say, such a controversy will not arise unless and until Traxys takes "a curial step towards enforcement". That is the point in time when the automatic deeming effect of s 8(3) is engaged.

(e) Section 53 of the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act) provides:

> 53 Enforcement of judgment
>
> (1) Subject to the Rules of Court, a person in whose favour a judgment of the Court is given is entitled to the same remedies for enforcement of the judgment in a State or Territory, by execution or otherwise, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given.
>
> (2) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for the execution and enforcement of judgments of the Court.

(f) Rule 41.10 of the *Federal Court Rules* provides:

> 41.10 Execution generally
>
> (1) A party may apply to the Court to issue a writ, order or any other means of enforcement of a judgment or order that can be issued or taken in the Supreme Court of the State or Territory in which the judgment or order has been made, as if it were a judgment or order of that Supreme Court.
>
> (2) An order made under subrule (1) authorises the Sheriff, when executing the orders of the Court, to act in the same manner as a similar officer of the Supreme Court of the State or Territory in which the order is being executed is entitled to act.
>
> (3) A party who wants to enforce an order in more than one State or Territory may adopt the procedures and forms of process of the Supreme Court of the State or Territory in which the judgment or order has been made.
>
> Note It is not necessary to adopt different modes of procedure and forms of process in each State or Territory.

(g) In due course, at the appropriate time, Traxys may avail itself of all measures by way of execution of or recovery under the Award as are available to it in the Supreme Court of New South Wales.

(h) The Award, once it is deemed to be a judgment of this Court under s 8(3) of the IAA, is a judgment debt for the purposes of the *Civil Procedure Act 2005* (NSW) (the CPA) (see s 3 of the CPA).

(i) A judgment debt (including the Award) may be enforced in accordance with s 106 of the CPA. That section provides:

> 106 Judgments for payment of money
>
> (cf Act No 9 1973, section 109; Act No 8 1901, sections 4 and 5)
>
> (1) A judgment debt may be enforced by means of any one or more of the following:
>
> (a) a writ for the levy of property,
>
> (b) a garnishee order,
>
> (c) in the case of a judgment of the Supreme Court or the District Court, a charging order.
>
> (2) Subject to the uniform rules, a writ for the levy of property is sufficient authority for the Sheriff:
>
> (a) to seize and to sell goods of or to which the judgment debtor is or may be possessed or entitled or which the judgment debtor may, at law or in equity, assign or dispose of, and
>
> (b) to seize money belonging to the judgment debtor, and
>
> (c) to seize and to realise cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the judgment debtor, and
>
> (d) to enter into possession of, and to sell, land of or to which the judgment debtor is seized or entitled, or which the judgment debtor may, at law or in equity, assign or dispose of, and
>
> (e) to take and to sell choses in action or equitable interests in goods or land held by the judgment debtor.
>
> (3) The power conferred on the Sheriff by subsection (2)(a) may not be exercised in relation to:
>
> (a) any clothing, or
>
> (b) any bedroom or kitchen furniture, or
>
> (c) any tools of trade (including vehicles, plant, equipment and reference books) not exceeding, in aggregate value, the sum prescribed by the uniform rules,
>
> if the clothing, furniture or tools are used by the judgment debtor or by any member of his or her family.
>
> (4) For the purposes of subsection (2)(d), the Sheriff is taken to have entered into possession of land when notice of the proposed sale of the land is published in accordance with the uniform rules.
>
> (5) The power conferred on the Sheriff by subsection (2)(d) may not be exercised in relation to land if the amount outstanding under the judgment is less than the jurisdictional limit of the Local Court when sitting in its Small Claims Division.
>
> (6) A garnishee order or charging order addressed to the Crown binds the Crown as garnishee or chargee, as the case requires.
>
> Note. Divisions 2, 3 and 4, respectively, apply to the enforcement of writs for the levy of property, garnishee orders and charging orders.

(j) None of these measures includes the appointment of receivers to the shares. That entitlement (if it exists at all) must arise in some other way. In general terms, the appointment of a receiver is part of a regime

designed to preserve assets not to levy execution in respect of judgments or orders of the Court. An order that receivers be appointed to the shares would not constitute "enforcement" of the Award within Pt II of the IAA. As matters presently stand, there is no application before the Court which qualifies as an application for "enforcement" of the Award pursuant to s 8(3) of the IAA.

Traxys' submissions

59 Traxys submitted that:

(a) When proper regard is had to the terms of Pt 41 of the *Federal Court Rules* and Pt 39 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR), it is plain that execution may not be levied against assets by a litigant without first obtaining a judgment or order of the Court. Those rules do not recognise "deemed" judgments and orders.

(b) Even if the entry of a judgment or the making of an appropriate order is not necessary, there is nothing preventing the Court from entering a judgment or making an appropriate order. The proposition that the IAA does not permit the taking of such steps is incorrect.

