

# Case Note

## *International Relief and Development Inc Ltd v Ladu*<sup>1</sup>

Russell Thirgood<sup>2</sup> and Emma Hanley<sup>3</sup>

### Introduction

In the August 2014 case of *International Relief and Development Inc Ltd v Ladu*,<sup>4</sup> International Relief and Development Inc (**IRD**) (the applicant) sought enforcement of a foreign arbitral award by the Federal Court of Australia pursuant to section 8(3) of the *International Arbitration Act 1974* (Cth) (**IAA**). The Federal Court of Australia ultimately found in favour of IRD, ordering the enforcement of the foreign award and that Mr Godfrey Ladu (the respondent) pay IRD's costs of the application.

The case raises a number of issues in regard to the recognition of foreign awards and the grounds upon which the Federal Court of Australia may refuse to enforce a foreign award under the IAA. The grounds upon which the court may refuse to enforce a foreign award are found in sections 8(5) and 8(7) of the IAA. The relevant ground to this case was whether Mr Ladu had been given proper notice of the appointment of the arbitrator or of the arbitration proceedings pursuant to section 8(5)(c) of the IAA. The ground of whether enforcement of the award would be contrary to public policy pursuant to section 8(7)(b) of the IAA was also 'mentioned from time to time' in Mr Ladu's submissions, although it was not at the forefront of those submissions.<sup>5</sup> Section 8(7)(b) of the IAA is to be read with section 8(7A) of the IAA, which provides the grounds on which a foreign award is contrary to public policy. Mr Ladu asserted that the enforcement of the foreign award would be contrary to public policy as there was a breach of the rules of natural justice in connection with the making of the award (section 8(7A)(b) of the IAA).

The case was decided in part on factual grounds. Nevertheless, it is in line with recent Federal Court judgments on the recognition of foreign awards in that it demonstrates the Court's pro-arbitration approach to enforcing foreign awards.<sup>6</sup>

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1 [2014] FCA 887. The date of judgment was 20 August 2014.

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4 [2014] FCA 887.

5 *Ibid* 52 [185].

6 See *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636. Also see *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 268; [2011] NSWSC 1331 and [2011] NSWSC 1567.

## Outline of the facts

Mr Ladu, an Australian citizen, entered into an Employment Agreement with IRD in September 2009 to undertake a role as Project (or Program) Manager for IRD's South Sudan Sustainable Foods and Livelihoods Initiative. IRD is a non-profit organisation that undertakes international humanitarian relief work in countries including Africa.

IRD terminated Mr Ladu's employment in April 2011 pursuant to clause 13 of his Employment Agreement with IRD which provided that the Employment Agreement was terminable 'at will'.<sup>7</sup> Justice Kenny referred to the termination of Mr Ladu's employment as a result of irregularities relating to the procurement of seeds by IRD from Sunspace Constructions and Supply Company Ltd (or Sun Space Construction & Suppliers).<sup>8</sup>

After IRD terminated Mr Ladu's employment, evidence came to light that Mr Ladu was the Chairman, Managing Director and shareholder of a company called Ladu & Brothers Company Ltd (**Ladu Company**). A Company Profile document on the Ladu Company contained information on Mr Ladu's involvement with Ladu Company, listing him as the primary point of contact and listing his email address as ladubrotherscompany@yahoo.co.uk. This information is relevant to the issue of whether Mr Ladu received proper notice of the appointment of the arbitrator or of the arbitration proceedings.

## Juba County Court proceedings

Prior to the arbitration held in the United States, Mr Matechak (IRD's general legal counsel) sent a letter to a representative of the South Sudan Relief and Rehabilitation Commission and Mr Ladu stating that 'any claim Mr Ladu may have against IRD would have to be arbitrated in accordance with his employment agreement'.<sup>9</sup> Despite this letter, Mr Ladu instituted proceedings in the Juba County Court in Sudan seeking damages for unlawful termination of his Employment Agreement with IRD. Proceedings were dismissed by the Juba County Court which lacked jurisdiction to hear the case. The Juba County Court took this position because the Employment Agreement was governed by the law of the Commonwealth of Virginia in the United States, and not by the law of South Sudan.<sup>10</sup> Dr Mulla was Mr Ladu's legal representative during the Juba County Court proceedings.

## The arbitration in the United States

Clause 14 of Mr Ladu's Employment Agreement contained a dispute resolution clause which provided that any disputes arising out of the Employment Agreement that could not be resolved amicably enabled IRD to bring the dispute before a single arbitrator in Arlington, Virginia, in accordance with the rules of the American Arbitration Association (**arbitration agreement**).

In reliance on the arbitration agreement, Mr Matechak sent a letter to Dr Mulla headed 'DEMAND FOR ARBITRATION' on 11 May 2011 which notified Dr Mulla of IRD's intention to invoke the arbitration agreement. As Mr Matechak received no response to this letter from Dr Mulla, Mr Matechak sent a

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7 [2014] FCA 887, 3 [10].

