FEDERAL COURT OF AUSTRALIA

Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd (No 2) [2011] FCA 206

Citation:	Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd (No 2) [2011] FCA 206
Parties:	**UGANDA TELECOM LIMITED v HI-TECH TELECOM PTY LTD (ACN 098 008 587); HI-TECH TELECOM PTY LTD (ACN 098 008 587) v UGANDA TELECOM LIMITED)**
File number:	NSD 171 of 2010
Judge:	**FOSTER J**
Date of judgment:	11 March 2011
Catchwords:	**ARBITRATION** – international arbitration – whether, in Australia, the appropriate way of recognising and enforcing a foreign monetary arbitral award pursuant to s 8 of the *International Arbitration Act 1974* (Cth) is to make declarations as to the binding nature of the award and as to the claimant's entitlement to have the award recognised and enforced and to give a money judgment for the amount awarded – declarations made and money judgment given
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 52(1), 52(2)(a), 53 *International Arbitration Act 1974* (Cth) s 8(1), s 8(3) *Federal Court Rules* O 35 r 8
Cases cited:	*Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 related *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1 cited *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 4)* (2009) 263 ALR 63 applied *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] NSWSC 1394 cited *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* (2005) 2 Lloyd's Rep 326 cited *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 applied *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm) cited *Westpac Banking Corporation v "Stone Gemini"* [1999] FCA 917 applied *Xiadong Yang v S & L Consulting Pty Ltd* [2008] NSWSC 1051 cited

Date of hearing:	Decided on the papers
Date of last submissions:	4 March 2011
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	21
Counsel for the Applicant/Cross-Respondent:	Mr CP Carter
Solicitor for the Applicant/Cross-Respondent:	Curwoods Lawyers
Counsel for the Respondent/Cross-Claimant:	Mr A Cheshire
Solicitor for the Respondent/Cross-Claimant:	Goldrick Farrell Mullan

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 171 of 2010**

BETWEEN:	**UGANDA TELECOM LIMITED** **Applicant/Cross-Respondent**
AND:	**HI-TECH TELECOM PTY LTD (ACN 098 008 587)** **Respondent/Cross-Claimant**

JUDGE:	**FOSTER J**
DATE OF ORDER:	**11 MARCH 2011**
WHERE MADE:	**SYDNEY**

THE COURT DECLARES THAT:

1. Pursuant to s 8(1) of *the International Arbitration Act 1974* (Cth) (**the Act**), the award dated 29 April 2009 made by Mr Robert Kafuko Ntuyo in arbitration proceedings in Uganda (No 23 of 2008) between the applicant and the respondent (**the Award**), a certified copy of which is annexed to the affidavit of Patrick Alunga Alvarez sworn on 17 February 2010 and filed herein and marked with the letter "O", is binding for all purposes upon the applicant and the respondent.
2. Pursuant to s 8(3) of the Act, the applicant is entitled to have the Award recognised by this Court and to enforce the Award in this Court as if the Award were a judgment of this Court.

THE COURT ORDERS THAT:

3. There be judgment in favour of the applicant against the respondent in the amount of Seven Hundred and Sixty-Two Thousand Eight Hundred and Eighty-Three Dollars and Seventy-Three Cents in United States currency (USD762,883.73).
4. The Application otherwise be dismissed.
5. The respondent pay the applicant's costs of and incidental to the Application.
6. The applicant may tax its costs forthwith.

THE COURT DIRECTS THAT:

7. The cross-claimant (Hi-Tech Telecom Pty Ltd) file and serve by 22 March 2011 an Amended Cross-Claim in such form as it may be advised.