(c) The submissions made on behalf of Balaji are contrary to authority. In *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2)* (2011) 277 ALR 441 (*Uganda No 2*) at [10]-[13], the Court held that it was appropriate to direct the entry of judgment so that there is a proper foundation upon which execution may thereafter be undertaken.

Decision

60 Part II of the IAA is entitled: "Enforcement of Foreign Awards". That heading is part of the IAA (s 13(2)(d) of the *Acts Interpretation Act 1901* (Cth)). It focuses on "enforcement" of foreign awards and does not mention "recognition" of such awards. It comprises ss 3 to 14. Section 8 is headed: "Recognition of foreign awards". Notwithstanding the terms of the heading to s 8 of the IAA, which is not part of the IAA in any event, the words "recognise" and "recognition" do not appear at all in the text of the section. The words which feature prominently in s 8 are "enforce" and "enforcement".

61 Section 3(2) provides that "enforcement", in relation to a foreign award, includes the recognition of the award as binding for any purpose. In other words, in Pt II of the IAA, the notion of "enforcement" carries with it as a necessary logical component the concept of "recognition". That is, a court cannot enforce an award which it does not recognise, although, it may recognise an award without necessarily enforcing it.

62 The concepts of "recognition" and "enforcement" are both found in the Convention, usually juxtaposed. In particular, Art III obliges each contracting state to recognise Convention awards as binding and to enforce them in accordance with the rules of procedure of the territory where the award is sought to be enforced. Article IV lays down some facultative provisions. These are reflected in s 9 of the IAA. Article V specifies the grounds upon which recognition and enforcement of the award may be refused. Articles III, IV and V speak of a composite concept: "recognition and enforcement".

63 As mentioned at [49]-[51] above, in interpreting the IAA, in determining Traxys' present application and in considering Balaji's submissions made in opposition to the relief which Traxys seeks, the Court is obliged to have regard

to the objects of the IAA (as to which, see s 2D), the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and the fact that awards are intended to provide certainty and finality. In particular, as far as s 2D is concerned, the Court must have regard to the matters which are to be facilitated according to s 2D(a), (b) and (c) and to the stated object that effect must be given to Australia's obligations under the Convention. It would be contrary to these commands for the Court to adopt an overly technical approach to enforcement applications unless such an approach was expressly required by the IAA.

64 Here, subject to Pt II of the IAA, the Award is binding for all purposes upon both Traxys and Balaji. This is a consequence of the operation of s 8(1) of the IAA and, to the extent that it may continue to be relevant, the operation of r 26.9 of the LCIA Rules.

65 In Australia, at the election of the enforcing party, a foreign award may be enforced in this Court or in an appropriate court of a State or Territory (see s 8(2) and (3) of the IAA). In the present case, of course, Traxys has chosen to seek enforcement in this Court.

66 The requirement for leave to enforce a foreign award which had been in a previous version of s 8(3) of the IAA, was removed when the IAA was amended by the *International Arbitration Amendment Act 2010* (Cth) (Act No 97 of 2010).

67 The removal of the requirement for leave of the Court to be obtained before enforcement of a foreign award could proceed is consistent with other amendments made by Act No 97 of 2010. Amongst other things, those amendments made clear that courts charged with the responsibility of enforcing foreign awards under the IAA might refuse to enforce such an award only in the limited circumstances mentioned in s 8(5) and (7) of the IAA. There is no general discretion unrelated to the grounds specified in s 8(5) and (7) reposed in those courts to refuse to enforce such an award.

68 The IAA does not prescribe any procedure for registering a foreign award in the records of this Court nor does it lay down any process or procedure for "recognising" a foreign award. The emphasis is on "enforcement". Section 3(2) provides that "enforcement" includes "recognition". Section 3(2) accommodates the relevant language of Arts IV, V and VI of the Convention ("recognition and enforcement"). In Australia, when "enforcement" of a foreign award is under consideration, there is no need to regard the concepts of "recognition" and "enforcement" as separate concepts requiring separate treatment. The latter incorporates the former.

69 "Enforcement" means applying legal sanctions to compel the party against whom the award has been made to carry out its obligations thereunder.

