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Eopply ➡ New Energy Technology Co Ltd v EP Solar Pty Ltd [2013] FCA 356 (19 April 2013)

Last Updated: 19 April 2013

FEDERAL COURT OF AUSTRALIA

⬅ Eopply ➡ New Energy Technology Co Ltd v EP Solar Pty Ltd [2013] FCA 356

Citation:	⬅ **Eopply** ➡ New Energy Technology Co Ltd v EP Solar Pty Ltd [2013] FCA 356
Parties:	⬅ **EOPPLY** ➡ **NEW ENERGY TECHNOLOGY CO LTD v EP SOLAR PTY LTD (ACN 138 556 304)**
File number:	NSD 549 of 2013
Judge:	**FOSTER J**
Date of judgment:	19 April 2013
Catchwords:	**ARBITRATION** – International Arbitration – whether a foreign arbitral award made in China should be enforced in Australia against an Australian corporation in liquidation
Legislation:	*Corporations Act 2001* (Cth), ss 491, 494 and 500 *Federal Court of Australia Act 1976* (Cth), s 54 *International Arbitration Act 1974* (Cth), ss 2D, 8, 9, 10 and 39
Cases cited:	*Catto v Hampton Australia Ltd (In Liq)* (1998) 29 ACSR 225 cited *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696; (2012) 292 ALR 161 cited *Executive Director of the Department of Conservation and Land Management v Ringfab Environmental Structures Pty Ltd* [1997] FCA 1484 cited *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 282 ALR 717 cited

Date of hearing:	10 April 2013
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	35
Counsel for the Applicant:	Mr TM Lynch
Solicitor for the Applicant:	W & H Lawyers Australia Pty Ltd
Counsel for the Respondent:	The Respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 549 of 2013**

BETWEEN:	**EOPPLY NEW ENERGY TECHNOLOGY CO LTD** **Applicant**
AND:	**EP SOLAR PTY LTD (ACN 138 556 304)** **Respondent**

JUDGE:	**FOSTER J**
DATE OF ORDER:	**19 APRIL 2013**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. To the extent that it may be necessary, pursuant to s 500(2) of the *Corporations Act 2001* (Cth), the applicant have leave to proceed against the respondent in respect of the claims made by it in this proceeding.
2. Judgment be entered in favour of the applicant against the respondent in the following amounts:

(a) USD1,217,289.39, being the total of the principal amount awarded under the foreign award the subject of the applicant's claim (USD634,666) plus interest thereon for the period from 14 October 2010 to the date of these Orders at the daily rate of 0.1% of the said principal sum (USD582,623.39); and

(b) RMB¥277,044, being the total of the amount of legal costs awarded under the said award (RMB¥140,000) and that portion of the arbitrators' fees awarded under the said award which the arbitrators required the respondent to pay and which the applicant has paid in its stead (RMB¥137,044).

3. The respondent pay the applicant's costs of and incidental to this proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 549 of 2013**

BETWEEN:	**EOPPLY NEW ENERGY TECHNOLOGY CO LTD** **Applicant**
AND:	**EP SOLAR PTY LTD (ACN 138 556 304)** **Respondent**
JUDGE:	**FOSTER J**
DATE:	**19 APRIL 2013**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1. The applicant commenced this proceeding on 28 March 2013. In its Originating Application, the applicant sought the following relief:

    1. An order pursuant to s 8(3) of the International Arbitration Act 1974 that the plaintiff be granted leave to enforce the arbitral award made on 15 February 2012 by the China International Economic and Trade Arbitration Commission Shanghai Sub-Commission at Shanghai China and published and notified to the parties that day.

2. An order that judgment be entered against the Defendant for the sum of:

(a) USD$634,666.00
(b) RMB¥311,305, and
(c) interest on the amount in (a) above from 14 October 2010 to the date of judgment at the rate of 0.1% per day ie. USD$643.67 per day, and
(d) costs.