8. The cross-respondent (Uganda Telecom Limited) file and serve by 5 April 2011 its Defence to Cross-Claim.

9. The Cross-Claim be listed for directions before Foster J at 9.30 am on 7 April 2011.

THE COURT ALSO ORDERS THAT:

10. The parties have liberty to apply on three days' notice.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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GENERAL DIVISION **NSD 171 of 2010**

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AND:	**HI-TECH TELECOM PTY LTD (ACN 098 008 587)** **Respondent/Cross-Claimant**

JUDGE:	**FOSTER J**
DATE:	**11 MARCH 2011**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 On 22 February 2011, I delivered Reasons for Judgment in this matter (*Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131) (**the first judgment**). On that day, I ordered that:

> 1. Within seven (7) days of the date of these Orders, the parties file and serve an agreed set of declarations, orders and directions designed to give effect to these Reasons for Judgment.
> 2. In the event that agreement cannot be reached within the timeframe specified in Order 1 above, each party file and serve within ten (10) days of the date of these Orders its version of the declarations, orders and directions which it submits that the Court should make, together with a brief Written Submission of no more than three pages in length in support of its version.
> 3. The form of relief will thereafter be determined on the papers.

2 The parties have been unable to agree on the terms of the declarations and orders which should be made in order to give effect to the Reasons for Judgment which I delivered on 22 February 2011. Each party has submitted a draft of the declarations and orders which it considers are appropriate and has supported that draft with brief Written Submissions. These Reasons for Judgment determine all questions relating to the relief to be granted to the applicant (**UTL**). I will also make directions in the Cross-Claim brought by the respondent (**Hi-Tech**) against UTL. Although the parties have agreed on the directions to be made in the Cross-Claim, I will not make all of the agreed directions. At this stage, I intend only to deal with the pleadings and then to review and, if necessary, case manage the Cross-Claim at directions hearings once the pleadings are closed.

CONSIDERATION

3 UTL submitted that I should make declarations declaring the binding nature of the Award and UTL's entitlement to enforce that Award. Hi-Tech agreed with that submission. Hi-Tech also agreed with the terms of the declarations suggested by UTL. I propose to make declarations substantially in the terms sought by UTL.

4 UTL also claims an order in the following terms, namely, that:

> Leave be granted to the Applicant to register the Award as a Final Judgment in the Commonwealth of Australia pursuant to section 8 of the International Arbitration Act, 1974 (Cth).

5 There is now no requirement that a person seeking to enforce a foreign arbitral award in Australia obtain the leave of this or any other court (see [6] to [9] of the first judgment). Furthermore, a foreign arbitral award does not have to be and cannot be registered under the *International Arbitration Act 1974* (Cth) (**the Act**) before it can be enforced. Registration is simply not a concept which is relevant to the enforcement of such an award. I therefore decline to make an order in the terms of the order extracted at [4] above.

6 UTL also seeks orders that:

> 2. Pursuant to the Award, judgment [be] entered for the Applicant against the Respondent in the amount of seven hundred and sixty thousand nine hundred and fifty three US dollars and ninety-three cents (USD760,953.93).
>
> 3. The respondent pay the applicant's costs of the proceedings to date, as agreed or taxed, forthwith.

7 These orders are opposed by Hi-Tech.

8 UTL submitted that a money judgment must be given or an order for payment must be made if the Award is to be *"enforced"* in Australia and also submitted that, in any event, in the first judgment, I have already decided that I should give judgment in favour of UTL against Hi-Tech for the amount awarded to UTL in the Award (see [138] of the first judgment).

9 In its Written Submissions, UTL explained how it had arrived at the amount which it argued should be the amount of the judgment (viz USD760,953.93) (see par 6 of UTL's Written Submissions lodged on 4 March 2011). In UTL's calculation, interest was claimed only up to 1 March 2011.

10 Hi-Tech submitted that UTL was not entitled to a judgment for the amount of USD760,953.93 or for any amount. It argued that, because there has not been any determination of the merits of the dispute by this Court, no money judgment can be given by this Court. This argument was developed by reference to s 8(3) of the Act. It was suggested that the words *"as if"* in that section should be interpreted as not authorising the giving of a money judgment. It was said that the words *"as if"* contemplate something less than an actual judgment or order. Hi-Tech also submitted that UTL was not now able to pursue its contract claims on the merits because, by electing to enforce the Award, it had lost the right to pursue the claims in contract which it had made in the alternative.