70 Article III of the Convention requires each contracting state to enforce Convention awards "in accordance with the rules of procedure of the territory where the award is relied upon". In the United Kingdom, for example, s 101(3) of the *Arbitration Act 1996* (UK) specifically authorises a UK court to direct the entry of a judgment in terms of the award. Section 101(2) is reminiscent of s 8(3) of the IAA and provides:

> A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

71 In *Uganda No 2*, at [12]-[13], I said:

> 12 The 1958 New York Convention is intended to facilitate the recognition and enforcement of foreign arbitral awards in Convention countries. The Act is intended to facilitate the recognition and enforcement of such awards in Australia. Unless the foreign arbitral award is reflected in a judgment or order of the Australian court in which recognition and enforcement is claimed, the party seeking to enforce that award will not be able to avail itself of the execution and recovery mechanisms available in that court.
>
> 13 Courts in this country and elsewhere have accepted that the appropriate way of recognising and enforcing a foreign monetary arbitral award is for the enforcing court to enter judgment or make an order for payment which reflects the terms of that award: see for example *Xiadong Yang v S & L Consulting Pty Ltd* [2008] NSWSC 1051; *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] NSWSC 1394; *Altain Khuder LLC v IMC Mining Inc* (2011) 276 ALR 733; [2011] VSC 1; *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm); and *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* (2005) 2 Lloyd's Rep 326; [2005] EWHC 726 (Comm). The words "as if" in s 8(3) of the Act, properly understood, support this approach. In my view, s 8(3) means that, subject to considering and determining such of the statutory grounds for refusing to enforce a foreign arbitral award as may be legitimately raised in any particular case, this court should treat the foreign arbitral award as if it were a judgment or order of this court. That is, once this court has decided to enforce the award, it should give full effect to that decision by directing the entry of an appropriate money judgment or by making an appropriate order for payment.

72 I adhere to the views which I expressed in *Uganda No 2* at [12]-[13]. I wish to supplement the remarks which I made in that case by adding that, as a matter of ordinary English, the words "as if" in s 8(3) of the IAA mean "as [it] would be if …". Section 8(3) should, therefore, be interpreted to mean: Subject to Pt II of the IAA, a foreign award (as defined in the IAA), may be enforced in the Federal Court of Australia as it would be if it were a judgment or order of this Court. That is to say, such an award is not, and is not deemed to be, by dint of the operation of s 8(3) alone, a judgment or order of this Court. Steps have to be taken to render it such a judgment or order. But, once those steps have been taken, the terms of the decision embodied in the award become a judgment or order of this Court. That judgment or order must reflect the Award and cannot differ in any material way from the terms thereof.

73 Furthermore, the Federal Court Act does not envisage that there can be such a thing as a "deemed" judgment or order of the Court. "Judgment" is defined in s 4 as follows:

> *judgment* means:
>
> (a) a judgment, decree or order, whether final or interlocutory; or
>
> (b) a sentence;
>
> and includes a conviction.

74 Section 4 contemplates that the judgment which is defined in that section will be a judgment of this Court: That is to say, a formal order made by this Court which disposes of, or deals with, the proceeding then before it (per Mason J in *Moller v Roy* (1975) 132 CLR 622 at 639). This is the sense in which the word "judgment" is used in s 35 of the *Judiciary Act 1903* (Cth) and in s 73 of the

Constitution of the Commonwealth. Without such a judgment, there is nothing from which a party can appeal. In my view, in this Court at least, there is no room for some notion of "deemed" judgment or order.

75 Section 53 of the Federal Court Act requires that there be a judgment of the Court before any remedies by way of enforcement (whether by execution or otherwise) may be pursued. The existence of such a judgment is fundamental to the engagement of s 53. The existence of such a judgment is the starting point for the engagement of r 41.10 of the *Federal Court Rules* and the relevant provisions of the CPA and UCPR (esp Pt 39 of the UCPR). The Constitutional requirement for this Court to be seised of a controversy which must be quelled before it can be regarded as exercising the judicial power of the Commonwealth can only satisfactorily be met when a party seeks to enforce a foreign award pursuant to s 8(3) of the IAA (assuming that that provision is a valid law of the Parliament) if the Court gives effect to its decision as to the enforcement of that award by directing the entry of a judgment or by making an order in the terms of the award or by dismissing the application for such relief on one or more of the grounds specified in s 8(5) or s 8(7) of the IAA. Either way, there must be a judicial determination of the question whether the Award is to be enforced or whether enforcement is to be refused.

76 In any event, looked at purely as a practical matter, the question of whether a foreign award should be enforced or whether enforcement should be refused is a matter which should be decided by this Court when an application for enforcement is made. To postpone consideration of the grounds upon which enforcement might be refused until an application for a garnishee order or a writ for the levy of property is made would be unworkable.

77 I do not think that the appointment of receivers to the shares cannot be regarded as a measure properly within the notion of "enforcement" under Pt II of the IAA. Section 53, by its terms, does not confine the enforcement of judgments to execution. Section 53 expressly contemplates other methods of enforcement. The words "or otherwise" are apt to cover enforcement by the appointment of a receiver.