8 Ibid 2-3 [9].

9 Ibid 5 [17].

10 Ibid 5-6 [18].

second and then third letter to Dr Mulla headed '2nd DEMAND FOR ARBITRATION' on 9 June 2011 and '3rd DEMAND FOR ARBITRATION' on 14 June 2011.<sup>11</sup> On 24 June 2011, Mr Matechak also emailed a notice of commencement of arbitration to Dr Mulla and Mr Ladu. Mr Matechak received no response from Dr Mulla to the correspondence sent from May to June 2011.

On 14 June 2011, Mr Matechak received an email from Mr Gueye (IRD's Country Director) in South Sudan advising that the correspondence to Dr Mulla from April to June 2011 was personally delivered to Dr Mulla's office in South Sudan.

Mr Paul J Waters, the nominated arbitrator in the proceedings held in the United States, purported to notify the parties (including Mr Matechak, Dr Mulla and Mr Ladu) of the proposed arbitral proceedings on or around 8 July 2011. Mr Waters mistakenly sent the relevant correspondence, as well as subsequent correspondence, to [ladubrotherscompany@yahoo.com](mailto:ladubrotherscompany@yahoo.com), which was not the correct email address of Mr Ladu. Mr Ladu's email address, as disclosed in the Company Profile for Ladu Company, was [ladubrotherscompany@yahoo.co.uk](mailto:ladubrotherscompany@yahoo.co.uk). Mr Matechak responded to Mr Waters' email on 14 July 2011 with a copy to Dr Mulla and Mr Ladu (which was sent to Mr Ladu's correct email address of [ladubrotherscompany@yahoo.co.uk](mailto:ladubrotherscompany@yahoo.co.uk)). Mr Waters sent further correspondence to Mr Ladu (again mistakenly sending the email to [ladubrotherscompany@yahoo.com](mailto:ladubrotherscompany@yahoo.com)) and Dr Mulla on 19 and 20 July 2011.

Dr Mulla did not acknowledge the receipt of any of these emails and did not respond to them. Mr Ladu did not respond to any of these emails. Mr Matechak confirmed IRD's attendance at the arbitration proceedings and the evidence to be presented at the hearing. The pre-hearing was conducted in the absence of Dr Mulla and Mr Ladu. The arbitration hearing by way of videoconference took place before Mr Waters on 20 July 2011 although Mr Ladu was absent. Mr Waters handed down his final award in favour of IRD on 21 July 2011.

Mr Ladu did not pay the amount under the final arbitral award within the stipulated time period. IRD sought to enforce the award as a judgment in the United States in which the United States District Court found in favour of IRD. Again, Mr Ladu did not pay IRD any amount in satisfaction of the judgment of the US District Court on 13 February 2012. Consequently, IRD sought enforcement of the award in the Federal Court of Australia pursuant to section 8(3) of the IAA.

## **Issues for the Federal Court of Australia**

The main issue for the Court was whether Mr Ladu was given proper notice of the appointment of the arbitrator or of the arbitration proceedings for the purposes of section 8(5)(c) of the IAA. The issue was also whether Mr Ladu was otherwise unable to present his case in the arbitration proceedings for the purposes of section 8(5)(c) of the IAA. The onus of proof rested with Mr Ladu to establish that the grounds in sections 8(5) and 8(7) of the IAA were made out in order to resist enforcement of the award.

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11 The third demand for arbitration was also copied to Mr Ladu at his email address of [ladubrotherscompany@yahoo.co.uk](mailto:ladubrotherscompany@yahoo.co.uk).

Section 8(5) of the IAA provides:

*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:*

...

*(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;...*

Section 8(7) of the IAA provides (**emphasis added**):

*(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.*

Mr Ladu submitted that he had not received proper notice of the arbitrator's appointment or of the arbitration proceedings. In fact, Mr Ladu argued that he did not receive information about the arbitration and the award until 14 September 2011 which was thirty days after the award was delivered by the nominated arbitrator, Mr Waters.<sup>12</sup> It was also submitted that Dr Mulla was not retained by Mr Ladu at the time of the arbitration and hence the notices were not passed on by Dr Mulla to Mr Ladu.<sup>13</sup>

Mr Ladu asserted that he did not receive the emails sent by IRD to the email address ladubrotherscompany@yahoo.co.uk as he ceased to be a director of the Ladu Company after November 2007. Mr Ladu argued that IRD should have sent the notice of the arbitration to g.l@easy.com which was the email address kept on file by IRD during Mr Ladu's employment.<sup>14</sup>

IRD submitted that it gave notice of its intention to arbitrate by demands for arbitration on 11 May 2011, 9 June 2011 and 14 June 2011 and a commencement of arbitration notice on 24 June 2011.<sup>15</sup> IRD asserted that:

- 1 Each notice was served by email on Dr Mulla as Mr Ladu's legal representative with a copy sent to Mr Ladu by email at ladubrotherscompany@yahoo.co.uk.<sup>16</sup>
- 2 The demands for arbitration were served on Dr Mulla personally in June 2011 during the Juba County Court proceedings that were initiated by Mr Ladu.
- 3 The letters of 11 May 2011, 9 June 2011 and 14 June 2011 were delivered to Dr Mulla personally.

