SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

BUILDING CASES LIST

No. 7565 of 2000

IN THE MATTER of an Application by Toyo Engineering Corporation (Japan) (ARBN 050 121 509) ("the Plaintiff") for an Order under s. 8(2) of the International Arbitration Act 1974 (Cth) and s. 33 of the Commercial Arbitration Act 1984 (Vic) for Leave to Enforce an Award made under an Arbitration Agreement.

JUDGE:	Byrne J
WHERE HELD:	Melbourne
DATE OF HEARING:	19 December 2000
DATE OF JUDGMENT:	20 December 2000
CASE MAY BE CITED AS:	Toyo Engineering Corp v John Holland Pty Ltd
MEDIUM NEUTRAL CITATION:	[2000] VSC 553

ARBITRATION – enforcement of foreign award – adjournment to enable challenge to award in foreign court.

International Arbitration Act 1974 (Cth) s. 8

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr E.N. Magee QC with Mr T.J. Margetts and Mr I.D. Martindale	Baker & McKenzie
For the Defendant	Mr A.C. Archibald QC with D.J. O'Callaghan	Clayton Utz

SC:HB

HIS HONOUR:

1 In July 1994 the plaintiff, Toyo Engineering Corporation (Japan) ("TEC"), entered into an agreement with Mobil Refinery Australia Ltd for performance of work in connection with the upgrading of the Mobil Altona Refinery. By a construction agreement executed on or about 5 April 1995 the defendant, John Holland Pty Ltd ("John Holland"), then called John Holland Construction and Engineering Pty Ltd, agreed with TEC to construct the works for a provisional price of $45M.

2 By GC15.1 of the construction agreement the parties agreed to refer disputes which may arise between them "to arbitration for settlement under the Rules of Conciliation and Arbitration of the International Chamber of Commerce". It was further agreed that the arbitration should take place in Tokyo unless the parties agreed otherwise. By SC11.3 it was agreed that the construction agreement should be governed and interpreted in accordance with the laws of the Republic of Singapore and that arbitration should take place in Singapore.

3 In November 1996 the construction agreement was brought to an end and each of the parties in late 1996 and January/February 1997 filed a request for arbitration with the ICC pursuant to Article 3 of the ICC Rules. In due course, an arbitral tribunal was constituted and on 30 July 1997 the terms of reference were prepared and signed pursuant to Article 13 of the ICC Rules. The award of the arbitrators was made in Singapore on 12 October 2000 but it was not received by the parties until 30 October 2000. By the award, John Holland was required to pay to TEC a sum of money and costs and TEC's advance of the ICC costs together with interest on each of these sums. The total payable, not including interest, was of the order of $A40M.

4 The involvement of this Court arose on 10 November 2000 when TEC applied by originating motion for leave to enforce the award pursuant to s. 8(2) of the International Arbitration Act 1974 (Cth) and s. 33 of the Commercial Arbitration Act 1984 (Vic). The application came on for hearing before me on 16 November 2000

when I gave directions with a view that it proceed inter partes on 19 December 2000.

5 Meantime, on 13 November 2000 John Holland applied to the High Court of the Republic of Singapore for the following relief:

(a) that the award be set aside pursuant to s. 17(2) of the Arbitration Act 1985 (Singapore). This is a provision equivalent to s. 42 of the uniform Commercial Arbitration Acts in this country. It requires proof of misconduct as that expression is understood in arbitration law;

(b) that John Holland be granted leave to appeal against the award pursuant to s. 28(1) of the Arbitration Act 1985 (Singapore). This is a provision equivalent to s. 38(4)(b) of the uniform Commercial Arbitration Acts, at least as that provision stood prior to the 1993 amendments. In Singapore, the question of leave falls to be determined in accordance with the Nema guidelines;

(c) that the award be set aside pursuant to s. 24(b) of the International Arbitration Act 1995 (Singapore). This is the equivalent of s. 15 of the International Arbitration Act 1974 (Cth), and Article 34 of the Model Law. Section 24(b) requires proof of a breach of the rules of natural justice. Article 34 of the Model Law permits the setting aside of an award on a number of grounds including that the award is in conflict with the public policy of Singapore.

6 The application presently before the court is made by John Holland by summons filed on 30 November 2000. It seeks an order that TEC's application for leave to enforce the award be adjourned pursuant to s. 8(8) of the International Arbitration Act 1974 (Cth) pending the hearing and determination of the Singapore impeachment application. There is also a cross-application by TEC by summons filed on 11 December 2000 seeking a suitable security if the adjournment be granted.

7 Counsel on behalf of John Holland submitted, in terms of s. 8(8), that I should find that it was proper to adjourn the enforcement application having regard to six circumstances. First, the impeachment application in Singapore is not hopeless;

second, their client offers adequate security for the payment of the award should it survive the impeachment application; third, the impeachment application had been brought promptly; fourth, there was no relevant prejudice to TEC if the adjournment be granted. The impeachment application will be heard February so that the adjournment sought was of relatively short duration. Fifth, if the adjournment were refused and the award enforced and satisfied, there would be prejudice to John Holland if the award were later set aside. This was that it would have the trouble, expense and delay in seeking to recover the money paid under the award from TEC in Japan. Finally, reliance was placed on the requirement of comity which dictated that this Court should not enter upon a consideration of the merits of the impeachment application which was properly before the proper forum of the Arbitration, the High Court of Singapore.

8 Before me, a good deal of argument was directed to the prospects of success of the impeachment application. Given that I have concluded that the enforcement application should be adjourned to enable the impeachment application to be dealt with in Singapore, it is undesirable that I should enter upon this question in any detail. It is sufficient that I conclude, as I do, that it could not be stated with confidence that the impeachment application is unarguable.

9 To my mind, however, the determinative factor is that the adjournment will be only for a relatively short time. According to Christopher Anand Daniel a member of the firm of solicitors acting for John Holland in Singapore, it seems likely that the impeachment application will be heard on 16 February 2001. I consider that this period of stay upon enforcement is so short that I should not, by any order on my part, put an obstacle in the way of the effective disposition of that application or in any was pre-empt it. It must be remembered that the parties themselves, including TEC, have selected the Singapore High Court as the appropriate forum to deal with matters affecting the arbitration. It seems not unreasonable that a challenge to the award should be permitted to proceed in that court.

10 Within a short time after 16 February 2001 the parties will know whether the award

has been set aside or not. If it has, then the question before me will turn to the application of Article V(i)(e) of the New York Convention. If not, then the ground for resisting the enforcement application will disappear. Either way, the position will then be a good deal clearer.

11 Mention has been made by senior counsel for TEC in Singapore, Mr Giam Chin Toon, of the likelihood of appeal in Singapore. This seems to me altogether premature. I will, therefore, adjourn the application for enforcement to a convenient date late in March 2001 by which time I understand the decision of the Singapore High Court will be known. The adjournment will be subject to an undertaking by John Holland that it will diligently prosecute its application in Singapore and, further, subject to a condition that suitable security be given by it for the unpaid amount of the award including interest to the adjourned date of the enforcement application.

12 I will hear counsel further as to the precise terms of the order which are necessary to give effect to these conclusions.