78 For all of these reasons, I reject Balaji's contentions in respect of Issue 1.

Issue 2 — The asserted pre-requisite that the enforcement applicant prove that there are assets within the enforcement jurisdiction

79 Senior Counsel for Balaji went so far as to submit that an Australian court could not even entertain an application to enforce a foreign award unless that court is first satisfied that there are assets in Australia against which execution might be levied. It was also submitted that, in the present case, I should find that Balaji has no assets in Australia or, alternatively, that Traxys has failed to prove that Balaji has assets in Australia. Senior Counsel also submitted that, in particular, an Australian court should not direct the entry of judgment or make an order in terms of a foreign award unless it is first satisfied that there are assets in Australia which belong to the party against whom recovery is sought. These propositions were underpinned by the further proposition that the concept of "enforcement" necessarily contemplates action by way of execution against particular assets. Thus, it was submitted that, if there are no assets, there can be no "enforcement".

80 Article III in the Convention obliges each contracting state to recognise and

enforce foreign awards made in accordance with the Convention. Recognition and enforcement is to be in accordance with the rules of procedure of the enforcement state.

81 I have already held that, subject to due consideration of the matters mentioned in s 8(5) and (7) of the IAA and subject to compliance with the requirements of s 9 of the IAA and the relevant rules of court, an Australian court which has jurisdiction under the IAA is obliged to enforce a foreign award made pursuant to the Convention including by the entry of a judgment or the making of an order in terms of that award.

82 There is nothing in the IAA that, as a matter of law, prevents an Australian court from directing the entry of judgment or the making of an order in the terms of the relevant award if there is evidence which proves that, at the time such a judgment is entered or such an order is made, there may be or, even, definitely are, no assets within Australia against which execution might be levied.

83 The ordinary entitlement of a successful party in litigation to a judgment is a fundamental entitlement and is not dependent upon that party proving to the satisfaction of the Court that there are likely to be assets available to the judgment creditor at any particular time against which execution might be levied. The litigious process which culminates in the entry of judgment or the making of an order and the process of levying execution in order to obtain satisfaction in respect of that judgment or order are quite separate processes.

84 A judgment creditor is entitled to levy execution against assets which come into the jurisdiction after the judgment is entered or which did not even exist at the time judgment was entered.

85 In the present case, the evidence establishes that Balaji remains the registered holder of all of the issued capital in Booyan and that, according to the records maintained by ASIC in respect of Booyan, Balaji holds its shares in Booyan as beneficial owner. Whilst it is true that Balaji contends that the beneficial ownership in the shares has already passed to Concast (a matter about which I have made no finding and which may need to be determined when I come to determine Traxys' claim that receivers be appointed to the shares) and whilst it is also true that there is some evidence that might be regarded as supporting that proposition, the legal estate in the shares remains with Balaji. That is a sufficient interest to support the relief claimed by Traxys even if I were to accept Balaji's contentions in relation to Issue 2.

86 Even if Balaji's contentions were to be accepted, there is a sufficient basis in the present case for the Court to direct the entry of an appropriate judgment or to make an appropriate order if it is otherwise satisfied that enforcement should not be refused on the public policy ground.

Issue 3 — Is enforcement of the Award contrary to public policy?

The scope of the public policy exception to enforcement

87 Section 8(7)(b) of the IAA provides that an enforcing court may refuse enforcement of a foreign award on the ground that to enforce the award would be contrary to public policy. Section 8(7A) provides that enforcement would be contrary to public policy if the making of the award was induced or affected by fraud or corruption or if a breach of the rules of natural justice occurred in connection with the making of the award.

88 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.

89 The enforcement court may be tempted to interpret the public policy basis for refusing to enforce a foreign award provided for in s 8(7) of the IAA as conferring a wide discretion upon the enforcing court to deny enforcement. Public policy is not specifically defined in the Convention nor is it defined in the IAA. It is, of course, specifically mentioned in Art V(2)(b) of the Convention and in Art 34(2)(b) of the UNCITRAL *Model Law on International Commercial Arbitration 1985*, adopted at New York on 21 June 1985. Article V(2)(b) is obviously the progenitor of s 8(7) of the IAA. Section 8(7) has the potential to provide a broad loophole for refusing enforcement (see the discussion in Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008) at pp 218-219).

90 Clearly the pro-enforcement bias of the Convention, as reflected in the IAA, requires that the public policy ground for refusing enforcement not be allowed to be used as an escape route for a defaulting award debtor. That ground should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the enforcement of foreign arbitral awards embodied in the Convention and in the IAA. As previously observed, arbitration facilitates international trade and commerce by providing an efficient and certain dispute resolution process to commercial parties. If the enforcement of awards is to be subjected to the vagaries of the entire domestic public policy of the enforcement jurisdiction, there is the potential to lose all of the benefits of certainty and efficiency that arbitration provides and which international traders seek.