2. The substantive relief sought by the applicant is the enforcement of an arbitral award made by China International Economic and Trade Arbitration Commission (**CIETAC**) Shanghai Sub-Commission on 15 February 2012 (**the award**). The applicant is the award creditor under the award. The respondent is the award debtor under the award.

3. The applicant's claim for final relief is supported by the affidavit of Gang Sun affirmed on 28 March 2013.

4. I am satisfied that the applicant's Originating Application and the affidavit of Gang Sun were served upon the respondent and came to its notice some time between 28 March 2013 and 9 April 2013.

5. On 5 April 2013, by resolution of the sole shareholder of the respondent (**Source Co Limited**) passed on that day, Mark William Pearce and Michael Dullaway were jointly and severally appointed as liquidators of the respondent for the purpose of winding up the respondent. Source Co Limited did not pass a separate resolution that the respondent be wound up voluntarily pursuant to s 491(1) of the *Corporations Act 2001* (Cth) (**the Corporations Act**) but such a resolution is implicit in the resolution which that corporation did pass on 5 April 2013. I will proceed upon the basis that, on 5 April 2013, the respondent was wound up voluntarily pursuant to s 491(1) of the Corporations Act by resolution of its sole shareholder, Source Co Limited. However, there was no evidence before me as to whether, prior to 5 April 2013, the directors of the respondent, or a majority of them, made a declaration of solvency pursuant to s 494 of the Corporations Act.

6. On 9 April 2013, the day before the first return of the proceeding before the Court, Mr Pearce transmitted by facsimile transmission to the solicitors for the applicant and to the Registry of the Court a letter dated the same day. Omitting formal parts, that letter is in the following terms:

EP SOLAR PTY LTD (IN LIQUIDATION)
A.C.N. 138 556 304 ("the Company")
FEDERAL COURT OF AUSTRALIA CLAIM NSD 549/2013 ("the Proceeding")

On 5 April 2013, Michael Dullaway and I, Mark William Pearce were appointed as joint and several Liquidators of the Company by virtue of a resolution of the Company's sole member under Section 490 of the *Corporations Act 2001 (Cth)* ("the Act"). I have ***enclosed*** a copy of the Resolution of Sole Member for Voluntary Winding Up.

I note that you act for **Eopply** New Energy Technology Co Ltd in an application which it has commenced against the Company.

I advise as follows:-

1. Pursuant to Section 500(2) of the Act *"no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes."*
2. I do not intend to take any steps in relation to the Proceeding or instruct solicitors to appear on my behalf at the forthcoming directions hearing in the Proceeding.
3. Whilst I have not been provided with satisfactory material to consider your client's claim in the Proceeding, I do not oppose your client's claim, nor do I oppose leave being granted to it to proceed with its claim under Section 500(2) of the Act.
4. Your client's claim against the company ranks as a provable debt in the liquidation. In this regard I have ***enclosed*** a Proof of Debt form which your client should complete and return to me in order to formally lodge its claim in the liquidation.

I am currently conducting investigations into the Company's affairs and the prospects of any recovery actions being pursued in the liquidation. In this regard, I will write to you further in due course (or directly to your client, should you instruct me to do so) and provide an update on the conduct of the winding up of the Company. I will also issue an initial Report to Creditors and convene a meeting of creditors in due course as required under the Act.

Would you please advise whether you request that I issue further correspondence to you, or directly to your client. If you wish for me to issue further correspondence directly to your client, please advise your client's contact details, including e-mail address.

Should you have any queries please don't hesitate to contact either Michael Dullaway or myself.

7. The matter was first returned before the Court on 10 April 2013. On that occasion, the applicant was represented by Counsel. Consistent with the liquidators' letter extracted at [6] above, there was no appearance either by or on behalf of the respondent or its liquidators. In those circumstances, I proceeded to deal with the applicant's claim for final relief on that day in the absence of the respondent.

8. On 10 April 2013, the applicant sought the following relief:

The COURT

1. Pursuant to s.500(2) of the Corporations Act, grants leave to the Applicant to proceed with the Originating Application herein.