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12 *International Relief and Development Inc v Ladu* [2014] FCA 887, 17 [61].

13 *Ibid* 14 [50].

14 *Ibid* 20 [69].

15 *Ibid* 16 [56].

16 *Ibid* 16 [56].

## Judgment

In determining whether the alleged grounds for resisting enforcement could be made out, Justice Kenny referred extensively to the evidence before the Court.

In addressing section 8(5)(c) of the IAA, Justice Kenny held that:<sup>17</sup>

- 1 Mr Ladu failed to establish that he was not involved with the Ladu Company at the time when IRD sent emails to the email address [ladubrotherscompany@yahoo.co.uk](mailto:ladubrotherscompany@yahoo.co.uk) and that he did not receive, or was not notified of, those emails.
- 2 Mr Ladu failed to establish that he did not receive, or was not notified of documents created for the Juba County Court proceedings, and notices sent regarding the intent to invoke the arbitration agreement in Mr Ladu's Employment Agreement.
- 3 IRD had provided notice to Dr Mulla of the arbitration – either by email or by personal delivery of documentation to Dr Mulla's office.
- 4 As the initiating party to the Juba County Court proceedings, Mr Ladu and Dr Mulla had notice that IRD invoked the arbitration agreement under his Employment Agreement via IRD's Defence on 14 June 2011.
- 5 Dr Mulla did not advise IRD that his retainer with Mr Ladu had ended.
- 6 There was no evidence to suggest that IRD had acted other than reasonably in directing their communications to Mr Ladu's email address [ladubrotherscompany@yahoo.co.uk](mailto:ladubrotherscompany@yahoo.co.uk).
- 7 Mr Waters emailed a letter to IRD and Dr Mulla (at his email address of [rkebi2002@yahoo.com](mailto:rkebi2002@yahoo.com)) on or around 8 July 2011 proposing a date, time and venue for the arbitral proceedings. Subsequently, IRD responded to Mr Waters' letter on 14 July 2011 via email with a copy to Dr Mulla and Mr Ladu.
- 8 Mr Waters sent emails to Dr Mulla on 19 and 20 July 2011 regarding the conduct of the arbitration.

Justice Kenny rejected Mr Ladu's evidence that he ceased to be a director of the Ladu Company and said that Mr Ladu was an unreliable witness and fabricated his evidence here, as well as in other instances throughout proceedings in the Federal Court.<sup>18</sup> Further, Justice Kenny found that Mr Ladu asserted that he was no longer involved with the Ladu Company in order to validate his assertion in the United States courts that he did not receive the correspondence sent to [ladubrotherscompany@yahoo.co.uk](mailto:ladubrotherscompany@yahoo.co.uk). Justice Kenny found that an exhibit to Mr Ladu's evidence was created by Mr Ladu for the purposes of these court proceedings in order to support his assertion that he ceased to be a shareholder and director of the Ladu Company in November 2007.<sup>19</sup>

Justice Kenny also rejected Dr Mulla's evidence that he did not receive any emails relating to the arbitration between April and July 2011 from IRD or the arbitrator. Justice Kenny referred to Dr Mulla as not a reliable or truthful witness.<sup>20</sup>

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17 Ibid 45-46 [164]-[166].

18 Ibid 20 [71].

19 Ibid 27 [90].

20 Ibid 36 [128].

Justice Kenny found that Mr Ladu did receive proper notice of the appointment of the arbitrator and of the arbitration proceedings. His Honour held that it was not necessary for the purposes of the present case to consider in depth what constitutes ‘proper notice’ of the appointment of the arbitrator and/or the arbitration proceedings.

Justice Kenny held that in considering IRD’s application the Court is obliged to have regard to the fact that arbitration is intended as an efficient, impartial, enforceable and timely method by which to resolve commercial disputes<sup>21</sup> and that arbitral awards are intended to provide certainty and finality,<sup>22</sup> pursuant to section 39(2)(b) of the IAA. Section 39(2) of the IAA is consistent with Australia’s obligations under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). With these factors in mind, Justice Kenny held that the expression ‘proper notice’<sup>23</sup> must be interpreted as having regard to these matters in section 39(2).

In regard to section 8(7)(b) of the IAA, Justice Kenny stated that Mr Ladu relied on the alleged lack of notice of the appointment of the arbitrator or of the arbitration proceedings as breaching the rules of natural justice pursuant to section 8(7A)(b) of the IAA. However, Mr Ladu only mentioned section 8(7)(b) from ‘time to time’ and it was not at the forefront of his submissions. Justice Kenny held, based on his Honour’s finding in regard to section 8(5)(c), that Mr Ladu failed to prove that there was a breach of the rules of natural justice in connection with the making of the award under section 8(7A)(b) of the IAA.

## Conclusion

This recent judgment not only demonstrates that the Federal Court of Australia adopts a pro-arbitration approach to enforcing foreign arbitral awards; it also highlights the limited grounds on which a foreign award can be resisted under the IAA.

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21 *International Arbitration Act 1974* (Cth) s 39(2)(b)(i).

22 *Ibid* s 39(2)(b)(ii).

23 *Ibid* s 8(5)(c).