91 In *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 (*Uganda No 1*) at [126]-[130], I said:

> 126 Section 8(5) of the Act does not permit a party to a foreign award to resist enforcement of that award on such a ground. Nor is it against public policy for a foreign award to be enforced by this court without examining the correctness of the reasoning or the result reflected in the award. 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.
>
> 127 In the United States, the courts have generally regarded the public policy ground for non-enforcement as one to be sparingly applied. It has not been

seen as giving a wide discretion to refuse to enforce an award which otherwise meets the definition of foreign arbitral award under the convention.

128 An example of this approach is *Parsons & Whittemore Overseas Co Inc v Société Générale De L'Industrie Du Papier* 508 F 2d 969 (2d Cir 1974). In that case, at 974, the court said that:

> We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.

129 Other courts in the United States have held that there is a pro-enforcement bias informing the convention: for example *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 at 306 (2004) (*Karaha Bodas*).

130 A more conservative approach has sometimes been taken in Australia: see for example *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428-32; (1993) 118 ALR 655 at 677-82.

92 At [131], I referred to the decision of McDougall J in *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317 at [6]-[14], [18]. In that case, his Honour described the discretion conferred on the Court by s 8(7)(b) of the IAA as "wide". His Honour also remarked that there may be, in addition, a general discretion to refuse to enforce a foreign award. However, his Honour expressly refrained from expressing a concluded view on this point. At [18], McDougall J said:

> 18 It was suggested in the course of argument that if I did not accede to the plaintiff's notice of motion then, in substance, it would send a warning signal to those who wish to enforce international arbitrations in Australia. Again, I do not agree. The very point of provisions such as s 8(7)(b) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the inquiry that it required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion, which is expressly referred to it, simply because of some "signal" that this might send to people who engage in arbitrations under the Act. There is, as the cases have recognised, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy. The resolution of that conflict, in my judgment, should be undertaken at a final hearing and not on an interlocutory application.

93 At [132]-[133] in *Uganda No 1*, I observed:

> 132 Whether or not, in 2004, there was a general discretion in the court to refuse to enforce a foreign award which was brought to the court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains. Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. While the exception in s 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases.

> The principles articulated in those cases sit more comfortably with the purposes of the convention and the objects of the Act. To the extent that McDougall J might be thought to have taken a different approach, I would respectfully disagree with him.
>
> 133 The complaint in the present case is that the assessment of general damages in the award is excessive because the arbitrator failed to consider the costs and expenses that would have to be expended by UTL in generating the gross income which he found was likely to be earned. This is quintessentially the type of complaint which ought not be allowed to be raised as a reason for refusing to enforce a foreign award. The time for Hi-Tech to have addressed this matter was during the arbitration proceedings in accordance with the timetable laid down by the arbitrator. It chose not to do so at that time. It cannot do so now. As the court in *Karaha Bodas* also said at 306:
>
> > Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.

94 Article V(2)(b) of the Convention makes clear that, under the Convention, it is the public policy of the enforcement state which matters. There is no express reference in the Convention to any concept of international or transnational public policy. Having regard to ss 2D and 39(2) of the IAA, s 8(7)(b) should be interpreted in a manner which is consistent with Art V(2)(b) of the Convention. For this reason, s 8(7)(b) should be interpreted as requiring the Court to consider the public policy of Australia when the public policy ground of refusal is invoked by an award debtor.

95 What then is the scope of the public policy which must be considered? Is it the entire domestic public policy of Australia or a more refined concept? The expression is not defined in the Convention, in the UNCITRAL Model Law or in the IAA. Nonetheless, some assistance as to its meaning is provided by the examples of matters which would definitely be contrary to public policy which are specified in s 8(7A) of the IAA. The matters covered by s 8(7A) are matters which most fair-minded thinking persons would regard as obvious reasons for refusing to enforce a foreign award.

96 For reasons which I will now explain, I think that the expression "public policy" when used in s 8(7)(b) means those elements of the public policy of Australia which are so fundamental to our notions of justice that the courts of this country feel obliged to give effect to them even in respect of claims which are based fundamentally on foreign elements such as foreign awards under the IAA.

97 As Bokhary PJ observed in *Hebei Import and Export Corporation v Polytek Engineering Company Ltd* [1999] HKCFA 16 at [29]:

> In regard to the refusal of enforcement of Convention awards on public policy grounds, there are references in the cases and texts to what has been called "international public policy". Does this mean some standard common to all civilized nations? Or does it mean those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected? I think that it should be taken to mean the latter. If it were the former, it would become so difficult of ascertainment that a court may well feel obliged (as the Supreme Court of India did in *Renusagar Power Co. Ltd v. General Electric Co*. Yearbook Comm. Arb'n XX (1995) 681 at p.700) to abandon the search for it.