2. Pursuant to s.8(3) of the International Arbitration Act, grants leave to the Applicant to enforce the award identified in prayer 1 of the Originating Application herein as if it were a judgment of this Court.

3. Gives judgment for the Applicant against the Respondent for the sum of
(1) USD$1,219,118.30 (inclusive of interest to 10 April 2013 of USD$584,452.36), and
(2) RMB¥311,305,
or the Australian Dollar equivalent at the time of payment.

4. The Respondent is to pay the Applicant its costs of the proceedings.

9. There is no longer any need for an award creditor/applicant to seek leave to enforce a foreign award. Order 2 is, therefore, unnecessary.

10. The amount of RMB¥311,305 claimed by the applicant comprises two amounts:

(a) RMB¥140,000, being legal costs awarded by the arbitrators as part of the award; and

(b) RMB¥171,305, being the amount which the applicant paid to the arbitrators as their fees for conducting the arbitration.

11. These Reasons for Judgment determine all of the applicant's claims for relief.

THE STATUTORY FRAMEWORK

12. Section 8(1) of the *International Arbitration Act 1974* (Cth) (**the IAA**) provides that, subject to Pt II of the IAA, a foreign award is binding by virtue of the IAA for all purposes on the parties to the arbitration agreement in pursuance of which it was made. Section 8(3) of the IAA provides that, subject to Pt II of the IAA, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of this Court (see also s 54 of the *Federal Court of Australia Act 1976* (Cth)). In Pt II of the IAA, unless the contrary intention appears

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 [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 to the IAA] applies.

13. In Pt II of the IAA, unless the contrary intention appears, *arbitration agreement* means an agreement in writing of the kind referred to in sub-article 1 of Art II of the Convention and *arbitral award* has the same meaning as in the Convention.

14. For the purposes of Pt II of the IAA, *arbitration agreement* is an agreement in writing (formal or informal) 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 (as to which, see sub-article 1 of Art II of the Convention).

15. Sub-articles 1 and 2 of Art I of the Convention define *arbitral award* for the purposes of the Convention and thus for the purposes of Pt II of the IAA as follows:

> 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
>
> 2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

16. Section 8(3A) provides that this Court may only refuse to enforce a foreign award in the circumstances mentioned in s 8(5) and s 8(7).

THE PRESENT CASE

17. The liquidators of the respondent have informed the Court that they do not oppose leave to proceed being granted to the applicant pursuant to s 500(2) of the Corporations Act nor do they oppose the making of the other orders sought by the applicant. In those circumstances, subject to being satisfied that leave to proceed is required and should be granted, subject to being satisfied of the matters specified in s 9 and s 10 of the IAA and subject to being satisfied that the award is a foreign award within the meaning of s 8(1) and s 8(3) of the IAA and thus binding on the applicant and the respondent, the Court should enforce the award.

Leave to Proceed

18. Section 500(2) of the Corporations Act provides that, after the passing of a resolution for the voluntary winding up of a corporation, no action or other civil proceeding is to be proceeded with against that corporation except by leave of the Court and subject to such terms as the Court imposes.

19. The winding up of the respondent purports to be a members' voluntary winding up. There is authority for the proposition that s 500(2) only operates in relation to a creditors' voluntary winding up and does not have effect in relation to a members' voluntary winding up where the directors, or a majority of them, have made a declaration of solvency (*Catto v Hampton Australia Ltd (In Liq)* (1998) 29 ACSR 225).

20. I do not know whether a declaration of solvency was made in the present case.

21. For that reason, and for more abundant caution, I propose to consider the question of leave under s 500(2) of the Corporations Act.

22. In *Executive Director of the Department of Conservation and Land Management v Ringfab Environmental Structures Pty Ltd* [1997] FCA 1484, Lee J discussed the relevant considerations which should ordinarily guide the exercise of the discretion to grant leave to proceed against a corporation in liquidation. The following considerations may be extracted from his Honour's judgment:

(a) The purpose of having a requirement for leave is to prevent a corporation in liquidation being subjected to actions that are expensive and, therefore, carried on at the expense of the creditors of the company and, perhaps, unnecessarily.