11 None of these submissions made by Hi-Tech is well founded and I reject all of them.

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 eg *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] 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). 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.

14 Hi-Tech also submitted that any money judgment which I propose to give in favour of UTL should not include any amounts for interest calculated at the rates and upon the bases

which the arbitrator awarded but rather should be calculated upon the basis that the Award was, in fact, or should be treated as though it were, a judgment of this Court from the date when the Award was made (viz 29 April 2009). The effect of this contention, if accepted, would be that interest would be awarded at the rate prescribed by the *Federal Court Rules* for interest on judgment debts (see s 52(1) and s 52(2)(a) of the *Federal Court of Australia Act 1976* (Cth) (**the Federal Court Act**) and O 35 r 8 of the *Federal Court Rules*) and not for the periods and at the rates awarded by the arbitrator.

15 This submission, too, is unsound. The arbitrator awarded interest in accordance with the laws of Uganda, as he was entitled to do. Under the Award, interest is to run on the amounts awarded until payment in full at the rates and upon the bases specified by the arbitrator. The Award is not reflected in a judgment of this Court until this Court gives judgment for the amount awarded. That judgment will not operate retrospectively. The amount awarded by the arbitrator does not become a judgment debt which carries interest pursuant to s 52 of the Federal Court Act until it has been entered. Once entered, interest will run on the amount of the judgment debt at the prescribed rate. A judgment given by this Court is to be enforced in a State or Territory of Australia by means of the same remedies, by execution or otherwise, as are allowed to judgment creditors in like cases by the laws of that State or Territory (s 53 of the Federal Court Act).

16 Hi-Tech did not advance any other criticism of the calculation put forward in UTL's Written Submissions of the amount now due under the Award. I propose to accept that calculation but to adjust it for the additional interest that has become payable from 1 March 2011 up to today. The amount now due under the award is:

Special damages: Invoice issued on 1/02/2008		USD30,803.15
Interest on USD30,803.15 at 24% pa from 2/02/2008 to 11/03/2011 (3 years and 37 days)		USD22,927.67
Special damages: Invoice issued on 3/03/2008		USD110,141.50
Interest on USD110,141.50 at 24% pa from 3/03/2008 to 11/03/2011 (3 years and 8 days)		USD79,881.26
General damages (Date of Award 29/04/09)		USD433,695.00
Interest on USD433,695.00 at 8% pa from 29/04/2009 to 11/03/2011 (1 year and 316 days)		USD64,733.43
Costs of the Arbitration proceeding		USD20,701.72
	Total	**USD762,883.73**

17 UTL claimed interest on the amount of the general damages only from the date of the Award and not from any earlier date. Further, it did not claim any interest on the costs component of the Award.

18 I will therefore give judgment in favour of UTL against Hi-Tech in the amount of USD762,883.73.

19 At [138] of the first judgment, I said:

> … That order for payment is to be expressed in US dollars and is to include interest up to the date upon which the order is made at the rates determined by the arbitrator.

20 Neither party submitted that the judgment should not be given in US dollars. The parties' terms of trade required payments to be made in US dollars and the Award was made in US dollars. The arbitration costs order was originally expressed in Ugandan shillings but has now been converted to US dollars. In my view, the appropriate course is to give the judgment in US dollars. Although it was once considered inappropriate for an Australian court to give judgment in a foreign currency, that is no longer the law. Judgments are now routinely given in a foreign currency, if the circumstances warrant such an approach. One circumstance which is regarded as warranting such an approach is where the action in question is to enforce a foreign money obligation, as is the case here (see *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 497H (per Lord Cross of Chelsea); *Westpac Banking Corporation v "Stone Gemini"* [1999] FCA 917 at [2] (per Tamberlin J); and *BHPB Freight*

Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 4) (2009) 263 ALR 63 at [3] (p 64) (per Finkelstein J)).

21 There will be declarations and orders accordingly.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster.

Associate:

Dated: 11 March 2011