98 The text of Art V(2)(b) of the Convention makes clear that the public policy to be applied is that of the jurisdiction in which the award is sought to be enforced. However, too rigid an application of the public policy of the domestic jurisdiction runs the risk of undermining the very purpose of the Act, being the facilitation of enforcement and the maintenance of certainty of foreign arbitral awards.

99 As Bokhary PJ also said in *Hebei* at [27], [28]:

> 27 In my view, there must be compelling reasons before enforcement of a Convention award can be refused on public policy grounds. This is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would justify setting aside a domestic judgment or award. A point to similar effect was made in a comparable context by the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* 473 US 614 (1985). There the question was whether an antitrust claim was to be referred to arbitration outside the United States. In holding that it was, the majority said this (at p.629):
>
> > … concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.
>
> The considerable strength of this demand for comity is apparent from what it was able to overcome, namely the advantages of dealing with antitrust claims by way of litigation in the United States rather than by way of arbitration elsewhere. These advantages are detailed in the dissenting judgment of the minority.
>
> 28 When a number of States enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.

100 The leading decision in the US on the public policy defence in Art V of the Convention is *Parsons & Whittemore Overseas Company Inc v Societe Generale De L'Industrie Du Papier (RAKTA)* 508 F (2d) 969 (2d Cir 1974). In that case, the US Second Circuit Court of Appeals addressed the scope of the defence in relation to an application to enforce an arbitration award between a US company contracted to perform work in Egypt and an Egyptian corporation, at a time when US/Egyptian political relations had broken down as a result of the Arab-Israeli six-day war. The US Court held that public policy must be narrowly construed, in keeping with the pro-enforcement purpose of the Convention. In an oft-cited passage, the Court held (at 974) that the enforcement of foreign arbitral awards should only be refused where enforcement would "violate the forum state's most basic notions of morality and justice". The Court went on to say (at 974):

> In equating "national" policy with United States "public" policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial

> device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy." Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. Cf. *Scherk v Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). (Moreover, the facts here fail to demonstrate that considered government policy forbids completion of the contract itself by a private party.)
>
> To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas' proposed public policy defense.

101 The Court in *Parsons* applied the principle that the relevant public policy to be applied is that of the enforcement state. However, the Court in *Parsons* went on to explain that the public policy to be applied is not the entirety of the public policy of the domestic jurisdiction. Enforcement is only to be refused on the basis that the "most basic notions of morality and justice" have been violated.

102 In a later case, *MGM Productions Group Inc v Aeroflot Russian Airlines* (unreported, Court of Appeal — Second Circuit NY, US, No 03-7561, 9 February 2004), the US Second Circuit Court of Appeals took the same approach as it had done in *Parsons*. In *MGM Productions Group Inc*, the Court remarked that enforcing the foreign award in that case would not contravene US public policy. The issue in that case was whether the relevant award should not be enforced because it compensated the claimant for Aeroflot's non-performance of a contract some terms of which constituted violations of the US Iranian Transactions Regulations adopted pursuant to Executive Orders issued by the President of the United States.

103 In *Hebei*, when refusing to grant relief to a defendant on public policy grounds, Bokhary PJ said (at [31]) that:

> Before a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention 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.

104 Where the public policy to be applied is defined by such narrow parameters, it may well be the case, as Sir Anthony Mason NPJ observed in *Hebei*, that the relevant public policy of the enforcement state is so widely accepted across civilised nations that it can, in a sense, be described as "international public policy". At [98]-[99], Sir Anthony Mason said:

> 98. In some decisions, notably of courts in civil law jurisdictions, public policy has been equated to international public policy. As already mentioned, Article V.2(b) specifically refers to the public policy of the forum. No doubt, in many instances, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy. Even in such a case, if the ground is made out, it is because the enforcement of the award is contrary to the public policy of the forum (A.J. van den Berg, The New York Convention of 1958, page 298).
>
> 99. However, the object of the Convention was to encourage the recognition

> and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506; *Imperial Ethiopian Government v. Barich-Foster Corp.* (1976) 535 F. 2d 334 at 335). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of Article V, notably Article V.2(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression "contrary to the public policy of that country" in Article V.2(b) means "contrary to the fundamental conceptions of morality and justice" of the forum. (*Parsons and Whittemore Overseas Co. Inc v Societe General de Industrie du Papier (Rakta)* (1974) 508 F. 2d 969 at 974 (where the Convention expression was equated to "the forum's most basic notions of morality and justice"); see A.J. van den Berg, The New York Convention of 1958, page 376; see also *Renusagar Power Co. Ltd. v General Electric Co*. (Yearbook Comm. Arb'n. XX (1995) page 681 at pages 697-702)).

105 Thus, in my view, the scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state. This view is consistent with the language of s 8(7), the terms of s 8(7A), the text of Art V(2) of the Convention, the fundamental objects of the Convention and the objects of the IAA. This approach also ensures that due respect is given to Convention-based awards as an aspect of international comity in our interconnected and globalised world which, after all, are the product of freely negotiated arbitration agreements entered into between relatively sophisticated parties.