(b) In determining whether leave should be granted, the Court considers whether the balance of convenience lies in allowing the applicant to proceed by way of action to judgment, or whether the applicant should be left to pursue his or her claim by lodging a proof of debt with the liquidator. The matter is one of discretion and the onus is on the applicant to demonstrate why it is more appropriate in respect of the particular claim, to proceed by way of action.

(c) For leave to be granted, it must be shown that there is a serious or substantial question to be tried and a real dispute between the parties. Leave will not be granted where the applicant does not have a genuine claim or where the claim would be futile.

23. In the present case, the following considerations point to the grant of leave:

(a) If leave is granted, virtually no additional expense or inconvenience will be visited upon the respondent. If leave is granted, judgment will be entered immediately.

(b) The applicant's claim is based upon a foreign award. Although that award is binding upon the parties to it without any further step needing to be taken (s 8(1) of the IAA), if the award is to be enforced in Australia, steps must be taken either in an appropriate State or Territory court or in this Court to obtain a judgment in order to give effect to the award. When appropriate regard is had to s 2D of the IAA which specifies the objects of the IAA and to s 39 of the IAA, there is good reason to make the path to recovery by the award creditor easier by granting leave and allowing judgment to be entered rather than leave the award creditor to the vagaries of the proof of debt process.

(c) There is no opposition to leave being granted.

24. Although there is no evidence before the Court as to the financial position of the respondent and thus no basis upon which the Court can make an assessment as to whether the award creditor is likely to recover any part of the amount awarded to it, the above considerations weigh heavily in favour of the grant of leave. In my judgment, there is no consideration of any moment which would weigh in the balance against the grant of leave.

25. For these reasons, to the extent that it is necessary to do so, I propose to grant leave to the applicant to proceed against the respondent in respect of the claims which it has made in this proceeding pursuant to s 500(2) of the Corporations Act.

Final Relief

26. The applicant has produced to the Court a duly certified copy of the award (in Chinese) (s 9(1)(a)) and an English translation of the award duly certified to be a correct translation (s 9(3)). The original award in Chinese has been certified by CIETAC and the translation has been certified by Yan Qian, a NAATI-certified translator. I am satisfied that the applicant has produced to the Court a true copy of the original award in Chinese and an accurate translation of that award into English.

27. The applicant has also produced a duly certified copy of the relevant arbitration agreement. The arbitration agreement is found in a commercial contract styled *"Co-Operation Agreement"* dated 3 May 2010 (**the Co-Operation Agreement**) (s 9(1)(b)). The applicant has also produced an English translation of that agreement certified to be a correct translation (s 9(3)). The copy Co-Operation Agreement has been certified by CIETAC. I am satisfied that the applicant has produced to the Court a true copy of the Co-Operation Agreement. The applicant has also established that the People's Republic of China is a Convention country for the purposes of Pt II of the IAA.

28. Clause 16 of the Co-Operation Agreement provides:

> 16. **Arbitration**-----This Contract is governed by the laws of the People's Republic of China. All disputes arising from the implementation of, or in connection with this Contract, shall be settled through friendly negotiation. In case no settlement can be reached through negotiation, the dispute shall be submitted to the CIETAC Shanghai Commission in accordance with its Provisional Rules of Procedure. The decision made by this commission shall be regarded as final and binding upon both parties. Arbitration fees shall be borne by the losing party, unless otherwise awarded. Both parties shall continue to perform their obligations specified in the Contract except for those under arbitration.