Balaji's submissions

106 Balaji submitted that:

(a) It is incumbent upon Traxys to demonstrate that its application has some utility. It has failed to demonstrate that Balaji has any assets in Australia. Balaji sold the shares on 16 July 2011. The beneficial interest in the shares passed to Concast on that date and it now has the right to compel Balaji to deliver a transfer of the shares in registrable form in accordance with the agreement for sale and purchase of shares which Balaji asserts was executed by Balaji and Concast on or about 16 July 2011. Traxys' application is therefore futile and enforcement should be refused on the ground that it is against the public policy of Australia within the meaning of s 8(7) of the IAA to allow a party to commence and to maintain a futile application to enforce a foreign award.

(b) It is also against the public policy of Australia within the meaning of s 8(7) in the IAA for this Court to entertain an application for enforcement of the Award in circumstances where there is an unresolved application to set aside the Award in India and an interim injunction in place issued *ex parte* by the Indian High Court against

Traxys in aid of Balaji's appeal from the District Court judge in India who refused to stay the operation of the Award, which injunction, according to its terms, restrains Traxys from seeking to enforce the Award. This interim injunction was in place and known to Traxys to be in place prior to 2 September 2011 when the present proceeding was commenced.

(c) The commencement and maintenance of this proceeding is a breach of the interim injunction granted by the Indian High Court and constitutes a serious contempt of that Court. As a matter of comity, enforcement should be refused. It is contrary to public policy to permit a multiplicity of actions where the Award is subject to challenge in the award debtor's country of origin, a place where it has assets. This Court should not permit the order of the Indian High Court to be ignored.

Traxys' submissions

107 Traxys submitted that:

(a) Traxys is entitled to enforce the Award in any Convention country in which it chooses to enforce it. That is the whole fundamental point of the Convention.

(b) The grounds under the IAA upon which this Court may decline to enforce the Award are limited. They are those grounds specified in s 8(5) and (7) of the IAA.

(c) Balaji has no proper basis upon which it can seek to set aside the Award in India. It can only do so in England which was the seat of the arbitration and the place where the Award was made. An award debtor cannot go to the courts of a country of its choosing (in this case, India) and seek to undermine the Award and the objects of the IAA and the Convention.

(d) Balaji sought an injunction in the Indian High Court at a time when it was well aware of the proceedings brought by Traxys in the English Commercial Court and of the anti-suit injunction granted by that Court. On 30 August 2011, the English Commercial Court granted Traxys permission to enforce the Award and to seek freezing orders in Australia. Traxys is not guilty of contempt of the Indian High Court. Nonetheless, the sequence of events is relevant when the Court comes to consider Balaji's contention that enforcing the Award would be against public policy.

Decision

108 At [79]-[86] above, I have explained why, as a matter of law, Traxys is not obliged, as a condition of being granted any relief, to prove that Balaji has assets in Australia. For similar reasons, it is not contrary to the public policy of Australia to direct the entry of judgment or to make an order in terms of a foreign award in the absence of proof that the award debtor has assets in Australia nor is it against the public policy of Australia to take those steps in the face of evidence which suggests or even proves that the award debtor has no assets here. Under the IAA, the award creditor is entitled to have a judgment unless the Court is satisfied that enforcement should be refused on one of the grounds specified in s 8(5) and (7) of the IAA. I therefore reject Balaji's first public policy argument.

109 The second and third bases upon which Balaji invokes s 8(7) are summarised at [106] above (subparas (b) and (c)). Balaji submitted that this Court should not ignore the proceedings in India and should pay due respect to the interim injunction granted by the Indian High Court.

110 The following matters are relevant to the Court's consideration of those arguments:

(a) The coke contract between the parties obliged them to refer disputes to arbitration pursuant to the LCIA Rules. Traxys did so and no point was taken by Balaji that the arbitrators did not have the power to conduct the arbitration and to make the Award.

(b) The LCIA Rules made the Award final and binding upon the parties.

(c) Balaji participated fully in the arbitration and had every opportunity to present its case in the arbitration.

(d) Balaji breached its contract when it commenced the Indian District Court proceedings. It was bound under its contract with Traxys and by the LCIA Rules to accept the Award as final and binding. In any event, s 8(1) of the IAA made the Award final and binding, at least for the purpose of enforcing the Award in Australia.

(e) The Courts of India do not have power to set aside the Award, it being a foreign award made under the Convention. India is a signatory to the Convention. The Indian Arbitration Act does not bestow such a power on Courts and the Convention itself does not contemplate that, in the circumstances of the present case, the Indian Courts would be authorised to entertain such an application. The Convention and the Indian Arbitration Act both provide that a foreign award can only be suspended or set aside by a competent authority of the country in which, or under the law of which, that award was made. In the present case, because the Award was made in England under the laws of England, it can only be set aside by an appropriate Court in England. Balaji has not made an application to any English Court to set aside the Award.

(f) The English Commercial Court has given effect to the Award.

(g) The English Commercial Court granted an anti-suit injunction against Balaji on 26 July 2011. This was after the Indian District Court Judge had refused Balaji's application for a stay of enforcement of the Award and before the Indian High Court granted the *ex parte* interim injunction restraining Traxys from seeking to enforce the Award. Balaji sought and obtained that interim injunction in breach of the anti-suit injunction granted by the English Commercial Court. The injunction was granted in aid of an appeal which appears to me to be hopeless. As far as I am aware, the Indian High Court did not give any reasons for granting the injunction. Whilst it is always possible that the Indian High Court may not agree with my assessment of Balaji's appeal, it is incumbent upon me to form some view of Balaji's prospects in its appeal in order to determine what weight (if any) in the present application I should give to the fact that there is an appeal on foot in India and the fact that there is an interim injunction in place. In my view, I should give no weight to these circumstances.

(h) The English Commercial Court authorised Traxys to seek freezing orders in Australia.

(i) At all times since the Award was made, Traxys has had the right to seek to enforce the Award in any one or more Convention countries. It was, and is, entitled to choose where and when it will seek to enforce the Award. Subject to the limited grounds available under the Convention for refusing to enforce a foreign award, Convention countries are bound to enforce the Award.

111 It seems to me when the above matters are considered and the context in which Traxys' enforcement actions in Australia is understood, the conduct of Balaji in instituting and maintaining the proceedings in India which it commenced in early July 2011 amounts to nothing more than a tactic designed to out-manoeuvre Traxys and to avoid its obligations under the Award, obligations which themselves arose out of the contract which it freely made with Traxys in 2009. In those circumstances, I am not at all persuaded that the public policy of Australia requires this Court to decline to enforce the Award simply because Balaji has pursued an appeal in India from an unfavourable decision at first instance and has somehow convinced the Indian High Court to grant an *ex parte* interim injunction against Traxys. These factors do not engage the core of morals and justice in Australia so as to enliven the discretion to refuse to enforce the Award.

112 This Court has a duty to uphold the laws of Australia when asked to do so. In the circumstances of this case, that duty requires that I accede to Traxys' present application notwithstanding that it has sought the relief which it seeks in apparent breach of the *ex parte* interim injunction granted by the Indian High Court on 29 July 2011.

Conclusion

113 For all of the above reasons, I will make the declaration sought by Traxys. I also propose to direct the entry of a judgment in favour of Traxys against Balaji for all sums due under the Award plus interest in accordance with the arbitrators' decision in relation to interest (as to which see [15] above and [143] and [152] of the Award). The judgment which I propose to give in favour of Traxys should probably comprise various components expressed in US dollars, Euros and Great British pounds in the fashion claimed by Traxys in para 2 of its Amended Originating Application. Alternatively, those amounts may be converted into Australian dollars. At the moment, I consider that Balaji should also pay pre-judgment interest pursuant to s 51A of the Federal Court Act or pursuant to the contract between the parties on the amounts awarded to it on account of the costs of the arbitration and the costs of the reference. The parties will also need to consider the basis upon which post-judgment interest should be calculated.

114 In order to allow the parties time to confer, to perform the necessary calculations and to decide whether there needs to be argument directed to the question of interest, I will direct the parties to bring in Short Minutes of Order in which final orders to be made are set out.

115 In addition, because the existing freezing orders initially made by this Court on 2 September 2011 are expressed to be operative only up to the delivery of judgment, in order to avoid any suggestion that those orders will cease to be operative as soon as I publish these Reasons for Judgment and make any orders, I intend to vary those freezing orders so as to ensure that they remain in place until further order.

116 The parties will also need to incorporate in their Short Minutes of Order an appropriate order for the separate trial of the issues determined by these Reasons for Judgment as well as directions for the future conduct of the proceeding.

117 Traxys has had complete success so far in this proceeding. I see no reason why costs should not follow the event. The fact that Traxys may not succeed in its claim to have receivers appointed to the shares is no reason to deny to it the costs of litigating its claim for a declaration and for a money judgment. The Short Minutes of Order to be furnished by the parties should contain an order that Balaji pay Traxys' costs of and incidental to the claims for relief made by it in paras 1 and 2 of its Amended Originating Application.

Orders accordingly

Solicitors for the applicant: *Clifford Chance*.

Solicitors for the first respondent: *McCullough Robertson Lawyers*.

Solicitors for the second respondent: *Vankish Lawyers*.

ANNA STOKES