29. Two specific sales contracts were subsequently entered into between the applicant, as vendor/supplier, and the respondent, as purchaser, under the umbrella of the Co-Operation Agreement. Under those contracts the applicant agreed to supply solar cell modules to the respondent. The applicant and the respondent also entered into a *"Supplementary Agreement"* dated 9 September 2010. Each of the specific sales contracts provided for the arbitration of disputes in connection with those contracts upon substantially the same terms as were specified in cl 16 of the Co-Operation Agreement. The relevant sales contract (Contract No EPm-S100731) provided for a late delivery penalty of 0.1% of the delayed payment for every day of delay. In the arbitration, the applicant claimed the unpaid purchase price of the solar cell modules under the relevant sales contract referred to above plus the agreed contractual penalty.

30. The decision of the Arbitral Tribunal is found in Section III (Decision) of the award. There, the Tribunal said:

III. Decision

The Arbitral Tribunal has in accordance with law decided as follows:

1. The Respondent shall pay the remaining sum of 634,666 US dollars under the *Sale Contract EPm-S100731* to the Claimant within 30 days of the date of this decision;
2. The Respondent shall pay the penalty on the overdue payment under the *Sale Contract EPm-S100731* within 30 days of the date of this decision, with the penalty calculated at a daily rate of 0.1% of the 643,666US dollars, starting from 14 October 2010 to the day when the Respondent makes the payment;
3. The Respondent shall pay the legal fee of RMB 140,000 to the Claimant within 30 days of the date of this decision;
4. Other claims of the Claimant are denied;
5. The arbitration fee for this case is RMB 171,305. The Claimant shall bear 20% of it, namely RMB 34,261. The Respondent shall bear 80%, namely RMB 137,044. The Respondent shall pay the Claimant the amount of RMB 137,044 arbitration fee.

The decision of the Arbitral Tribunal is final and is effective from the date it is made.

31. There is no doubt that the award is an *arbitral award* within the meaning of Pt II of the IAA nor is there any doubt that it was made pursuant to an *arbitration agreement* within the meaning of that Part. It is also an *arbitral award* in relation to which the Convention applies. It was made in China. The award is, therefore, a *foreign award* within the meaning of s 8(1) and s 8(3) of the IAA.
32. I am satisfied that the applicant has established that it is entitled to have the award enforced. Once a claimant establishes the matters required to be established by ss 8(2), 9 and 10 of the IAA, the Court may only refuse to enforce the foreign award in the circumstances mentioned in s 8(5) and s 8(7). The onus of establishing one or more of the grounds upon which enforcement may be refused under s 8(5) and s 8(7) rests upon the party resisting enforcement (*IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 282 ALR 717 at 729–730 [43]–[45] per Warren CJ and at 759–762 [153]–[173] per Hansen JA and Kyrou AJA; and *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696; (2012) 292 ALR 161 at 174 [53]). In the present case, neither the respondent nor its liquidators have raised any matter in opposition to the applicant's claim. In particular, neither the respondent nor its liquidators have requested the Court not to enforce the award on one or more of the grounds specified in s 8(5) and s 8(7) of the IAA.
33. In all the above circumstances, there is no reason not to enforce the award and I propose to do so.
34. However, there is one matter which requires separate consideration. At par 5 of the Decision forming part of the award, the arbitrators made clear that 20% of the arbitration fee was to be paid by the applicant, come what may. Apparently, this decision was arrived at because the arbitrators were of the opinion that part of the arbitration was occupied in considering claims made by the applicant which were ultimately rejected by the arbitrators. In this Court, the applicant has claimed the whole amount of RMB¥171,305, being the total amount paid by it to the arbitrators as their fee. Given that the respondent was only ever responsible for 80% of that fee, I am not prepared to enter judgment for the full amount of RMB¥171,305 on account of arbitrators' fees. Rather, I think that the appropriate figure is the amount of the legal fees (RMB¥140,000) and that proportion of the arbitration fees which the respondent was ordered to pay by the

arbitrators (RMB¥137,044). Therefore, the amount to be incorporated in the judgment for the legal fees and arbitrators' fees is RMB¥277,044 and not RMB¥311,305, as claimed.

35. There will be orders accordingly.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster.

Associate:

Dated: 19 April 2013